: 4510-27-P

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 780, 788, and 795

RIN 1235-AA34

Independent Contractor Status under the Fair Labor Standards Act; Withdrawal

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This notice of proposed rulemaking (NPRM) proposes to withdraw the final rule titled "Independent Contractor Status under the Fair Labor Standards Act," which was published on January 7, 2021 and the effective date of which is currently May 7, 2021.

DATES: Submit written comments on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA34, by either of the following methods: Electronic Comments: Submit comments through the Federal eRulemaking Portal at http://www.regulations.gov. Follow the instructions for submitting comments. Mail: Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Instructions: Please submit only one copy of your comments by only one method. Commenters submitting file attachments on www.regulations.gov are advised that uploading text-recognized documents—*i.e.*, documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to https://www.regulations.gov, including any personal information provided. The Department will post comments gathered and submitted by a third-party organization as a group under a single document ID number on https://www.regulations.gov. All comments must be received by 11:59 p.m. EST on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] for consideration. The Department strongly recommends that commenters submit their comments electronically via http://www.regulations.gov to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at http://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this proposal may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory and Legal Background

The Fair Labor Standards Act (FLSA or Act) requires all covered employers to pay nonexempt employees at least the federal minimum wage for every hour worked in a non-overtime workweek.[1] In an overtime workweek, for all hours worked in excess of 40 in a workweek, covered employers must pay a nonexempt employee at least one and one-half times

[1] 29 U.S.C. 206(a).

the employee's regular rate.[2] The FLSA also requires covered employers to make, keep, and preserve certain records regarding employees.[3]

The FLSA's minimum wage and overtime pay requirements apply only to employees.[4] Section 3(e) generally defines "employee" to mean "any individual employed by an employer."[5] Section 3(d) of the Act defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee."[6] Section 3(g) defines "employ" to "include[] to suffer or permit to work."[7]

The Supreme Court, in interpreting these definitions, has stated that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame," and that "the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'"[8] The Supreme Court has further stated that the "striking breadth" of the FLSA's definition of "employ"—"to suffer or permit to work"—"stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[9] Thus, the FLSA expressly rejects the common law standard for determining whether a worker is an employee.[10]

Though the FLSA's definition of employee is broader than the common law definition, the Supreme Court has also recognized that the Act was "not intended to stamp all persons as

---

[2] 29 U.S.C. 207(a).
[3] 29 U.S.C. 211(c).
[4] *See* 29 U.S.C. 206 (minimum wage) and 207 (overtime pay).
[5] 29 U.S.C. 203(e)(1).
[6] 29 U.S.C. 203(d).
[7] 29 U.S.C. 203(g).
[8] *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Black)).
[9] *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992).
[10] *See id.*; *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) ("But in 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)).

employees."[11] The Supreme Court has acknowledged that even a broad definition of employee "does not mean that all who render service to an industry are employees."[12] One category of workers that has been recognized as being outside the FLSA's broad definition of "employees" is "independent contractors."[13] Courts have thus recognized a need to delineate between employees, who fall under the protections of the FLSA, and independent contractors, who do not.

The Supreme Court has repeatedly emphasized that the test for whether an individual is an employee under the FLSA is one of "economic reality."[14] Under this test, the "technical concepts" used to label a worker as an employee or independent contractor do not drive the analysis, but rather it is the economic realities of the relationship between the worker and the employer that is determinative.[15]

In *United States v. Silk*, 331 U.S. 704, 712 (1947), an early case applying an economic realities test under the Social Security Act, the Supreme Court acknowledged that "[p]robably it is quite impossible to extract from the statute a rule of thumb" regarding the distinction between employees and independent contractors.[16] The Court suggested that federal agencies and courts "will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for

---

[11] *Portland Terminal*, 330 U.S. at 152; *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (workers may not be employees when their work does not "in its essence . . . follow[] the usual path of an employee").
[12] *United States v. Silk*, 331 U.S. 704, 712 (1947) (analyzing the definition of employee under the Social Security Act).
[13] *Rutherford Food*, 331 U.S. at 729 ("There 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.").
[14] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)).
[15] *Goldberg*, 366 U.S. at 32-33.
[16] 331 U.S. at 716. At the time, the Supreme Court noted that "[d]ecisions that define the coverage of the employer-[e]mployee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723-23 (1947). However, Congress amended the Social Security Act in 1948.

decision."[17] The Court cautioned that no single factor is controlling and that the list is not exhaustive.[18] 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.[19]

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 circuit court decision that analyzed an FLSA employment relationship based on its economic realities.[20] The Court rejected an approach based on "isolated factors" and again considered "the circumstances of the whole activity."[21] 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.[22] 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."[23]

Since *Silk* and *Rutherford Food*, federal courts of appeals have applied the economic realities test to distinguish independent contractors from employees who are entitled to the FLSA's protections. Recognizing that the common law concept of "employee" had been rejected for FLSA purposes, courts of appeals followed the Supreme Court's instruction that "'employees are those who as a matter of economic realities are dependent upon the business to which they render service.'"[24]

---

[17] 331 U.S. at 716.
[18] *See id.*
[19] *Id.*
[20] *See Rutherford Food*, 331 U.S. at 727.
[21] *Id.* at 730.
[22] *See id.*
[23] *Id.* at 729-30.
[24] *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

All of the courts of appeals have followed the economic realities test, and nearly all of them analyze the economic realities of an employment relationship using the factors identified in *Silk*.[25] No court of appeals considers any factor or combination of factors to universally predominate over the others in every case.[26] For example, the Ninth Circuit has explained that some of the factors "which may be useful in distinguishing employees from independent contractors for purposes of social legislation such as the FLSA" are: (1) the degree of the 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 his or her managerial skill; (3) the worker's investment in equipment or materials required for his or her task, or employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the employer's business.[27] The Ninth Circuit repeated the Supreme Court's instruction that no individual factor is conclusive and that the ultimate determination depends upon the circumstances of the whole activity.[28]

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

---

[25] *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *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 Entm't, LLC*, 825 F.3d 235, 241 (4th Cir. 2016); *Acosta v. Off Duty Police Services, Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019); *Secretary of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987); *Karlson v. Action Process Service & Private Investigation, LLC*, 860 F.3d 1089, 1092 (8th Cir. 2017); *Real v. Driscoll Strawberry Associates, 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 (11th Cir. 2013); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001).

[26] *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" (citation omitted)); *Martin v. Selker Bros.*, 949 F.2d 1286, 1293 (3d Cir. 1991) ("It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive."); *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor "depends on the facts of the case").

[27] *Real*, 603 F.2d at 754.

