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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 500, 795, and 825

[Docket No. WHD-2026-0001]

RIN 1235-AA46

Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act

AGENCY: Wage and Hour Division, Department of Labor

ACTION: Notice of proposed rule; request for comments.

SUMMARY: The Department is proposing to rescind the analysis for determining employee or independent contractor status under the Fair Labor Standards Act (FLSA) currently set forth in 29 CFR part 795 and replace it with the analysis that it published and adopted in a prior final rule dated January 7, 2021, with a few modifications. In addition, the Department proposes to apply this analysis to the Family and Medical Leave Act (FMLA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA), both of which incorporate the FLSA's scope of employment.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA46, by either of the following methods:

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

Instructions: Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Commenters submitting file attachments on https://www.regulations.gov are advised that uploading text-recognized documents—i.e., documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment, including any personal information provided, will become a matter of public record and will be posted without change to https://www.regulations.gov. The Department posts 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. ET on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], for consideration in this rulemaking; comments received after the comment period closes will not be considered.

The Department recommends that commenters submit their comments electronically via https://www.regulations.gov to ensure timely receipt prior to the close of the comment period. Please 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 https://www.regulations.gov. In accordance with 5 U.S.C. 553(b)(4), a summary of this rule may also be found at https://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Daniel Navarrete, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Alternative formats are available upon request by

calling 1-866-487-9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the 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 log onto WHD's website at https://www.dol.gov/agencies/whd/contact/local-offices for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Background

A. Relevant FLSA, FMLA, and MSPA Definitions

Enacted in 1938, the FLSA requires that, among other things, covered employers pay their nonexempt employees at least the federal minimum wage for every hour worked and overtime pay for every hour worked over 40 in a workweek, and it mandates that employers keep certain records regarding their employees.[1] The FLSA does not define the term "independent contractor," but defines "employer" in section 3(d) to "include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee"; "employee" in section 3(e)(1) to mean, subject to certain exceptions, "any individual employed by an employer"; and "employ" in section 3(g) to include "to suffer or permit to work."[2] The Supreme Court has recognized that "there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947).

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[1] *See* 29 U.S.C. 206(a) (minimum wage requirements); 207(a) (overtime pay requirements); 29 U.S.C. 211(c) (recordkeeping requirements).

[2] 29 U.S.C. 203(d), (e), (g). The FLSA defines a "person" as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. 203(a).

The Supreme Court has interpreted the phrase "suffer or permit" that defines FLSA employment to be broad and more inclusive than the common law standard. In *Nationwide Mutual Insurance Co. v. Darden*, the Court explained that section 3(g)'s "suffer or permit" language "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[3] However, the Court also recognized that the FLSA's "statutory definition[s] … have [their] limits." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985) (internal citation omitted); *see also Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) ("The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees[.]"). The Supreme Court specifically recognized that "[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees." *Rutherford Food*, 331 U.S. at 729. Accordingly, federal courts of appeals have uniformly held, and the Department has consistently maintained, that independent contractors are not "employees" for purposes of the FLSA.[4]

Enacted in 1983, MSPA protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures and recordkeeping.[5] Agricultural employers, agricultural associations, and farm labor contractors (as those terms are defined in MSPA) must comply with such applicable standards in their employment of migrant and seasonal agricultural workers.[6] MSPA also requires farm labor contractors to register with the Department and obtain a certificate of registration.[7] It is a

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[3] 503 U.S. 318, 326 (1992); *see also U.S. v. Rosenwasser*, 323 U.S. 360, 362–63 (1945) (explaining that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame" in ruling that employees paid by piece rates may be covered by the FLSA's requirements).
[4] *See, e.g.*, *Saleem v. Corporate Transp. Grp., Ltd.*, 854 F.3d 131, 139–40 (2d Cir. 2017); *Karlson v. Action Process Serv. & Private Investigation, LLC*, 860 F.3d 1089, 1092 (8th Cir. 2017).
[5] *See generally* 29 U.S.C. 1801, *et seq*.
[6] *See* 29 U.S.C. 1821–1823, 1831–32, 1841–1844.
[7] *See* 29 U.S.C. 1811–1815.

violation of MSPA to threaten, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker, with just cause, files a complaint, institutes a proceeding, testifies or is about to testify in a proceeding, or exercises any right under MSPA.[8] MSPA expressly adopts the FLSA's definition of "employ" as MSPA's definition of "employ" and thus incorporates the "suffer or permit" standard for determining the scope of employment relationships.[9]

Enacted in 1993, the FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.[10] Eligible employees who take such leave must generally be restored to the same or an equivalent position when they return to work after FMLA leave.[11] An employer cannot interfere with, restrain, or deny an employee's exercise of or attempt to exercise any rights under the FMLA.[12] The FMLA adopts the FLSA's definitions of "employ" and "employee" and thus incorporates the FLSA's standard for determining the scope of employment relationships.[13]

B. Economic Dependence and the Economic Reality Test

1. Supreme Court Development of the Economic Reality Test

Less than a decade after the FLSA was enacted, the U.S. Supreme Court explored the limits of the employer-employee relationship in a series of cases from 1944 to 1947 under three different federal statutes: the FLSA, the National Labor Relations Act (NLRA), and the Social Security Act (SSA). These cases established an "economic reality" test to distinguish between

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[8] 29 U.S.C. 1855(a).
[9] 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under [the FLSA, 29 U.S.C. 203(g)].").
[10] *See* 29 U.S.C. 2611–2614.
[11] *See* 29 U.S.C. 2614.
[12] *See* 29 U.S.C. 2615.
[13] 29 U.S.C. 2611(3) (providing that the terms "employ" and "employee" for purposes of the FMLA have the same meanings given such terms in 29 U.S.C. 203(e) and (g)). The FMLA has its own definitions for whether an employee is "eligible" for FMLA leave and whether his or her employer is covered by the FMLA. *See* 29 U.S.C. 2611(2), (4).

employees and independent contractors which is still used today in FLSA cases.[14] Although the longstanding "economic reality" descriptor is often repeated and is the lens through which the individual worker's relationship with the employer is viewed, the ultimate inquiry focuses on an individual's "economic dependence" for work.

In the first of these cases, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Supreme Court held that the NLRA's definition of employment, which merely defined "employee" to "include any employee," *id.* at 113 n.1, was broader than that of the common law. *Id.* at 123–25. Congress responded by amending the definition of employment under the NLRA on June 23, 1947, with the "obvious purpose of ... hav[ing] the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the [NLRA]."[15]

On June 16, 1947, 1 week before Congress amended the NLRA in response to *Hearst*, the Supreme Court decided *United States v. Silk*, 331 U.S. 704 (1947), which addressed the distinction between employees and independent contractors under the SSA (which did not define "employee"). In that case, the Court relied on *Hearst* to hold that "economic reality," as opposed to "technical concepts" of the common law, such as master and servant, determines workers' classification. *Id.* at 712–14. Although the Court found it to be "quite impossible to extract from the [SSA] a rule of thumb to define the limits of the employer-employe[e] relationship," it identified five factors as "important for decision": "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation." *Id.* at 716. The Court added that "[n]o one [factor] is controlling nor is the list complete." *Id.* Nevertheless, based on the factors that it identified, the Court found that the coal unloaders were employees by referencing, among other things, the employer's

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[14] *See* Dep't of Labor, Independent Contractor Status Under the Fair Labor Standards Act, Notice of Proposed Rulemaking, 85 FR 60600, 60601 (Sept. 25, 2020).
[15] *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

supervision and the workers' lack of opportunity for profit based on initiative and investment.[16] In addition, the Court held that the truck drivers in that case were independent contractors by emphasizing facts related to control, opportunity for profit, initiative and investment.[17]

One week after *Silk* and on the same day Congress amended the NLRA, the Court reiterated these five factors in *Bartels v. Birmingham*, 332 U.S. 126 (1947), another case involving employee or independent contractor status under the SSA. In *Bartels*, the Court explained that under the SSA, employee status "was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker"; instead, employees are "those who as a matter of economic reality are dependent upon the business to which they render service." *Id*. at 130. The Court held that a dance hall's contractual right of control was insufficient to establish an employment relationship with a band leader that it hired. *Id.* at 132.

The same day as it decided *Silk*, the Court ruled in *Rutherford Food* that certain workers at a slaughterhouse were employees under the FLSA, and not independent contractors, by examining facts pertaining to most of the five factors identified in *Silk*.[18] The Court also considered whether the work was "a part of the integrated unit of production" (meaning whether the putative independent contractors were integrated into the assembly line alongside the

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[16] *Silk*, 331 U.S. at 717–18 (finding that the employer "was in a position to exercise all necessary supervision over their simple tasks" and that the unloaders "had no opportunity to gain or lose except from the work of their hands and the[ir] simple tools").

[17] *Id.* at 719 ("They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.").

[18] For example, the Court noted that the slaughterhouse workers performed work on the "premises and equipment of [the employer]," indicating little investment by the workers. 331 U.S. at 730. The workers had a continuous relationship with the slaughterhouse, indicating a permanent work arrangement. *Id*. "The managing official of the plant kept close touch on the operation," indicating control by the alleged employer. *Id*. And "[w]hile profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor." *Id*.

company's employees) to assess whether they were employees or independent contractors under the FLSA. *Id.* at 729–30.

In November 1947, 5 months after *Silk* and *Rutherford Food* were decided, the Department of the Treasury (Treasury) proposed regulations defining when an individual was an independent contractor or employee under the SSA, which used a test that balanced the following factors: (1) degree of control of the individual, (2) permanency of relation, (3) integration of the individual's work in the business to which he renders service, (4) skill required by the individual, (5) investment by the individual in facilities for work, and (6) opportunity of the individual for profit or loss.[19]

Factors one, two, and four through six corresponded directly with the five factors identified as being "important for decision" in *Silk*, 331 U.S. at 716, and the third factor corresponded with *Rutherford Food*'s consideration of the fact that the workers were "part of an integrated unit of production." 331 U.S. at 729. The Treasury proposal further relied on *Bartels*, 332 U.S. at 130, to apply these factors to determine whether a worker was "dependent as a matter of economic reality upon the business to which he renders services."[20]

Congress rejected the interpretations of the definitions of "employee" adopted in *Hearst* for the NLRA and in *Silk* and *Bartels* for the SSA "to demonstrate that the usual common-law principles were the keys to meaning." *Darden*, 503 U.S. at 324–25. Congress did not, however, similarly amend the FLSA following *Rutherford Food*.

In 1961, in *Goldberg v. Whitaker House Cooperative, Inc.*, the Supreme Court revisited independent contractor status under the FLSA and reaffirmed that "the 'economic reality' rather than 'technical concepts'" is the "the test of employment" under the FLSA.[21] It found that certain homeworkers were "not self-employed …[or] independent, selling their products on the market

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[19] *See* 12 FR 7966.
[20] *Id*. The Treasury proposal was never finalized because Congress amended the SSA to foreclose the proposal.
[21] 366 U.S. 28, 33 (1961) (citing the FLSA's definition of "employ," *Silk*, 331 U.S. at 713, and *Rutherford Food*, 331 U.S. at 729).

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," and thus employees.[22] Finally, in *Darden*, the Supreme Court reiterated that the FLSA's test for employee status comes from its definition of "employ" in 29 U.S.C. 203(g) as including to "suffer or permit" to work and is thus broader than the common law test.[23]

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

a. WHD's Early Guidance Applying Economic Reality Test under the FLSA

Since the *Silk*, *Rutherford Food*, and *Whitaker House* decisions, WHD has applied variations of the economic reality analysis when considering whether a worker is an employee under the FLSA or an independent contractor, with an eye to facilitating its real-world application by workers and businesses.

For example, on June 23, 1949, the Wage and Hour Division (WHD) issued an opinion letter distilling six "primary factors which the Court considered significant" in *Rutherford Food* 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."[24] The 1949 opinion letter 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."[25]

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[22] *Id.* at 32.
[23] 503 U.S. at 326 (citing *Rutherford Food*, 331 U.S. at 728).
[24] WHD Op. Ltr. (June 23, 1949).
[25] *Id*.

Subsequent WHD opinion letters addressing employee or independent contractor status under the FLSA have provided similar recitations of the 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."[26] 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."[27] Indeed, the various factors are directed to evaluating the nature of an individual's "dependence" for work.

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.[28] Citing to *Silk*, *Rutherford Food*, 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."[29] 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

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[26] *See, e.g.*, WHD Op. Ltr. (Aug. 13, 1954) (applying six factors); 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); WHD Op. Ltr., 2000 WL 34444352, at *1 (Jul. 5, 2000) (identifying seven factors); WHD Op. Ltr., 2000 WL 34444342, at *3–6 (Dec. 7, 2000) (discussing six factors); WHD Op. Ltr., 2002 WL 32406602, at *2–3 (Sept. 5, 2002) (same).

[27] WHD Op. Ltr. (Sept. 30, 1964).

[28] 27 FR 8032; *see* 29 U.S.C. 213(b)(28) (previously codified at 29 U.S.C. 213(a)(15)).

[29] 27 FR 8033 (29 CFR 788.16(a)).

by the one who performs the services; the amount of investment; and the degree of control which the principal has in the situation."[30]

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 under the FLSA.[31] This regulation was nearly identical to the independent contractor guidance for the logging and forestry industry previously promulgated at 29 CFR 788.16(a), including an identical description of the same six economic reality factors.[32] Both provisions—29 CFR 780.330(b) and 788.16(a)—remained unchanged until 2021.

b. Federal Appellate Courts' Application of the Economic Reality Test

In the 1970s and 1980s, federal courts of appeals began to adopt versions of a multifactor "economic reality" test based on *Silk*, *Rutherford Food*, and *Bartels* and similar to WHD's early guidance to analyze whether a worker was an employee or an independent contractor under the FLSA. Drawing on the Supreme Court precedent discussed above, courts have recognized that the heart of the inquiry is whether "as a matter of economic reality" the workers are "dependent upon the business to which they render service." *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels*, 332 U.S. at 130); *see also Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 299–300 (5th Cir. 1975). Courts have clarified that this question of economic dependence may be boiled down to asking "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." *Saleem*, 854 F.3d at 139 (internal quotation marks and citations omitted).[33] Courts have also explained that a non-exhaustive set of factors—derived from *Silk* and *Rutherford*

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[30] *Id*.
[31] *See* 37 FR 12084, 12102 (introducing 29 CFR 780.330(b)).
[32] *Id*.
[33] *See also Chavez-DeRemer v. Med. Staffing of Am., LLC*, 147 F.4th 371, 397 (4th Cir. 2025); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Iontchev v. AAA Cab Serv., Inc.*, 685 F. App'x 548, 551 (9th Cir. 2017); *Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013).

Food—shape and guide this inquiry. *See, e.g.*, *Usery*, 527 F.2d at 1311 (identifying "[f]ive considerations [which] have been set out as aids to making the determination of dependence, vel non"); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (articulating a six-factor test).

In *Driscoll*, the Ninth Circuit Court of Appeals described its six-factor test as follows: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed, (2) the alleged employee's opportunity for profit or loss depending on his managerial skill, (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers, (4) whether the service rendered requires a special skill, (5) the degree of permanency of the working relationship, and (6) whether the service rendered is an integral part of the alleged employer's business. 603 F.2d at 754.

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

Some courts of appeals have made noteworthy modifications to the economic reality factors as originally articulated in 1947 by the Supreme Court.[34] First, the "skill required" factor

[34] *See* 85 FR 60603–04.

identified in *Silk*, 331 U.S. at 716, is now articulated more expansively by some courts to include "initiative." *See, e.g.*, *Parrish*, 917 F.3d at 379 (considering "the skill and initiative required in performing the job"); *Karlson*, 860 F.3d at 1093 (same); *Superior Care*, 840 F.2d at 1058–59 (considering "the degree of skill and independent initiative required to perform the work").

Second, *Silk* analyzed workers' investments, 331 U.S. at 717–19. However, the Fifth Circuit has revised the "investment" factor to instead consider "the extent of the relative investments of the worker and the alleged employer." *Hopkins v. Cornerstone America,* 545 F.3d 338, 343 (5th Cir. 2008). Some other circuits also apply this "relative investment" approach but continue to use the phrase "worker's investment" to describe the factor. *See, e.g.*, *Keller*, 781 F.3d at 810; *Snell*, 875 F.2d at 805, 810.

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

Finally, *Rutherford Food*'s consideration of whether work is "part of an integrated unit of production," 331 U.S. at 729, has now been replaced by many courts of appeals by consideration of whether the service rendered is "integral," which those courts have applied as meaning important or central to the potential employer's business. *See, e.g.*, *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 232 (3rd Cir. 2019) (concluding that workers' services were integral because they were the providers of the business's "primary offering"); *Acosta v. Off Duty Police Servs., Inc*., 915 F.3d 1050, 1055 (6th Cir. 2019) (concluding that services provided by workers were "integral" because the potential employer "built its business around" those services); *McFeeley v. Jackson Street Entertainment, LLC*, 825 F.3d 235, 244 (4th Cir. 2016) (considering "the importance of the services rendered to the company's business").

Courts of appeals have cautioned against the "mechanical application" of the economic reality factors. *See, e.g.*, *Saleem*, 854 F.3d at 139. "Rather, each factor is a tool used to gauge the

economic dependence of the alleged employee, and each must be applied with this ultimate concept in mind." *Hopkins*, 545 F.3d at 343. Further, courts of appeals make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself. *See, e.g*., *Keller*, 781 F.3d at 807 ("No one factor is determinative."); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998) ("None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.").

c. The Department's More Recent Application of the Economic Reality Test under the FLSA, FMLA, and MSPA

In 1995, the Department promulgated a regulation at 29 CFR 825.105(a) addressing employee status under the FMLA and the distinction between employees and independent contractors.[35] The regulation currently explains that "[t]he definition of employ for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g), 29 U.S.C. 203(g)," meaning a broader scope of employment than at the common law.[36] The regulation further explains that determining employee status "depends 'upon the circumstances of the whole activity' including the underlying 'economic reality.'"[37] The regulation adds that: "In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who 'follows the usual path of an employee' and is dependent on the business which he/she serves."[38] The regulation does not provide any specific economic reality factors to apply. A separate regulation, 29 CFR 825.102, defines various terms under the FMLA, and consistent with the FMLA's adoption of the FLSA's statutory definitions, defines "employ" to mean "to suffer or permit to work" and "employee" to generally mean "any individual employed by an employer."

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[35] *See* 60 FR 2240.
[36] 29 CFR 825.105(a); *see also* 29 U.S.C. 2611(3).
[37] 29 CFR 825.105(a).
[38] *Id*.

In 1997, the Department promulgated a regulation applying a multifactor economic reality analysis for distinguishing between employees and independent contractors under MSPA, which—like the FMLA—statutorily adopts the FLSA's "suffer or permit" definition of employment by reference.[39] The regulation explains that "[t]he definition of the term *employ* may include consideration of whether or not an *independent contractor* or *employment* relationship exists under the Fair Labor Standards Act."[40] The regulation 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.[41] 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."[42] This description of six economic reality factors is very similar to the earlier description of the six factors test to evaluate the economic reality, that is an individual's economic dependence for work, on a putative employer, provided in 29 CFR 780.330(b) and 788.16(a).

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[39] *See* 62 FR 11734, 11747; *see also* 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under section 3(g) of the [FLSA]").
[40] 29 CFR 500.20(h)(4).
[41] *Id*.
[42] *Id*.

Also in 1997, WHD issued Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)."[43] 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 he or she serves. The fact sheet identifies 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 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).[44] AI 2015-1 explained that, "under the FLSA, courts use the multi-factorial 'economic realities' test, which focuses on whether the worker is economically dependent on the employer or in business for him or herself," and it identified and provided guidance regarding the application of six economic realities factors. AI 2015-1 further explained that its FLSA analysis "should also be applied in determining whether a worker is an employee or an independent contractor in cases arising under [MSPA] and the [FMLA]" because both statutes adopt the FLSA's definition of "employ."

In 2019, WHD issued an opinion letter, FLSA2019-6 (later redesignated as FLSA2025-2),[45] addressing whether service providers who used a "virtual marketplace" company to be referred to end-market consumers were employees or independent contractors of the virtual marketplace company under the FLSA. The opinion letter generally applied principles and

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[43] *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 the Department is currently applying (available at https://www.dol.gov/sites/dolgov/files/WHD/fact-sheets/whdfs13.pdf).

[44] AI 2015-1 was withdrawn on June 7, 2017, and is no longer in effect.

[45] WHD withdrew WHD Opinion Letter FLSA2019-6 on February 19, 2021, but reissued the opinion letter on May 2, 2025, redesignating it as Opinion Letter FLSA2025-2, available at https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/FLSA2019-6.pdf.

factors similar to those described in the prior opinion letters and the 2008 version of Fact Sheet #13, but not the "independent business organization" factor because it did not add to the analysis as a separate factor and was "[e]ncompassed within" the other factors. WHD Opinion Letter FLSA2025-2 at 5. It also stated that the investment factor should focus on the "amount of the worker's investment in facilities, equipment, or helpers." *Id*. Based on the facts provided, WHD concluded that the service providers at issue appeared to be independent contractors and not employees of the virtual marketplace company. WHD found that it was "inherently difficult to conceptualize the service providers' 'working relationship' with [the virtual marketplace company], because as a matter of economic reality, they are working for the consumer, not [the company]." *Id.* at 7–8. Because "[t]he facts … demonstrate economic independence, rather than economic dependence, in the working relationship between [the virtual marketplace company] and its service providers," WHD opined that they were not employees of the company under the FLSA but rather were independent contractors. *Id.* at 11.

C. The 2021 Rule

On January 7, 2021, the Department published a final rule (2021 Rule) which—for the first time—organized and distilled the longstanding economic reality factors into practical regulatory guidance for workers and business to aid the proper classification of employees and independent contractors under the FLSA for use in any industry.[46] The Department explained that the 2021 Rule was intended to combine longstanding legal and judicial frameworks in a practicable package that could be broadly applied in workplaces across the nation—promoting certainty for stakeholders, reducing litigation, and encouraging innovation in the economy.

In the 2021 Rule, the Department affirmed the "economic reality" test under the FLSA to determine whether a worker is in business for himself or herself (an independent contractor) or is instead economically dependent on an employer for work, as an employee conventionally

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[46] *See* Dep't of Labor, Independent Contractor Status Under the Fair Labor Standards Act, Final Rule, 86 FR 1168 (Jan. 7, 2021).

depends on his employer for work.[47] The Department framed five familiar "factors," drawn from the longstanding approach articulated by the Supreme Court and courts of appeals, to "guide the determination" of workers' "economic reality." Like the components of those tests, the Department explained that the "factors are not exhaustive" and "no single factor is dispositive."[48] Based on its experience and case law, the Department further identified two of those factors (the nature and degree of control over the work and the individual's opportunity for profit or loss) as "core" factors that, across a wide spectrum of work arrangements, are "the most probative as to whether or not an individual is an economically dependent 'employee'" and "therefore typically carr[y] greater weight in the analysis than any other factor."[49] The Department added that, "[g]iven these two core factors' greater probative value, if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification."[50] Similarly, the Department explained that other factors are "less probative and, in some cases, may not be probative at all" in answering the ultimate "economic reality" inquiry to which these tests are directed. Typically, these other factors "are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."[51]

The Department provided guidance in the 2021 Rule on how to apply the control and opportunity for profit or loss factors, including that an individual's opportunity for profit or loss could be 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."[52] The Department identified three other factors to be considered with the two core factors and provided guidance on each: the

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[47] 86 FR 1246 (§ 795.105(b)).
[48] 86 FR 1246 (§ 795.105(c)).
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] 86 FR 1246–47 (§ 795.105(d)(1)(i)–(ii)).

amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production.[53] The Department added that "[a]dditional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA, but only if the factors" are directly material to the "economic reality" inquiry that determines whether an individual's relationship with a potential employer is more akin to that of another business or an employee.[54] The Department further advised that, when applying the factors, "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible."[55] The Department also provided six "illustrative examples" of how the factors may be applied in certain factual situations.[56] And, the Department included a severability provision explaining that the Department would still give "maximum effect" to the rule in the event that any of its provisions are enjoined or invalidated.[57]

In the 2021 Rule, the Department also revised the industry-specific guidance provided at 29 CFR 780.330(b) (addressing the employment status of sharecroppers and tenant farmers) and 788.16(a) (workers in forestry or logging). The Department replaced the recitation of the six economic reality factors identified in those regulatory subsections with cross-references to the 2021 Rule's updated and generally applicable guidance.[58]

Finally, the 2021 Rule noted that the Department had received several comments addressing the possibility of applying that rule's analysis to determining employee or independent contractor status under MSPA, including by revising 29 CFR 500.20(h)(4).[59] The Department recognized in the 2021 Rule that "MSPA adopts by reference the FLSA's definition of 'employ,' *see* 18 U.S.C. 1802(5), and that 29 CFR 500.20(h)(4) considers 'whether or not an

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[53] 86 FR 1247 (§ 795.105(d)(2)(i)–(iii)).
[54] 86 FR 1247 (§ 795.105(d)(2)(iv)).
[55] 86 FR 1247 (§ 795.110).
[56] 86 FR 1247–48 (§ 795.115).
[57] 86 FR 1248 (§ 795.120).
[58] 86 FR 1246.
[59] 86 FR 1177.

independent contractor or employment relationship exists under the Fair Labor Standards Act' to interpret independent contractor status under MSPA."[60] The Department added that "the regulatory standard for determining an individual's classification status under MSPA is generally consistent with the FLSA guidance finalized in this rule."[61] The Department determined at the time that it did "not see a compelling need to revise" the MSPA regulation because it was "unsure whether application of the six factor economic reality test described in that regulation has resulted in confusion and uncertainty in the more limited MSPA context similar to that described in the FLSA context."[62] The Department concluded that it "prefers to proceed incrementally at this time by leaving the MSPA regulation at 29 CFR 500.20(h)(4) unchanged."[63]

The effective date of the 2021 Rule was March 8, 2021.

D. Attempts to Delay and Withdraw the 2021 Rule

On March 4, 2021, the Department published a final rule (Delay Rule) delaying the effective date of the 2021 Rule until May 7, 2021—60 days after its original March 8, 2021, effective date.[64] The Delay Rule stated that it took effect immediately upon its publication in the *Federal Register*.[65] On May 6, 2021, the Department published a final rule withdrawing the 2021 Rule (Withdrawal Rule).[66] The Withdrawal Rule stated that it took effect immediately upon its publication in the Federal Register.[67]

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

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[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *See* Dep't of Labor, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 FR 12535 (Mar. 4, 2021).
[65] *See id.* at 12537.
[66] *See* Dep't of Labor, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 FR 24303 (May 6, 2021).
[67] *See id.* at 24320.

Texas issued a decision vacating the Department's Delay and Withdrawal Rules. *See Coalition for Workforce Innovation v. Walsh*, No. 1:21–CV–130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022) (*CWI* Decision). 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," *id.* at *9,[68] failed to show "good cause for making the [Delay Rule] effective immediately upon publication," *id.* at *11, and acted in an arbitrary and capricious manner in its Withdrawal Rule by "fail[ing] to consider potential alternatives to rescinding the [2021] Rule," *id.* at *13. Accordingly, the district court vacated the Delay and Withdrawal Rules and ruled that the 2021 Rule "became effective as of March 8, 2021, the rule's original effective date, and remains in effect." *Id.* at *20.