[28] *See id.*

guides the analysis.[29] Nevertheless, the Fifth Circuit—recognizing that the listed factors are not exhaustive—has considered the extent to which a worker's function is integral to a business as part of its economic realities analysis.[30] The Second Circuit varies in that it treats the employee's opportunity for profit or loss and the employee's investment as a single factor, but it still uses the same considerations as the other circuits to inform its economic realities analysis.[31]

In sum, since the 1940s, federal courts have consistently analyzed the question of employee status under the FLSA by examining the economic realities of the employment relationship to determine whether the worker is dependent on the employer for work or is in business for him or herself.[32] In doing so, courts have looked to the six factors first articulated in *Silk* as useful guideposts while acknowledging that those factors are not exhaustive and should not be applied mechanically.[33]

B. Prior Wage and Hour Division Guidance

Since at least 1954, the Wage and Hour Division (WHD) has applied variations of this multifactor analysis when considering whether a worker is an employee under the FLSA or an independent contractor.[34] In a guidance document issued in 1964, WHD stated, "The Supreme Court has made it clear that an employee, as distinguished from a person who is engaged in a business of his own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business which he serves."[35] Like the courts, WHD has

---

[29] *See Usery*, 527 F.2d at 1311.
[30] *See Hobbs v. Petroplex Pipe and Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020).
[31] *See*, *e.g.*, *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x 74, 76 (2d Cir. 2020).
[32] *See, e.g.*, *Franze*, 826 F. App'x at 76; *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 142-43 (3d Cir. 2020); *Gilbo v. Agment, LLC*, 831 F. App'x 772, 775 (6th Cir. 2020).
[33] *See, e.g.*, *Superior Care*, 840 F.2d at 1054.
[34] *See* WHD Opinion Letter (Aug. 13, 1954) (applying six factors very similar to the six economic realities factors currently used by courts of appeals).
[35] WHD Opinion Letter FLSA–795 (Sept. 30, 1964).

consistently applied a multifactor economic realities analysis when determining whether a worker is an employee under the FLSA or an independent contractor.[36]

The Department's primary sub-regulatory guidance addressing this topic, WHD Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)," similarly states that, when determining whether an employment relationship exists under the FLSA, the test is the "economic reality" rather than an application of "technical concepts," and that status "is not determined by common law standards relating to master and servant."[37] Instead, "it is the total activity or situation which controls," and "an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves." The fact sheet identifies seven economic realities factors; in addition to factors that are similar to the six factors used by the federal courts of appeals and discussed above, it also identifies the worker's "degree of independent business organization and operation." The fact sheet identifies certain other factors that are immaterial to determining whether a worker is an employee covered under the FLSA or independent contractor, including the place where work is performed, the absence of a formal employment agreement, and whether an alleged independent contractor is licensed by a State or local government.[38]

---

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

[37] Fact Sheet #13 is available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf (last visited March 9, 2021).

[38] WHD maintains additional sub-regulatory guidance addressing whether a worker is an employee or independent contractor under the FLSA. For example, WHD's Field Operations Handbook, in its section titled "Test of the employment relationship," cross-references Fact Sheet #13. *See* Section 10b05 of Chapter 10 ("FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits") of WHD's Field Operations Handbook, available at

In 1969 and 1972, WHD promulgated regulations relevant to specific industries after Congress amended the FLSA to change the way it applied to those industries.[39] Those regulations applied a multifactor analysis under the FLSA for determining whether a worker is an employee or independent contractor in those specific contexts.[40] Further, WHD promulgated a regulation in 1997 applying a multifactor economic realities analysis for distinguishing between employees and independent contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).[41]

On July 15, 2015, WHD issued Administrator's Interpretation No. 2015–1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors" (AI 2015–1).[42] AI 2015–1 reiterated that the economic realities of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for him or herself. It identified six economic realities factors that followed the six factors used by most federal courts of appeals: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the

---

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf (last visited March9, 2021); *see also* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/misclassification-facts.pdf (last visited March9, 2021). And the section of WHD's elaws Advisor compliance-assistance materials addressing independent contractors provides guidance very similar to that of Fact Sheet #13. *See* https://webapps.dol.gov/elaws/whd/flsa/scope/ee14.asp (last visited March9, 2021).

[39] *See* 37 FR 12084 (explaining that Part 780 was revised in order to adapt to the changes made by the Fair Labor Standards Amendments of 1966 (80 Stat. 830) and implementing 29 CFR 780.330(b) to apply a six-factor economic realities test to determine whether a sharecropper or tenant is an employee under the Act or an independent contractor); 34 FR 15794 (explaining that Part 788 was revised in order to adapt to the changes made by the 1966 Amendments and implementing 29 CFR 788.16(a) to apply a six-factor economic realities test to determine whether workers in certain forestry and logging operations are employees under the Act or independent contractors).

[40] *See id*.

[41] *See* 62 FR 11734 (amending 29 CFR 500.20(h)(4)).

[42] AI 2015–1 is available at 2015 WL 4449086.

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.[43]

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.[44] Like WHD'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.[45] The letter identified six economic realities factors that differed slightly from the factors typically articulated by WHD 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.[46] Opinion Letter FLSA2019-6 was withdrawn for further review on February 19, 2021.[47]

C. The January 2021 Independent Contractor Rule

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

---

[43] *See* News Release 17-0807-NAT, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance" (Jun. 7, 2017), *available at* https://www.dol.gov/newsroom/releases/opa/opa20170607 (last visited March9, 2021).
[44] *See* WHD Opinion Letter FLSA2019-6, 2019 WL 1977301 (Apr. 29, 2019) (withdrawn February 19, 2021).
[45] *See id.* at *3.
[46] *See id.* at *4.
[47] *See note at* https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA (last visited March 9, 2021).

(Independent Contractor Rule or Rule).[48] The Independent Contractor Rule would introduce into Title 29 of the Code of Federal Regulations a new part (Part 795) titled "Employee or Independent Contractor Classification under the Fair Labor Standards Act" that would provide a new generally applicable interpretation of employee or independent contractor status under the FLSA.[49] The Rule would also revise WHD's prior interpretations of independent contractor status in 29 CFR 780.330(b) and 29 CFR 788.16(a), both of which apply in limited contexts.[50]

The Department explained that the purpose of the Independent Contractor Rule would be to establish an economic realities test that improved on prior articulations that the Rule viewed as "unclear and unwieldy."[51] It stated that the existing economic realities test applied by WHD 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.[52] The Rule explained that the shortcomings and misconceptions associated with the test were more apparent in the modern economy and that additional clarity would promote innovation in work arrangements.[53]

The Independent Contractor 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.[54] The Rule would adopt an "economic dependence" test under which a worker is an employee of an employer if that worker is economically dependent on the employer for work.[55] In contrast, the worker would be an independent contractor if the worker is in business for him or herself.[56]

---

48 *See* 86 FR 1168. WHD had published a notice of proposed rulemaking requesting comments on a proposal. *See* 85 FR 60600 (Sept. 25, 2020). The final rule adopted "the interpretive guidance set forth in [that proposal] largely as proposed." 86 FR 1168.
49 *See id*.
50 *See id*.
51 86 FR 1172.
52 86 FR 1172-75.
53 *See* 86 FR 1175.
54 *See* 86 FR 1246 (section 795.105(a)).
55 *See* 86 FR 1246 (section 795.105(b)).
56 *See id*.

The Rule's new economic realities test would identify five economic realities factors that would guide the inquiry into a worker's status as an employee or independent contractor.[57] These factors would not be exhaustive, no one factor would be dispositive, and additional factors would 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."[58] Two of the identified factors would be designated as "core factors" that would carry greater weight in the analysis. If both of those factors indicated the same classification, as either an employee or an independent contractor, there would be a "substantial likelihood" that classification is the worker's correct classification.[59]

The first core factor would be the nature and degree of control over the work, which would indicate 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 his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors.[60] 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) would not constitute control.[61]

The second core factor would be the worker's opportunity for profit or loss.[62] This factor would weigh towards the worker being an independent contractor to the extent the worker has an opportunity to earn profits or incur losses based on either his or her exercise of initiative (such as managerial skill or business acumen or judgment) or his or her management of investment in or

---

[57] *See* 86 FR 1246 (section 795.105(c)).
[58] 86 FR 1246-47 (sections 795.105(c) & (d)(2)(iv)).
[59] 86 FR 1246 (section 795.105(c)).
[60] *See* 86 FR 1246-47 (section 795.105(d)(1)(i)).
[61] *See id.*
[62] *See* 86 FR 1247 (section 795.105(d)(1)(ii)).

capital expenditure on, for example, helpers or equipment or material to further the work.[63] While the effects of the worker's exercise of initiative and management of investment would both be considered under this factor, the worker would not need to have an opportunity for profit or loss based on both initiative and management of investment for this factor to weigh towards the worker being an independent contractor.[64] This factor would weigh towards the worker being an employee to the extent the worker is unable to affect his or her earnings or is only able to do so by working more hours or faster.[65]

The Rule would also identify three other 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 is distinct from the concept of the importance or centrality of the worker's work to the employer's business).[66] The Rule would provide that these other factors would be "less probative and, in some cases, [would] not be probative at all" and would be "highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."[67]

The Rule would further provide that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.[68] The Rule would also provide five examples illustrating how different factors would inform the analysis.[69]

WHD issued Opinion Letters FLSA2021-8 and FLSA2021-9 on January 19, 2021 applying the Rule's analysis to specific factual scenarios, and then 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.[70]

---

[63] *See id.*
[64] *See id.*
[65] *See id.*
[66] *See* 86 FR 1247 (section 795.105(d)(2)).
[67] 86 FR 1246 (section 795.105(c)).
[68] *See* 86 FR 1247 (section 795.110).
[69] *See* 86 FR 1247-48 (section 795.115).
[70] *See* https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA (last visited March 9, 2021), noting the withdrawal of Opinion Letters FLSA2021-8 and FLSA2021-9.

D. *Delay of Rule's Effective Date*

On February 5, 2021, the Department published a proposal to delay the Independent Contractor Rule's effective date until May 7, 2021, 60 days after the original effective date of March 8, 2021.[71] 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 Independent Contractor Rule as proposed.[72] The Department explained that the delay was consistent with a January 20, 2021 memorandum from the Assistant to the President and Chief of Staff, titled "Regulatory Freeze Pending Review."[73] The Department further explained that a delay would allow it additional time to consider "significant and complex" issues associated with the Rule, including whether the rule effectuates the FLSA's purpose to broadly cover workers as employees as well as the costs and benefits attributed to the rule, including its effect on workers.[74]

II. Proposal to Withdraw

The Department proposes to withdraw the Independent Contractor Rule, which has not yet taken effect. The Department's reasons for proposing to withdraw the Rule are explained below, and the Department requests comments on its proposal.

A. *The Rule's Standard Has Never Been Used by Any Court or by WHD, and Is Not Supported by the Act's Text or Case Law*

WHD recognizes that the cornerstone of the FLSA is the Act's broad definition of "employ," which provides that an employee under the Act is any individual whom an employer suffers, permits, or otherwise employs to work.[75] Rather than being derived from the common law of agency, the FLSA's "suffer or permit" definition of "employ" originally came from state

[71] *See* 86 FR 8326.
[72] 86 FR 12535.
[73] *Id.* (citing January 20, 2021 memo from the Assistant to the President and Chief of Staff, titled "Regulatory Freeze Pending Review," 86 FR 7424).
[74] *Id.*
[75] *See* 29 U.S.C. 203(e)(1), (g).

laws regulating child labor.[76] This standard was intended to expand coverage beyond employers who controlled the means and manner of performance.[77] The FLSA's breadth in defining the employment relationship, as well as its clear remedial purpose, comes from the statutory text itself as well as the legislative history.[78] This standard "stretches the meaning of 'employee' [under the FLSA] to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[79] The FLSA's overarching inquiry of economic dependence thus establishes a broader scope of employment than that which exists under the common law of agency.

Among the reasons the Department is proposing to withdraw the Rule is that, upon further review and consideration of the Rule, the Department questions whether the Rule is fully aligned with the FLSA's text and purpose or case law describing and applying the economic realities test.

1. The Choice to Elevate Control and Opportunity for Profit or Loss as the "Most Probative" Factors in Determining Employee Status Under the FLSA

---

[76] *See Rutherford Food*, 331 U.S. at 728 & n.7.
[77] *See generally People ex rel. Price v. Sheffield Farms-Slawson-Decker Co*., 225 N.Y. 25, 29-31 (N.Y. 1918).
[78] *See, e.g.*, *Parrish*, 917 F.3d at 378 ("Given the remedial purposes of the [FLSA], an expansive definition of 'employee' has been adopted by the courts." (citation omitted)); *Off Duty Police*, 915 F.3d at 1054-55 (noting, directly under the heading "Employment Relationship," that "[t]he FLSA is 'a broadly remedial and humanitarian statute ... designed to correct labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers'" (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (some internal quotation marks omitted)). The FLSA's broad scope of employment, broader than the common law, was not changed by the Supreme Court's decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), which explained that the Act's statutory exemptions should be interpreted fairly because there is no textual indication that the exemptions should be construed narrowly. *See* 138 S. Ct. at 1142. Here, the Act's definition of "employ" as including "to suffer or permit to work" gives a clear textual basis for the breadth of employment under the FLSA. 29 U.S.C. 203(g); *see Off Duty Police*, 915 F.3d at 1062 ("[T]hese [economic reality] factors must be balanced in light of the FLSA's strikingly broad definition of employee." (quotations and citation omitted)).
[79] *Darden*, 503 U.S. at 326; *see also Portland Terminal*, 330 U.S. at 150 (in determining employee status under the FLSA, "common law employee categories or employer-employee classifications under other statutes are not of controlling significance").