The Department filed a notice of appeal of the district court's decision to the Fifth Circuit Court of Appeals. *See Coal. for Workforce Innovation v. Su*, No. 22–40316 (5th Cir. appeal filed, May 13, 2022). The Fifth Circuit entered successive orders staying the appeal while the Department engaged in further rulemaking. Once the Department's further rulemaking concluded, the Fifth Circuit dismissed the appeal, vacated the district court's decision as moot, and remanded the case to the district court. *See* No. 22-40316, 2024 WL 2108472 (5th Cir. Feb. 19, 2024).

E. The 2024 Rule

On January 10, 2024, the Department published a final rule (2024 Rule) to rescind the 2021 Rule and replace it with a modified analysis for determining employee or independent contractor classification under the FLSA, which is currently set forth in 29 CFR part 795.[69] Like

[68] The district court specifically faulted the Department's use of a shortened 19-day comment period (instead of 30 days) in its proposal to delay the 2021 Rule's original effective date, and for failing to consider comments beyond its proposal to delay the 2021 Rule's effective date. 2022 WL 1073346, at *7–10.

[69] *See* Dep't of Labor, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, Final Rule, 89 FR 1638 (Jan. 10, 2024).

the 2021 Rule, the 2024 Rule advises that the FLSA'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," elaborating that "[a] worker is an independent contractor, as distinguished from an 'employee' under the [FLSA], if the worker is, as a matter of economic reality, in business for themself."[70] The 2024 Rule identifies six factors as "tools or guides to conduct a totality-of-the-circumstances analysis": (1) opportunity for profit or loss depending on managerial skill, (2) investments by the worker and the potential employer, (3) degree of permanence of the work relationship, (4) nature and degree of control, (5) extent to which the work performed is an integral part of the potential employer's business, and (6) skill and initiative.[71] The 2024 Rule does not identify any core factors or otherwise elaborate on the relative importance of these factors, advising instead that "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."[72] The Department added that the six factors "are not exhaustive" and "[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 themself, as opposed to being economically dependent on the potential employer for work."[73] The 2024 Rule advises that the outcome of its 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 themself."[74]

In addition, the Department made minor revisions to the industry-specific guidance provided at 29 CFR 780.330(b) and 788.16(a) by updating the cross-references to 29 CFR part

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[70] 29 CFR 795.105(b).
[71] 29 CFR 795.110(a)(1), (b)(1)–(6).
[72] 29 CFR 795.110(a)(2).
[73] 29 CFR 795.110(a)(2), (b)(7).
[74] 29 CFR 795.110(a)(1).

795 that the 2021 Rule had added.[75] Also, like the 2021 Rule, the Department included a severability provision in the 2024 Rule.[76]

Like in the 2021 Rule, the Department in the 2024 Rule "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."[77] The Department explained that the guidance provided in the MSPA regulation is "substantially similar" to the economic reality test adopted by the 2024 Rule, the comments received did not address MSPA, and the Department "is not revising the MSPA regulation at this time."[78]

Unlike the 2021 Rule, the 2024 Rule's regulatory text does not include any illustrative examples of how to apply the economic reality test or address the relevance of parties' actual practice as compared to what may be contractually or theoretically possible. However, the Department provided examples of how to apply each economic reality factor and addressed the actual practice issue in the 2024 Rule's preamble.[79]

The 2024 Rule took effect on March 11, 2024.

F. Litigation Challenging the 2024 Rule and WHD's 2025 Field Assistance Bulletin

Five lawsuits were filed challenging the legality of the 2024 Rule. Each lawsuit remains pending, although each has been stayed based on the Department's representation that it intends to reconsider the 2024 Rule, including whether to issue a notice of proposed rulemaking to rescind the rule.

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[75] *See* 89 FR 1741.
[76] *See* 29 CFR 795.115.
[77] 89 FR 1664.
[78] *Id*.
[79] *See* 89 FR 1718–22 (discussing the relevance of actual practice); *see also* 89 FR 1722–24 (discussing commenter feedback on illustrative examples provided in the preamble of the Department's 2022 Notice of Proposed Rulemaking).

In *Frisard's Transportation, L.L.C. v. Department of Labor*, the district court denied a motion for temporary restraining order and preliminary injunction that sought to enjoin the 2024 Rule because the trucking companies and business association challenging the 2024 Rule failed to meet their burden of showing irreparable harm. *See* Dkt. No. 19, No. 2:24-cv-00347-EEF-MBN (E.D. La. Mar. 8, 2024). The trucking companies and business association appealed the denial of preliminary injunction to the Fifth Circuit Court of Appeals, and the district court later stayed its proceedings. The Fifth Circuit has stayed the appeal.

In *Warren v. Department of Labor*, the district court ruled in favor of the Department without addressing the legality of the 2024 Rule, concluding that the freelancers challenging the 2024 Rule do not have standing to do so. *See* Dkt. No. 42, No. 2:24-CV-7-RWS (N.D. Ga. Oct. 7, 2024). The freelancers appealed to the Eleventh Circuit Court of Appeals, which has stayed the appeal.

In *Colt & Joe Trucking, LLC v. Department of Labor*, the district court ruled in favor of the Department, concluding that the trucking company challenging the 2024 Rule does not have standing to do so and also rejecting its various arguments that the 2024 Rule is unlawful. *See* No. 24-cv-00391-KWR-GBW, 2025 WL 56658 (D.N.M. Jan. 9, 2025). The trucking company appealed to the Tenth Circuit Court of Appeals, which has stayed the appeal.

In *Littman v. Department of Labor*, the district court ruled in favor of the Department without addressing the legality of the 2024 Rule, affirming the magistrate judge's report and recommendation that found that the freelancers challenging the 2024 Rule do not have standing to do so. *See* No. 3:24-cv-00194, 2025 WL 763583 (M.D. Tenn. Mar. 11, 2025). The freelancers appealed to the Sixth Circuit Court of Appeals, and that appeal has been stayed by the court's Mediation Office.

In *Coalition for Workforce Innovation v. Walsh*, the business associations that had challenged the Delay and Withdrawal Rules amended their complaint following remand to challenge the 2024 Rule. Dkt. No. 40, No. 1:21–CV–130 (E.D. Tex. Mar. 5, 2024). In 2024, the

business associations filed a motion for summary judgment arguing that the 2024 Rule is unlawful, and the Department filed a cross-motion arguing that the case should be dismissed for lack of standing and that it should be granted summary judgment because the 2024 Rule is lawful. The parties fully briefed the motions, and the district court later stayed the case.

On May 1, 2025, WHD published Field Assistance Bulletin (FAB) No. 2025-1, providing enforcement guidance in FLSA cases.[80] FAB No. 2025-1 explained that the Department has taken the position in the lawsuits challenging the 2024 Rule that it is reconsidering the rule, including whether to rescind it. The FAB added that "WHD is currently reviewing and developing the appropriate standard for determining FLSA employee versus independent contractor status," and advised WHD staff that "WHD will no longer apply the 2024 Rule's analysis when determining employee versus independent contractor status in FLSA investigations." In its place, "WHD will enforce the FLSA in accordance with [the 2008 version of Fact Sheet #13], and as further informed by [WHD Opinion Letter FLSA2025-2] with respect to any matters for which no payment has been made, directly to individuals or to DOL, for back wages and/or civil money penalties as of May 1, 2025." FAB No. 2025-1 noted that, "[u]ntil further action is taken, the 2024 Rule remains in effect for purposes of private litigation and nothing in this FAB changes the rights of employees or responsibilities of employers under the FLSA."

II. Need for Rulemaking

The Department is concerned that the 2024 Rule broadens and generalizes a variation of the longstanding legal analysis in ways that complicate and frustrate its application by workers and businesses. Repeated emphasis on the "whole activity" and little direction regarding how its factors should be used to answer the ultimate question resulted in a rule that fails to provide an analysis for distinguishing between independent contractors and employees under the FLSA that is sufficiently clear and leads to predictable outcomes. The Department is separately concerned

[80] The FAB is available at https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-1.pdf.

that the 2024 Rule's description of several economic reality factors could be viewed as setting a higher bar to find independent contractor status than the law requires. Among other harms, an open-ended balancing analysis of six ambiguous elements can deter businesses from engaging with bona fide independent contractors or induce them intentionally to unnecessarily classify such contractors as employees. Indeed, these and other concerns have been emphasized by many self-identified independent contractors who have participated in the Department's recent rulemakings on this topic. The Department believes that replacing the 2024 Rule with a modified and updated 2021 Rule would avoid this outcome and facilitate the more accurate and predictable classification of individuals, with a familiar and clear analysis drawn from established case law that is more amenable to the modern economy and fully effective in preventing the misclassification of employees. In particular, and as explained in greater detail in section III.E. of this NPRM, the Department believes that the 2021 Rule's elevation of control and opportunity as "core" factors in the analysis used to identify independent contractors better aligns with the Supreme Court's original application of the economic reality test, as well as the ordinary understanding of being in business for oneself. Accordingly, in this rulemaking, the Department is proposing to rescind the 2024 Rule and readopt the analysis provided in the 2021 Rule, with a few modifications, which the Department has successfully applied in WHD investigations.[81] For the reasons provided herein, the Department believes this proposed analysis represents the best construction of the FLSA with respect to whether an individual is an independent contractor or an employee.

A. Concerns That the 2024 Rule Fails to Provide Needed Clarity

The principal flaw of the 2024 Rule is its failure to provide effective guidance on how different factors in its multi-factor balancing test should be weighed or applied together. In the

[81] WHD began applying the 2021 Rule's analysis after the *CWI* Decision (issued on March 14, 2022) in its FLSA cases involving work performed by an alleged independent contractor from March 8, 2021, to March 10, 2024 (*i.e.*, from the 2021 Rule's intended effective date until its rescission by the 2024 Rule).

absence of such guidance, engaging individuals as independent contractors could be confusing and risky when different factors point to different classification outcomes. Imagine, for example, that a company is evaluating its longstanding relationship with an individual who works from home, has the ability to accept or decline any project without repercussion, sets her own schedule, and negotiates her compensation with the company as well as several other companies with which she works. Under the 2024 Rule, some economic reality factors in this scenario might indicate that the individual is an independent contractor—*i.e.*, the company's lack of control over her, her opportunity for profit and loss, and her skill and business-like initiative.[82] However, other factors might indicate an employment relationship—*i.e.*, her work may be an "integral part" of the company's business,[83] the parties have a "continuous" (though non-exclusive) relationship,[84] and the individual may lack significant investments (at least in comparison to the company's "investments in its overall business").[85] In this scenario, although the individual may well be an independent contractor under the 2024 Rule, that outcome may be uncertain because the factors point in different directions and "the weight to give each factor may depend on the facts and circumstances of the particular relationship."[86] Accordingly, the company might believe that engagement of the individual would require classification of the individual as an employee under the FLSA (which may or may not be possible given both the business's and the individual's circumstances), given that the 2024 Rule lacks clear guidance on how to weigh the factors, repeatedly emphasizing the totality not only of the six factors but all potentially relevant considerations. One can point to a myriad of additional scenarios involving workers who are in business for themselves (and thus are bona fide independent contractors), but where two or more factors from the 2024 Rule arguably indicate an employment relationship, particularly in industries where those workers are "integral" to the businesses in those industries.

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[82] *See* 29 CFR 795.110(b)(1), (4), (6).
[83] 29 CFR 795.110(b)(5).
[84] *See* 29 CFR 795.110(b)(3).
[85] *See* 29 CFR 795.110(b)(2).
[86] 29 CFR 795.110(a)(2).

As Judge Frank Easterbrook noted in 1987, "'[economic] reality' encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision."[87] It is precisely this ambiguity that motivated the Department to initially propose regulatory guidance for analyzing employee or independent contractor status under the FLSA in 2020.[88] In that rulemaking, after reviewing decades of judicial decisions applying *Silk* and *Rutherford*, the Department determined that courts tended to focus on two economic reality factors—control and the opportunity for profit or loss. The Department determined that courts tended to treat the direction in which they pointed as a reliable indicator of employee or independent contractor status, effectively—if not formally—giving them more weight and an elevated status. As the Department explained, control and opportunity "strike at the core of what it means to be in business for oneself."[89] It is logical that those factors would and should have more weight in assessing the legality of an independent contractor arrangement than the ancillary considerations regarding the skill of the individual worker at issue, the permanency of the individual's relationship with a particular business, and whether the work is an "integral part" of that business.[90]

In the Department's recent rulemakings on this topic, numerous self-identified independent contractors and businesses that engage independent contractors commented positively on the 2021 Rule for its identification of control and opportunity as "core" factors in

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[87] *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).
[88] For example, Judge Easterbrook has generally observed that "[u]nless some obstacle such as inexperience with the subject, a dearth of facts, or a vacuum in the statute books intervenes, we should be able to attach legal consequences to recurrent factual patterns. Courts have had plenty of experience with the application of the FLSA to migrant farm workers. Fifty years after the Act's passage is too late to say that we still do not have a legal rule to govern these cases." *Id*.
[89] 86 FR 1199. The 2021 Rule reflected thoughtful analysis of the caselaw that has situated the core of the employee vs. independent contractor analysis in the control and opportunity for profit and loss factors. The 2024 Rule does not cite a single case where these two core factors (when pointing to the same classification) were overridden.
[90] *See* 86 FR 1196–97.

the FLSA's multi-factor economic reality test.[91] As a policy matter, these commenters asserted that the Department's identification of core factors brought helpful clarity and assurance. In the 2024 Rule, the Department largely rejected such policy arguments, believing that identifying "core" and "non-core" factors "would … likely [cause] confusion and uncertainty" if left in place.[92] Upon reconsideration, the Department finds compelling the sentiment expressed by workers and businesses who did not share that view and sought added clarity in how different factors from the economic reality test should be balanced in predictable ways. As described in greater detail in section III of this NPRM, the Department can apply an economic reality test grounded in federal case law that provides more clarity to interested stakeholders than an unguided "totality-of-the-circumstances analysis" in which "the weight to give each factor may depend on the facts and circumstances of the particular relationship."[93] In advising the public on how it intends to weigh different economic reality factors, the Department can and should do better than "it depends." *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1299 (7th Cir. 1996) (noting Judge Easterbrook's observation that real world actors need guidance ahead of time rather than critiques afterward).

The Department is additionally concerned that the 2024 Rule features numerous redundancies in its description of the different factors, which the 2021 Rule sought to eliminate to facilitate the proper, clear, and reliable application of the analysis. For example, the phrases "managerial skill (including initiative or business acumen or judgment)," "business-like initiative," and "independent business initiative" appear in the guidance provided for three different factors in the 2024 Rule.[94] Both the "control" and the "opportunity for profit or loss"

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[91] *See* 86 FR 1197 (2021 Rule); 86 FR 24308–09 (Withdrawal Rule); 89 FR 1650, 1666–67 (2024 Rule).
[92] 89 FR 1654.
[93] 29 CFR 795.110(a)(2).
[94] 29 CFR 795.110(b)(1), (3), and (6).

factors consider whether the worker determines or negotiates their pay.[95] The "opportunity" factor considers "whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space,"[96] despite a separate factor examining "evidence of capital or entrepreneurial investment."[97] The control factor examines "whether the potential employer … explicitly limits the worker's ability to work for others" or "places demands or restrictions on workers that do not allow them to work for others,"[98] while the "permanence" factor separately inquires whether "the work relationship is … exclusive of work for other employers."[99] Finally, the "permanence" factor states in circular fashion that an impermanent work arrangement is only indicative of independent contractor status if it is "based on the worker being in business for themself,"[100] which of course is the overarching inquiry of the economic reality test.[101] And, the factor further states that a worker must be "marketing their services or labor to multiple entities" for an impermanent relationship to be indicative of independent contractor status, when "whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work" is separately considered under the 2024 Rule's "opportunity" factor.[102]

The Department acknowledged in the preamble of the 2024 Rule that "certain relevant facts may overlap among the factors," but explained that it "does not wish to be overly prescriptive" about such overlap for fear of establishing "a formulaic or rote analysis" that would

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[95] *Compare* 29 CFR 795.110(b)(1) (examining "whether the worker determines or can meaningfully negotiate the charge or pay for the work provided") *with id*. at 795.110(b)(4) (examining "control over prices or rates for services … provided by the worker").
[96] 29 CFR 795.110(b)(1).
[97] 29 CFR 795.110(b)(2).
[98] 29 CFR 795.110(b)(4).
[99] 29 CFR 795.110(b)(3). The 2024 Rule also addressed ability to work for others in its preamble discussion of the "investments" factor. *See* 89 FR 1681 ("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.").
[100] 29 CFR 795.110(b)(3).
[101] 29 CFR 795.110(a)(1) (advising that employee or independent contractor status turns on "whether the worker is economically dependent on the potential employer for work or is in business for themself").
[102] 29 CFR 795.110(b)(1). Marketing is also arguably an example of "business-like initiative," a required element of the "skill and initiative" factor in 29 CFR 795.110(b)(6).

not be "flexible enough to apply to all kinds of work, and all kinds of workers."[103] While some degree of factual overlap may be inevitable in a multifactor analysis, the Department now believes that the 2024 Rule crosses the line from natural overlap into unhelpful repetition—particularly where the same concepts (such as "business initiative") are presented as required elements of multiple factors and are applied for different purposes. These redundancies risk confusing businesses and workers alike, creating uncertainty about whether the same considerations must be counted multiple times or weighed differently depending on the factor in which they appear. The Department believes that a more concise articulation of each factor, with a clearer delineation of which considerations are most relevant to each, would enhance the clarity and utility of the Department's regulatory guidance on the economic reality test.

Ultimately, the Department is concerned that the framework set forth in the 2024 Rule was too general and expected that workers and businesses assess the notion of "economic reality" with six broad and vague factors, as well as any other information that might be relevant—or later deemed relevant—without any direction regarding how those factors should be applied. In this way, the 2024 Rule failed to facilitate proper classification of workers. Instead, the Department believes that the vagueness of the 2024 Rule, and its lack of predictable application, pressured businesses to unnecessarily classify bona fide independent contractors as employees. Although "economic reality" may be an imprecise concept, the Department believes that in most instances, the proper classification of workers under the law can—and should—be reasonably certain and predictable.

B. Concerns That the 2024 Rule's Description of the Factors May Have a Chilling Effect on Independent Contracting Arrangements and Departs from the Supreme Court's Application

In addition to concerns about the 2024 Rule's lack of clarity, the Department has concerns that the 2024 Rule could be viewed as more restrictive of independent contracting than

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[103] 89 FR 1670.

the law requires. As explained below and consistent with comments received during the 2024 rulemaking, the Department is concerned that several of the economic reality factors in the 2024 Rule are described in ways (particularly by including additional considerations that must be met for the factor to indicate independent contractor status) that make proper classification of independent contractors more difficult than the law requires, pressures the unnecessary classification of such workers as employees, or tilts the analysis to make classification in one direction more difficult with more attendant legal risk than the other. In the 2024 Rule, the Department stated that it was attempting to reflect the ways in which a number of courts have viewed the various considerations within the factors. Upon further consideration, the Department believes that referencing a multitude of additional considerations within the factors not only departs from the Supreme Court's articulation of the factors, but also could have a chilling effect on independent contractor arrangements involving individuals who are, in fact, in business for themselves. Readopting the streamlined analysis in the 2021 Rule better aligns with the Court's precedent and reduces these risks.

The "investments" factor at 29 CFR 795.110(b)(2) is instructive. Before the 2024 Rule, when the Department would enumerate the multi-factor economic reality test for assessing independent contractor arrangements, the Department's description of the investments factor would generally focus on any investments (or lack thereof) made by the individual worker.[104] However, the 2024 Rule expanded this factor to examine "investments by the worker *and the potential employer*," with guidance elaborating that "the worker's investments should be considered on a relative basis with the potential employer's investments in its overall

[104] *See* WHD Fact Sheet #13 (July 2008), https://www.dol.gov/sites/dolgov/files/WHD/fact-sheets/whdfs13.pdf (assessing "[t]he amount of the alleged contractor's investment in facilities and equipment"); *see also, e.g.*, WHD Op. Ltr. (June 23, 1949) (examining "the amount of the so-called 'contractor's' investment in facilities or equipment"); WHD Op. Ltr. (Aug. 13, 1954) (examining "the amount of investment on the part of the one who performs the service"); WHD Op. Ltr. FLSA2019-6 (April 29, 2019) (considering "the amount of the worker's investment in facilities, equipment, or helpers").

business."[105] The Department recognizes that this additional consideration of comparing the worker's investment to the potential employer's investment is applied by some courts, but that approach has no support in Supreme Court cases. This is notable given how close in time the key Supreme Court decisions were to the enactment of the FLSA. But as explained in section III.F.2. below, the Supreme Court has *never* compared investments and instead has focused exclusively on the worker when considering investments.

Moreover, comparing investments diminishes the probative value of the investment. An independent contractor's investments will almost invariably be smaller than any corporate client's "investments in its overall business," and so counterfactually tends to indicate employee status.[106] In response to commenter concerns on this point, the Department recognized the problem and clarified in the final 2024 Rule regulatory text that 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."[107] Even with that clarification, however, the 2024 Rule's "investments" factor still undertakes this comparative approach, which is a departure from *Silk* and may obfuscate proper classification of workers.

The 2024 Rule's "permanence" factor, 29 CFR 795.110(b)(3), is another example. The operative text advises that "[t]his 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," while it "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 themself and marketing their services or labor to multiple

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[105] 29 CFR 795.110(b)(2) (emphasis added).
[106] *Id.*; *see* 89 FR 1683–84.
[107] 29 CFR 795.110(b)(2); *see also* 89 FR 1684 (explaining that the Department intended for the analysis to "compar[e] the qualitative (rather than primarily the quantitative) value of the investments").

entities."[108] Here, the conditional language following the word "sporadic" seems to add further considerations than the law requires in order for an impermanent relationship to indicate independent contractor status. Adding to the perception that it could be more difficult to find that this factor weighs in favor of independent contractor status, the 2024 Rule additionally advises, as some courts have, that "this [permanence] factor is not necessarily indicative of independent contractor status" 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 … unless the worker is exercising their own independent business initiative."[109] There is no corresponding language in the other direction, categorically discounting industries where lengthy professional relationships between businesses and independent contractors might be commonplace. The result is a factor framed in a way that may indicate the existence of an FLSA employment relationship when permanence exists but unnecessarily require additional considerations to indicate independent contractor status when permanence does not exist.

The 2024 Rule's "skill and initiative" factor operates in a similar fashion and also deviates from Supreme Court precedent. The operative regulatory text begins with straightforward guidance that a lack of skills indicates that a worker is an employee: "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."[110] However, the guidance does not correspondingly state that specialized skills indicate that the worker is an independent contractor and instead inserts an additional consideration that must be met for this factor to indicate that a worker with specialized skills is an independent contractor: "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

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[108] 29 CFR 795.110(b)(3).
[109] *Id.*; *see* 89 FR 1688 and n.330.
[110] 29 CFR 795.110(b)(6).

connection with business-like initiative that indicates that the worker is an independent contractor."[111] Here again, the Department recognizes that this approach is applied by some courts, but the 2024 Rule articulates this factor in a way that makes it more difficult than the law requires to establish that a worker might be an independent contractor rather than an employee. While it is true that "both employees and independent contractors may be skilled workers," the converse is also true, as other workers who may not possess "specialized skills" are both employees and independent contractors. Moreover, although the 2024 Rule's consideration of initiative as part of the skill factor is supported by some courts, the Supreme Court has not considered initiative in terms of skill. Instead, and as discussed in section III.G.1, it has consistently analyzed whether initiative contributes to the success or profitability of the claimed independent business.[112]

The 2024 Rule's "integral" factor departs from *Rutherford Food*'s guidance to consider whether a worker is part of an integrated unit, and it may also unreasonably frustrate finding independent contractor status where appropriate, because this factor weighs in favor of employee status when his or her work is "critical, necessary, or central to the potential employer's principal business."[113] In some sense, all work performed is in some way necessary to the employer's business. If not, the business would not pay for it to be performed.[114] Indeed, several commenters expressed concerns that the integral factor would "effectively subsume" all independent contractors into employment status because businesses do not pay employees or independent contractors to engage in work that is not in some sense critical or necessary to their operations.[115] Finally, in its descriptive guidance for the "control" factor, the 2024 Rule gives several examples

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[111] *Id*.
[112] *Silk*, 331 U.S. at 716 (finding that truck drivers "depend upon their own initiative, judgment and energy for a large part of their success"); *Rutherford Food*, 331 U.S. at 730 (finding that workers' "profits" did not depend "upon the initiative, judgment or foresight of the typical independent contractor").
[113] 29 CFR 795.110(b)(5).
[114] *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring) ("*Everything* the employer does is 'integral' to its business—why else do it?").
[115] 89 FR 1710.

of facts relevant to a potential employer's control over workers but does not provide similar examples of facts relevant to a worker's control, further implying that this factor is not a balanced aid in determining proper classification.[116]

Taken together, these aspects of the 2024 Rule appear to be misaligned with the Supreme Court's analysis and may have created the perception of an economic reality test with a number of considerations that would make it harder to conclude that an individual who is in business for him- or herself is an independent contractor. While the Department maintains that preventing the misclassification of FLSA-covered employees as independent contractors is an important policy goal, it is equally important that the Department's guidance not be viewed as chilling independent contracting arrangements that comply with the statute.

C. Concerns Over the 2024 Rule's Compatibility with the Modern Economy

In the 2021 Rule, the Department explained that certain technological and social changes have made the traditional articulation of the economic reality test more difficult to apply in the modern economy. For example, it highlighted the effects of several types of change, including societal transition from a predominantly industrial-based to a more knowledge-based economy and shorter job tenures among employees.[117] In 2024, the Department disagreed with its past statements and arguments from some commenters that the 2021 Rule was better suited to the modern economy, asserting that "[m]odern work arrangements … are best addressed using the [2024 Rule's] 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."[118] However, as discussed earlier in section II.A., generalizing the legal analysis in ways that expand "flexibility" can undermine the utility of a rule—namely to clarify the proper application of statutory provisions, which provides regulated entities with the reasonable certainty and predictability they need to do

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[116] 29 CFR 795.110(b)(4).
[117] *See* 86 FR 1175.
[118] 89 FR 1649.

business. This is particularly true for practices which might be novel and innovative. Moreover, in the 2024 Rule, the Department did not address, much less refute, the points made by the 2021 Rule that the predictive accuracy of certain economic reality factors (investments, permanence, and integrality) may be waning due to recent workplace trends. These trends are no less true today than they were in 2021, reinforcing the need for prioritization among the factors of the economic reality test.

D. Concerns Over Negative Effects if the 2024 Rule is Left in Place

As a downstream consequence of all the risks described above, the Department is concerned that leaving the 2024 Rule in effect could lead to undesirable outcomes that are not required by, and may be inconsistent with, the law. Specifically, a classification analysis that amplifies ambiguity or is perceived as overly restrictive of independent contracting may deter bona fide independent contracting and related efficiencies and innovations in the broader economy. As the Department acknowledged in the 2024 Rule, "independent contractors and small businesses play an important role in our economy."[119] Independent contracting offers individuals the ability to control when, where, and how they work, and it provides businesses—particularly small enterprises and new ventures—with access to specialized skills and scalable workforces.[120]

While independent contractors are not entitled to FLSA protections, they often prize the autonomy and flexibility their work affords; indeed, many pursue contracting arrangements as a preferred mode of work.[121] A rule that operates to complicate or discourage these arrangements

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[119] 89 FR 1646.

[120] *See*, *e.g.*, Liya Palagashvili, *Exploring How Regulations Shape Technology Startups*, Mercatus Research 23 (May 2021), https://www.mercatus.org/media/74416/ (reporting that 57 percent of surveyed tech startups indicated that the use of independent contractors was "an indispensable or essential part of their business models").

[121] For example, in 2023, the Bureau of Labor Statistics reported that 80.3 percent of independent contractors prefer their work arrangement, compared to just 8.3 percent who would prefer a "traditional work arrangement." Bureau of Labor Statistics, U.S. Department of Labor, *Contingent and Alternative Employment Arrangements—July 2023*, USDL-24-2267 (Nov. 8, 2024), https://www.bls.gov/news.release/pdf/conemp.pdf. The Department notes that to the

may inadvertently limit work opportunities for individuals seeking flexibility due to caregiving responsibilities, education, retirement, geographic constraints, or other personal circumstances. For businesses, unclear regulations can deter growth and investment. To the extent that the 2024 Rule curtails or discourages legitimate independent contracting, investment, and innovation, it may lead to negative effects on consumers, who may face higher prices and a reduced number of alternatives to meet their needs. These potential effects are discussed in greater detail in the preliminary regulatory impact analysis for this proposed rule in section IV of this NPRM.

In 2024, the Department explained that its rulemaking to rescind and replace the 2021 Rule was motivated, in part, by concerns that the 2021 Rule had "increased the risk of worker misclassification" by "improperly narrow[ing] the focus of the inquiry in a way that may have led employers to believe the test no longer includes as many considerations," asserting that "confusion and misapplication of [the 2021 Rule] could deprive many workers of protections they are entitled to under the FLSA."[122] However, apart from highlighting statements made by some commenters,[123] the Department did not present any evidence or otherwise demonstrate that the 2021 Rule was actually being misapplied in ways that resulted in the misclassification of FLSA-covered employees as independent contractors.[124] To the contrary, the Department issued numerous press releases contemporaneous to the 2022-2024 rulemaking announcing successful enforcement actions where WHD applied the 2021 Rule's analysis.[125] This suggests that the

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extent the discussion herein could be interpreted to mean that individuals may choose whether to be an employee or an independent contractor as a matter of law under the FLSA, as discussed in the 2021 Rule, "workers who are employees under the facts and law [may not] waive the FLSA's protections by classifying themselves as independent contractors." 86 FR 1179; *see also* 89 FR 1671 (similar discussion in 2024 Rule preamble).

[122] 89 FR 1658.

[123] 89 FR 1656–57.

[124] *See* 89 FR 1726 (suggesting in the 2024 Rule's regulatory impact analysis that the 2024 Rule "*may* reduce misclassification of employees as independent contractors" to the extent that "confusion about how to apply the analysis in the 2021 IC Rule … *could* lead to misclassification") (emphasis added).

[125] *See, e.g.*, US Department of Labor Recovers $168K in Back Wages for 51 Storm Recovery Workers Misclassified as Independent Contractors, Denied Overtime, WHD Press Release (Jan. 23, 2024), https://www.dol.gov/newsroom/releases/whd/whd20240123; US Department of Labor

2021 Rule was no impediment to the Department to appropriately identify, pursue, and remedy the unlawful misclassification of FLSA-covered employees as independent contractors, consistent with its duty to enforce the FLSA.

Correctly classifying workers, whether as employees or independent contractors, remains vitally important to the proper application and enforcement of the FLSA. One of the most effective ways to prevent misclassification is to clarify how workers and businesses may properly and reliably apply the appropriate analysis across a wide array of industries, companies, and individual working arrangements. The Department's role is not to incentivize or disincentivize companies from classifying workers as employees or independent contractors, either by placing a regulatory finger on one side of the scale or the other or by allowing legal ambiguity to discourage the correct classification of individuals. In this rulemaking, the Department proposes a rule that is more consistent with Supreme Court precedent, provides a more cogent synthesis of the over 80 years of case law since the FLSA's passage that have helped to define the relevant statutory terms, and also seeks to minimize potential negative effects on independent contractors and their business partners while still effectively addressing misclassification and abuse.

E. The Need for Uniformity and Consistency in the Analysis of Employee or Independent Contractor Status Under the FLSA, FMLA, and MSPA, Which Share the Same Statutory Definitions of Employment

As noted earlier, the FMLA and MSPA both incorporate the FLSA's broad definition of "employ," including "to suffer or permit to work." *See* 29 U.S.C. 2611(3) (FMLA); 29 U.S.C. 1802(5) (MSPA). Thus, it has been the Department's longstanding position that the analysis for

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Recovers $532K in Back Wages for 67 Workers After Montgomery Home Care Employer Misclassifies Them as Contractors, WHD Press Release (Nov. 14, 2023), https://www.dol.gov/newsroom/releases/whd/whd20231114-0; Department of Labor Recovers $1.6M in Back Wages, Damages from North Carolina Contractor for 188 Workers Misclassified as Independent Contractors, WHD Press Release (Aug. 9, 2023), https://www.dol.gov/newsroom/releases/whd/whd20230809.

determining whether a worker is an employee or an independent contractor should be the same under all three statutes—*i.e.*, the analysis which applies under the FLSA.

However, the Department's regulations do not currently reflect a single standard for the three statutes.[126] For example, the MSPA regulation currently notes that MSPA and the FLSA share the same employment definitions, *see* 29 CFR 500.20(h)(1)–(3), and advises that a determination of employee or independent contractor status "may include consideration of whether" there is an employee or independent contractor relationship under the FLSA, *see* 29 CFR 500.20(h)(4). However, the regulation also advises that determining whether agricultural workers or farm labor contractors are independent contractors "should be resolved in accordance with the factors set out" in 29 CFR 500.20(h)(4), "based upon an evaluation of all of the circumstances."[127] Those factors are not exactly the same as the factors that the Department is proposing to adopt in this NPRM, and of particular relevance, the MSPA regulation does not—like this proposal—advise how to weigh the factors. There are also differences between the economic reality factors in the MSPA regulation and some of the factors described in the 2024 Rule and the analysis from FAB 2025-1 that the Department is currently applying. Thus, retaining the MSPA regulation's instruction to assess employee or independent contractor status "in accordance with" that regulation's enumerated factors could create uncertainty over whether the FLSA guidance issued by the Department on this topic—including the analysis proposed in this rulemaking—also applies in MSPA cases.

Failing to make conforming edits to the MSPA regulation risks confusing agricultural employers, agricultural associations, and farm labor contractors which might be subject to both

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[126] The FMLA and MSPA both authorize the Department to issue regulations interpreting their provisions. *See* 29 U.S.C. 2654 (FMLA); 29 U.S.C. 1861 (MSPA).

[127] 29 CFR 500.20(h)(4) further advises that the determination should also be made in accordance with "the principles articulated by the federal courts in" five cited court decisions—*Rutherford Food*, 331 U.S. 722, and four appellate cases addressing the FLSA employment status of farm labor contractors or agricultural workers. *See Driscoll*, 603 F.2d 748; *Lauritzen*, 835 F.2d 1529; *Beliz v. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985); and *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983).

the FLSA and MSPA, as well as the agricultural workers that such entities engage. Revising the MSPA regulation (29 CFR 500.20(h)(4)) to conform it to the Department's FLSA regulatory guidance would resolve these concerns and provide uniformity between MSPA and the FLSA on this issue.

The FMLA regulation's guidance for assessing employee or independent contractor status could be similarly unclear if conforming edits are not made. The regulation defines "Employee" in 29 CFR 825.102 as having the same meaning as that term has under the FLSA and notes that the "definition of employ for purposes of FMLA is taken from the [FLSA]," 29 CFR 825.105(a). However, the FMLA regulation does not mention the economic reality factors used to distinguish between employees and independent contractors under the FLSA or advise how the factors should be weighed. Instead, the regulation explains generally that "courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship." *Id*. It further advises that "an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who 'follows the usual path of an employee' and is dependent on the business which he/she serves." *Id*. This language, although accurate in describing the overall analysis, could be misinterpreted as suggesting that—unlike the FLSA (and MSPA)—there is no set of factors for distinguishing between employees and independent contractors in FMLA cases. The Department did not intend to create or imply any discrepancy between the FMLA and FLSA when it added the language in 29 CFR 825.105(a) in 1995.[128] The Department believes that adding cross-references to part 795 in 29 CFR 825.102 (definition of "Employee") and 825.105(a) would address this concern and provide useful guidance when making the determination under the FMLA.

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[128] *See* 60 FR 2186 ("If a particular arrangement in fact constitutes an employee-employer relationship within the meaning of the FLSA (and case law thereunder) as contemplated by the statutory definitions, and the 'employee' satisfies FMLA's eligibility criteria, the employee is entitled to FMLA's benefits. A true independent contractor relationship within the meaning of the FLSA would not constitute an employee-employer relationship.").

The risk that employee or independent contractor status under the FMLA could be assessed without applying FLSA principles is not merely theoretical. In *Alexander v. Avera St. Luke's Hospital*, 768 F.3d 756, 763–64 (8th Cir. 2014)—the only federal circuit-court-level case to decide such a dispute arising under the FMLA—the Eighth Circuit expressly declined to apply an FLSA economic reality test to determine whether the plaintiff was an employee or independent contractor. While acknowledging that the FMLA incorporates the FLSA's "suffer or permit" language, the Eighth Circuit concluded that "simply applying" an FLSA economic reality test in that FMLA case would "not [be] appropriate," noting that the plaintiff's "work in a 'professional capacity' was totally exempt from the FLSA's minimum standards." *Id*. at 763 (citing 29 U.S.C. 213(a)(1)). The Department believes that the Eighth Circuit's approach in *Alexander*, even if limited to cases where the worker would be exempt from the FLSA if an employee, is inconsistent with the FMLA's statutory text and the Department's regulations and guidance, as well as the approach taken by most federal district courts, which do apply an FLSA economic reality test to adjudicate employee or independent contractor disputes under the FMLA. *See, e.g.*, *Hay v. ALH Admin. Servs.*, 283 F. Supp. 3d 1273, 1276 (M.D. Fla. 2017); *Nichols v. All Points Transp. Corp. of Mich., Inc.*, 364 F. Supp. 2d 621, 630 (E.D. Mich. 2005); *Edwards v. Cmty. Enters., Inc.*, 251 F. Supp. 2d 1089, 1103 (D. Conn. 2003).

Although the Department is not aware of any court that has declined to apply an economic reality test under MSPA, several courts have cited to the Department's MSPA regulation and applied its formulation of the economic reality test at 29 CFR 500.20(h)(4) to determine whether an individual is an independent contractor or employee under MSPA. *See, e.g.*, *Fanette v. Steven Davis Farms, LLC*, 28 F. Supp. 3d 1243, 1255–56 (N.D. Fla. 2014); *Arredondo v. Delano Farms Co.*, 922 F. Supp. 2d 1071, 1075–82 (E.D. Cal. 2013); *Luna v. Del Monte Fresh Produce (Se.), Inc.*, No. 1:06-CV-2000-JEC, 2008 WL 754452, at *7–9 (N.D. Ga. Mar. 19, 2008). Of course, it is entirely appropriate for courts to apply the Department's MSPA regulation to adjudicate employee or independent contractor disputes under MSPA, as the

Department's MSPA regulation is a legislative rule issued pursuant to an express delegation of rulemaking authority that is binding on regulated entities.[129] However, to the extent the MSPA regulation's specific articulation of the economic reality test differs in meaningful ways from the Department's FLSA guidance (including the analysis proposed in this rulemaking), the Department does not believe it is appropriate to have separate economic reality tests for employee or independent contractor status under laws which share the same statutory definitions for employment.

The Department declined to revise the MSPA regulations in the 2021 and 2024 Rules as it did not see a compelling need to do so at those times,[130] emphasizing in the 2021 Rule, for example, the Department's preference to "proceed incrementally."[131] However, the Department recognizes that many stakeholders desire greater uniformity in the analysis for determining employee or independent contractor status across federal laws that explicitly share common statutory terms. As a result, the Department now agrees that it should make clear that the analysis is consistent under the FLSA, FMLA, and MSPA because these statutes share the same relevant FLSA provisions.

In sum, the Department's proposed edits to the FMLA and MSPA regulations are motivated by the fact that the analysis for distinguishing between employees and independent contractors should be the same under those statutes as it is under the FLSA. Workers and businesses alike would benefit from the simplicity and certainty of having a single uniform standard for assessing employee or independent contractor status under all three laws.

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[129] *See* 29 U.S.C. 1861. The Supreme Court has advised that legislative rules which carry the "force and effect of law" are those which: (1) "affect[ ] individual rights and obligations"; (2) are "rooted in a grant of [legislative] power by the Congress"; and (3) are "promulgat[ed] … [in] conform[ity] with any procedural requirements imposed by Congress." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979) (internal quotation marks omitted). Similarly, the Department's FMLA regulation is a legislative rule issued pursuant to express rulemaking authority. *See* 29 U.S.C. 2654.

[130] *See supra* sections I.C. and I.E. The Department did not address the FMLA in the 2021 or 2024 Rules.

[131] 86 FR 1177; *see also* 89 FR 1664 (explaining in the 2024 Rule that the Department was "not revising the MSPA regulation *at this time*") (emphasis added).

F. Request for Comments

The Department invites comments on the need for this rulemaking. The Department specifically welcomes comments on its preliminary reassessment of the 2024 Rule and of any consequences, positive or negative, which have occurred since the 2024 Rule took effect last year. The Department additionally seeks comments on whether any aspects of the 2024 Rule should be retained, and if there have been any significant economic or labor changes since 2021 that should inform this rulemaking. Further, the Department seeks comments on the impact and effects of the 2021 Rule during the period when it was in effect, and how that may additionally inform the Department's proposal to readopt the 2021 Rule's analysis, as modified. Finally, the Department welcomes comments on its proposal to provide a uniform standard for employee or independent contractor status under the FLSA, FMLA, and MSPA.

III. Proposed Regulatory Provisions

For all of the reasons discussed in section II of this NPRM, the Department is proposing to rescind the 2024 Rule's regulatory guidance on employee or independent contractor classification (presently at 29 CFR part 795) and, separately, to readopt the 2021 Rule's regulatory guidance on independent contractor classification in part 795 with a few modifications. In the Department's view, rescission of the 2024 Rule would operate independently of any regulatory guidance adopted in its place, as the Department intends for its proposed rescission of the 2024 Rule to be independent and severable from its proposal to readopt guidance from the 2021 Rule.

As discussed in greater detail below, the proposal to readopt the 2021 Rule's FLSA guidance in part 795, with a few modifications, includes:

- An introductory provision at § 795.100 explaining the purpose of part 795;
- a provision at § 795.105(a) explaining that independent contractors are not employees under the FLSA;

- a provision at § 795.105(b) discussing the "economic reality" test for distinguishing FLSA employees from independent contractors, including that the ultimate inquiry of economic dependence turns on whether an individual is in business for him- or herself (independent contractor) or is economically dependent on an employer for work (employee) (the Department is additionally proposing to provide further context on the meaning of economic dependence, as explained below);
- provisions at § 795.105(c) and (d) describing factors examined as part of the economic reality test, including two "core" or primary factors—the nature and degree of the individual's control over the work and the individual's opportunity for profit or loss—which, as has been the case in many judicial decisions, here too typically carry greater weight in the analysis, as well as three other factors that may serve as additional guideposts in the analysis (although the Department is proposing one minor non-substantive change to the regulatory text at § 795.105(d)(2)(iii), as explained below);
- a provision at § 795.110 advising that the parties' actual practice is more relevant than what may be contractually or theoretically possible;
- fact-specific examples at § 795.115 (although the Department is proposing minor updates to one example from the 2021 Rule and to add two new examples, as explained below); and
- a severability provision at § 795.120.

Additionally, the Department is proposing to revise the regulations addressing employee or independent contractor status under MSPA and the FMLA so that the analysis in part 795 applies when determining employee or independent contractor status under those statutes too. Specifically, the Department is proposing to revise 29 CFR 500.20(h)(4) in the MSPA regulations to replace the analysis there with a cross-reference to the analysis in 29 CFR part 795, and to revise the definition of "Employee" in 29 CFR 825.102 and the language in 29 CFR

825.105(a) to incorporate into the FMLA regulations the analysis for determining employee or independent contractor classification in 29 CFR part 795.

The Department is not proposing to amend the existing versions of 29 CFR 780.330(b) and 788.16(a), which the 2024 Rule updated to include cross-references to the guidance at 29 CFR part 795.[132]

As noted above and for the reasons provided herein, the Department believes this proposed analysis represents the best construction of the FLSA—and by extension the FMLA and MSPA—with respect to whether an individual is an independent contractor or an employee.

A. Introductory Statement (Proposed § 795.100)

The Department is proposing to readopt the regulatory text of § 795.100 from the 2021 Rule, which provided an introductory statement at the beginning of the FLSA regulatory provisions. The introductory statement would advise that: part 795 contains the Department's "general interpretations of the text governing individuals' classification as employees or independent contractors under the [FLSA]"; the WHD Administrator will use the interpretations "to guide the performance of his or her duties under the [FLSA]" and intends them "to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the [FLSA]"; any prior inconsistent or conflicting "administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under the [FLSA]" are rescinded; and employers may rely on the interpretations to satisfy the good faith reliance defense in the Portal-to-Portal Act (29 U.S.C. 259), notwithstanding that after any such act or omission in the course of such reliance, any such interpretation is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

The Department believes that this introductory statement would provide clarity as to how WHD intends to use part 795 and how employers, businesses, workers, and courts should use

[132] *See* 89 FR 1725 (explaining changes to 29 CFR 780.330(b) and 788.16(a)).

part 795. The introductory statement would also address how part 795 relates to prior interpretations, providing further clarity to the public. Finally, the introductory statement would explain how employers can rely on part 795 for purposes of the good faith reliance defense in the Portal-to-Portal Act.

The Department's proposal that became the 2024 Rule stated that the Department was "proposing only clarifying edits" to the § 795.100 published in the 2021 Rule,[133] and the 2024 Rule adopted proposed § 795.100 as the introductory statement "without change" and described it as "very similar to the 2021 IC Rule introductory statement, except to note that these regulations would be interpretive guidance."[134]

The Department believes that the version of the introductory statement in the 2021 Rule more clearly and concisely summarizes the purposes of part 795 and, therefore, is proposing to readopt that version. In any event, the Department reiterates that proposed § 795.100 (from the 2021 Rule) is very similar to current § 795.100 (from the 2024 Rule).

B. Determining Employee and Independent Contractor Classification under the FLSA (Proposed § 795.105)

As explained in the following sections of this NPRM, the Department is proposing to readopt the analysis for determining employee or independent contractor classification under the FLSA that it published as § 795.105 of the 2021 Rule.

C. Independent Contractors Are Not Employees under the Act (Proposed § 795.105(a))

The Department is proposing to readopt the regulatory text of § 795.105(a) from the 2021 Rule, which explained that independent contractors are not employees under the FLSA. In the 2021 Rule, the Department explained that an individual who renders services to a person (a putative or potential employer) as an independent contractor is not an employee of that person under the FLSA, which means that the minimum wage, overtime pay, and recordkeeping

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[133] 87 FR 62233.
[134] 89 FR 1664.

obligations for employers under sections 6, 7, and 11 of the FLSA do not apply with respect to services received from the independent contractor.[135]

The 2024 Rule contained a similar provision (current 29 CFR 795.105(a)), explaining that the FLSA's minimum wage, overtime pay, and recordkeeping obligations apply only to workers who are covered employees under the FLSA, and that workers who are independent contractors are not covered by these protections.[136] The Department is therefore proposing in this section to adopt explanatory guidance that it has consistently provided across rulemakings.

D. Economic Dependence as the Ultimate Inquiry (Proposed § 795.105(b))

The Department is proposing to readopt, with a few modifications, the regulatory text of § 795.105(b) from the 2021 Rule, which explained, as the Supreme Court and courts of appeals have long held, that economic dependence is the ultimate inquiry when determining an individual's status under the FLSA. This section would reference the relevant statutory text, explaining that an "employee" under the FLSA is an individual whom an employer suffers, permits, or otherwise employs to work. *See* 29 U.S.C. 203(e)(1), (g). It would further explain that 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, as distinguished from an independent contractor, who is in business for him- or herself.

In the 2021 Rule, the Department explained that the "touchstone" of the economic reality test is "economic dependence," that is the nature or character of that dependence, as all workers, whether employees or independent contractors, are dependent on others. 86 FR 1178. As the 2021 Rule further explained: "'Economic dependence is *not* conditioned reliance on an alleged employer for one's primary source of income, for the necessities of life.'" *Id.* (quoting *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1054 (5th Cir. 1987)). Rather, courts have framed the question as "'whether, as a matter of economic reality, the workers depend upon someone else's

[135] 86 FR 1177–78.
[136] 89 FR 1664–66.

business for the opportunity to render service or are in business for themselves.'" *Id.* (quoting *Saleem*, 854 F.3d at 139). Moreover, the Department observed in the 2021 Rule that some courts have relied on a worker's entrepreneurship with respect to one type of work to conclude that the worker was also in business for him- or herself in a second, unrelated type of work, but that this "approach is inconsistent with the Supreme Court's instruction that the economic reality analysis be limited to 'the claimed independent operation.'" *Id.* (quoting *Silk*, 331 U.S. at 716). Thus, "the relevant question in this context is whether the worker providing certain service to a potential employer is an entrepreneur 'in that line of business.'" *Id.* (quoting *Mr. W Fireworks*, 814 F.2d at 1054). Otherwise, businesses would be required to make FLSA classification decisions based on facts outside of the working relationship. *Id*.

The 2024 Rule contained a similar provision (current 29 CFR 795.105(b)), explaining that economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor or an employee and clarifying that economic dependence does not focus on the amount the worker earns or whether the worker has other sources of income. 89 FR 1665. The Department is therefore providing explanatory guidance that it has consistently provided across rulemakings that economic dependence for work rather than economic dependence for income is the proper inquiry. As the Third Circuit has explained, economic dependence "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." *Donovan v. DialAmerica Mktg., Inc.,* 757 F.2d 1376, 1385 (3d Cir. 1985). As noted in the 2021 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. *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.*, 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). 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." *Halferty*, 821 F.2d at 268.

Consistent with the explanations above, and to provide further context on the meaning of economic dependence, the Department is proposing the regulatory text of § 795.105(b) from the 2021 Rule with two modifications. The purpose of the first modification would be to clarify the nature and character of the economic dependence that an employee typically has on an employer for work, as distinct from the relationship that a business owner has to another business with which it works. The purpose of the second modification would be to reinforce the Department's consistent guidance that economic dependence for work rather than economic dependence for income is the proper inquiry. Specifically, the Department has added the following sentences to the end of the proposed § 795.105(b): "Though both employees and independent contractors are dependent on others in some sense, economic dependence in this context means the dependence that a typical employee has on an employer for work, as opposed to an individual who has more of the nature and character of a business owner who has a separate business. Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income." The Department welcomes comments on the inclusion of this additional context on economic dependence into § 795.105(b).

E. Determining Economic Dependence (Proposed § 795.105(c))

The Department is proposing to readopt the regulatory text of § 795.105(c) from the 2021 Rule, which explained that certain non-exhaustive "economic reality" factors are more probative to the determination of whether the relationship between an individual and a potential employer is of the sort of economic dependence characteristic of an employee or of an independent contractor. 86 FR 1246 (§ 795.105(c)). As in the 2021 Rule, the Department is proposing that

two primary, or "core" economic reality factors described in § 795.105(d)(1)—namely, the control and opportunity for profit or loss factors—are the most probative of whether an individual is an economically dependent "employee," and that these two core factors will typically carry greater weight in the analysis than any other factor. Thus, these two factors should be considered first, and if both point toward the same classification (either employee or independent contractor), there is a substantial likelihood that is the accurate classification for the individual. The Department is also proposing that the three additional economic dependence, or economic reality, factors described in § 795.105(d)(2)—skill, permanence, and whether the work is part of an integrated unit of production—serve as additional guideposts but are less probative in the analysis (and, in some cases, may not be probative at all). As a result, these "economic reality" factors are very unlikely, either individually or collectively, to outweigh the combined probative value of the two core or primary factors when together they point toward the same classification. As in the 2021 Rule, the Department is proposing that this provision will also explain that all these economic reality factors are not exhaustive, and that no single factor is dispositive.

As the Department explained in the 2021 Rule, this provision is intended to improve the certainty and predictability of the multifactor economic reality test by focusing it, much in the way that many courts have effectively done, on two principal elements, which it labeled "core" factors. 86 FR 1179, 1196. Absent clear, generally applicable guidance about how to balance the broad and overlapping factors and facts encompassed in the multifactor economic reality test, there is an excessive amount of uncertainty as to "which aspects of 'economic reality' matter, and why." *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring); *see also* 86 FR 1173. As the Department explained when proposing the 2021 Rule, although the Department and courts historically analyzed "the totality of the circumstances making up the economic reality of the relationship to determine a worker's classification" without "identifying which types of facts or factors are the most important," the significance of facts may sometimes be unclear or factors

may point in opposite directions under this approach, exacerbating uncertainty in the application of the law. 85 FR 60606–07, 60620. And, as noted below, even within the totality of the circumstances and multifactor tests, some courts have tended to focus on the core factors as the primary indicators of whether an individual is an employee or independent contractor. The Department, taking its cue from the courts, sought in the 2021 Rule to provide greater clarity and focus by identifying the two factors it believed were most salient in determining relevant economic dependence, explaining that the two core factors "drive at the heart of what is meant by being in business for oneself: Such a person typically controls the work performed in his or her business and enjoys a meaningful opportunity for profit or risk of loss through personal initiative or investment." 86 FR 1196. As such, even though no one test can perfectly harmonize the variations of factors, language, and emphasis between the tests of the Supreme Court and circuit courts of appeals, the Department has attempted to distill the central commonality in these approaches to a single framework that workers and employers alike may accurately apply and on which they may confidently rely.

As explained in the 2021 Rule, highlighting the combined probative value of the two core factors in the manner set forth in the regulatory text proposed in § 795.105(c) is supported by case law. The Supreme Court has never required a factor-by-factor analysis. Although the Court has applied the economic reality test only a handful of times, it has repeatedly resolved cases by focusing primarily on facts that concern the core factors identified in the 2021 Rule: control over the work and the worker's opportunity for profit or loss based on initiative and investment. In *Silk*, for example, the Court distinguished between truck drivers and coal unloaders: the truck drivers were deemed independent contractors because they owned their trucks, could hire helpers, assumed risk, and had an opportunity for profit; by contrast, the unloaders were employees because the putative employers "were directors of their businesses," they provided only picks and shovels, and had no meaningful opportunity for profit based on initiative or

investment.[137] In *Rutherford Food*, the Court likewise found meat boners to be employees because they lacked control over their work, could not or did not shift to other plants (and thus had a continuous relationship with the slaughterhouse), and were paid piece-rate wages dictated by the company rather than earnings tied to initiative or capital investment (as the premises and equipment belonged to the plant).[138] Similarly, in *Whitaker House*, the Supreme Court focused its analysis on facts related to control and opportunity for profit, and did not discuss other economic reality factors. It 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," and thus employees.[139] In each case, the Court listed multiple relevant considerations but ultimately resolved the classification question by focusing on whether the worker exercised control and had a genuine opportunity for profit or loss based on initiative or investment—factors that go to the heart of whether an individual is truly in business for themself.