The Rule would elevate two "core" factors, control and opportunity for profit or loss, above all other factors, and would provide that only in "rare" cases would the other factors outweigh the core factors.[80] For decades, WHD, consistent with case law, has applied a multi-factor balancing test to assess whether the worker, as a matter of economic reality, is economically dependent on the employer or is in business for him or herself.[81] Courts universally apply this analysis as well and have explained that "economic reality" rather than "technical concepts" is the test of employment under the FLSA.[82] WHD and the courts of appeals generally consider and balance the following economic realities factors—derived from the Supreme Court's decisions in *Silk*, 331 U.S. at 716, and *Rutherford Food*, 331 U.S. at 729-30: the nature and degree of the employer's control over the work; the permanency of the worker's relationship with the employer; the degree of skill, initiative, and judgment required for the work; the worker's investment in equipment or materials necessary for the work; the worker's opportunity for profit or loss; whether the service rendered by the worker is an integral part of the employer's business; and the degree of independent business organization and operation.[83]

The Rule would set forth a new analysis elevating two factors (control and opportunity for profit or loss) as "core" factors above the other factors, and designating them as having greater probative value.[84] The Rule would further provide that if both core factors point towards the same classification—that the worker is either an employee or an independent contractor—

[80] 86 FR 1201, 1246-47 (sections 795.105(c) and (d)).
[81] *See*, *e.g.*, Fact Sheet #13 (July 2008), available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf (last visited March 9, 2021).
[82] *Goldberg*, 366 U.S. at 33; *see also Tony & Susan Alamo*, 471 U.S. at 301 ("The test of employment under the Act is one of 'economic reality.'") (quoting *Goldberg*, 366 U.S. at 33).
[83] *See*, *e.g.*, *Razak*, 951 F.3d at 142-43; *Karlson*, 860 F.3d at 1092; *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Lauritzen*, 835 F.2d at 1534; *Real*, 603 F.2d at 754; Fact Sheet #13 (July 2008), available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf (last visited March [insert], 2021).
[84] 86 FR 1246-47 (sections 795.105(c) & (d)).

then there would be a substantial likelihood that this is the worker's correct classification.[85] In addition, the preamble to the Rule disagreed that the economic realities test "requires factors to be unweighted or equally weighted."[86] Although the Rule did identify three other factors, it made clear that these "other factors are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."[87] The Rule underscored that it "is quite unlikely for the other, less probative factors to outweigh the combined weight of the core factors. In other words, where the two core factors align, the bulk of the analysis is complete, and anyone who is assessing the classification may approach the remaining factors and circumstances with skepticism, as only in unusual cases would such considerations outweigh the combination of the two core factors."[88] Similarly, the Rule would provide that unlisted additional factors may be considered, but that they are "unlikely to outweigh either of the core factors."[89] The Rule noted that "[w]hile all circumstances must be considered, it does not follow that all circumstances or categories of circumstance, *i.e.*, factors, must also be given equal weight."[90] Rather, the Rule would emphasize the control and opportunity for profit or loss factors as more probative than other factors in determining whether an individual is in business for him or herself, and provide that "other factors are less probative and may have little to no probative value in some circumstances."[91]

WHD understands that no court has taken the Rule's approach in analyzing whether a worker is an employee or an independent contractor under the FLSA, and that the Rule would mark a departure from WHD's own longstanding approach. In view of this elevation of only two factors, the Department is concerned that the Rule's approach may be inconsistent with the

---

[85] *See id*.
[86] *Id.* at 1197.
[87] *Id*. at 1246 (section 795.105(c)).
[88] *Id.* at 1197 (referencing the NPRM).
[89] *Id*.
[90] *Id.* at 1201 (internal quotation marks omitted).
[91] *Id*. at 1202.

position, expressed by the Supreme Court and federal courts of appeals, that no single factor in the analysis is dispositive.[92] WHD is not aware of any court that has, as a general and fixed rule, elevated a subset of the economic realities factors, and there is no clear statutory basis for such a predetermined weighting of the factors. Rather, WHD is cognizant of the voluminous case law that emphasizes that it "'is impossible to assign to each of these factors a specific and invariably applied weight.'"[93] Undeniably, courts have generally refused to assign universal weights to certain factors; rather, courts emphasize that the analysis considers the totality of the circumstances and neither the presence nor absence of any particular factor is dispositive.[94]

---

[92] *See, e.g.*, *Silk*, 331 U.S. at 716 (explaining that "[n]o one [factor] is controlling" in the economic realities test, including "degrees of control"); *Parrish*, 917 F.3d at 380 (stating that it "is impossible to assign to each of these factors a specific and invariably applied weight" (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 . . . neither the presence nor the absence of any particular factor is dispositive.").

[93] *Parrish*, 917 F.3d at 380 (quoting *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983)); *see also Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor "depends on the facts of the case").

[94] *See Razak*, 951 F.3d at 143 (citing *DialAmerica Mktg.*, 757 F.2d at 1382); *see also 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."); *Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012) ("This 'economic reality' standard, however, is not a precise test susceptible to formulaic application. . . . It prescribes a case-by-case approach, whereby the court considers the 'circumstances of the whole business activity.'") (quoting *Brandel*, 736 F.2d at 1116); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001) ("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."); *Superior Care*, 840 F.2d at 1059 ("No one of these factors is dispositive; rather, the test is based on a totality of the circumstances. . . . 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."); *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."); *Hickey*, 699 F.2d at 752 ("It is impossible to assign to each of these factors a specific and invariably applied weight."); *Usery*, 527 F.2d at 1311-12 ("No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor—economic dependence.").

Accordingly, the Department is concerned that the Rule's approach is in tension with the language of the Act as well as the position, expressed by the Supreme Court and in appellate cases from across the Circuits, that no single factor is determinative in the analysis of whether a worker is an employee or independent contractor and, as such, questions whether the Rule's "core factor" approach is supportable.