Moreover, the Department is not aware of any federal appellate case in which the court's ultimate conclusion as to an individual's classification under the FLSA—whether employee or independent contractor—was not in alignment with the court's analysis that the control and opportunity for profit or loss factors both favored that classification. 86 FR 1196–97.[140] The

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[137] 331 U.S. at 716–19.
[138] 331 U.S. at 730–31.
[139] 366 U.S. at 32.
[140] The Department noted "a remarkably consistent trend based on the Department's review of the results of appellate decisions since 1975 applying the economic reality test. Among those cases, the classification favored by the control factor aligned with the worker's ultimate classification in all except a handful where the opportunity factor pointed in the opposite direction. And the classification favored by the opportunity factor aligned with the ultimate classification in every case. These two findings imply that whenever the control and opportunity factors both pointed to the same classification—whether employee or independent contractor—that was the court's conclusion regarding the worker's ultimate classification." 86 FR 1196–97. *See also New Jersey v. Bessent*, 149 F.4th 127, 146 n.12 (2d Cir. 2025) (noting that where the text of a statute "in isolation, provides very little for us … to go on," "[m]uch of the settled understanding of" the statute "derives not from the four corners of the statute itself, but from the

Department has further observed 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." 86 FR 1198.

The 2024 Rule did not include the guidance provided in this provision, opting instead to use a totality-of-the-circumstances analysis in which the economic reality factors were not assigned a predetermined weight. The Department explained in the 2024 Rule that it believed that this approach, which, as mentioned above, had been used by courts and the Department (prior to the 2021 Rule), would be less confusing and less prone to misapplication that could result in greater misclassification. 89 FR 1647, 1726. The 2024 Rule also identified further grounds for returning to the historical multifactor, totality-of-the-circumstances analysis, including that the 2021 Rule's analysis was not supported by judicial precedent or aligned with the FLSA's text as interpreted by courts because it elevated the control and opportunity for profit or loss factors, and in particular, elevating control was contrary to courts' determination that the common law control test should not be used to analyze independent contractor classification under the FLSA. 89 FR 1650–53.

In proposing to re-promulgate the 2021 Rule's "core factor" analysis in § 795.105(c), the Department recognizes that this presents a change with respect to the interpretation from the 2024 Rule. The Department believes that this change is warranted for significant and valid legal and policy reasons. Primarily, the Department believes that a clearer, more focused test distilled from overlapping judicial tests, that is easier for the regulated community to accurately apply will provide more certainty for employers, employees, and those who wish to engage with or as independent contractors. With greater clarity, all of these persons can gain efficiencies in their interactions, and there will likely be a reduced need for litigation in which a court must

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meaning imputed to that statute by our precedents"). Thus, the Department believes that the core factor structure is a veracious synthesis of the case law that better captures the "settled understanding" of who is an employee or independent contractor under the FLSA than does the 2024 Rule.

ultimately reach a conclusion years later about the proper classification of one or more individuals.

Additionally, the Department has reconsidered the concerns identified in the 2024 Rule and believes they are misplaced. First, in rescinding the 2021 Rule, the 2024 Rule relied in part on the assertion that the 2021 Rule improperly gave two "core factors"—the nature and degree of control over the work and the worker's opportunity for profit or loss—invariable weight in the analysis. 89 FR 1651, 1692. Upon further consideration, the Department now concludes that this premise was mistaken.

The 2021 Rule did not assign invariable weight to any factor or combination of factors. Rather, it recognized that control and opportunity for profit or loss are, in most cases, more probative than other factors in determining whether a worker is in business for themself. It expressly acknowledged that even when both factors align, their combined weight could still be outweighed by other considerations, though it viewed such circumstances as "highly unlikely." 86 FR 1246 (§ 795.105(c)).

Recognizing that certain factors are typically more probative than others is not the same as assigning them invariable weight. This mischaracterization in the 2024 Rule led the Department to conclude—incorrectly—that the framework was inconsistent with the FLSA's text and purpose, as interpreted by courts, and judicial precedent. Both decades of case law and common-sense understanding confirm the opposite, namely that whether a worker controls the manner of their work and has a meaningful opportunity for profit lies at the core of the employee–independent contractor distinction. For example, at the time the FLSA was enacted, the term "self-employed" was understood to mean "earning income directly from one's own business, trade, or profession rather than as a specified salary or wages from an employer."[141]

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[141] *See Self-employed*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/self-employed (defining "self-employed" as "earning income directly from one's own business, trade, or profession rather than as a specified salary or wages from an employer" and noting that the first known use of the term as defined was in 1916); *see also Self-employed*, Webster's New Collegiate Dictionary (1977).

This understanding—which remains true today—suggests that an independent contractor is an independent business owner, someone who directs the manner and means of his or her own work and whose compensation depends on profit or loss, rather than on wages. Thus, when assessing the legitimacy of an independent contracting arrangement under the FLSA, facts germane to control and profit matter more than factors such as the worker's skill, the duration of their relationship with a particular business, or whether the work performed is important or "integral" to that business. Those factors may be relevant, but they are less directly tied to the ordinary understanding of independent business status and the central inquiry of whether a worker is truly in business for themselves.

The Department believes that the concerns identified in the 2024 Rule therefore should not preclude the Department from identifying those factors as the most reliable indicators of economic independence in most cases, nor do they preclude the Department from providing greater clarity in its interpretation of the economic reality analysis, including guidance on how to weigh the factors. For example, the 2024 Rule noted "tension" between elevating the control and opportunity for profit and loss factors and "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 themself." 89 FR 1650. Then as now, the Department expressly rejects the notion that any factor, core or otherwise, is determinative of the economic reality analysis. Likewise, the Department does not share the notion that the economic dependence, or economic reality, framework it proposes is in tension with the core commonality in decisions from federal appellate courts across the country. To the contrary, the Department believes that any tension between judicial precedent and the core factor analysis from the 2021 Rule was overstated in the 2024 Rule, and that the 2021 Rule's analysis does not run afoul of judicial precedent.

Specifically, the 2021 Rule and this proposal continue to affirm—consistent with judicial precedent—that no one factor is determinative. By identifying two factors that encompass the primary considerations that are relevant to determining economic dependence, the Department is certainly not implying that either one of these two core factors alone would be determinative. Instead, the Department is providing guidance (which, to the Department's knowledge, is consistent with the outcome of every single federal appellate case) that these two factors in combination and pointing to the same classification are rarely going to be outweighed by the probative value of the remaining economic reality factors. Further, the Department explained in the 2021 Rule that the core factor analysis provided in § 795.105(c) did not run afoul of the principle in FLSA case law that "mechanical application" of the economic reality test is not appropriate because the regulatory text recognizes that these two factors "typically" (but not necessarily) carry more weight. 86 FR 1198–99. The Department explained that there may be situations in which "a core factor does not weigh very strongly toward a particular classification because considerations within that factor point in different directions," or where a "core factor may even be at equipoise, in which case it would not weigh at all in favor of a particular classification." 86 FR 1199. Thus, "the weight assigned to a factor in a particular case refers to how strongly specific facts within the factor, on balance, favor a particular classification." 86 FR 1199. Identifying two factors as core factors does not mean that the analysis is or should be applied mechanically, but rather just as carefully, as there are often a variety of relevant facts and concepts to consider within each individual factor before determining whether the factor points toward a particular classification.

The 2024 Rule also noted that the Supreme Court and federal appellate courts have emphasized that employment status under the economic reality test turns upon "the circumstances of the whole activity" rather than "isolated factors," and that the Fifth Circuit Court of Appeals has stated that it "is impossible to assign to each of these factors a specific and invariably applied weight." 89 FR 1651 & n. 127 (citing *Parrish*, 917 F.3d at 380). The

Department believes that the guidance provided in § 795.105(c) does no such thing and would not be so rigid as to confine the analysis to any isolated factors, or that the core factors will necessarily always carry more weight. The guidance simply and helpfully provides a focus to the inquiry, while recognizing that the enumerated factors are "not exhaustive." Further, the guidance does not stop at the two core factors, but rather identifies three other economic reality factors, and also provides for the possible consideration of additional factors. In other words, the Department's proposal, like the 2021 Rule, provides for the consideration of all material facts. Although the other factors are less probative, and in some cases, may not be probative at all, the proposal to readopt the analysis from the 2021 Rule would still require non-core factors to be considered as part of the circumstances of the whole activity when determining economic dependence. As the Department explained in the 2021 Rule, the "other economic reality factors—skill, permanence, and integration—are also relevant as to whether an individual is in business for him- or herself," 86 FR 1196, and "each factor should be analyzed," 86 FR 1201. Thus, "[a]ssigning one factor less weight than another does not restrict the circumstances being considered because the very act of determining relative weight requires considering both factors." *Id*.

Though several commenters in the rulemaking that produced the 2024 Rule mistakenly believed that the analysis in § 795.105(c) in the 2021 Rule could be reduced to a "two-factor test" or one where the non-core factors were only considered when the two core factors pointed to opposite classification outcomes, 89 FR 1656, the Department reiterates that "even when both of the core factors align, they are not 'controlling' because their combined weight can still be outweighed by other considerations" and that "it is necessary to consider both [core and non-core] factors." 86 FR 1201. In sum, the regulatory text that the Department is proposing to readopt does not state, and should not be interpreted, to apply in a mechanical way that precludes consideration of all relevant facts and factors.

Regarding the concern identified in the 2024 Rule that elevating control as one of the two core factors brings the analysis closer to the common law control test that courts have rejected when interpreting independent contractor classification under the FLSA, 89 FR 1652, the Department believes, upon reconsideration, that a multifactor analysis that recognizes the greater probative value of the control and opportunity for profit or loss factors and considers other factors is readily distinguishable from a control test. As discussed further below, the opportunity for profit or loss factor that the Department is proposing to readopt in § 795.105(d)(1)(ii) encompasses an individual's opportunity to earn profits or incur losses based on his or her initiative or management of investments, and as such, includes a number of critical considerations in evaluating economic dependence that go beyond the nature and degree of control over work. As a result, the Department believes that giving greater probative value to both the control and opportunity for profit or loss factors (especially given the considerations that comprise that factor) is not akin to adopting the common law control test, which specifically designates control as the overarching consideration. And importantly, the "ultimate inquiry" of the analysis proposed by the Department would remain the individual's economic dependence, 86 FR 1246 (§ 795.105(b)), which is different from the common law's inquiry into control.[142]

Finally, the Department explained in the 2021 Rule that courts and the Department had historically articulated the factors such that there was overlap among the factors (i.e., some facts were considered under multiple factors), which could lead to inefficiency and confusion when attempting to apply the economic reality test. 86 FR 1174. Thus, the analysis the Department is proposing to readopt as set forth in this section is based on factors that have historically been used by the Department and most federal courts of appeals, while describing two factors as "core" or primary, and making certain reformulations within each factor for clarity, as discussed below with respect to each factor. Though the 2024 Rule expressed a concern that the 2021 Rule

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[142] *See Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730, 751 (1989); *see also* section V.B.1, *infra* (discussing the common law control test as a regulatory alternative for this rulemaking).

unduly narrowed the analysis and did not allow for full consideration of facts which might be relevant to determining whether a worker is economically dependent on the employer for work, 89 FR 1653, upon reconsideration, the Department believes that all relevant facts can be considered, as detailed below in the discussions of each factor.

The Department welcomes comments from the public regarding their experiences using the economic reality analyses provided in the 2021 and 2024 Rules, and why one may be preferable to the other.

Additionally, the Department seeks comment on whether further streamlining the "two core factor" analysis would provide even greater clarity and focus to the question whether an individual is an employee or independent contractor under the FLSA. Specifically, the Department could provide guidance that the control factor should be considered first, followed—if necessary—by the opportunity for profit or loss factor and the three other factors. In this further streamlined analysis, if the potential employer controls the worker based on the considerations for the control factor that the Department is proposing to readopt (see discussion of control factor below), there would be no need to consider any other factors and the worker would be an employee. If the control factor indicates independent contractor status, or if the control factor is neutral and does not indicate independent contractor status or employee status, then the analysis would proceed as proposed in this NPRM.[143]

The Department offers this alternative for comment in the interest of bringing greater clarity to the analysis, but also in recognition of the fact that the "suffer or permit" language in the FLSA has been interpreted by the Supreme Court to provide a broader scope of employment

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[143] In other words, if the opportunity for profit or loss factor and the control factor indicate independent contractor status, then the other three factors would be considered; however, because the two core factors would both point toward the same classification there is a substantial likelihood that is the accurate classification for the individual and it would be highly unlikely that the other factors would outweigh the combined probative value of these two core factors. And if the control and opportunity for profit or loss factors point toward different classifications or are neutral, the other factors would be considered to arrive at an overall determination as to the worker's status.

than the common law control test, *see supra* sections I.A. and I.B.1. Yet, there are instances in which a worker could be an employee under the common law control test but not under the FLSA's economic reality test. For example, as discussed in the 2021 Rule, some workers subject to a potential employer's "right to control" and who would be employees under the common law test may nevertheless be independent contractors when all of the economic reality factors are applied. 86 FR 1204–05 (discussing, among other cases, *Bartels*, 332 U.S. at 132, where the Court held that a dance hall's contractual right of control was insufficient to establish an employment relationship with a band leader that it hired).

An alternative analysis that focuses first on whether the potential employer controls the individual and results in employee status if there is such control, but considers opportunity for profit or loss and other factors if there is not such control, could be responsive to language from Supreme Court decisions emphasizing that the FLSA extends the scope of employment beyond the common law control test.[144] Thus, it may be possible to streamline the economic reality analysis even further in a way that is consistent with the Supreme Court's interpretation of employment under the FLSA. The Department welcomes comments on this potential alternative application of the two core factors identified in the 2021 Rule.

Finally, the Department also welcomes comments about the most effective, reliable, and consistent circuit court analyses, or other appropriate analyses for determining employee or independent contractor status.

F. Economic Reality Factors—Core Factors (Proposed § 795.105(d)(1))

The Department is proposing to readopt as core factors the two factors that it identified in § 795.105(d)(1) of the 2021 Rule. As noted in proposed § 795.105(c), these factors constitute the primary elements of the analysis into the nature of an individual's economic dependence for

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[144] *See Darden*, 503 U.S. at 326 (explaining 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"); *Rosenwasser*, 323 U.S. at 362 (explaining that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame").

work. These economic reality factors would be "the most probative" and "typically carr[y] greater weight in the analysis than any other factor," and "if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification."

1. The Nature and Degree of Control over the Work (Proposed § 795.105(d)(1)(i))

The Department is proposing to readopt the regulatory text of § 795(d)(1)(i) from the 2021 Rule, which discussed the first economic reality core factor—the nature and degree of control over work. This provision would explain that the control factor weighs toward the individual being an independent contractor where the individual, rather than the potential employer, exercises substantial control over key aspects of the performance of the work such as scheduling, selection of projects, and the ability to work for others (which may include the potential employer's competitors). 86 FR 1246–47 (§ 795.105(d)(1)(i)). By contrast, the control factor would weigh in favor of the individual being an employee where the potential employer, rather than the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload, or by directly or indirectly requiring the individual to work exclusively for the potential employer. *Id.*

Additionally, the Department is proposing to readopt guidance from the 2021 Rule advising that when a potential employer places certain compliance requirements on an individual, it "does not constitute control that makes the individual more or less likely to be an employee under the Act." 86 FR 1247 (§ 795.105(d)(1)(i)). These pertain to "[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships)." *Id.* For example, as illustrated in the example in § 795.115(b)(1) (which the Department is proposing to readopt from the 2021 Rule with an update to the scenario in the example, as explained below), where a logistics company contracts with an individual

owner-operator of a tractor-trailer to provide transportation services and the logistics company requires the owner-operator to comply with federally-mandated transportation safety rules requiring drug and alcohol testing, and requires the owner-operator to meet certain contractually agreed-upon delivery deadlines, this does not constitute control that would make it more or less likely for the owner-operator to be an employee under the FLSA. Another example would be requiring all workers to complete anti-harassment training. Such training is intended to make the workplace safer, benefits everyone in the workplace, and is not control that makes an individual worker more or less likely to be an employee under the FLSA.

In the 2021 Rule, the Department explained that the control factor referenced both the individual's control and the potential employer's control, consistent with case law, which generally considers both the individual's control and the potential employer's control. 86 FR 1180 (noting that the Supreme Court referred to "degrees of control" in *Silk*, 331 U.S. at 716). The Department further explained that the three identified examples of control that may indicate employee or independent contractor status (setting schedules, selecting projects, and working exclusively for the employer or working for others) were non-exhaustive, and may or may not be probative in any particular case, depending on the facts. 86 FR 1180–81.

Where commenters viewed the 2021 Rule's regulatory text as limiting, the Department explained that "the examples of types of control identified in the proposal were not an attempt to narrow or limit the control factor analysis…. Any type of control over the work by the individual worker or the potential employer may be considered." 86 FR 1181. The Department further noted that considerations within these examples may be nuanced—for example, even where an employer does not enforce an explicit bar on working for others, the employer may impose working conditions that make doing so impracticable, which is evidence of control. 86 FR 1181. Finally, recognizing that many commenters sought industry-specific guidance with respect to the control factor, the Department explained that "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. The Department reiterated that it had "purposefully articulated the control analysis in a general manner to encompass various different types of control that the individual worker and the potential employer may exercise over the working relationship, and to avoid any unintended inferences regarding omitted types of control." 86 FR 1182.

The control factor in the 2024 Rule bears some similarities with the control factor in the 2021 Rule, as well as some differences. Overall, the Department explained that it continued 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 were relevant considerations in evaluating the nature and degree of control. 89 FR 1690. Additionally, the 2024 Rule's regulatory text explains that "[m]ore indicia of control by the potential employer favors employee status," whereas "more indicia of control by the worker favors independent contractor status." 29 CFR 795.110(a)(4).

The control factor in the 2024 Rule identifies additional aspects of control in the regulatory text, including control mediated by technology and control over economic aspects of the work relationship, such as control over setting the prices or rates for services provided by the worker, as well as consideration of whether a potential employer places demands or restrictions on workers that do not allow them to work when they choose. 29 CFR 795.110(a)(4). The 2024 Rule also recognizes reserved control, including the right to supervise or discipline workers, as a consideration relevant to the potential employer's control, whereas the "primacy of actual practice" provision in the 2021 Rule (discussed below under proposed § 795.110) advised 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." Additionally, the regulatory text for the control factor in the 2024 Rule takes a modified approach to the probative value of requirements placed on individuals to comply with legal obligations, stating that "[a]ctions taken

by the potential employer for the sole purpose of complying with a specific" law are not indicative of control, whereas "[a]ctions taken by the potential employer that go beyond compliance with a specific" law and "instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control." 29 CFR 795.110(a)(4).

Upon reconsideration, the Department believes that the more straightforward and focused explanation of the control factor in the 2021 Rule provides clearer guidance on how to evaluate control for purposes of determining whether an individual is an employee or an independent contractor under the FLSA. It is simply not possible for the Department to describe all of the potentially-relevant considerations for the control factor, as the 2024 Rule may have attempted to do by adding other aspects of control for consideration. As the Department explained in the 2021 Rule, it "purposefully articulated the control analysis in a general manner to encompass various different types of control," and "any type of control over the work by the individual worker or the potential employer may be considered, although some types of control are not probative of economic dependence[.]" 86 FR 1182. By proposing to readopt the regulatory text from the 2021 Rule, the Department would provide necessary additional guidance regarding the primacy of the parties' actual practices as compared to reserved control (discussed below under proposed § 795.110), as well as providing greater clarity regarding facts that are not indicative of control associated with an employment relationship.

To that end, the Department recognizes that a very large proportion of the comments received regarding the control factor during the Department's 2024 rulemaking on this topic objected to proposed guidance in the 2022 NPRM, 87 FR 62275, that "[c]ontrol implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of [an employment relationship]"—a significant change from guidance provided in the 2021 Rule, 86 FR 1247, which advised that such actions "[would] not constitute control that makes the individual more or less likely to be an employee

under the [FLSA].” 89 FR 1691. Commenters were particularly concerned that this change would disincentivize legal compliance and discourage safety practices that benefit all individuals in the workplace as well as the public generally. 89 FR 1691.The Department explained in the preamble to the final 2024 Rule that such “comments have persuaded the Department that the provision proposed may lead to unintended consequences due to stakeholder confusion and uncertainty.” 89 FR 1694. Although the Department modified this guidance in the final 2024 Rule to take commenters’ concerns into account—clarifying that “[a]ctions 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 [an employment relationship],” 29 CFR 795.110(b)(4)—the Department believes the best course of action at this time is to return to the language in the 2021 Rule, which provides greater clarity and certainty regarding these considerations, and therefore supports the Department’s policy objectives in proposing to readopt the 2021 Rule.

By proposing to readopt the language from the 2021 Rule, the Department would also be restoring the guidance addressing aspects of control taken for reasons other than legal compliance (including health and safety standards and requirements to carry insurance), which explain that requiring an individual to “meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.” Though the final regulatory text in the 2024 Rule adopted a modified approach that takes into account “[a]ctions taken by the potential employer that go beyond compliance with a specific” law and “instead serve the potential employer’s own compliance methods, safety, quality control, or contractual or customer service standards,” which may be indicative of control associated with an employment relationship, 29 CFR 795.110(b)(4), in the Department’s experience, determining what “goes

beyond" a law can be a hurdle when interpreting this guidance. Thus, the Department believes the guidance in the 2021 Rule is clearer, less burdensome, and consistent with the FLSA.

Finally, as this issue has generated a high number of comments in the past, the Department further notes (as it did in both the 2021 and 2024 rulemakings) that although the case law is not uniform on this aspect of the control factor, the Department's proposed guidance is supported by case law, as discussed in both the 2021 and 2024 Rules. 86 FR 1183; 87 FR 62247–48; 89 FR 1693–94.[145]

The Department welcomes comments on all aspects of this proposed factor.

2. The Individual's Opportunity for Profit or Loss (Proposed § 795.105(d)(1)(ii))

The Department is proposing to readopt the regulatory text of § 795.105(d)(1)(ii) from the 2021 Rule, which discussed the second economic reality core factor—the individual's opportunity for profit or loss. This factor would weigh toward 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." 86 FR 1247 (§ 795.105(d)(1)(ii)).

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[145] For example, some courts have viewed employer requirements on workers in order to comply with applicable legal obligations or meet quality control standards as not indicative of control. *See Parrish*, 917 F.3d at 382; *Iontchev*, 685 F. App'x at 550; *Chao v. Mid-Atl. Installation Servs., Inc.*, 16 F. App'x 104, 106 (4th Cir. 2001). Other courts have rejected employers' arguments that, because they were exerting control over workers only to comply with legal obligations imposed by the government or quality control standards, their actions could not be viewed as evidence of control. *See Scantland*, 721 F.3d at 1316; *Hopkins,* 545 F.3d at 343; *Schultz v. Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1271 (10th Cir. 1970). Still other courts have recognized that where the employer goes beyond compliance with specific legal requirements and exerts control to serve its own purposes, this may indicate control. *See Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 916 (S.D.N.Y. 2013) ("[W]here a club implements regulations to assure compliance with law, those regulations are not evidence of the club's control over its dancers," but where the majority of the rules are aimed at "achiev[ing] [the employer's] business ends" rather than "providing a safe and law-abiding venue," the rules "compellingly indicate" control.); *Ferguson v. Tex. Farm Bureau*, No. 6:17-CV-00111-ADA-JCM, 2021 WL 2349340, at *4 (W.D. Tex. May 19, 2021) (ruling that "the exercise of requisite control should not be indicative one way or another if regulations demand it" but where the employer took actions beyond what the regulations required, the employer was "in control of Plaintiffs").

The 2021 Rule elaborated on the "capital" nature of the investment, explaining that, "[c]onsistent with the economic dependence inquiry, an investment must indicate an independent business by the worker, as opposed to merely being required by the potential employer, for it to indicate an opportunity for profit or loss." 86 FR 1187.

This section would further explain that, "[w]hile the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor." 86 FR 1247 (§ 795.105(d)(1)(ii)). Thus, both the individual worker's exercise of initiative and management of investment would be considered under this factor even if the opportunity for profit or loss factor may indicate independent contractor classification based on only one. Providing that the worker must have an opportunity for profit or loss based on both initiative and investment for this factor to indicate independent contractor status would overemphasize initiative and investment and detract from this factor's ultimate focus on the worker's opportunity, as it is that opportunity which is a core or primary indicator of a worker's status as explained above.

This factor would weigh toward the individual being an employee "to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster." 86 FR 1247 (§ 795.105(d)(1)(ii)). One of the examples from the 2021 Rule that the Department is proposing to readopt (*see* proposed § 795.115(b)(3)) illustrates this point in the context of a construction worker who "is paid a fixed hourly rate" for a company that "determines how many and which tasks she performs." The example would explain that the worker "does not have a meaningful opportunity for profit or loss based on her exercise of initiative or investment, indicating employee status," because she "is unable to profit, *i.e.*, increase her earnings, by exercising initiative or managing investments because she is paid a fixed hourly rate and the company determines the assignment of work."

The 2024 Rule describes this factor as the "opportunity for profit or loss depending on managerial skill" and explains that it "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." 29 CFR 795.110(b)(1). The 2024 Rule identifies the "following facts, among others," as "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." *Id*. The 2024 Rule explains that "[i]f a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee," and added that "[s]ome 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." *Id*.

The primary difference between the proposed opportunity for profit or loss factor (from the 2021 Rule) and the opportunity for profit or loss factor from the 2024 Rule is that the proposal considers the individual's investment as a consideration within the opportunity factor, while the 2024 Rule describes investments as a separate factor in the analysis. The 2021 Rule explained that, although *Silk* articulated opportunity for profit and loss and investment as separate factors, it analyzed the two together. 86 FR 1174 and 1186 (both citing 331 U.S. at 719). In particular, the Court found that the coal unloaders were employees because they had "no opportunity to gain or lose except from the work of their hands and [ ] simple tools," while the truck drivers who invested in their own vehicles had "opportunity for profit from sound management" of that investment by, for instance, hauling for different customers. 331 U.S. at 718–19. Thus, it framed the analysis as whether workers are more like unloaders whose profits

were based solely on "the work of their hands and [ ] simple tools" or the drivers whose profits depended on their initiative and investments. *Id*. Considering investment as part of opportunity for profit or loss is thus consistent with the Supreme Court's decision in *Silk*.

In addition, the Second Circuit considers opportunity for profit or loss and investment as one factor. *See Saleem*, 854 F.3d at 144 n.29 ("Economic investment, by definition, creates the opportunity for loss, but investors take such a risk with an eye to profit."); *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 consideration of opportunity for profit or loss and investment as one factor. *See Morrison v. Int'l Programs Consortium*, 253 F.3d 5, 11 (D.C. Cir. 2001) (citing *Superior Care*, 840 F.2d at 1058–59). Although a majority of circuit courts articulate opportunity for profit or loss and investment as separate factors, some have acknowledged that the two concepts are related. *See McFeeley*, 825 F.3d at 243 (explaining that the two factors "relate logically to one other" and considering them together); *Lauritzen*, 835 F.2d at 1537 ("The capital investment factor is interrelated to the profit and loss consideration.").

The Department believes that proposing to consider the individual's investment as part of the opportunity for profit or loss factor is consistent with its intent to articulate a legal framework comprised of commonality between the Supreme Court and federal appellate courts that may be applied by workers and businesses accurately and reliably. This approach provides greater explanation and clarity, including in terms of how the factors relate to each other and what considerations comprise each factor. Understanding the relationship between opportunity for profit or loss and investment and considering them together would make the analysis clearer to apply and avoid duplication. Considering investment as part of opportunity for profit or loss would also prevent an investment by the individual that is unrelated to, and outside of, the business from becoming the focus of the analysis. *See*, *e.g.*, *Parrish*, 917 F.3d at 384 (considering consultant's investment in, and losses relating to, a goat farm that was unrelated to his work for an oil drilling company that was the issue in the case). As the 2021 Rule explained,

the economic reality factors are limited to the individual's "claimed independent operation." 86 FR 1178 (citing *Silk*, 331 U.S. at 716). The example from the 2021 Rule discussed above that the Department is proposing to readopt (*see* proposed § 795.115(b)(3)) illustrates this point in the context of an individual who "works full time performing home renovation and repair services for a residential construction company." The individual also "earns substantial profits" from a food truck that she operates on weekends. However, "that is a separate business from her work in the construction industry, and therefore is not relevant to the question of whether she is an employee of the construction company or in business for herself in the construction industry."