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

As explained, the Independent Contractor Rule would identify two factors as "core" factors, would designate them as "the most probative" of whether a worker is an employee or independent contractor, and would provide that each core factor "typically carries greater weight in the analysis than any other factor."[95] The nature and degree of control over the work would be one of the two core factors.[96] According to the Rule, "review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so."[97] The Rule addressed and rejected comments which opined that focusing the analysis on two core factors—one of which would be control—would narrow the analysis to a common law control test.[98]

Although the standard for determining who is an employee and who is an independent contractor under the Rule is not the same as the common law control analysis, the Department is concerned that significant legal and policy implications could result from making control one of only two factors that would be ascribed greater weight. For example, the Supreme Court has repeatedly stated that the FLSA's definition of "employ" in section 3(g) means that the scope of employment under the Act is broader than under a common law control (*i.e.*, agency) analysis.[99]

---

[95] 86 FR 1246 (section 795.105(c)).
[96] *See id.* at 1246-47 (section 795.105(d)(1)). The worker's opportunity for profit or loss would be the other core factor.
[97] *Id.* at 1198 (citing 85 FR 60619).
[98] *See id.* at 1200-01.
[99] *See Darden*, 503 U.S. at 326 ("[T]he FLSA . . . defines the verb 'employ' expansively to mean 'suffer or permit to work.' This . . . definition, whose striking breadth we have previously noted, stretches the meaning of 'employee' to cover some parties who might not qualify as such

In light of the directive to consider as employment relationships under the FLSA a broader scope of relationships than those where the employer sufficiently controls the work, the outsized—even if not exclusive—role that control would have if the Rule's analysis were to apply may be contrary to the Act's text and case law. These considerations are further reasons the Department is proposing to withdraw the Rule.

3. The Rule's Narrowing of the Factors

The Department is also concerned that the Independent Contractor Rule's treatment of the factors would improperly narrow the application of the economic realities test. For example, the Rule would provide that the opportunity for profit or loss factor indicates independent contractor status if the worker has that opportunity based on either his or her exercise of initiative (such as managerial skill or business judgment) *or* management of his or her investment in or capital expenditure on helpers or equipment or material to further his or her work.[100] The worker "does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor."[101] In other words, the factor would indicate independent contractor status if the worker either: (1) made no capital investment but exercised managerial skill or (2) had a capital investment but exercised no managerial skill. The Rule would therefore erase from the analysis in certain situations the worker's lack of capital investment or lack of managerial skill—both of which are longstanding and well-settled indicators of employee status. The worker's investment and managerial skill would be considered only as the two prongs comprising the opportunity for profit or loss factor under the

---

under a strict application of traditional agency law principles." (citations omitted)); *Portland Terminal*, 330 U.S. at 150-51 ("But in 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." (citations omitted)); *Rutherford Food*, 331 U.S. at 728 ("The [FLSA] definition of 'employ' is broad."); *Rosenwasser*, 323 U.S. at 362-63 ("A broader or more comprehensive coverage of employees [than that of the FLSA] . . . would be difficult to frame.").

[100] *See* 86 FR 1247 (section 795.105(d)(1)(ii)).

[101] *Id.*

Rule, so if one indicates an opportunity for profit or loss, the other could not reverse or weigh against that finding even if it indicates employee status as a matter of economic reality.

In addition, the preamble to the Rule provided that "comparing the individual worker's investment to the potential employer's investment should not be part of the analysis of investment."[102] In support, the Rule cited decisions from the Fifth and Eighth Circuits in which courts gave little weight to the comparison of the potential employer's investment in its business to the worker's investment in the work in light of the facts presented in those cases.[103] However, the decisions cited did make the comparison of the investments a part of the analysis, but found that the comparison had little relevance or accorded it little weight under those particular facts.[104] In any event, numerous other courts of appeals consider the worker's investment in the work in comparison to the potential employer's investment in its business,[105] as does WHD in

---

[102] *Id.* at 1188.

[103] *See id.* The Fifth Circuit decisions cited were *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 383 (5th Cir. 2019), and *Hopkins v. Cornerstone America*, 545 F.3d 338, 344-46 (5th Cir. 2008).

[104] *See Parrish*, 917 F.3d at 383; *Hopkins*, 545 F.3d at 344-46. Indeed, the Fifth Circuit recently again articulated the investment factor as "'the extent of the relative investments of the worker and the alleged employer.'" *Hobbs*, 946 F.3d at 829 (quoting *Hopkins*, 545 F.3d at 343). In *Hobbs*, the Fifth Circuit affirmed the district court's finding that the relative investments – the potential employer's "overall investment in the pipe construction projects" as compared to the workers' individual investments – favored employee status. *Id.* at 831-32. The Fifth Circuit agreed with the district court's conclusion to give the factor "little weight in its analysis" in that case given the nature of the industry and work involved. *Id.* at 832 (citing *Parrish*, 917 F.3d at 383). In sum and contrary to what the Rule would provide, the Fifth Circuit routinely considers the relative investments of the worker and the potential employer even if the factor may ultimately be accorded little weight depending on the circumstances.

[105] *See*, *e.g.*, *McFeeley*, 825 F.3d at 243 (comparing the potential employers' payment of rent, bills, insurance, and advertising expenses to the workers' "limited" investment in their work); *Keller*, 781 F.3d at 810 ("We agree that courts must compare the worker's investment in the equipment to perform his job with the company's total investment, including office rental space, advertising, software, phone systems, or insurance."); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998) ("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."); *Lauritzen*, 835 F.2d at 1537 (disagreeing that "the overall size of the investment by the employer relative to that by the worker is irrelevant" and finding that "that the migrant workers' disproportionately small stake in the pickle-farming operation is an indication that their work is not independent of the defendants"); *see also Iontchev v. AAA Cab Service, Inc.*, 685 Fed. Appx. 548, 550 (9th Cir. 2017) (noting that the drivers "invested in equipment or materials and employed helpers to perform their work" but concluding that the investment factor was

enforcement actions. Despite this authority, the Rule would preclude comparing the worker's investment to the potential employer's investment.

The Rule would also recast the factor examining whether the worker's work "is an integral part" of the employer's business as whether the work "is part of an integrated unit of production."[106] The Rule would reject as irrelevant to this factor whether the work is important or central (*i.e.*, integral) to the employer's business.[107] Instead, the Rule would provide that "the relevant facts are the integration of the worker into the potential employer's production processes" because "[w]hat matters is the extent of such integration rather than the importance or centrality of the functions performed" by the worker.[108] The Rule asserted that this recast articulation is supported by Supreme Court precedent,[109] but WHD and courts often consider whether the work is important or central, as the Rule acknowledges.[110]

Finally, in stressing the primacy of actual practice by providing that "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible,"[111] the Rule would advise 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."[112] In support of this guidance, the Rule's preamble 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," and that the FLSA "does not necessarily include

---

"neutral" because the cab company "leased taxicabs and credit card machines to most of the [drivers]").