By proposing to readopt the opportunity for profit or loss factor from the 2021 Rule, this factor would consider the individual worker's investment only and not the relative investments of both the individual and the potential employer. As the 2021 Rule explained, "comparing the relative investments does not illuminate the worker's economic dependence or independence," which is the ultimate inquiry. 86 FR 1188. Indeed, "[c]omparing their respective investments does little more than compare their respective sizes and resources." *Id*. The potential employer in almost all (if not all) cases is larger and has greater resources than the individual. That relative comparison thus sheds little, if any, light on the individual's economic dependence or independence and is not probative. The 2024 Rule considers the relative investments but does not take an approach that simply compares "the dollar values of investments or the sizes of the worker and the potential employer," explaining that, 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." 29 CFR 795.110(b)(2). Even with this additional guidance, however, the Department believes upon further consideration that the 2024 Rule's consideration of relative investments is not probative of the economic dependence or independence of the individual worker at issue, as explained above, and unnecessarily introduces the potential employer's size and resources into the analysis.

The Department believes that this approach is more consistent with the Supreme Court's articulation of the economic reality test. The Court has never compared a worker's investment to that of the potential employer. To the contrary, in *Silk*, the Court recognized that the truck drivers' ownership of their vehicles supported independent contractor status even though the coal companies that engaged them undoubtedly had far greater overall capital investments. 331 U.S. at 719. The Department understands that this approach is different from how some (but not all) circuit courts have since considered investment, but the Department believes application of the Supreme Court's analysis takes precedence.

Another example from the 2021 Rule that the Department is proposing to readopt (*see* proposed § 795.115(b)(2)) illustrates how only the individual worker's investment should be considered. In the example, the individual "is able to meaningful[ly] increase his earnings by exercising initiative and business acumen and by investing in his own equipment," and the potential employer "has invested millions of dollars" in its business. The example would explain that the opportunity for profit or loss factor indicates independent contractor status under those facts "despite the substantial difference in the monetary value of the investments made by each party" because the value of the potential employer's "investment is not relevant in determining whether the individual has a meaningful opportunity for profit or loss through his initiative, investment, or both."

Finally, it is well-settled that an individual worker's initiative should be considered as part of opportunity for profit or loss. The 2021 Rule explained that "a worker's initiative, such as managerial skill or business acumen or judgment, is an appropriate measure of a worker's opportunity to earn profits or incur losses." 86 FR 1189 (collecting cases). And the 2024 Rule describes this factor as considering "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." 29 CFR 795.110(b)(1). Consistent with the 2021 Rule and contrary to the 2024 Rule, however, the Department is proposing to consider the

individual's initiative only as part of the opportunity for profit or loss factor and not as part of the skill or permanence factors. The Department is addressing this further in the discussions of the skill and permanence factors below, but notes that this approach would avoid duplication and overlapping considerations among factors and ensure that the key concept of entrepreneurial initiative is considered in a core factor.

The Department welcomes comments on all aspects of this proposed factor.

G. Economic Reality Factors—Other Factors (Proposed § 795.105(d)(2))

The Department is proposing to readopt the other factors that it identified in § 795.105(d)(2) of the 2021 Rule that also guide the economic reality analysis. 86 FR 1176. As noted in proposed § 795.105(c), the Department believes that these factors would be less probative than the proposed core or primary factors. In some cases, they may not be probative at all. Nevertheless, as the 2021 Rule explained, they would be considered in every case for whatever value they bring to analyzing the character of an individual's economic dependence for work, namely whether it is more in the nature and character of a business owner or a typical employee.[146]

1. The Amount of Skill Required for the Work (Proposed § 795.105(d)(2)(i))

The Department is proposing to readopt the regulatory text of § 795.105(d)(2)(i) from the 2021 Rule, which discussed the first other economic reality factor—the amount of skill required for the work. This factor would indicate independent contractor status "to the extent the work at issue requires specialized training or skill that the potential employer does not provide." 86 FR 1247 (§ 795.105(d)(2)(i)). This factor would indicate employee status "to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job." *Id*. This factor would thus focus on training and skill because an individual "who is in business

[146] *See* 86 FR 1202.

for him- or herself typically brings his or her own skills to the job rather than relying on the client to provide training." 86 FR 1191.

The individual worker's exercise of initiative would not be considered under this factor. The Department explained in the 2021 Rule that "the Supreme Court articulated the factor as 'skill required' in *Silk*, 331 U.S. at 716, and multiple courts of appeals continue to consider [it] as 'the degree of skill required to perform the work.'" 86 FR 1191 (citing cases). As explained in the 2021 Rule, sharpening this factor to consider only skill and not include initiative would clarify the overall analysis and reduce overlapping considerations among the factors given that the individual's exercise of initiative would be considered under the opportunity for profit or loss factor (a core factor). *See id*. This would be consistent with the proposed analysis' focus on economic dependence because the presence or absence of initiative is usually more probative of an individual's economic dependence or independence than the skill required for the work. *See id*.

The 2024 Rule articulates this factor as skill and initiative and explains that it "considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative." 29 CFR 795.110(b)(6). Similar to the 2021 Rule, the 2024 Rule explains 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 potential employer to perform the work." *Id*. But when the individual worker has specialized skills, the 2024 Rule advises that this is not itself indicative of independent contractor status "because both employees and independent contractors may be skilled workers"; instead, "[i]t is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor." *Id*.

The Department's proposal, like the 2024 Rule, would advise that the lack of specialized skills or an individual being dependent on the potential employer for training necessary to do the job indicates employee status. However, the 2024 Rule incorporates an additional consideration

(compared to the 2021 Rule) when applying the skill factor by stating that, if specialized skills are present, then this factor does not necessarily indicate independent contractor status and whether the individual worker uses the specialized skills in connection with the business-like initiative is determinative for the factor.

Upon further consideration, refocusing this factor on skill and training and excluding initiative (like the 2021 Rule) would be consistent with the Department's overall goal in this proposal to provide a clearer analysis whereby facts are relevant to a particular factor rather than overlappingly considered under multiple factors. The proposed skill factor would also eliminate the additional consideration from the 2024 Rule of whether the individual uses those specialized skills in connection with business-like initiative—another reason why it would provide greater clarity. The individual's exercise of initiative would of course still be considered in the overall analysis. Initiative would be considered as part of the opportunity for profit or loss factor (a core factor), reflecting the 2021 Rule's explanation that the individual's initiative is usually more probative of the individual's economic dependence or independence than the skill required for the work.

The Department believes that considering initiative as part of the opportunity for profit or loss factor is more consistent with the Supreme Court's application of the economic reality test. In *Silk*, the Court considered the truck drivers' initiative and judgment in the context of their opportunity for profit, finding that they "depend upon their own initiative, judgment and energy for a large part of their success" in concluding that they were independent contractors. 331 U.S. at 716. Likewise, the Court in *Rutherford Food* found it highly probative that "profits to the boners" did not actually depend "for success upon the initiative, judgment or foresight of the typical independent contractor." 331 U.S. at 730. The Supreme Court has treated the probative value of the worker's initiative as being tied to the success or profitability of the worker's claimed independent business, and the Department is proposing to adopt the same approach. The Department understands that this approach is different from how some (but not all) circuit courts

have articulated the skill factor, but it believes application of the Supreme Court's analysis takes precedence.

The Department welcomes comments on all aspects of this proposed factor.

2. The Degree of Permanence of the Working Relationship between the Individual and the Potential Employer (Proposed § 795.105(d)(2)(ii))

The Department is proposing to readopt the regulatory text of § 795.105(d)(2)(ii) from the 2021 Rule, which discussed the second other economic reality factor—the degree of permanence of the working relationship between the individual and the potential employer. This factor would weigh in favor of the individual being an independent contractor to the extent the work relationship is "by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification." 86 FR 1247 (§ 795.105(d)(2)(ii)). It would weigh in favor of the individual being an employee "to the extent the work relationship is instead by design indefinite in duration or continuous." *Id.*

The 2021 Rule explained that "this factor will not always be probative," but noted that "courts and the Department routinely consider this factor when applying the economic reality analysis under the FLSA to determine employee or independent contractor status." 86 FR 1192–93. In general, the Department noted that the regulatory text "indicates that a long-term relationship points toward an employment relationship," but that "a long-term relationship may not always indicate an employee relationship." 86 FR 1193. Further, the Department explained that the short-term or seasonal nature of work would not necessarily indicate independent contractor status. 86 FR 1192. For example, seasonal work (which could be viewed as short-term or sporadic and definite in duration, and therefore weighing toward independent contractor status) "would not indicate independent contractor status where the worker's position is permanent for the duration of the relevant season and where the worker has done the same work for multiple seasons." *Id.* (citing *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1236–37

(10th Cir. 2018)). Additionally, the Department noted that "in certain industries where employees are often employed for short periods, a short term of employment would not indicate independent contractor status." 86 FR 1193. These concepts are illustrated in one of the examples from the 2021 Rule that the Department is proposing to readopt (*see* proposed § 795.115(b)(6)), where a housekeeper works for a ski resort every winter and returns to his position each new season, and therefore has a long-term and indefinite relationship with the ski resort under the permanence factor, which weighs in favor of classification as an employee.

The 2021 Rule also explained that, although some courts consider the exclusivity of a work relationship as part of the permanence factor, the Department believed that exclusivity is more directly related to the control factor, which considers whether the individual has the ability to work for others, rather than the permanence factor. 86 FR 1192. The Department explained that, similar to the Department's analysis of the concept of initiative, "the Department believes analysis of exclusivity as part of the permanence factor dilutes the significance of actual permanence within that factor, blurs the lines between the economic reality factors, and creates confusion by incorporating a concept that is distinct from permanence." 86 FR 1193.

The permanence factor in the 2024 Rule retains many of the same considerations as the permanence factor in the 2021 Rule that the Department is proposing to readopt, including that a work relationship that is sporadic and definite in duration favors independent contractor status, while a work relationship that is indefinite in duration and continuous favors employee status. 29 CFR 795.110(b)(3). Additionally, the 2024 Rule includes virtually identical language as the 2021 Rule recognizing that "regularly occurring fixed periods of work" may be considered to be definite in duration and sporadic, but that "the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification." *Id.*

The primary differences between the permanence factor in the 2021 Rule and the 2024 Rule are that the 2024 Rule incorporates the concepts of exclusivity and initiative, whereas the 2021 Rule, as explained earlier, sought to minimize blurring between the factors through use of

the same concepts in multiple factors. For example, the regulatory text for the permanence factor in the 2024 Rule explains 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, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative." 29 CFR 795.110(b)(3). And, the 2024 Rule recognized exclusivity as an aspect of permanence that courts and the Department had viewed as relevant, making a policy choice to include "all facts that may be relevant to a particular factor." 89 FR 1688.

Upon further consideration, the Department is proposing to provide greater clarity and efficiency by placing certain concepts—like exclusivity and initiative—in the factor for which they are most relevant (control and opportunity for profit or loss, respectively), rather than using a confusing and redundant analysis that considers facts related to these concepts in multiple factors. Moreover, the Department has consistently noted throughout the 2021 and 2024 independent contractor rulemakings that it is important for the Department to provide clear guidance on the fact that the ultimate inquiry of economic dependence is a "dependence-for-work" analysis rather than a "dependence-for-income" analysis. *See* 86 FR 1172–73; 89 FR 1690. Removing consideration of whether individuals have an exclusive relationship with one employer or more than one job or source of income from the permanence factor helps to clarify that a "dependence-for-income" approach is not indicative of whether an employment relationship exists. Finally, because control and opportunity for profit or loss are "core" factors, the concepts of exclusivity and initiative will be given their appropriate probative value, as opposed to the limited probative value of the permanence factor overall in the proposed analysis. Thus, by proposing to readopt the more streamlined permanence factor from the 2021 Rule, the Department believes it will better retain key concepts relevant to the permanence factor within the broader analysis.

The Department welcomes comments on all aspects of this proposed factor.

3. Whether the Work Is Part of an Integrated Unit of Production (Proposed § 795.105(d)(2)(iii))

The Department is proposing to readopt the regulatory text of § 795.105(d)(2)(iii) from the 2021 Rule, which discussed the third other economic reality factor—whether the work is part of an integrated unit of production. The Department is proposing to make one non-substantive change to the regulatory text, to align the description of this factor with the descriptions of the other factors, all of which begin by explaining how the factor weighs in favor of independent contractor status before explaining how the factor weighs in favor of employee status. *See* 86 FR 1246–47 (§ 795.105(d)(1), (d)(2)(i)–(ii)). This factor would weigh in favor of the individual being an independent contractor "to the extent his or her work is segregable from the potential employer's production process" and would weigh in favor of the individual being an employee "to the extent his or her work is a component of the potential employer's integrated production process for a good or service." 86 FR 1247 (§ 795.105(d)(2)(iii)). This provision would clarify that this factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business. *Id.*

In the 2021 Rule, the Department explained that the "integrated unit" factor derives from *Rutherford Food*, in which the workers ultimately determined to be employees were "part of an integrated unit of production" who worked "alongside admitted employees of the plant operator at their tasks." 86 FR 1194 (citing 331 U.S. at 729). As the Department acknowledged and many commenters noted, the 2021 Rule's "integrated unit" formulation of the factor differed from the way the Department's prior guidance and most courts articulated this factor using an "integral part" analysis. 86 FR 1193. That formulation considers "the extent to which services rendered are an integral part of the potential employer's business." *Id*.

Under an "integral part" analysis, courts focus on the importance or centrality of the work to the potential employer's business. In the 2021 Rule, the Department reasoned that asking whether a worker is a part (integral or otherwise) of the potential employer's business "simply

restates the ultimate inquiry: If a worker were part of the potential employer's business, then he or she could not be in business for him- or herself and therefore would be economically dependent." 86 FR 1194.

In the 2021 Rule, the Department also explained that the "integral part" factor used by courts has limited probative value and may be misleading in some instances. 86 FR 1193. As the Department observed, everything the employer does could be considered "integral" in the sense of "important." 86 FR 1194; *see Lauritzen,* 835 F.2d at 1541 (Easterbrook, J., concurring) ("*Everything* the employer does is 'integral' to its business—why else do it?"). The Department concluded that an analysis based on importance or centrality could favor employee status even for individuals who are independent contractors, rather than being probative of economic dependence.

The 2024 Rule returned to the "integral part" analysis, articulating the relevant inquiry as whether the work is "critical, necessary, or central to the potential employer's principal business." 29 CFR 795.110(b)(5). In the 2024 Rule, the Department asserted that "courts continue to find the integral [part] factor useful." 89 FR 1708. Responding to commenters' concerns that this formulation of the integral factor would point to employee status in virtually all cases, the 2024 Rule emphasized that the "key limiting word" is "principal," which would distinguish work that is critical or necessary in a general sense—e.g., an accountant hired to manage a business's tax obligations—from work that is critical or necessary to the potential employer's principal business—e.g., picking tomatoes for a tomato farm. 89 FR 1710–11.

Upon reconsideration, the Department believes that the "integrated unit" formulation of this factor is more probative of whether an individual is economically dependent on the potential employer for work than the "integral part" analysis. It is also more consistent with the Supreme Court's consideration in *Rutherford Food* of whether a worker is part of an "integrated unit."[147] The Department believes that an individual who is integrated into the potential employer's

[147] 331 U.S. at 729.

production process is more likely to be an employee. Conversely, an individual who performs services that are segregable from the potential employer's production process is more likely to be an independent contractor. The difference is illustrated by the examples that the Department is proposing to readopt from the 2021 Rule (*see* proposed §§ 795.115(b)(7)–(8)), which contrast a newspaper editor, who is involved in the entire production process of the newspaper, with a freelance journalist, whose work is limited to article submissions and is segregated from the rest of the newspaper's production process.

The Department believes that the "integral part" analysis departs from how it was intended to apply in *Silk*. While the 2024 Rule asserted that *Silk* considered whether coal unloaders were an "integral part" of the coal business as a relevant factor,[148] on reexamination, the Department now believes the Court merely discussed "integral part" in the context of the control factor. After listing the economic reality factors—which began with "degrees of control" and did not include integrality—the *Silk* Court stated: "These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses"[149] As the 2021 Rule explained, to the extent that a company directs the performance of integral work, that is already captured under the control factor.[150]

The Department believes its approach best supports the policy objective of providing greater clarity to business owners, workers, and independent contractors. The Department further believes that the 2024 Rule's emphasis on the potential employer's principal business lacks

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[148] 89 FR 1709 (citing *Silk*, 331 U.S. at 716).
[149] *Silk*, 331 U.S. at 716.
[150] 86 FR 1194. To the extent that *Silk* can be read as introducing the "integral part" analysis as a separate factor, the outcome demonstrates that it is not highly probative and may even be misleading. Both unloaders and drivers performed work that was integral to the potential employer's business, yet one group was deemed employees and the other independent contractors.

sufficient precision for the modern economy, in which, for example, modern manufacturers commonly assemble critical parts and components produced by wholly separate companies.

The Department welcomes comments from the public regarding their experiences applying the "integrated unit" analysis of the 2021 Rule and the "integral part" analysis of the 2024 Rule, as well as any other aspect of this proposed factor.

4. Additional Factors (Proposed § 795.105(d)(2)(iv))

The Department is proposing to readopt the regulatory text of § 795.105(d)(2)(iv) from the 2021 Rule, which provided: "Additional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA, but only if the factors in some way indicate whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work." 86 FR 1247 (§ 795.105(d)(2)(iv)).

The Department and courts have consistently stated that the identified factors are not exhaustive and additional factors may be considered. *See*, *e.g.*, *Silk*, 331 U.S. at 716 (explaining that its list of factors is not "complete"); WHD Opinion Letter FLSA2025-2 at 5 (explaining that "[o]ther factors may also be relevant" in addition to the identified factors); *see also*, *supra*, discussion of proposed § 795.105(c) (which would state that the identified "factors are not exhaustive"). Of course, such additional factors are relevant only to the extent that they help answer the ultimate inquiry (*see* proposed § 795.105(b)): whether the individual is in business for him- or herself or is economically dependent on the employer for work. For example, the "integral part" factor considered by most circuit courts could still be analyzed as an "other factor" to the extent it is probative as to this question.

The preamble to the 2021 Rule advised that factors that do not bear on this ultimate inquiry, "such as whether an individual has alternate sources of wealth or income and the size of the hiring company," are not relevant. *See* 86 FR 1196. The Department welcomes comments on whether it should identify in any final rule certain facts or factors (in addition to or in lieu of the

individual's alternate sources of wealth or income and the size of the employer) as not relevant because they do not bear on the individual's economic dependence.

Finally, consistent with the emphasis in the 2021 Rule's analysis and the analysis being proposed here that two factors are "core" factors that typically carry greater weight than other factors, any additional factors would be less probative than the core factors listed in § 795.105(d)(1). *See* 86 FR 1196. The precise weight of any additional factors would depend on the circumstances of each case and would be unlikely to outweigh either of the core factors. *See id*.

The 2024 Rule adopted § 795.105(d)(2)(iv) of the 2021 Rule with only minor editorial changes, although it was renumbered and moved to § 795.110(b)(7). *See* 87 FR 62257; 89 FR 1715-18; 29 CFR 795.110(b)(7). Making the additional factors section the seventh numbered subparagraph after six numbered paragraphs discussing the identified factors, as the 2024 Rule did, may have inadvertently caused confusion by suggesting that additional factors had to be considered in every case. To the contrary, the Department expects that additional factors will not be considered in many cases because the identified factors will be more than sufficient to make the determination. As the Department explained in the 2024 Rule, "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." 89 FR 1717.

Because it is well-settled that additional factors may be considered if they are relevant to the ultimate inquiry of the individual's economic dependence and for the other reasons explained above, the Department is proposing to readopt § 795.105(d)(2)(iv) of the 2021 Rule.

H. Primacy of Actual Practice (Proposed § 795.110)

The Department is proposing to readopt the regulatory text of § 795.110 from the 2021 Rule, which explained that when "evaluating the individual's economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may be

contractually or theoretically possible." 86 FR 1247 (§ 795.110). As an example, an individual's "theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, the individual is prevented from exercising such rights." *Id*. As another example, a potential employer's "contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority." *Id*.

In the 2021 Rule, the Department explained that the primacy of actual practice is derived from the Supreme Court's holding that "'economic reality' rather than 'technical concepts' is to be the test of employment" under the FLSA. 86 FR 1203 (quoting *Whitaker House,* 366 U.S. at 33). The Department also explained that "prioritizing substance over form is consistent with the Department's general interpretation and enforcement of the FLSA." 86 FR 1204. For example, a "skillfully devised" contract may suggest that a worker is an independent contractor, while the actual practices of the parties establish the existence of an employment relationship. 86 FR 1204. In such a case, the economic reality of the working relationship, as shown by actual practices, is an employment relationship. At the same time, the Department observed that an emphasis on actual practices "is not a one-way ratchet, applying selectively either for or against a finding of independent contractor status." 86 FR 1205. The actual practices of the parties may suggest that an individual is an employee, or they may suggest an individual is an independent contractor. *See id.* (comparing *Donovan v. Sureway Cleaners,* 656 F.2d 1368, 1371 (9th Cir. 1981), and *DialAmerica,* 757 F.2d at 1387, with *Saleem,* 854 F.3d at 143).

The 2024 Rule similarly recognized that actual practices are "often more relevant to the economic dependence inquiry than contractual possibilities." 89 FR 1721. The 2024 Rule departed from the 2021 Rule in stating that "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." 89 FR 1720. The 2024 Rule provided as an example that a potential employer's reserved rights to control "may strongly influence the behavior of the worker in their performance of the work even absent the employer actually exercising its contractual rights." *Id*.

In removing this provision, the 2024 Rule characterized it as a "bright line rule" and a "predetermined elevation of actual practice above unexercised or reserved rights" in an "overly mechanical" manner that was inconsistent with the totality-of-the circumstances economic reality analysis. 89 FR 1718, 1720, 1721.

The 2021 Rule did not, however, categorically disregard reserved rights. In response to various stakeholders' comments, the Department declined both to entirely disregard unexercised contractual rights (as suggested by some commenters generally supportive of the 2021 Rule) and to afford equal relevance to reserved control and control that is actually exercised (as suggested by some commenters generally opposed to the 2021 Rule). 86 FR 1204 and n.56. The Department emphasized that "unexercised powers, rights, and freedoms are not irrelevant" but "merely *less* relevant than powers, rights, and freedoms which are actually exercised under the economic reality test." 86 FR 1204. Evaluating "the circumstances of the whole activity" in a work arrangement, *Rutherford Food*, 331 U.S. at 730, requires consideration of both actual practices and contractual rights, but the "reality" of the work arrangement, *Silk,* 331 U.S. at 713, lies more in what actually happens than what a contract suggests may happen. This principle is illustrated in *Bartels*, in which the Supreme Court concluded that the dance hall's contractual right of control was not as probative as the band leader's actual exercise of control over band members.[151]

Upon further consideration, the Department is proposing to readopt the 2021 Rule's provision confirming the primacy of actual practice. The Department believes that the 2024 Rule's removal of this provision produced uncertainty among stakeholders regarding how to weigh evidence of actual practices against unexercised contractual provisions or theoretical possibilities. This confusion was evident in numerous comments the Department received from parties who viewed the removal of the actual practice provision as a disavowal of longstanding FLSA case law that has consistently focused on the reality of a work relationship rather than

[151] 332 U.S. at 128, 132.

assuming that formalities like a title or contractual arrangement are dispositive of whether an individual is an employee or an independent contractor. *See* 89 FR 1718–20. Though the Department explained in the preamble to the 2024 Rule that it did "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 economic reality," 89 FR 1719–20, having a regulatory text provision in place would provide greater certainty. In re-affirming that actual practice is more relevant than what may be contractually or theoretically possible, the Department believes that, contrary to the 2024 Rule's characterization, this provision does not create a bright-line rule but provides greater clarity on the respective roles that actual practice and contractual provisions play in determining the economic reality of the working relationship.

As the Department explained in the 2021 Rule, recognizing the primacy of actual practice does not mean that facts regarding unexercised contractual rights and authorities are never relevant. 86 FR 1204. Two circuit court cases that considered evidence of both actual practices and reserved rights are illustrative. In *Saleem*, the Second Circuit's focus on actual practices led to the conclusion that black-car drivers were independent contractors, and that conclusion was also supported by evidence of reserved rights. 854 F.3d at 142. The court found that the drivers were not only permitted to but actually did drive for competitors and personal clients, hire helpers in some cases, set their own schedules, and decline assignments without meaningful repercussions. *Id.* at 142–43, 146–47. While the court's overall inquiry was focused on actual practices, it also considered reserved rights in the parties' contracts. *Id.* at 135–36, 141. In particular, the court found that a provision that permitted drivers to terminate the contracts at any time "constituted a significant restriction on the ability of [the potential employers] to exercise control." *Id.* at 141.

In *Brant v. Schneider National, Inc.*, 43 F.4th 656, 665 (7th Cir. 2022), the Seventh Circuit applied the "well established" principle that "the terms of a contract do not control the employer-employee issue under the [FLSA]" to a truck driver who hauled freight for a freight

company. In considering several provisions in the parties' contract that theoretically indicated independent contractor status, the court repeatedly emphasized that the relevant inquiry is "economic reality, not just contractual terms." *Id.* at 672. The driver's theoretical abilities to control the manner of his work, hire helpers, own his own truck, and choose his own routes did not indicate that he was an independent contractor where he was not, as a practical matter, able to exercise those abilities. *Id.* at 666–68. The court also considered a contractual provision under which the potential employer "retained the right to gather remotely and to monitor huge quantities of data" and to use that data "for any reason [it] deems advisable," including as a basis to terminate the contract. *Id.* at 666–67. "This allegedly high degree of scrutiny," coupled with "the constant threat of termination," weighed in favor of employee status. *Id.* at 667. As *Saleem* and *Brant* demonstrate, centering the focus on actual practice does not preclude consideration of reserved contractual rights and authorities where they are relevant.

In readopting the 2021 Rule's "actual practice" provision, the Department acknowledges that, in certain situations where it is well established that either an employer and/or a worker engages in actual practice that is consistent with the relevant provision of a clear and binding contractual agreement between them, that provision would be more probative than a provision for which actual practice is not so well established. Indeed, where contractual provisions between workers and putative employers reflect actual practice, they may even have substantial probative value.

The Department welcomes comments on any aspect of the proposed readoption of the primacy of actual practice provision.

I. Examples of Analyzing Economic Reality Factors (Proposed § 795.115)

The Department is proposing to readopt the regulatory text of § 795.115 from the 2021 Rule, which provided six illustrative examples demonstrating "how the factors listed in § 795.105(d) may be analyzed under the facts presented" in the examples, and is also proposing to update one of those examples and add two new examples.

The example from the 2021 Rule that the Department is proposing to update is the one in § 795.115(b)(1). In the 2021 Rule, that example provided that a logistics company "installed, at its own expense, a device that limits the maximum speed of the owner-operator's vehicle and monitors the speed through GPS" and that "[t]he company limits the owner-operator's speed in order to comply with federally mandated motor carrier safety regulations and to ensure that she complies with local traffic laws." 86 FR 1247 (§ 795.115(b)(1)(i)). The example advised that, in that scenario, the fact that the company "installed a device that limits and monitors the speed of the owner-operator's vehicle does not change" the conclusion that the "owner-operator exercises substantial control over key aspects of her work, indicating independent contractor status." 86 FR 1247 (§ 795.115(b)(1)(ii)).