[106] *See* 86 FR at 1193-96, 1247 (section 795.105(d)(2)(iii)).

[107] *See id.* at 1193-95.

[108] *Id.* at 1195.

[109] *See id.* at 1193-94. The Rule's discussion of precedent failed to consider a passage from the Supreme Court's decision in *Silk*, finding that "unloaders" were employees of a retail coal company as a matter of economic reality in part because they were "*an integral part* of the businesses of retailing coal or transporting freight." 331 U.S. at 716 (emphasis added).

[110] *See id.* at 1193.

[111] *Id.* at 1247 (section 795.110).

[112] *Id.*; *but see Razak*, 951 F.3d at 145 ("[A]ctual control of the manner of work is not essential; rather, it is the right to control which is determinative.").

every worker considered an employee under the common law."[113] This understanding of the FLSA's scope of employment seems inconsistent with the Supreme Court's observations that "[a] broader or more comprehensive coverage of employees" than that contemplated under the FLSA "would be difficult to frame,'"[114] 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."[115]

In the each of the ways identified above, the Rule would narrow the scope of facts and considerations comprising the analysis of whether the worker is an employee or independent contractor. The Department proposes to withdraw the Rule in part because it eliminates from the economic realities test several facts and concepts that have deep roots in both the courts' and WHD's application of the analysis. The Department is further concerned that for this reason, the Rule's approach is inconsistent with the court-mandated totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor.[116] In addition to these legal concerns, the Department is concerned, as a policy matter, that the Rule's narrowing of the analysis would result in more workers being classified as independent contractors not entitled to the FLSA's protections, contrary to the Act's purpose of broadly covering workers as employees. To the extent that women and people of color are overrepresented in low-wage independent contractor positions, as some commenters asserted as part of the Independent Contractor Rule rulemaking, this result could have a disproportionate impact on low-wage and vulnerable workers. For example, a report from the U.S. Treasury Department Office of Tax Analysis shows that independent contractors are more likely to be low-income than those who are primarily employees. The report finds that 42 percent of what it calls "gig economy or

---

[113] 86 FR 1205.
[114] *Rosenwasser*, 323 U.S. at 362.
[115] *Darden*, 503 U.S. at 326.
[116] *See* footnote 94, *supra*.

platform workers" and 45 percent of "self-employed sole proprietors" make less than $20,000 a year, compared to 14 percent of those who are employees earning wages.[117]

B. Whether the Rule Would Provide the Intended Clarity

One of the Independent Contractor Rule's primary stated purposes would be to "significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act."[118] Although the intent of the Rule would be to provide clarity, it would also (as discussed above) introduce several concepts to the analysis that neither courts nor WHD have previously applied. The Department's proposal to withdraw the Rule arises in part from a concern regarding the possibility that these changes will cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty, as intended.

For example, the Rule would identify two factors as "core" factors, would designate them as "the most probative," and would provide that they carry "greater weight" than other factors.[119] The Rule would also provide that, if both core factors "point towards the same classification . . . , there is a substantial likelihood that is the individual's accurate classification," and other factors would be "highly unlikely, either individually or collectively, to outweigh" the core factors.[120] Because neither courts nor WHD have previously pre-assigned certain factors a greater weight than other factors or grouped the factors into categories of "core" and "other" factors, it may not be clear to courts, WHD, and/or the regulated community how the analysis and weighing of factors would work, and there could be inconsistent approaches and/or outcomes as a result.

In addition, the Rule would recast several factors as discussed above. As one example, the factor that many courts articulate as whether the work "is an integral part" of the employer's

---

[117] Emilie Jackson, Adam Looney, and Shanthi Ramnath, "The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage," The Department of the Treasury; Office of Tax Analysis (January 2017), available at https://home.treasury.gov/system/files/131/WP-114.pdf (last visited March 9, 2021).
[118] 86 FR 1168.
[119] *Id.* at 1246 (section 795.105(c)).
[120] *Id.*

business would be recast as whether the work "is part of an integrated unit of production."[121] The Rule asserts that this revision is supported by Supreme Court precedent.[122] However, as the Rule acknowledges,[123] this more limited articulation has not generally been applied by courts or WHD and would thus be unfamiliar to employers, workers, courts, and WHD. As a result, there could be inconsistent approaches and/or outcomes in its application.

In sum, the Rule would make numerous changes to an economic realities test that courts and WHD are familiar with applying. Given that courts and WHD could struggle with applying the new concepts introduced by the Rule, the Department is uncertain whether the Rule would provide the clarity that it intends.

C. The Costs and Benefits of the Rule, Particularly the Assertion that the Rule Will Benefit Workers as a Whole

As part of its analysis of possible costs, transfers, and benefits, the Independent Contractor Rule quantified some possible costs (regulatory familiarization) and some possible cost savings (increased clarity and reduced litigation).[124] The Rule identified and discussed—but did not quantify—numerous other costs, transfers, and benefits possibly resulting from the Rule, including "possible transfers among workers and between workers and businesses."[125] The Rule "acknowledge[d] that there may be transfers between employers and employees, and some of those transfers may come about as a result of changes in earnings," but determined that these transfers cannot "be quantified with a reasonable degree of certainty for purposes of [the Rule]."[126] The Economic Policy Institute (EPI) had submitted a comment during the rulemaking estimating that the annual transfers from workers to employers as a result of the Rule would be $3.3 billion in pay, benefits, and tax payments.[127] The Rule discussed its disagreements with

---

[121] *See id.* at 1170, 1193-96, 1247 (section 795.105(d)(2)(iii)).
[122] *See id.* at 1193-94.
[123] *See id.* at 1193.
[124] *See id.* at 1211.
[125] *Id.* at 1214-16.
[126] *Id.* at 1223.
[127] *See id.* at 1222.

various assumptions underlying EPI's estimate and explained its reasons for not adopting the estimate.[128] The Rule concluded that "workers as a whole will benefit from [the Rule], both from increased labor force participation as a result of the enhanced certainty provided by [the Rule], and from the substantial other benefits detailed [in the Rule]."[129] Although the Rule did not use EPI's analysis to quantify transfers, upon further consideration, the Department believes that the analysis may be useful in illustrating the types of impacts that the Rule would have on workers.