However, the Department is concerned that, although the Department of Transportation may have previously considered a regulation requiring speed limiting devices in trucks, it has not issued a specific regulation implementing such a requirement. To avoid any unintended confusion, the Department is proposing to revise this example so that the scenario instead addresses a different transportation requirement. The revised example (proposed § 795.115(b)(1)) would provide that "the logistics company requires the owner-operator to comply with federally-mandated transportation safety rules requiring drug and alcohol testing" and that the "fact that the company requires the owner-operator to complete certain drug and alcohol testing does not change" the conclusion that the owner-operator exercises substantial control over key aspects of her work, indicating independent contractor status.

In addition, the Department is proposing to add two new examples addressing the "amount of skill required for the work" factor. The 2021 Rule did not contain examples addressing the "amount of skill required for the work" factor. Adding these two new examples would ensure that the examples section provides guidance on all of the factors identified in § 795.105(d). The two new examples would be located at § 795.115(b)(4) and (5), and other examples in § 795.115(b) from the 2021 Rule would be renumbered. Finally, the Department is

proposing to make a minor edit to one other example from the 2021 Rule (changing "rewrites" to "revises" in the example that would be located at § 795.115(b)(7)).

Each example would provide a set of facts followed by an "Application" section discussing how a particular factor would apply to those facts and whether the factor would indicate employee or independent contractor status under those facts. 86 FR 1247–48 (§ 795.115(b)); *see also* 86 FR 1208 ("[E]ach illustrative example focuses on the classification favored by a specific economic reality factor within the context of the fact-specific scenario."). The discussion in each "Application" section would be "limited to substantially similar factual situations." 86 FR 1247 (§ 795.115(a)).

The Department stated in the 2024 Rule that "examples are helpful to workers and businesses alike." 89 FR 1724. Like the 2021 Rule, the 2024 Rule provides examples "to illustrate the application of each factor of the economic reality test as applied to various factual scenarios." 89 FR 1722. Unlike the 2021 Rule, the 2024 Rule provides the examples in the preamble rather than in the regulatory text; following the discussion in the preamble of each factor are examples applying the factor. The 2024 Rule explains that the examples "provide the greatest value by residing in the preamble to the final rule following the detailed discussion of the relevant factor" because such "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." 89 FR 1724. And of course, the examples in the 2024 Rule illustrate how the 2024 Rule's economic reality factors apply, while the examples in the 2021 Rule illustrated how the 2021 Rule's economic reality factors applied.

There is no question that the public appreciates examples of how the economic reality factors apply. The 2024 Rule's concern about examples in the regulatory text "being disconnected" from the preamble discussion of each factor appears to be overstated, however. Upon further consideration, the Department believes that including the examples in the regulatory text would make them more accessible to the public, which is more likely to refer to

the regulatory text than the preamble. The regulatory text—not the preamble—is what is published in the Code of Federal Regulations. The examples would constitute a clearly delineated section in that regulatory text following the discussion of the factors in the regulatory text and would therefore not be meaningfully "disconnected."

Accordingly, the Department is proposing to readopt as § 795.115 of the regulatory text the six illustrative examples that were in the 2021 Rule (with updates to one example, the addition of two new examples, and a minor edit to another example, all as explained above) demonstrating how the proposed factors in § 795.105(d) would apply. The Department welcomes comments on additional illustrative examples, including those addressing common general working arrangements that are more likely to be deemed employment or contractor.

J. Proposed Changes to FMLA and MSPA Regulations

The Department is proposing to revise the regulations addressing employee or independent contractor status under the FMLA and MSPA to clarify that the analysis in part 795 applies when determining employee or independent contractor status under those statutes too.

Both MSPA and the FMLA statutorily incorporate FLSA definitions regarding the scope of employment. *See* 29 U.S.C. 1802(5) (providing that the term "employ" for the purposes of MSPA has the meaning given such term under section 3(g) of the FLSA); 29 U.S.C. 2611(3) (providing that the terms "employee" and "employ" for purposes of the FMLA have the same meanings given such terms in sections 3(e) and (g) of the FLSA).[152]

In addition, the Department's MSPA and FMLA regulations recognize that the scope of employment under those statutes is determined by the FLSA. The MSPA regulations state that "employ," "employer", and "employee" are each given the meaning set forth in the FLSA. 29

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[152] *See also Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1287 (11th Cir. 2016) (noting that when Congress enacted MSPA, "it adopted the same sweeping statutory 'suffer or permit to work' definition of the term 'employ,' incorporating the FLSA definition by reference" (citing 29 U.S.C. 1802(5))); *Mendel v. City of Gibraltar*, 727 F.3d 565, 569 (6th Cir. 2013) ("To answer the question of whether [workers] fall within the scope of the FMLA's definition of an 'employee,' we must turn to the section of the FLSA that addresses this issue." (citing 29 U.S.C. 2611(3))).

CFR 500.20(h)(1)–(3) (citing 29 U.S.C. 203(d), (e), and (g)). The MSPA regulations add that "[t]he definition of the term *employ* may include consideration of whether or not an *independent contractor* or *employment* relationship exists under the Fair Labor Standards Act." 29 CFR 500.20(h)(4). The FMLA regulations reiterate that the definitions of "employ" and "employee" come from the FLSA. 29 CFR 825.102, 825.105(a). And in AI 2015-1 (which was later rescinded as explained above), the Department advised that the FLSA analysis that it provided "should also be applied in determining whether a worker is an employee or an independent contractor in cases arising under [MSPA] and the [FMLA]" because both statutes adopt the FLSA's definition of "employ."

Both MSPA and the FMLA thus support applying to those statutes the same analysis that the Department applies for determining employee or independent contractor status under the FLSA. In addition, applying one analysis across the three statutes will encourage consistent results and will provide a simpler approach for employers, businesses, and workers in determining their rights and obligations under the statutes. In the 2021 and 2024 rulemakings, the Department received comments supporting a uniform analysis for determining employee or independent contractor status across federal laws. Although only Congress can achieve that, where a uniform analysis is consistent with the statutes, as it would be with the FLSA, MSPA, and FMLA here, the Department believes that regulations adopting a uniform analysis would not only be beneficial, but also consistent with Congressional intent.

For the MSPA regulations, the Department is proposing to revise 29 CFR 500.20(h)(4) to remove the six economic reality factors (as well as references to the factors and several case citations) and replace them with a cross-reference providing that questions of employee or independent contractor status under MSPA "should be resolved in accordance with the criteria set forth in §§ 795.105 through 795.110 of this chapter." The Department would retain much of 29 CFR 500.20(h)(4), including the guidance on the impact of the employee versus independent

contractor inquiry in agriculture. The Department welcomes comments on all aspects of its proposed revisions to 29 CFR 500.20(h)(4).

For the FMLA regulations, the Department is proposing to revise the definition of "Employee" in 29 CFR 825.102. Paragraph (1) of that definition provides: "The term *employee* means any individual employed by an employer[.]" The Department is proposing to revise paragraph (1) so that it would read: "The term *employee* means any individual employed by an employer, and the criteria set forth in §§ 795.105 through 795.110 of this chapter apply to any determination of whether an individual is an employee or independent contractor[.]" The Department is also proposing to revise 29 CFR 825.105(a) by adding the following sentence to the end of the general guidance currently located in that provision: "The criteria set forth in §§ 795.105 through 795.110 of this chapter apply to any determination of whether an individual is an employee or independent contractor." These revisions would incorporate into the FMLA regulations the analysis for determining employee or independent contractor classification in part 795.

In addition, the Department is proposing to delete the sentence in 29 CFR 825.105(a) advising that "[m]ere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship." The Department added this sentence in the 1995 FMLA final rule as part of "a more general discussion" of the employment relationship in the context of counting employees for determining coverage.[153] The purpose of this NPRM's proposed revisions to the FMLA regulations is to confirm that the multi-factor analysis in 29 CFR part 795 would apply when determining an individual's classification as an employee or independent contractor under the FMLA. The Department is concerned that retaining a statement in 29 CFR 825.105(a) that mere knowledge may create an employment relationship could be viewed as inconsistent with considering "the circumstances of the whole activity" when

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[153] 60 FR 2184; *see* 29 U.S.C. 2611(4)(A)(i) (defining "employer" as any person "who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year").

determining employee or independent contractor status, *Rutherford*, 331 U.S. at 730, as well as the multi-factor analysis set forth herein in proposed 29 CFR part 795, and thus could cause parties to not apply the analysis as the Department intends. Deleting the sentence from 29 CFR 825.105(a) would help to ensure that the analysis in 29 CFR part 795 applies under the FMLA.

The Department welcomes comments on all aspects of its proposed revisions to 29 CFR 825.102 and 825.105(a).

K. Severability

The Department is proposing to readopt as § 795.120 the regulatory text from the 2021 Rule which provided that any provision of part 795 found to be invalid or unenforceable "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." 86 FR 1248 (§ 795.120).

The 2021 Rule noted that the Department did not receive any comments on the severability provision that it had proposed and adopted that provision as proposed. 86 FR 1209. The 2024 Rule adopted the same severability provision, noting that "[n]o 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." 89 FR 1725. Accordingly, the Department's proposal contains the same severability provision at § 795.120.

Relatedly, the Department is proposing in this rulemaking to both rescind the 2024 Rule and readopt the regulatory provisions of the 2021 Rule by revising 29 CFR part 795 to incorporate those provisions. In other words, rescission of the 2024 Rule would be separate from readoption of the regulations regarding employee or independent contractor status promulgated in the 2021 Rule. Thus, the Department intends that, if the regulations that it finally adopts as 29 CFR part 795 at the culmination of this rulemaking are thereafter invalidated, enjoined, or

otherwise not put into effect, then the 2024 Rule and its regulations would nonetheless be rescinded for all the reasons set forth by the Department in this rulemaking. The Department recognizes that, in such a case, it would have no generally-applicable regulations addressing employee or independent contractor status under the FLSA (which was the case for 83 years following the FLSA's enactment until the 2021 Rule). If that were the case, the Department would provide subregulatory guidance for stakeholders. Additionally, the Department notes that the 2024 Rule expressed a similar intent for its rescission of the 2021 Rule then to be separate from the affirmative regulations that it promulgated at 29 CFR part 795. *See* 89 FR 1725 (explaining 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").

Finally, the Department's proposed changes to the FMLA and MSPA regulations are separate from its proposed changes to the FLSA regulations in 29 CFR part 795. Thus, if the Department's proposed changes to the FLSA regulations in 29 CFR part 795 are finalized but thereafter invalidated, enjoined, or otherwise not put into effect, in whole or in part, then the Department intends that its proposed changes to the FMLA and MSPA regulations would remain in effect.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq*., and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

This NPRM does not contain a collection of information subject to OMB approval under the Paperwork Reduction Act. The Department welcomes comments on this determination.

V. Review Under Executive Orders 12866, 13563, and 14192

Among other requirements, Executive Order 12866 requires agencies to submit "significant regulatory actions" to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) for review. Section 3(f) of E.O. 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; (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has determined that this rule is economically significant 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; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. *See* 76 FR 3821 (Jan. 21, 2011). E.O. 13563 recognizes that some costs and benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. *Id.*

Executive Order 14192, titled "Unleashing Prosperity Through Deregulation," was issued on January 31, 2025. This rule, if finalized as proposed, is expected to be an E.O. 14192

deregulatory action, as the Department estimates that perpetual cost savings attributable to the rule—including reduced compliance costs and reduced litigation costs—would exceed one-time regulatory familiarization costs. The analysis provided below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned Executive orders.

A. Need for Rulemaking

As explained more fully in section II of this notice, the Department is concerned that the 2024 Rule fails to provide an analysis for distinguishing between independent contractors and employees under the FLSA that is sufficiently clear and leads to predictable outcomes. The Department is separately concerned that the 2024 Rule's description of several economic reality factors could be viewed as setting a higher bar to find independent contractor status than required under the law. Among other harms, an analysis which is ambiguous or perceived as too restrictive of independent contracting can deter businesses from engaging with bona fide independent contractors or induce them to unnecessarily classify such individuals as employees—concerns emphasized by many self-identified independent contractors who have participated in the Department's recent rulemakings on this topic.

Accordingly, in this rulemaking, the Department is proposing to rescind the 2024 Rule and largely readopt the 2021 Rule,[154] which the Department has successfully applied in WHD investigations.[155] Additionally, the Department is proposing to revise the regulations addressing employee or independent contractor status under MSPA and the FMLA so that the analysis in part 795 applies when determining employee or independent contractor status under those statutes too.

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[154] As explained in section III, the Department proposes to readopt the 2021 Rule's FLSA guidance with a substantive edit to proposed § 795.105(b), one non-substantive edit to proposed § 795.105(d)(2)(iii), and a few small modifications to the illustrative examples in proposed § 795.115.

[155] *See supra*, n. 81.

B. Overview of Estimated Effects

The Department believes that replacing the 2024 Rule with the 2021 Rule is likely to improve the welfare of both workers and businesses on the whole. With respect to businesses, the Department believes that the improved clarity offered by the rule would increase the efficiency of the labor market, allowing businesses to be more productive and decreasing their litigation burden. With respect to workers, broadly speaking, this rule would likely have three categories of potential effects.

First, this rulemaking would make it easier for the millions of individuals who currently work as independent contractors and those who hire them to comply with the law. Compliance cost savings would be shared between the independent contractors and businesses for which they work.

Second, legal clarity may encourage firms to create independent contractor arrangements for roles that did not previously exist, which may attract workers who otherwise would not work in that field. Such job creation would benefit workers and firms alike.[156]

Third, as a result of the improved clarity of the proposed rule, businesses might convert some existing positions from employee status to independent contractor status. Although the Department maintains that the streamlined core factor analysis proposed in this rule is neither more nor less permissive of independent contractor relationships as compared to the analysis that the Department is currently applying,[157] the Department expects that this proposed rule could reduce any "voluntary" employment classification. This refers to situations where businesses classify workers who may be in business for themselves (and thus independent contractors) as employees to avoid legal risk (in the event that the business does not satisfy the FLSA's

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[156] *See* L. Palagashvili, *Consequences of Restricting Independent Work and the Gig Economy*, Mercatus Center (2022), available at https://www.mercatus.org/research/policy-briefs/consequences-restricting-independent-work-and-gig-economy.

[157] As explained in section I.F. of this NPRM, the Department is currently enforcing its pre-2021 guidance on employee and independent contractor status, which it has previously characterized as "neither more nor less permissive of independent contractor relationships as compared to" the 2021 Rule. *See* 86 FR 1240.

requirements).[158] This rule would provide the greatest legal certainty to employers classifying a worker as an independent contractor if the worker substantially controls the work and has a meaningful opportunity for profit or loss based on initiative or investment—a scenario that, to the Department's knowledge, no federal appellate court has ever found to be an FLSA employment relationship.

Businesses would only be expected to reclassify workers classified as employees into independent contractors upon a determination that the clarity provided by this rule materially shifts the balance of tradeoffs, including legal risk. Any benefit to businesses of modified classifications would need to outweigh the costs, including any autonomy they cede to workers in such arrangements and any costs associated with implementation or modifying the classification itself, and such a relationship would need to be compatible with their business models. Further, generally speaking, workers would have a choice of whether to agree to the new independent contractor arrangement. The overall effect of job conversion on workers would be ambiguous and could vary from worker to worker, but the Department expects that any reclassification of workers classified as employees into independent contractors attributable to this rulemaking would be minimal, as the Department is not aware of significant reclassification which occurred following publication of the 2021 Rule. The Department welcomes feedback from commenters on the extent of any worker reclassification which occurred as a result of or following publication of the 2021 Rule.

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[158] *See* Richard J. Reibstein, Lisa B. Petkun & Andrew J. Rudolph, *How Companies Can Minimize the Risks of Independent Contractor Misclassification*, 40 Tax Mgmt. Comp. Plan. J. 207 (Aug. 3, 2012), republished at https://www.jdsupra.com/legalnews/how-companies-can-minimize-the-risks-of-35626/ (discussing the "voluntary reclassification" of independent contractors and noting that "some lawyers and legal commentators routinely advise businesses to cease using ICs or to reclassify all of their ICs as employees to avoid the potential for misclassification liability"); *see also* Daniel P. O'Meara, *A Preventative Approach To Using Independent Contractors*, J. Accountancy (Sept. 1, 1997), https://www.journalofaccountancy.com/issues/1997/sep/prevent (advising companies to "resolve close cases by concluding the workers are employees" to avoid legal risk).

The Department has attempted to place the magnitude of these potential impacts into context. Drawing on the best available evidence from the Contingent Worker Supplement (CWS), labor market studies of flexible work (Mas and Pallais, 2017; Chen et al., 2019),[159] and a recent evaluation of a 2019 California law that changed the standard for determining independent contractor classification in a manner that restricted independent contracting[160] (Palagashvili et al., 2024),[161] the Department estimates that the number of independent contractors could increase by 1 to 3 percentage points if this proposal were finalized. On today's labor force of approximately 25 million workers who rely on independent contracting as their primary or secondary job, this would represent between 0.25 million and 0.75 million additional independent contracting relationships, with a central estimate of 0.5 million.[162] The rationale for this estimate is explained in greater detail in section V.E.3.

The Department assumes that this increase would occur through new labor force entry rather than through the reclassification of existing employees. This assumption reflects Palagashvili et al.'s findings that, while AB 5 reduced independent contracting, there was no statistically significant evidence that it increased traditional employment, contrary to the impact

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[159] Alexandre Mas & Amanda Pallais, "Valuing Alternative Work Arrangements," 107 Am. Econ. Rev. 3722 (2017); Keith Chen et al., "The value of flexible work: Evidence from Uber drivers," 127 J. of Political Econ. 2735 (2019).

[160] *See* Assembly Bill No. 5 ("AB 5"), Ch. 296, 2019-2020 Reg. Sess. (Cal. 2019) (codifying the "ABC" test articulated in *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018)). California's ABC test presumes an individual worker is an employee unless the potential employer can satisfy three elements: absence of control of the worker, that the worker performs work outside the employer's usual course of business, and that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

[161] Liya Palagashvili et al., "Assessing the Impact of Worker Reclassification: Employment Outcomes Post–California AB5," Mercatus Working Paper (2024), https://www.mercatus.org/research/working-papers/assessing-impact-worker-reclassification-employment-outcomes-post.

[162] The Department believes that this 0.5 million figure represents an appropriate estimate of the total number of new independent contractor arrangements that could be created by this proposed rule, in part because some individuals and businesses operating in states with analyses that are more restrictive of independent contracting, such as the "ABC" tests used in California or Massachusetts, are unlikely to be affected by this rulemaking.

that may have been anticipated as the law discouraged independent contractor classification.[163] This suggests few independent contractors were "switched" to traditional employees as a result of California's law. The Department believes the converse would be true here—that the reclassification of employees to independent contractors would remain small while new entry of independent contractors would be more significant (though lower, in terms of magnitude, than the converse impact under AB 5). Indeed, the proposed rule's effect on reclassification should be even smaller than under AB 5 because, unlike AB 5, it would not change the underlying classification standard (i.e., the economic reality test); it would merely clarify the test. As such, permissible reclassification would be limited to workers who already possess the characteristics of being in business for themselves but are classified as employees due to perceived legal uncertainty. Meanwhile, employers who are holding back from engaging independent contractors would have the clarity to expand opportunities, creating genuine new participation.

The Department acknowledges that these estimates are subject to significant uncertainty. The precise number of new entrants, the distribution of reclassified positions across industries and firm sizes, and the demographic characteristics of affected workers cannot be reliably projected. Nevertheless, by presenting order-of-magnitude estimates, the Department seeks to provide transparency about the potential scope of impacts while inviting public comment to refine underlying assumptions.

The Department estimates that the regulatory familiarization costs of this proposed rule would be $488.2 million in the first year. However, the Department estimates that this proposed rule would yield $682.7 million dollars in cost savings per year.[164] Over a 10-year analytic time horizon, this results in an annualized net cost savings of $627.2 million and $617.2 million using a 3 percent and 7 percent discount rate respectively. In addition, and as discussed below, the

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[163] Palagashvili et al., *supra* n.161.

[164] The Department notes that this might be an overestimate of the effects of this rulemaking to the extent that some workers and businesses in certain states might not be affected by this rulemaking.

Department estimates that the total undiscounted benefits to workers from new labor force entry could amount to $17.6 billion over 10 years, with an additional $14.9 billion accruing to broader society in the form of taxes collected on the earnings of the new labor These earnings are estimated at $87.79 billion over 10 years as described in section V.E.3 below. On an annualized basis, the Department estimates that the benefits from increased labor force participation could amount to $3.25 billion at a 7 percent discount rate, depending on the number of new entrants and their characteristics.

C. Current Number of Independent Contractors

The Department has estimated that there were 11.9 million independent contractors in the United States in 2023, the most recent year of data available.[165] As explained above, the Department believes the number of independent contractors for purposes of the FLSA, MSPA, and FMLA would increase as a result of this rule. There are a variety of estimates of the number of independent contractors, and these span a wide range based on methodologies and how the population is defined. The Department believes that the Current Population Survey (CPS) Contingent Worker Supplement (CWS) is the most appropriate estimate of the number of independent contractors; however, there are potential biases in these data as noted. Additionally, estimates from other sources are presented to demonstrate the potential range.

1. Department of Labor Estimate

The CPS is conducted by the U.S. Census Bureau and 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 2023, the CPS has included a supplement to collect data on contingent and alternative employment arrangements.

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[165] U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements—July 2023*, USDL–24–2267 (Nov. 8, 2024), https://www.bls.gov/news.release/pdf/conemp.pdf.

Based on the CWS, there were 11.9 million independent contractors in 2023, amounting to 7.4 percent of workers.[166]

The BLS's estimate of independent contractors includes workers "who are identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are identified as wage and salary workers or self-employed." Two questions are asked to identify independent contractors.

1. 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)?"
2. 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?"

The Department believes that the Current Population Survey (CPS) Contingent Worker Supplement (CWS) offers an appropriate lower bound for the number of independent contractors. However, there are several possible limitations in this data. 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).[167] Therefore, the estimate of independent contractors does not include those who may be employees for their primary jobs, but also work as independent contractors. This is likely the largest limiting factor in the data when trying to estimate the population of workers doing any work as an independent contractor. For example, Lim et al. (2019) estimates that for 48 percent of independent contractors, such work is their primary

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[166] *Id.*

[167] 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.

source of income.[168] Applying this estimate to the 11.9 million independent contractors estimated from the CWS results in 24.8 million independent contractors.[169]

The CPS CWS's large sample size results in small sampling error. However, the questionnaire's design may result in some non-sampling errors. For example, one potential limitation of the data is that the CWS includes information to calculate estimates of the prevalence of independent contractors at a single point in time, that is, during a specified 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.[170] For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy.[171] 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." However, a factor of four is likely too large of an adjustment because a 3-year period does not represent the current workforce any more than does a 1-week period, and because there is likely more week-to-week volatility in participation in the Online Platform Economy than among independent contractors.

The CWS also uses proxy responses, which may underestimate the number of independent contractors. The RAND American Life Panel (ALP) survey conducted a supplement

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[168] Lim et al., *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data* (2019), https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.

[169] 11.9 million independent contractors * (1 + (52 ÷ 48)).

[170] 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 are independent contractors would exceed the one-week estimate.

[171] D. Farrell & F. Greig, *Paychecks, Paydays, and the Online Platform* (2016), JPMorgan Chase Institute, 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.

in 2015 to mimic the CPS CWS questionnaire. The results of the survey were summarized by Katz and Krueger (2018).[172] This survey found that independent contractors comprise 7.2 percent of workers.[173] Katz and Krueger identified two primary factors to explain the 0.5 percentage point difference in magnitude between the 2017 CWS and the ALP: (1) cyclical conditions and (2) differences in survey methods (e.g., the use of self-responses only in the ALP supplement). The first factor does not reflect a bias in either survey or estimate, whereas the second factor *may* reflect an underestimate in the CWS estimate. 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).[174]

Another potential source of bias in the CWS data is that some respondents may not self-identify as independent contractors. In the CWS, one person answers the survey questions about everyone living in the household. Thus, respondents provide data about themselves and others living with them. People who report about other household members may not be able to answer all questions about others' employment arrangements.[175]

Conversely some workers misclassified as independent contractors may answer in the affirmative, despite not truly being independent contractors. The prevalence of misclassification is unknown, but it is generally agreed to be common. The National Employment Law Project

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[172] L. Katz & A. Kreuger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (2018), https://scholar.harvard.edu/lkatz/publications/rise-and-nature-alternative-work-arrangements-united-states-1995-2015.

[173] The estimate is 9.6 percent without correcting for overrepresentation of self-employed workers or multiple job holders. *Id.* at 31.

[174] In addition to the use of proxy responses, this difference is also due to cyclical conditions. The impacts of these two are not disaggregated for independent contractors, but if we applied the relative sizes reported for all alternative work arrangements, we would get 0.36 percentage point difference due to proxy responses. Additionally, it should be noted that this may not entirely be a bias. It stems from differences in independent contracting reported by proxy respondents and actual respondents. As Katz and Krueger explain, this difference may be due to a "mode" bias or proxy respondents may be less likely to be independent contractors.

[175] U.S. Bureau of Labor Statistics, *Electronically mediated work: new questions in the Contingent Worker Supplement,* Monthly Labor Review (Sept. 2018), https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm.

conducted a literature review of state-level audits estimating misclassification of employees as independent workers and found that the share of employers misclassifying workers ranged from 10 percent to 30 percent.[176]

Because reliable data on the potential magnitude of these biases are unavailable, the Department has not calculated any estimates of how these biases may impact the estimated number of independent contractors.

2. Range of Estimates in the Literature

To further consider the range of estimates available, the Department conducted a literature review, the findings of which are presented in Table 1. Other studies were also considered but are excluded from this table because the study population was much broader than

[176] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (2020), https://www.nelp.org/wp-content/uploads/Independent-Contractor-Costs.pdf.

just independent contractors or because they are limited to one state.[177] The RAND ALP[178] and the General Social Survey's (GSS's) Quality of Worklife (QWL)[179] supplement are widely cited alternative estimates. The W.E. Upjohn Institute for Employment Research conducted large-scale telephone surveys to obtain their estimates on the independent contractor population.[180] However, the Department chose to use the CWS as our primary estimate over these other sources primarily because of the significantly larger sample sizes.

Jackson et al. (2017)[181] and Lim et al. (2019)[182] use tax information to estimate the prevalence of independent contracting. In general, studies using tax data tend to show an increase

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[177] *See*, *e.g.*, 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 & McGee, *Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey* (2016), https://doi.org/10.17016/FEDS.2016.089; Upwork, *Freelancing in America* (2019); Washington Department of Commerce, *Independent Contractor Study* (2019), https://deptofcommerce.app.box.com/v/independent-contractor-study; Farrell & Greig, *supra* n. 171; MBO Partners, *State of Independence in America* (2016), https://www.mbopartners.com/state-of-independence/mbo-partners-state-of-independence-in-america-2016/; Abraham et al., *Measuring the Gig Economy: Current Knowledge and Open Issues* (2018), https://www.nber.org/papers/w24950; Collins et al., *Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns* (2019), https://www.russellsage.org/research/outputs/gig-work-replacing-traditional-employment-evidence-two-decades-tax-returns; 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/; Dourado & Koopman, *Evaluating the Growth of the 1099 Workforce*, Mercatus Center (2015), https://www.mercatus.org/publication/evaluating-growth-1099-workforce.