Upon review, the Department does not believe the Rule fully considered the likely costs, transfers, and benefits that could result from the Rule. This concern is premised in part on WHD's role as the agency responsible for enforcing the FLSA and its experience with cases involving the misclassification of employees as independent contractors. The consequence for a worker of being classified as an independent contractor is that the worker is excluded from the protections of the FLSA. Without the protections of the FLSA, workers need not be paid at least the federal minimum wage for all hours worked, and are not entitled to overtime compensation for hours worked over 40 in a workweek. These impacts can be significant and must be evaluated further. In addition, a recent Presidential Memorandum began a process for agencies to better "take into account the distributional consequences of regulations."[130] WHD also questions whether a rule that could increase the number of independent contractors,[131] effectuates the FLSA's purpose, recognized repeatedly by the Supreme Court, to broadly provide employees with its protections.[132] These concerns are an additional reason that the Department is proposing to withdraw the Rule.

---

[128] *See id.* at 1222-23.
[129] *Id.* at 1223.
[130] Modernizing Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies (Jan. 20, 2021), published at 86 FR 7223 (Jan. 26, 2021).
[131] *See* 86 FR 1210.
[132] *See*, *e.g.*, *Rutherford Food*, 331 U.S. at 729 ("'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.'") (quoting *Portland Terminal*, 330 U.S. at 150); *Rosenwasser*, 323 U.S. at 362-63 ("A broader or more comprehensive coverage of employees [than that of the FLSA] . . . would be difficult to frame.").

D. Withdrawal Would Not Be Disruptive Because the Rule Has Yet to Take Effect

Because the Independent Contractor Rule has yet to take effect, the Department does not believe that withdrawing it would be disruptive. Courts have not applied the Rule in deciding cases. Moreover, WHD has not implemented the Rule. For example, WHD's Fact Sheet #13, titled "Employment Relationship Under the Fair Labor Standards Act (FLSA)" and dated July 2008, does not contain the Rule's analysis for determining whether a worker is an employee or independent contractor.[133] WHD's Field Operations Handbook addresses independent contractor status by simply cross-referencing Fact Sheet #13 and likewise does not contain the Rule's new economic realities test.[134] WHD's elaws Advisor compliance-assistance information regarding independent contractors likewise does not contain the Rule's analysis.[135] And on January 26, 2021, Wage and Hour withdrew two opinion letters that it had issued on January 19, 2021 applying the Rule's analysis to several factual scenarios.[136] WHD explained that the letters were "issued prematurely because they are based on [a Rule] that ha[s] not gone into effect."[137] Accordingly, the regulated community has been functioning under the current state of the law and the Department does not believe that it would be negatively affected by continuing to do so were the Rule to be withdrawn. In particular, any businesses currently engaging independent contractors or individuals who are now independent contractors would be able to continue to operate without any effect brought about by the absence of new regulations. Even if the Department withdraws the Rule, businesses that had taken steps in preparation for the Rule

---

[133] Fact Sheet #13 is available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf (last visited March 9, 2021).

[134] Chapter 10 of Wage and Hour's Field Operations Handbook, entitled "FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits", is available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf (last visited March 9, 2021). The relevant provision, Section 10b05 ("Test of the employment relationship"), is on page 6.

[135] *See* https://webapps.dol.gov/elaws/whd/flsa/scope/ee14.asp (last visited March 9, 2021).

[136] *See* https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA (last visited March 9, 2021), noting the withdrawal of Opinion Letters FLSA2021-8 and FLSA2021-9.

[137] *Id*.

taking effect will not be precluded from adjusting their relationships with workers or paying for new services from workers, and can rely on past court decisions and WHD guidance to determine whether those workers are employees under the FLSA or independent contractors.

E. Effect of Proposed Withdrawal

If the Independent Contractor Rule is withdrawn as proposed: (1) the guidance that the Rule would have introduced as Part 795 of Title 29 of the Code of Federal Regulations will not be introduced and Part 795 will be reserved; and (2) the revisions that the Rule would have made to 29 CFR 780.330(b) and 29 CFR 788.16(a) will not occur and their text will remain unchanged. The Department is not proposing any regulatory guidance to replace the guidance that the Independent Contractor Rule would have introduced as Part 795, so any commenter feedback addressing or suggesting such a replacement or otherwise requesting that the Department adopt any specific guidance if the Rule is withdrawn will be considered to be outside the scope of this NPRM. In addition to the reasons for the proposed withdrawal explained above, withdrawal of the Rule would allow WHD an additional opportunity to consider legal and policy issues relating to the FLSA and independent contractors.

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) and its attendant regulations require an agency to consider its need for any information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. This NPRM does not contain a collection of information subject to Office of Management and Budget approval under the PRA.

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

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[138] Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. This proposed withdrawal will be economically significant under section 3(f) of Executive Order 12866 because it is withdrawing an economically significant rule.

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.[139] Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed withdrawal and was prepared pursuant to the above-mentioned executive orders.

B. Background

---

[138] *See* 58 FR 51735 (Sept. 30, 1993).
[139] *See* 76 FR 3821 (Jan. 21, 2011).

On January 7, 2021, WHD published a final rule titled "Independent Contractor Status under the Fair Labor Standards Act" (Independent Contractor Rule or Rule).[140] The Department is proposing to withdraw the Rule, which has not taken effect. If this withdrawal goes forward as proposed, the Rule will never have been in effect. Aside from minimal rule familiarization costs, the Department also provides below a qualitative discussion of the transfers that may be avoided by withdrawing the Rule.

C. Costs

1. Rule Familiarization Costs

Withdrawing the Independent Contractor Rule would impose direct costs on businesses that will need to review the withdrawal. To estimate these regulatory familiarization costs, the Department determined: (1) the number of potentially affected entities, (2) the average hourly wage rate of the employees reviewing the withdrawal, and (3) the amount of time required to review the withdrawal. It is uncertain whether these entities would incur regulatory familiarization costs at the firm or the establishment level.[141] For example, in smaller businesses there might be just one specialist reviewing the withdrawal, while larger businesses might review it at corporate headquarters and determine policy for all establishments owned by the business. To avoid underestimating the costs of the withdrawal, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the withdrawal, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and

---

[140] *See* 86 FR 1168. WHD had published a notice of proposed rulemaking requesting comments on a proposal. *See* 85 FR 60600 (Sept. 25, 2020). The final rule adopted "the interpretive guidance set forth in [that proposal] largely as proposed." 86 FR 1168.
[141] An establishment is a single physical location where one predominant activity occurs. A firm is an establishment or a combination of establishments.

7,860,674 private establishments with paid employees.[142] Because the Department is unable to determine how many of these businesses are interested in using independent contractors, this analysis assumes all businesses will undertake review.