[178] L. Katz & A. Kreuger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (2018), https://scholar.harvard.edu/lkatz/publications/rise-and-nature-alternative-work-arrangements-united-states-1995-2015.

[179] Abraham et al., *Measuring the Gig Economy: Current Knowledge and Open Issues* (2018), https://www.nber.org/papers/w24950.

[180] K.G. Abraham et al., *The Independent Contractor Workforce: New Evidence on Its Size and Composition and Ways to Improve Its Measurement in Household Surveys* (2023), https://www.nber.org/papers/w30997.

[181] Jackson, Looney & Ramnath, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage* (2017), https://home.treasury.gov/system/files/131/WP-114.pdf.

[182] Lim et al., *supra* n.168.

in prevalence of independent contracting over time whereas survey data do not. 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 recall bias, and records of all activity throughout the calendar year (the CWS only references one week). 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; and the estimates include misclassified independent contractors. A major disadvantage of using tax data for this NPRM is that the data are not publicly available and thus cannot be verified or adjusted as necessary.

Table 1: Summary of Estimates of Independent Contracting

Source	Method	Definition	Percent of Workers	Sample Size	Year
CPS CWS	Survey	Independent contractor, consultant or freelance worker	7.4%	~60,000	2023
ALP	Survey	Independent contractor, consultant or freelance worker	7.2%	6,028	2015
GSS QWL	Survey	Independent contractor, consultant or freelancer	14.10%	2,538	2014
Jackson et al.	Tax data	Independent contractor, household worker	3.3% [a]	~5.9 million [b]	2014
Lim et al.	Tax data	Independent contractor	8.1%	1% of 1099-MISC and 5% of 1099-K	2016
W.E. Upjohn Institute for Employment Research	Survey	Independent contractor	15%	~61,000	2023

[a] Summation of (1) 2,132,800 filers with earnings from both wages and sole proprietorships and expenses less than $5,000, and (2) 4,125,200 primarily sole proprietorships with less than $5,000 in expenses.
[b] Estimate based on a 10 percent sample of self-employed workers and a 1 percent sample of W2 recipients.

D. Costs

1. Regulatory Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing a new regulation. To estimate the total regulatory familiarization costs imposed if this proposal is finalized, the Department used (1) the number of establishments and government entities; (2) the wage rate for the employees reviewing the rule; and (3) the number of hours that it estimates employers would 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.[183] Presumably, the headquarters of a firm would conduct the regulatory review for businesses with multiple locations and may also require some locations to familiarize themselves with the regulation at the establishment level. Other firms may either review a rule to consolidate key takeaways for their affiliates or they may rely entirely on outside experts to evaluate a 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 used the Statistics of U.S. Businesses (SUSB).[184] In 2021, the most recent year available, there were 8.3 million establishments. These data were supplemented with the 2022

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[183] 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.

[184] U.S. Census Bureau, 2021 SUSB Annual Data Tables by Establishment Industry, https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.

Census of Government that reports 90,888 local government entities, and 51 state and federal government entities.[185] The number of establishments and governments was 8,389,450.

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.[186] 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 2.91 million entities.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13-1141) (or a staff member in a similar position) would review the rule.[187] According to the most recent Occupational Employment and Wage Statistics (OEWS) estimates, these workers had a mean wage of $39.86 per hour. Given the proposed clarification to the Department's interpretation of who is an employee and who is an independent contractor, the Department assumes that it would take on average about 1 hour to review a final rule. Based on prior rulemakings, the Department believes that an hour, on average, is appropriate. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate would be $64.97; thus, the average cost per establishment would be $64.97.[188] Therefore, the undiscounted regulatory familiarization costs for establishments in Year 1 if the proposed rule is finalized are estimated to be $189.1 million

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[185] U.S. Census Bureau, *2022 Census of Governments*, https://www.census.gov/data/tables/2022/econ/gus/2022-governments.html.
[186] *See* Lim et al., *supra* n.168, at 66 (Table 10: Firm sample summary statistics by year (2001–2015)).
[187] 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, *Occupational Employment and Wage Statistics Query System*, https://data.bls.gov/oes/#/industry/000000 (last updated May 2024).
[188] BLS, Employer Costs for Employee Compensation – September 2025, Employer Costs for Employee Compensation Summary - 2025 Q02 Results [Benefits rate based on compensation rates for civilian workers].

($64.97 × 2,911,139). Regulatory familiarization costs in future years are assumed to be de minimis. This amounts to a 10-year annualized cost of $19.9 million at a discount rate of 7 percent.

For regulatory familiarization costs for independent contractors, the Department used its estimate of up to 24.8 million independent contractors and assumed each independent contractor would spend an average of 30 minutes to review the regulation. 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 would likely rely on summaries of the key elements of a rule 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 $24.12, which is the median hourly wage rate for independent contractors in the CWS of $23.94 updated to 2024 dollars using the gross domestic product (GDP) deflator.[189,190] Therefore, the undiscounted regulatory familiarization costs to independent contractors in Year 1 are estimated to be $299.01 million ($24.12 × 0.5 hour × 24.8 million). The total one-time undiscounted regulatory familiarization costs for establishments, governments, and independent contractors are estimated to be $488.2 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 even if this proposal is not finalized, so this rulemaking is not expected to impose costs after the first year. This amounts to a 10-year annualized cost of $50.3 million at a discount rate of 3 percent or $52.2 million at a discount rate of 7 percent.

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[189] The Department's calculation of the median hourly wage is based on the July 2023 Contingent and Alternative Employment Arrangements release, where the median weekly earnings for full-time contingent workers is $838 and the definition of fulltime work status is 35 hours or more per week ($838 ÷ 35 hours = $23.94).

[190] In the 2021 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.

2. Other Costs

There may be other costs associated with this NPRM that have not been quantified due to uncertainties or data limitations. The Department invites public comments and data to address this issue.

E. Benefits and Cost Savings

This NPRM, if finalized, is expected to result in cost savings to firms, including increased clarity, reduced misclassification, reduced litigation, and increased efficiency. A final rule adopting the proposal in this NPRM could increase clarity concerning whether a worker is an independent contractor under the FLSA, reducing burden on firms to classify workers, misclassification, and litigation costs. Firms could spend less time analyzing independent contractor status, saving internal administrative costs. Additionally, workers may benefit from having more clarity about their rights related to their work status. Finally, due to increased clarity, there could be a reduction in FLSA litigation involving alleged misclassification.

1. Increased Clarity

This proposed rule, if finalized, would increase clarity concerning whether a worker is classified as an employee or as an independent contractor under the FLSA. This would reduce the burden faced by employers, potential employers, and workers in understanding the distinction and how the working relationship should be classified. It is unclear exactly how much time would be saved, but the Department provides some quantitative estimates to provide a sense of the magnitude. The importance of increased clarity is noted by an article authored by Caitlin Kapolas on behalf of Lift HCM which notes that misclassification due to lack of clarity can result in fines, back taxes, and potential lawsuits—all consequences businesses can avoid with proper worker classification.[191]

[191] Caitlin Kapolas, Lift HCM, *Independent Contractor vs. Employee: Key Differences and Compliance Tips* (2025), https://lifthcm.com/article/independent-contractor-vs-employees.

The Department expects that a final rule adopting this proposal would produce beneficial cost savings by clarifying the classification process. To quantify this benefit, the following variables need to be defined and estimated: (1) the number of new employer-worker relationships being assessed to determine the appropriate classification; (2) the amount of time saved per assessment; and (3) an average wage rate for the time spent. The Department estimates this will result in an undiscounted annual cost savings of $682.7 million. The Department began with its estimate of the number of independent contractors as the basis for estimating the number of new relationships. As discussed above, according to the CWS, there were 11.9 million workers in 2023 who were independent contractors in their primary job. Adjusting this figure to account for independent contractors in their secondary job results in 24.8 million independent contractors. According to Lim et al. (2019), in 2016 the average number of 1099–MISC forms issued per independent contractor was 1.43.[192] Therefore, the Department assumes the average independent contractor has 1.43 jobs per year. This number does not account for the workers who do not file taxes, a recognized limitation in the cited study. Because it is unclear whether those who do not file taxes would have a higher or lower number of jobs per year, the Department does not believe that this limitation biases the estimate in either direction. Multiplying these two numbers (1.43 jobs per year × 24.8 million independent contractors) results in an estimated 35.5 million new independent contractor relationships which would be assessed by the Department's clearer analysis. A subset of new independent contractor relationships may have time savings associated with the proposed rule if finalized. Such a reduction would be difficult to quantify because it is unclear how many establishments and independent contractors will realize benefits of increased clarity. It is also possible that the increased clarity of the classification process would lead to compound effects that generate far greater benefits over time. Nonetheless, because it is possible that only a subset of contracts would receive the cost savings associated with increased clarity, the

[192] Lim et al., *supra* n.168, at 61.

Department has preliminarily reduced the number of contracts in the estimates by 25 percent. This would result in 26.6 million contracts with cost savings to both the engaging firm and the independent contractor.[193] The Department requests comment on: (a) how many of the 35.5 million independent contractor relationships (or the 26.6 million subset or another subset that acknowledges that independent contractor relationships in some states may still be assessed under state laws notwithstanding the clearer analysis in this rulemaking) undergo assessments per year, and (b) if these point-in-time estimates overstate or possibly even understate the number of annual assessments, how the savings per assessment should be adjusted from the preliminary estimates to be discussed next.

Following a similar methodology to the one used in the 2021 final rule, the Department has assumed that employers would save 20 minutes of time and independent contractors would save 10 minutes per each new contract.[194] These numbers are small because they represent the marginal time savings for each contract, not the entire time necessary to identify whether an independent contractor relationship holds.

To estimate the cost savings due to the increased clarity that the proposed rule would provide, the Department applies the following estimates. For employers, this time is valued at a loaded hourly wage rate of $64.97. This is the mean hourly rate of Compensation, Benefits & Job Analysis Specialists (13–1141) from the OEWS multiplied by 1.63 to account for benefits and overhead. For independent contractors, this time is valued at $24.12 per hour (median wage rate for independent contractors in the CWS of $23.46 adjusted to present value using the GDP deflator). Using these numbers, the Department estimates that contracting firms would save $575.8 million annually and independent contractors would save $106.9 million annually due to

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[193] As noted earlier, this might be an overestimate of the effects of this rulemaking to the extent that some workers and businesses in certain states might not be affected by this rulemaking. *See supra*, n.164.

[194] These time savings are based on a 33 percent assumed reduction in the estimated familiarization time per contract for both independent contractors discussed above in section V.D.1. (reduced from 30 minutes to 20 minutes) and employers (reduced from 1 hour to 40 minutes).

increased clarity. In sum, this is estimated to be an undiscounted annualized cost savings of $682.7 million. The Department assumes the parameters used in this cost savings estimate would remain constant over time. This assumes no growth in independent contracting, no real wage growth, and no subsequent innovation in the employer-worker relationship. These assumptions facilitate simplicity of calculation.

Table 2: Cost Savings For Increased Clarity to Employers and Independent Contractors

Parameter	Value
Number of new relationships (per year): Independent Contractors…….. Number of jobs per contractor…….	 24,791,667 1.43
New independent contractor jobs to assess using clearer analysis	35,452,083
Adjustment factor	75%
Total	**26,589,063**
Time savings per job (minutes) Employers……... Independent contractors……..	 20 10
Value of time Employers…….. Independent contractors……	 $64.97 $24.12
Total Savings Employers Independent contractors	 $575,846,417 $106,869,807
Total	**$682,743,224**

2. Reduced Litigation

This proposal, if finalized, could result in decreased litigation due to increased clarity and reduced misclassification. This proposal would clarify to stakeholders how to distinguish between employees and independent contractors. The increased clarity would result in fewer independent contractor misclassification legal disputes, and lower litigation costs. The Department welcomes feedback on how to quantify the potential reduction in litigation due to increased clarity.

3. Increased Labor Force Entry

The Department anticipates that most benefits of this proposal would arise from new labor force entry. A recent assessment of a 2019 California law (AB 5) that changed the standard for determining independent contractor classification in a manner that restricted independent contracting found that self-employment fell by 10.5 percent in affected occupations and overall employment fell by 4.4 percent in affected occupations.[195] The Department believes this proposed rule would have an effect in the opposite direction because it would be viewed as less restrictive of independent contracting than the 2024 Rule. However, this labor force effect would be smaller in magnitude because the change to California's independent contractor analysis codified under AB 5 was more substantial than the change to the Department's guidance regarding the analysis under federal wage and hour law that could occur as a consequence of this rulemaking, which would not change the underlying classification standard (i.e., the economic reality test) and would primarily add clarity. Additionally, this rulemaking would not likely impact some individuals operating in states that have more stringent independent contractor tests, though the exact offsetting impact of such state laws is difficult to determine because of significant variation in state laws' exemptions and applications.[196] Accordingly, the Department estimates that the number of independent contractors could increase by 1 to 3 percent if this proposal were finalized.

As explained above, the Department assumes this increase results from independent contractors entering the workforce. That assumption is based on Palagashvili et al.'s finding that there was no statistically significant evidence that AB 5 increased traditional employment—

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[195] Palagashvili et al., *supra* n.161. The occupations affected by the California law exclude the approximately 109 occupations for which a statutory exemption from the ABC test exists. *Id.*, Appendix Table A1.

[196] The FLSA does not preempt or "excuse noncompliance with" state laws that establish stricter standards based on the state's own law and definitions. 29 U.S.C. 218(a). In states that use an ABC test, there is significant variation in the number of occupations and/or industries that are exempt from the test. Furthermore, some states apply the test for purposes of unemployment insurance, for example, but not wage and hour law.

suggesting that few independent contractors switched to traditional employment—but that AB 5 did result in a statistically significant decrease of independent contractors in the labor force.[197] The converse effect would be an increase in independent contractors in the labor force without significant reclassification of employees to independent contractors. The Department acknowledges that, due to data limitations and complexities involving the interpretation of different state labor laws, the Department might be overestimating or underestimating the potential impact of this rulemaking on the number of independent contractors and the overall labor force. Also, Palagashvili et al. admit a lack of parallel trends for the pre-treatment period—which raises questions about the reliability of their difference-in-difference identification strategy. The Department requests public comments and data on the potential labor force impact of this rulemaking, including any alternative methods, inputs, or assumptions.

Using the above estimate of 24.8 million independent contractors, the Department's assumption results in between 248,000 and 744,000 (1 and 3 percent of all independent contractors respectively) new workers entering independent contracting, with half being full-time and half being part-time independent contractors.[198] Using the above hourly wage estimate of $24.12 for full-time independent contractor and assuming that each works full-time (40 hours per week for 52 weeks per year), the Department estimates that each new full-time worker would have the opportunity to earn $50,170 per year. Using the median wage estimate of $400 weekly

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[197] Palagashvili et al., *supra* n.161. The impact of AB 5 on affected occupations was estimated across four occupation subsamples using data on the percentage of employed workers who were self-employed by occupation: 1) Occupations in the lowest quartile of prevalence of self-employment, 2) Occupations in the second quartile of prevalence of self-employment, 3) Occupations in the third quartile of prevalence of self-employment, and 4) Occupations in the highest quartile of prevalence of self-employment.

[198] Based on the 2023 Contingent Worker Supplement (CWS), the Department's estimate of an even distribution of full-time and part-time works entering the labor force may underestimate the actual distribution of full-time Independent Contractors and the potential economic impact of new labor force participants. *See Contingent and Alternative Employment Arrangements - July 2023*, *supra* n.165. Additionally, as noted earlier, this might be an overestimate of the effects of this rulemaking to the extent that some workers and businesses in certain states might not be affected by this rulemaking. *See supra* n.164.

for part-time independent contractors and assuming they work year-round,[199] the Department estimates that each new part-time independent contractor would have the opportunity to earn $20,800 per year. Earnings is an intermediate result toward the goal of estimating worker surplus, which is a net value amount that accounts for the opportunity cost of time and effort. Bartik (2015)[200] estimates such net value to range from 8 to 32 percent of earnings. Based on this finding, we assign a midpoint value of 20 percent to total earnings to quantify the social benefit derived from increased earnings. Assuming that the number of independent contractors increases by the central estimate of 2 percent, if this proposal were finalized, this results in estimated additional undiscounted total earnings of approximately $87.79 billion. Applying the 20 percent estimate of societal value to this finding yields a societal benefit attributable to those additional earnings of $17.59 billion (for 248,000 new entries evenly split between full-time and part-time workers) over 10 years or an annualized increase of $1.76 billion at a 7 percent discount rate. Moreover, a benefit accruing to broader society, in the form of taxes collected on the additional earnings, is estimated as 17 percent of those earnings, or $1.49 billion annually.[201] The Department seeks public comment and input on the likely magnitude of new labor force entry, and the quantification of worker surplus and other societal benefits under this proposal.

Along the same lines, a substantial body of evidence demonstrates that workers derive significant benefit from flexible work arrangements. Using administrative data on Uber drivers, Chen et al. (2019) estimate that the ability to choose when to work yields more than twice the surplus that drivers would obtain in less flexible alternatives.[202] The Department, however, is not

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[199] Annual wage estimate for part-time Independent Contractors is based on the 2023 CWS estimate for the median usual weekly earnings of part-time workers ($400 per week × 52 weeks = $20,800). *See Contingent and Alternative Employment Arrangements - July 2023*, *supra* n.165.
[200] Bartik, T., "The Social Value of Job Loss and Its Effect on the Costs of U.S. Environmental Regulations," Review of Environmental Economics and Policy 9, no 2 (2015).
[201] The source for the 17 percent input is https://aspe.hhs.gov/sites/default/files/documents/639756a60fbe7e51786bcec176ad52f1/Standard-RIA-Values-2025.pdf.
[202] Chen et al., *supra* n.159, at 2769.

proposing to quantify the economic value of additional flexibility at this time (except insofar as it is embedded in the worker surplus quantification above).

4. Consumer Surplus

Qualitatively, expanded participation in independent contracting also increases service availability in sectors such as ridesharing, delivery, personal services, and creative/professional contracting. Evidence from ride-hailing markets indicates that greater supply reduces wait times and rationing, generating consumer surplus.[203] While the Department does not attempt to quantify these gains in the base case, such benefits are conceptually distinct from transfers and may be material. The Department seeks public comment on evidence of consumer surplus gains from expanded service availability that could support quantification.

5. Broader Labor Market Benefits

Additional benefits may arise from expanding labor force participation among groups that highly value flexibility (e.g., caregivers, students, older workers); **s**upporting continued labor market attachment during periods when traditional employment is infeasible; and enhancing efficiency by better aligning heterogeneous worker preferences with available work arrangements. These effects are difficult to quantify but represent genuine improvements in worker welfare and economic efficiency.

F. Potential Transfer Effects

The substantive effect of the proposed rule is not intended to favor independent contractor or employee classification relative to the status quo. However, the Department assumes in this RIA that the increased legal certainty associated with this proposed rule could lead to an increase in the number of independent contractor arrangements due to some degree of reclassification. To be sure, as explained above, Palagashvili, et al. did not find that AB 5

[203]Juan Camilo Castillo et al., *Matching and Pricing in Ride Hailing: Wild Goose Chases and How to Solve Them* (February 13, 2024), https://ssrn.com/abstract=2890666 or http://dx.doi.org/10.2139/ssrn.2890666.

resulted in a significant increase in traditional employment, suggesting that few independent contractors switched to traditional employment as a result of California's law.[204] The implication is that reclassification due to this proposed rule would likewise remain small, especially since the Department does not propose changing the underlying legal standard and merely clarifies the analysis. Nonetheless, the Department believes that some reclassification may occur where workers are functionally in business for themselves but are currently being classified as employees due to legal uncertainty that the proposed rule dispels.

Potential transfers may result from differences in employer-provided benefits, tax liabilities, and earnings between employees and independent contractors. Although employer-provided benefits could decrease, and tax liabilities could increase, independent contractors also tend to receive higher gross earnings than employees to offset tax, benefits, and other expenses, thus making much of the transfer impact intrapersonal (in other words, an individual worker may receive remuneration in a different form).[205] Overall, the Department believes the net impact on total compensation should be small in either direction.

To the extent that employers currently provide employees benefits such as health insurance, retirement contributions, and paid time off, these would likely decrease with an increase in the use of independent contractors because independent contractors generally do not

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[204] Palagashvili et al., *supra* n.161.

[205] *See generally* Stephen Fishman, *Working for Yourself: Law & Taxes for Independent Contractors, Freelancers & Consultants* (6th ed. 2006). Scholarly literature relevant to substitution among forms of remuneration includes: A. Mas and A. Pallais, "Alternative Work Arrangements," *Annual Review of Economics* 12, pp. 631-58 (2020); S.J. Hong, J.M. Bauer, K. Lee and N.F. Granados, "Drivers of Supplier Participation in Ride-Hailing Platforms," *Journal of Management Information Systems* 37(3), pp. 602-30 (2020); Hagiu and J. Wright, "The Status of Workers and Platforms in the Sharing Economy," *Journal of Economics & Management Strategy* 28(1), pp. 97-108 (2019); M.J. Bidwell and F. Briscoe, "Who Contracts? Determinants of the Decision to Work as an Independent Contractor Among Information Technology Workers," *Academy of Management Journal* 52(6), pp. 1148-68 (2009); R. Gibbons, "Incentives in Organizations," *Journal of Economic Perspectives* 12(4), pp. 115-32 (1998); B. Holmstrom and P. Milgrom, "The Firm as an Incentive System," *American Economic Review* 84(4), pp. 972-91 (1994).

receive these benefits directly (although independent contractors are able to purchase at least some of these benefits for themselves).

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 employees to independent contractors, there may be a transfer in federal tax liabilities from employers to workers (regardless of whether this affects the actual cost of these taxes to the worker).

Furthermore, in order to attract qualified workers, companies must offer competitive compensation whether they are employees or independent contractors. Therefore, in a competitive labor market, any reduction in benefits and increase in taxes is likely to be offset by higher gross earnings. An Upjohn Institute study of CWS data from 1995 to 2017 finds that independent contractors and contract workers who report being self-employed have weekly earnings of 3 percent and 8 percent more, on average, than wage and salary workers with the same observable job characteristics.[206] By contrast, some sources warn employers that classifying a worker as an independent contractor can cost between 25 and 40 percent more in hourly terms.[207] The Department believes this apparent gap reflects at least two dynamics: within a firm, when comparing truly equivalent positions, shifting an employee to independent contractor status is costly because the firm must compensate for lost benefits, payroll taxes, and other expenses. Across the broader economy, however, the Department assumes that the pool of independent contractors skews towards lower-tenure workers who perform qualitatively different tasks from employees, which can compress the measured earnings premium in survey data to only a few percentage points. Such differences in specific job tasks may not be observable in

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[206] *See* Katharine G. Abraham & Susan N. Houseman, *Contingent and Alternative Employment: Lessons From the Contingent Worker Supplement, 1995–2017*, W.E. Upjohn Inst. (2020), https://research.upjohn.org/cgi/viewcontent.cgi?article=1274&context=reports.

[207] *See* Barbara Weltman, *How Much Does an Employee Cost You?*, U.S. Small Business Administration (2019), https://www.sba.gov/blog/how-much-does-employee-cost-you.

CWS data upon which the Upjohn study relied. The Department invites comments on how best to reconcile these figures.

The Department invites further comments on its assumption that use of independent contractors will increase if the proposed rule is finalized. The Department also welcomes comments and data from companies looking to increase their use of independent contractors, specifically on whether their classifications of workers as employees would change to independent contractor status, consistent with this proposed rule and their other contractual and legal obligations, or whether they would instead hire new workers as independent contractors.

G. Alternatives Considered

The Department considered three alternatives to the proposed rule, listed below from least to most restrictive of independent contracting:[208]

(1) adoption of the common law control test, which applies in distinguishing between employees and independent contractors under various other federal laws;

(2) adoption of WHD's current enforcement policy, which is comprised of sub-regulatory guidance and provides a multifactor "economic reality" balancing test; and

(3) adoption of an "ABC" test (which a number of states have adopted).

The Department previously considered and rejected the first and third alternatives—i.e., a common law control test or an ABC test—on legal viability grounds in the 2021 Rule and 2024 Rule.[209] The Department continues to believe that legal limitations prevent the Department from adopting either of those alternatives, but has included them in this analysis to the extent that an analysis might be helpful in providing greater context on the merits of legislative proposals in Congress.[210]

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[208] OMB guidance advises that, where possible, agencies should analyze at least one "more stringent option" and one "less stringent option" to the proposed approach. OMB Circular A-4 at 16.

[209] *See* 86 FR 1238–43; 89 FR 1660–63.

[210] OMB Circular A-4 advises that agencies should "discuss the statutory requirements that affect the selection of regulatory approach. If legal constraints prevent the selection of a regulatory

1. Adopting a Common Law Control Test

The least restrictive (of independent contracting) alternative considered to the proposed rule's streamlined "economic reality" test would be to adopt a common law control test, as is generally used to determine employee or independent contractor classification questions arising under the Internal Revenue Code and various other federal laws.[211] The overarching focus of the common law control test is "the hiring party's right to control the manner and means by which [work] is accomplished," *Reid,* 490 U.S. at 751, but the Supreme Court has explained that "other factors relevant to the inquiry [include] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of 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.* at 751–52 (footnotes omitted).

Although the common law control test considers many of the same factors as those identified in the proposed rule's "economic reality" test (*e.g.,* skill, duration of the working relationship, investments in equipment and hiring helpers, *etc.*), courts generally recognize that, because of its focus on control, the common law test is more permissive of independent

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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."

[211] *See* 26 U.S.C. 3121(d)(2) (generally defining the term "employee" under the Internal Revenue Code as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee"); 42 U.S.C. 410(j)(2) (similarly defining "employee" under the Social Security Act). The Supreme Court has explained that the common law standard of employment applies by default under Federal law "unless [Congress] clearly indicates otherwise." *Darden*, 503 U.S. at 325 (holding that "a common-law test" should resolve employee/independent contractor disputes under Employee Retirement Income Security Act); *see also Reid*, 490 U.S. at 739–40, 751 (explaining that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine" and applying "principles of general common law of agency" to determine "whether … work was prepared by an employee or an independent contractor" under the Copyright Act of 1976).

contracting arrangements than the economic reality test, which more broadly examines the economic dependence of the worker. *See, e.g., Diggs* v. *Harris Hospital-Methodist, Inc.,* 847 F.2d 270, 272 n.1 (5th Cir. 1988) (observing that "[t]he 'economic realities' test is a more expansive standard for determining employee status" than the common law control test). Thus, if a common law control test determined independent contractor status under the FLSA, it is possible that some workers presently classified as employees could be reclassified as independent contractors, increasing the overall number of independent contractors and reducing the overall number of employees. The Department is unable to estimate the exact magnitude of such a reclassification effect, but believes that the vast majority of FLSA employees would remain FLSA employees under a common law control test.

Adopting a common law control test would create a simpler legal regime for regulated entities interested in receiving services from an independent contractor, thereby reducing confusion, compliance costs, and legal risk for entities interested in doing business with independent contractors. Entities would not, for example, have to understand and apply one employment classification analysis for tax purposes and a different employment classification analysis for FLSA purposes. Thus, adopting the common law control test would likely increase perpetual cost savings for regulated entities attributable to improved clarity and reduced litigation as compared to the proposed rule. It could, on the other hand, impose burdens on workers who might prefer to be employees subject to FLSA protections.

The Department notes that the Supreme Court has interpreted the "suffer or permit" language in section 3(g) of the FLSA as demanding a broader definition of employment than that which exists under the common law. *See, e.g., Darden,* 503 U.S. at 326; *Portland Terminal Co.,* 330 U.S. at 150–51. Accordingly, the Department believes it is legally constrained from adopting the common law control test unless the Supreme Court revisits its precedent or if Congress passes legislation that alters the applicable analysis under the FLSA.

2. Adopting WHD's Current Enforcement Policy

On May 1, 2025, WHD issued Field Assistance Bulletin (FAB) No. 2025-1,[212] directing WHD field staff to no longer apply the analysis from the 2024 Rule when determining employee or independent contractor status in FLSA investigations. Instead, FAB 2025-1 instructs WHD field staff to use the analysis from the July 2008 version of Fact Sheet #13, as further informed by Opinion Letter FLSA2025-2, in WHD enforcement matters. This is WHD's current enforcement policy regarding FLSA independent contractor or employee status. Opinion Letter FLSA2025-2 applies a six-factor economic reality analysis derived from the July 2008 version of Fact Sheet #13 that focuses on how the factors relate to the worker's economic dependence or independence and emphasizes the degree to which the worker could choose between work opportunities, work for others including competitors, and pursue external economic opportunities.

The Department believes that this multifactor balancing test that WHD is currently applying per FAB 2025-1 is neither materially more nor less permissive of independent contractor relationships as compared to the streamlined, core factors analysis set forth in the 2021 Rule,[213] which the Department is proposing to readopt. Both tests describe the "economic dependence" of the worker at issue as the essential inquiry of the test; both emphasize the importance of actual practice over contractual or theoretical possibilities (*i.e.,* the "economic reality" of the work arrangement); and both evaluate the same set of underlying factors, notwithstanding an emphasis and consolidation of certain factors under the streamlined test.

While Opinion Letter FLSA2025-2, for example, sought to refine each factor in a focused way, it did not expressly recognize any "core" factors and instead stated that "the appropriate weight to give to each factor depends on the facts."[214] Although it provides some additional

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[212] https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-1.pdf.
[213] *See* 86 FR 1240 (explaining that the Department's pre-2021 guidance was "neither more nor less permissive of independent contractor relationships as compared to" the 2021 Rule).
[214] *See* WHD Op. Ltr. FLSA2025-2 at 5.

instruction, WHD's current enforcement policy lacks specific guidance on how to weigh the factors when applying the multi-factor economic reality analysis and leaves stakeholders without clearer guidance to determine independent contractor or employee status under the FLSA, especially in today's modern economy. For these reasons, the Department is not proposing to adopt its current enforcement policy on independent contractor or employee status.

3. Adopting an "ABC" Test

The third and most restrictive (of independent contracting) regulatory alternative considered to the Department's proposed rule would be to adopt an "ABC" test like the ones enacted in a number of states to distinguish between employee and independent contractor status.[215] Generally, an ABC test presumes an individual is an employee unless the potential employer can satisfy all three requirements in order to classify the individual as an independent contractor. The three requirements of an ABC test typically are: (A) the individual is free from the potential employer's control or direction in performing his work, both under a contract for the performance of such work and in fact; (B) the work performed by the individual is outside the usual course of the potential employer's business; and (C) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the potential employer.[216]

On its face, an ABC test is more restrictive of independent contracting arrangements than any formulation of an "economic reality" test, including the proposed rule. Whereas no single factor necessarily disqualifies a worker from independent contractor status under an economic reality test, *each* of an ABC test's three factors may alone disqualify the worker from

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[215] *See e.g.,* Cal. Lab. Code sec. 2775(b)(1)(A)–(C) (2025); Mass. Gen. Laws ch. 149, sec. 148B(a)(1)–(3) (2025); N.J. Stat. 43:21-19(i)(6)(A)–(C) (2025); Vt. Stat. Ann. Tit. 21, sec. 341(1) (2025); *see also* Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work,* 39 N. Ill. U. L. Rev. 379, 408-11 (2019) (discussing the origins and expansion of the ABC test).

[216] Jon O. Shimabukuro, Cong. Rsch. Serv., R46765, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test* (2021).

independent contractor status. The Department believes adopting an ABC test as the FLSA's generally applicable analysis for distinguishing employees from independent contractors would be too restrictive.

In any event, the Department believes it is legally constrained from adopting an ABC test because the Supreme Court has instituted the economic reality test as the relevant standard for determining workers' classification under the FLSA as an employee or independent contractor. *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 (holding that "'economic reality' rather than 'technical concepts' is … the test of employment" under the FLSA) (citing *Silk,* 331 U.S. at 713; *Rutherford Food,* 331 U.S. at 729)).

Moreover, the Supreme Court has stated that the existence of employment relationships under the FLSA "does not depend on such isolated factors" as the three independently determinative factors in an ABC test would constitute, "but rather upon the circumstances of the whole activity." *Rutherford Food,* 331 U.S. at 730. Because an ABC test is therefore inconsistent with Supreme Court precedent interpreting the FLSA, the Department concludes it could not adopt an ABC test unless the Supreme Court revisits its precedent or if Congress passes legislation that alters the applicable analysis under the FLSA.

VI. Initial Regulatory Flexibility Act Analysis (IRFA)

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.

Accordingly, the Department examined the regulatory requirements of this NPRM, if finalized, to determine whether they would have a significant economic impact on a substantial number of small entities.

The Department believes that rescinding the 2024 Rule and replacing it with regulations that provide greater clarity and predictable outcomes would be helpful for both workers and employers. The Department believes this NPRM, if finalized, would likely improve the welfare of both workers and businesses on the whole, including those who wish to work as independent contractors.

A. Reasons Why Action by the Agency is Being Considered and Statement of Objectives and Legal Basis for the Proposed Rule

As explained more fully in section II of this notice, the Department is concerned that the 2024 Rule fails to provide an analysis for distinguishing between independent contractors and employees under the FLSA that is sufficiently clear and leads to predictable outcomes. The Department is separately concerned that the 2024 Rule's description of several economic reality factors could be viewed as setting a higher bar to find independent contractor status than the law requires. Among other harms, an analysis which is ambiguous or perceived as too restrictive of independent contracting can deter businesses from engaging with bona fide independent contractors or induce them to unnecessarily classify such individuals as employees—concerns emphasized by many self-identified independent contractors who have participated in the Department's recent rulemakings on this topic.

Accordingly, in this rulemaking, the Department is proposing to rescind the 2024 Rule and largely readopt the 2021 Rule,[217] which the Department has successfully applied in WHD investigations.[218] Additionally, the Department is proposing to revise the regulations addressing

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[217] As explained in section III, the Department proposes to readopt the 2021 Rule's FLSA guidance with a substantive edit to proposed § 795.105(b), one non-substantive edit to proposed § 795.105(d)(2)(iii), and a few small modifications to the illustrative examples in proposed § 795.115.

[218] *See supra*, n. 81.

employee or independent contractor status under MSPA and the FMLA so that the analysis in part 795 applies when determining employee or independent contractor status under those statutes too.

The Department's authority to interpret the FLSA comes with its authority to administer and enforce it. *See* 29 U.S.C. 204; *Herman v. Fabri-Centers of Am., Inc.,* 308 F.3d 580, 592–93 & n.8 (6th Cir. 2002) (noting that "[t]he Wage and Hour Division of the Department of Labor was created to administer the Act" while agreeing with the Department's interpretation of one of the FLSA's provisions); *Dufrene v. Browning-Ferris, Inc.,* 207 F.3d 264, 267 (5th Cir. 2000) ("By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret."); *Condo v. Sysco Corp.,* 1 F.3d 599, 603 (7th Cir. 1993) (same). The Department's authority to interpret the FMLA and MSPA is expressly delegated by statute. 29 U.S.C. 2654 (FMLA); 29 U.S.C. 1861 (MSPA).

B. Description of the Number of Small Entities Potentially Affected by the Proposed Rule

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.[219] The Department then applied these thresholds to the U.S. Census Bureau's 2022 Economic Census to obtain the number of establishments with employment or sales/receipts below the small business threshold in the industry.[220,221] Next, the Department estimated the number of small governments, defined as having population less than 50,000, from the 2022 Census of

[219] SBA, Summary of Size Standards by Industry Sector, 2022, https://www.sba.gov/document/support-table-size-standards.
[220] The 2022 data are the most recently available with revenue data.
[221] 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.

Governments.[222] In total, the Department estimated there are 6.4 million small establishments or governments.

C. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

As explained more fully in section V.D. of this NPRM, the only direct costs to affected entities would be rule familiarization costs. This proposed rule lays out the framework for assessing employee or independent contractor status under the FLSA. It does not create any new reporting or recordkeeping requirements for businesses.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) would review any final rule.[223] According to the OEWS, these workers had a mean wage of $39.86 per hour. Given the proposed clarification to the Department's interpretation of who is an employee and who is an independent contractor, the Department assumes that it would take on average about 1 hour to review the rule if adopted as proposed. The Department believes that an hour, on average, is appropriate, because while some establishments would spend longer than one hour to review a rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $64.97; thus, the average cost per establishment conducting regulatory familiarization would be $64.97. The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, would be $12.06, median hourly wage of independent contractors in the CWS

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[222] U.S. Census Bureau, *2022 Census of Governments*, https://www.census.gov/data/tables/2022/econ/gus/2022-governments.html.

[223] 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, BLS, *Occupational Employment and Wage Statistics Query System*, https://data.bls.gov/oes/#/industry/000000 (last updated May 2024).

($24.12) multiplied by 0.5 hour. The Department believes that 30 minutes, on average, is appropriate, because while some independent contractors would spend longer than 30 minutes to review a rule, many will spend little or no time reviewing it.

As discussed above in section V.D.3, the Department calculated cost savings for 8.3 million establishments that will experience cost savings due to increased clarity from the proposed rule. Among those establishments, 6.37 million were identified as small businesses with under 500 employees.[224] Annual payroll estimates for these small business establishments totaled $3,465 million which is approximately 39 percent of total payroll across all businesses regardless of size.[225] The Department applied this figure to the total cost savings for all employers to derive an estimated 10-year cost savings of $2,225 million for small business employers (0.39 × $5,758 million). This yields $373.59 in cost savings per small employer at a 7 percent discount rate, and an annualized cost savings of $37.24 per employer at a 7 percent discount rate. The undiscounted cost savings due to increased clarity for each independent contractor, some of whom would be a small business, is $4.31. The Department calculated this cost savings by dividing the total annualized cost savings for independent contractors ($106,869,807) by the number of independent contractors (24,791,667). Over a 10-year period the cost savings per independent contractor is $46.14 at a 7 percent discount rate, or $4.61 annualized at a 7 percent discount rate. Based on this evaluation, presented below in table 3, the Department estimates that the total 10-year cost savings for small business employers and independent contractors is $3,525 million at a 7 percent discount rate, or $352.52 million annualized at a 7 percent discount rate.

Type of Entity	Total Cost Savings with 7% Discount	Per Entity	Annualized with 7% Discount	Per Entity

[224] *See* SUSB, *supra* n.184

[225] 2022 SUSB total payroll across all establishments is $8,965,035,263. Across establishments with fewer than 500 employees the total payroll was $3,465,049,519 [8,965,035,263 × 0.3865 = $3,465,049,519].

Sm. Employers	$2,381,485,217	$373.59	$238,148,522	$37.24
Contractors	$1,143,795,834	$46.14	$114,379,583	$4.61
Combined	$3,525,281,050		$352,528,10	

Because regulatory familiarization is a one-time cost and the cost savings from clarity recur each year, the Department expects cost savings to outweigh regulatory familiarization costs in the long run. Because both costs and cost savings are minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses, the Department expects that this proposal, if finalized, would not have a significant economic impact on a substantial number of small entities.

Potential transfers may be attributed to the reclassification from employee to independent contractor due to reduced payroll taxes and benefit costs while workers assume increased tax liabilities and the loss of employer-provided benefits. The Department believes that these transfers are largely offsetting since workers are expected to receive higher gross earnings that compensate for the lost benefits and increased taxes. Small firms may benefit disproportionately since they use independent contractors more than large firms.[226] Additional transfers occur between competing small businesses, where independent contractor model firms gain advantages over traditional employers, and their service providers. Market imperfections may generate deadweight losses through incomplete wage compensation, higher costs for individually-purchased benefits, and increased tax compliance burdens. Because the overall, net impact on worker compensation is expected to be small, the Department does not expect that the proposed rule should create undue hardship for small businesses since benefits and cost savings outweigh costs.

[226] Lim et al., supra n.168, at 51.

D. Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Proposed Rule

The Department is unaware of any Federal rules which duplicate, overlap, or conflict with the proposed rule.

E. Discussion of Regulatory Alternatives

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."[227] As discussed earlier in section V.G., 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.

The Department also considered adopting WHD's current enforcement policy as a regulatory alternative. As noted in section V.G.2., since May 1, 2025, WHD has been applying the analysis from the July 2008 version of Fact Sheet #13, as further informed by Opinion Letter FLSA2025-2, in its enforcement matters.[228] The Department believes that this multifactor balancing test that WHD is currently applying per FAB 2025-1 is neither materially more nor less permissive of independent contractor relationships as compared to the streamlined, core factors analysis set forth in the 2021 Rule,[229] which the Department is proposing to readopt. However, WHD's current enforcement policy lacks specific guidance on how to weigh the factors when applying the multi-factor economic reality analysis and leaves stakeholders without clearer guidance to determine independent contractor or employee status under the FLSA, especially in today's modern economy.[230] For these reasons, the Department is not proposing to adopt its current enforcement policy on independent contractor or employee status.

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[227] 5 U.S.C. 603(c).
[228] *See* FAB No. 2025-1 (May 1, 2025).
[229] *See* 86 FR 1240.
[230] *See* WHD Op. Ltr. FLSA2025-2 at 5 (advising that "the appropriate weight to give to each factor depends on the facts").

In addition to the alternatives discussed above, section 603(c) of the RFA describes four categories of regulatory alternatives that might be appropriate for consideration in an IRFA analysis. The Department does not believe that the FLSA is best interpreted to encompass these categories of regulatory alternatives or that they are necessarily applicable to this proposal.

1. **Differing compliance or reporting requirements that take into account the resources available to small entities**

Nothing in the FLSA or the decades of court decisions interpreting it suggest that a worker's status as an employee or independent contractor should turn on the size of the entity that benefits from their labor. As described earlier, one of the primary goals of the FLSA is to curtail "unfair method[s] of competition in commerce" by establishing minimum labor standards that all covered employers must observe.[231] Providing differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance and, if this proposed rule is finalized, will prepare a small entity compliance guide, as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).[232] Therefore, the Department has not proposed differing compliance or reporting requirements for small businesses.

2. **The clarification, consolidation, or simplification of compliance and reporting requirements for small entities**

This proposed rule does not impose any new reporting requirements, and the Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

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[231] 29 U.S.C. 202(a)(3).
[232] Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121 sec. 212.

3. The use of performance rather than design standards

This proposed rule provides guidance regarding the factors that should be considered regarding a worker's employment status under the FLSA, FMLA, and MSPA, consistent with Supreme Court precedent interpreting statutory language which is common to all three laws. It is unclear whether any performance standards could appropriately determine a worker's status as an employee or independent contractor, and such an approach is foreclosed in any event by judicial precedent.

4. An exemption from coverage of the rule, or any part thereof, for such small entities

Creating an exemption from coverage of this proposed rule for businesses with as many as 500 employees, those defined as small businesses under SBA's size standards, would be inconsistent with the FLSA, which applies to all employers that satisfy the enterprise coverage threshold or employ individually covered employees, regardless of the employer's number of employees. Further, as described above, case law interpreting the distinction between employees and independent contractors under the FLSA does not support such an exemption.

The Department welcomes comments on this IRFA's analysis of regulatory alternatives.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or tribal governments in the aggregate, or on the private sector, in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately $206 million. This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

G. Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects

29 CFR Part 500

Administrative practice and procedure, Aliens, Employment, Housing, Insurance, Intergovernmental relations, Investigations, Licensing and registration, Migrant labor, Motor vehicle safety, Occupational safety and health, Penalties, Reporting and recordkeeping requirements, Wages, Whistleblowing.

29 CFR Part 795

Employment, Wages.

29 CFR Part 825

Administrative practice and procedure, Airmen, Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Penalties, Pensions, Reporting and recordkeeping requirements, Teachers.

For the reasons set out in the preamble, the Department of Labor is proposing to amend 29 CFR parts 500, 795, and 825 as follows:

PART 500—MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION

1. The authority citation for part 500 continues to read as follows:

Authority: Pub. L. 97-470, 96 Stat. 2583 (29 U.S.C. 1801-1872); Secretary's Order No. 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 Note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114-74, 129 Stat 584.

2. Amend § 500.20 by revising paragraph (h)(4) to read as follows:

(4) The definition of the term *employ* may include consideration of whether or not an *independent contractor* or *employment* relationship exists under the Fair Labor Standards Act. Under MSPA, questions will arise whether or not a farm labor contractor engaged by an agricultural employer/association is a bona fide independent contractor or an employee. Questions also arise whether or not the worker is a bona fide independent contractor or an employee of the farm labor contractor and/or the agricultural employer/association. These questions should be resolved in accordance with the criteria set forth in §§ 795.105 through 795.110 of this chapter. If it is determined that the farm labor contractor is an *employee* of the agricultural employer/association, the agricultural workers in the farm labor contractor's crew who perform work for the agricultural employer/association are deemed to be employees of the agricultural employer/association and an inquiry into joint employment is not necessary or appropriate. 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.

PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT

3. The authority citation for part 795 continues to read as follows:

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

4. Revise part 795 to read as follows:

§ 795.100 Introductory statement.

This part contains the Department of Labor's general interpretations of the text governing individuals' classification as employees or independent contractors under the Fair Labor Standards Act (FLSA or Act). *See* 29 U.S.C. 201–19. The Administrator of the Wage and Hour Division will use these interpretations to guide the performance of his or her duties under the

Act, and intends the interpretations to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the Act. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. The interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, notwithstanding that after any such act or omission in the course of such reliance, any such interpretation in this part "is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." 29 U.S.C. 259.

§ 795.105 Determining employee and independent contractor classification under the FLSA.

(a) *Independent contractors are not employees under the Act*. An individual who renders services to a potential employer—i.e., a putative employer or alleged employer—as an independent contractor is not that potential employer's employee under the Act. As such, sections 6, 7, and 11 of the Act, which impose obligations on employers regarding their employees, are inapplicable. Accordingly, the Act does not require a potential employer to pay an independent contractor either the minimum wage or overtime pay under sections 6 or 7. Nor does section 11 of the Act require a potential employer to keep records regarding an independent contractor's activities.

(b) *Economic dependence as the ultimate inquiry*. An "employee" under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. 29 U.S.C. 203(e)(1), (g). An employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). An individual is an independent contractor, as distinguished from an "employee" under the Act, if the individual is, as a matter of economic reality, in business for

him- or herself. Though both employees and independent contractors are dependent on others in some sense, economic dependence in this context means the dependence that a typical employee has on an employer for work, as opposed to an individual who has more of the nature and character of a business owner who has a separate business. Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income.

(c) *Determining economic dependence*. The economic reality factors in paragraph (d) of this section guide the determination of whether the relationship between an individual and a potential employer is one of economic dependence and therefore whether an individual is properly classified as an employee or independent contractor. These factors are not exhaustive, and no single factor is dispositive. However, the two core factors listed in paragraph (d)(1) of this section are the most probative as to whether or not an individual is an economically dependent "employee," 29 U.S.C. 203(e)(1), and each therefore typically carries greater weight in the analysis than any other factor. Given these two core factors' greater probative value, if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification. This is because other factors are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.

(d) *Economic reality factors*—(1) *Core factors*—(i) *The nature and degree of control over the work*. This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors. In contrast, this factor weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by

controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential employer. Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.

(ii) *The individual's opportunity for profit or loss*. This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work. While the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor. This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster.

(2) *Other factors*—(i) *The amount of skill required for the work*. This factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide. This factor weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job.

(ii) *The degree of permanence of the working relationship between the individual and the potential employer*. This factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may

include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.

(iii) *Whether the work is part of an integrated unit of production*. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

(iv) *Additional factors*. Additional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA, but only if the factors in some way indicate whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.

§ 795.110 Primacy of actual practice.

In evaluating the individual's economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible. For example, an individual's theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, the individual is prevented from exercising such rights. Likewise, a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority.

§ 795.115 Examples of analyzing economic reality factors.

(a) The following illustrative examples demonstrate how the factors listed in § 795.105(d) may be analyzed under the facts presented and are limited to substantially similar factual situations.

(b)(1)(i) *Example*. An individual is the owner and operator of a tractor-trailer and performs transportation services for a logistics company. The owner-operator substantially controls the key aspects of the work. However, the logistics company requires the owner-operator to comply with federally-mandated transportation safety rules requiring drug and alcohol testing. The company also requires the owner-operator to meet certain contractually agreed-upon delivery deadlines, and her contract includes agreed-upon incentives for meeting, and penalties for missing, the deadlines.

(ii) *Application*. The owner-operator exercises substantial control over key aspects of her work, indicating independent contractor status. The fact that the company requires the owner-operator to complete certain drug and alcohol testing does not change the above conclusion. This measure is implemented in order to comply with specific legal obligations and to ensure safety, and thus under § 795.105(d)(1)(i) would not constitute control that makes the owner-operator more or less likely to be an employee under the Act. The contractually agreed-upon delivery deadlines, incentives, and penalties are typical of contractual relationships between businesses and likewise would not constitute control that makes the owner-operator more or less likely to be an employee under the Act.

(2)(i) *Example*. An individual accepts assignments from a company that provides an app-based service linking those who need home-repair work with those who perform home-repair work. The individual is able to meaningful increase his earnings by exercising initiative and business acumen and by investing in his own equipment. The company, however, has invested millions of dollars in developing and maintaining the app, marketing itself, maintaining the security of information submitted by actual and prospective customers and workers, and monitoring customer satisfaction with the work performed.

(ii) *Application*. The opportunity for profit or loss factor favors independent contractor status for the individual, despite the substantial difference in the monetary value of the investments made by each party. While the company may have invested substantially more in its

business, the value of that investment is not relevant in determining whether the individual has a meaningful opportunity for profit or loss through his initiative, investment, or both.

(3)(i) *Example*. An individual worker works full time performing home renovation and repair services for a residential construction company. She is also the part owner of a food truck, which she operates on weekends. In performing the construction work, the worker is paid a fixed hourly rate, and the company determines how many and which tasks she performs. Her food truck recently became very popular and has generated substantial profits for her.

(ii) *Application*. With regard to the construction work, the worker does not have a meaningful opportunity for profit or loss based on her exercise of initiative or investment, indicating employee status. She is unable to profit, i.e., increase her earnings, by exercising initiative or managing investments because she is paid a fixed hourly rate and the company determines the assignment of work. While she earns substantial profits through her food truck, that is a separate business from her work in the construction industry, and therefore is not relevant to the question of whether she is an employee of the construction company or in business for herself in the construction industry.

(4)(i) *Example*. An individual worker works for a commercial construction company and is assigned to the crew that installs roofs on buildings. The company required no roofing skills when he started working for it, and he had no roofing skills when he started. Over his time working for the company, the individual has developed skills through on-the-job experience and training provided by the company.

(ii) *Application*. The work performed by this individual requires no specialized training or skill, and the individual relies on the construction company to provide any training necessary to perform the work. Accordingly, the skill factor weighs in favor of the individual being an employee. The fact that the individual has developed skills over his time at the company does not change that outcome because those skills resulted from on-the-job experience and training provided by the company.

(5)(i) *Example*. An individual performs roofing work for a commercial construction company. He has specialized training in roofing and relies on his own skills to perform the work. The construction company provides him with no training and hired him based on his roofing skills and expertise. The individual touted his roofing skills when securing roofing work from the company and similarly relies on those skills when seeking work from other companies.

(ii) *Application*. This individual brings his own skills to the work and does not rely on the construction company to provide training. Accordingly, the skill factor weighs in favor of the individual being an independent contractor. The fact that the individual used his specialized skills to secure the work would not be considered under this factor, although it could be indicative of initiative to consider under the opportunity for profit or loss factor.

(6)(i) *Example*. A housekeeper works for a ski resort every winter. At the end of each winter, he stops working for the ski resort because the resort shuts down. At the beginning of each of the past several winters, the housekeeper returned to his prior position at the ski resort without formally applying or interviewing.

(ii) *Application*. The housekeeper has a long-term and indefinite work relationship with the ski resort under the permanence factor, which weighs in favor of classification as an employee. That his periods of working for the ski resort end at the end of each winter is a result of the seasonal nature of the ski industry and is thus not indicative of a sporadic relationship. The fact that the housekeeper returns to his prior position each new season indicates that his relationship with ski resort does not end and is indefinite as a matter of economic reality.

(7)(i) *Example*. An editor works part-time for a newspaper. The editor works from home and is responsible for assigning and reviewing many articles published by the newspaper. Sometimes she also writes or revises articles. The editor is responsible for determining the layout and order in which all articles appear in the newspaper's print and online editions. She makes assignment and layout decisions in coordination with several full-time editors who make similar

decisions with respect to different articles in the same publication and who are employees of the newspaper.

(ii) *Application*. The editor is part of an integrated unit of production of the newspaper because she is involved in the entire production process of the newspaper, including assigning, reviewing, drafting, and laying out articles. This factor points in the direction of her being an employee of the newspaper. This conclusion is further supported by the fact that the editor performs the same work as employees of the newspaper in coordination with those employees. The fact that she does not physically work at the newspaper's office does not outweigh these more probative considerations of the integrated unit factor.

(8)(i) *Example*. A journalist writes articles for a newspaper on a freelance basis. The journalist does not have an office and generally works from home. He submits an article to the newspaper once every 2 to 3 weeks, which the newspaper may accept or reject. The journalist sometimes corresponds with the newspaper's editor regarding what to write about or regarding revisions to the articles that he submits, but he does not otherwise communicate or work with any of the newspaper's employees. The journalist never assigns articles to others nor does he review or revise articles that others submit. He is not responsible for determining where his article or any other articles appear in the newspaper's print and online editions.

(ii) *Application*. The journalist is not part of an integrated unit of production of the newspaper, indicating independent contractor status. His work is limited to the specific articles that he submits and is completely segregated from other parts of the newspaper's processes that serve its specific, unified purpose of producing newspapers. It is not relevant in analyzing this factor that the writing of articles is an important part of producing newspapers. Likewise, the fact that he works at home does not strongly indicate either status, because the nature of the journalist's work is such that the physical location where it is performed is largely irrelevant.

§ 795.120 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

5. The authority citation for part 825 continues to read as follows:

Authority: 29 U.S.C. 2654; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); and Pub. L. 114-74 at sec. 701.

6. Amend § 825.102 by revising paragraph (1) of the definition of "Employee" to read as follows:

The term *employee* means any individual employed by an employer, and the criteria set forth in §§ 795.105 through 795.110 of this chapter apply to any determination of whether an individual is an employee or independent contractor;

7. Amend § 825.105 by revising paragraph (a) to read as follows:

(a) The definition of employ for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g), 29 U.S.C. 203(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term "employ" as defined in the Act includes "to suffer or permit to work." The courts have indicated that, while "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on isolated factors or upon a single characteristic or technical concepts, but

depends “upon the circumstances of the whole activity” including the underlying “economic reality.” In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who “follows the usual path of an employee” and is dependent on the business which he/she serves. The criteria set forth in §§ 795.105 through 795.110 of this chapter apply to any determination of whether an individual is an employee or independent contractor.

Dated: February 25, 2026.

Andrew B. Rogers,

Administrator, Wage and Hour Division.

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