The Department believes ten minutes per entity, on average, to be an appropriate review time here. This rulemaking would withdraw the Independent Contractor Rule and would not set forth any new regulations in its place. Additionally, the Department believes that many entities do not use independent contractors and thus would not spend any time reviewing the withdrawal. Therefore, the ten-minute review time represents an average of no time for the entities that do not use independent contractors, and potentially more than ten minutes for review by some entities that might use independent contractors

The Department's analysis assumes that the withdrawal would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) or employees of similar status and comparable pay. The median hourly wage for these workers was $31.04 per hour in 2019, the most recent year of data available.[143] The Department also assumes that benefits are paid at a rate of 46 percent[144] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of $50.60.

The Department estimates that the lower bound of regulatory familiarization cost range would be $50,675,004 (5,996,900 firms × $50.60 × 0.167 hours), and the upper bound, $66,424,267 (7,860,674 establishments × $50.60 × 0.167 hours). The Department estimates that all regulatory familiarization costs would occur in Year 1.

Additionally, the Department estimated average annualized costs of this proposed withdrawal over 10 years. Over 10 years, it would have an average annual cost of $6.7 million to

---

[142] Statistics of U.S. Businesses 2017, https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html, 2016 SUSB Annual Data Tables by Establishment Industry.
[143] Occupational Employment and Wages, May 2019, https://www.bls.gov/oes/current/oes131141.htm.
[144] The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

$8.8 million, calculated at a 7 percent discount rate ($5.8 million to $7.6 million calculated at a 3 percent discount rate). All costs are in 2019 dollars.

2. Other Costs

In the Independent Contractor Rule, the Department estimated cost savings associated with increased clarity, as well as cost savings associated with reduced litigation. The Department does not anticipate that this withdrawal would increase costs in these areas, or result in greater costs as compared to the Rule. Although the intent of the Rule would be to provide clarity, it would also introduce several concepts to the analysis that neither courts nor WHD have previously applied. Because the Rule would be unfamiliar and could lead to inconsistent approaches and/or outcomes, and because withdrawal would maintain the status quo, the Department does not believe that a withdrawal of the Independent Contractor Rule would result in decreased clarity for stakeholders.

One of the main benefits discussed in the Rule was the increased flexibility associated with independent contractor status. The Department acknowledges that although many independent contractors report that they value the flexibility in hours and work, employment and flexibility are not mutually exclusive. Many employees similarly value and enjoy such flexibility.

The Department welcomes any comments and data on other costs associated with this proposed withdrawal.

D. Transfers

The Department believes that it is important to provide a qualitative discussion of the transfers that would have occurred under the Rule. In the economic analysis accompanying the Rule, the Department assumed that the Rule would lead to an increase in the number of independent contractor arrangements, and acknowledged that some of this increase could be due to businesses reclassifying employees as independent contractors. As discussed in the Rule and again below, an increase in independent contracting could have resulted in transfers associated with employer-provided fringe benefits, tax liabilities, and minimum wage and overtime pay. By withdrawing the Rule, these transfers from employees (and, in some cases, from state or local governments) to employers are avoided. The Department welcomes any comments and data on the transfer impacts associated with this proposed withdrawal.

1. Employer Provided Fringe Benefits

The reclassification of employees as independent contractors, or the use of independent contracting relationships as opposed to employment, decreases access to employer-provided fringe benefits such as health care or retirement benefits. According to the BLS Current Population Survey (CPS) Contingent Worker Supplement (CWS), 79.4 percent of self-employed independent contractors have health insurance, compared to 88.3 percent of employees.[145] 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.

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 employers pay 5.3 percent of employees' total compensation in retirement benefits on average ($1.96/$37.03). If a worker shifts from employee to independent contractor status, that worker may no longer receive employer-provided retirement benefits.

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, as discussed in the Rule, if workers' classifications change from employees to independent

[145] 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.

contractors, there may be a transfer in federal tax liabilities from employers to workers.[146] Although the Rule only addressed whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax purposes.[147] 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.[148] 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).

In addition to affecting tax liabilities for workers, some commenters claimed that the Rule would have an impact on state tax revenue and budgets. In their comment to the NPRM proposing the Independent Contractor Rule, several States' Attorneys General asserted that misclassifying employees as independent contractors leads to losses in unemployment insurance and workers' compensation funds, as well as increases in the cost of providing health care coverage to uninsured workers. Because independent contractors do not receive benefits like health insurance, workers compensation, and retirement plans from an employer, these commenters suggested that a rule that increases the prevalence of independent contracting could shift this burden to State and Federal governments.

3. Minimum Wage and Overtime Requirements

When workers are shifted from employee to independent contractor status, the minimum wage and overtime pay requirements of the FLSA no longer apply. Independent contractors are

---

[146] *See* 86 FR 1218.

[147] 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 whether a worker is an FLSA employee or an independent contractor may affect the businesses' classification decisions for purposes of benefits and legal requirements under other federal laws.

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

more likely to earn less than the minimum wage: 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). Research on drivers who work for online transportation companies in California and New York also finds that many drivers receive significantly less than the applicable state minimum wages.[149]

V. Regulatory Flexibility Act (RFA) 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, Pub. L. No. 104-121 (1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined this proposed withdrawal to determine whether it would have a significant economic impact on a substantial number of small entities.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.[150] Of these, 5,976,761 firms and 6,512,802 establishments have fewer than 500 employees. The per-entity cost for small business employers is the regulatory familiarization cost of $8.43, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist ($50.60) multiplied by 1/6 hour (ten

---

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

[150] Statistics of U.S. Businesses 2017, https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html, 2016 SUSB Annual Data Tables by Establishment Industry.

minutes). Because this cost is minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses, the Department certifies that this proposed withdrawal would not have a significant economic impact on a substantial number of small entities. The Department welcomes any comments and data on this Regulatory Flexibility Act Analysis, including the costs and benefits of this proposed withdrawal on small entities.

VI. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA)[151] requires agencies to prepare a written statement for rules with a federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year.[152] This statement must: (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative. This proposed withdrawal is not expected to result in increased expenditures by the private sector or by state, local, and tribal governments of $165 million or more in any one year.

VII. Executive Order 13132, Federalism

The Department has (1) reviewed this proposed withdrawal in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed withdrawal would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

---

[151] *See* 2 U.S.C. 1501.

[152] Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

VIII. Executive Order 13175, Indian Tribal Governments

This proposed withdrawal would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Signed this 10th day of March, 2021.

Jessica Looman,

Principal Deputy Administrator, Wage and Hour Division.

[FR Doc. 2021-05256 Filed: 3/11/2021 8:45 am; Publication Date: 3/12/2021]