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[4510-27-P]

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: Final rule.

SUMMARY: This final rule rescinds the analysis for determining employee or independent contractor status under the Fair Labor Standards Act (FLSA or Act) set forth in the Department of Labor's (Department) regulations and replaces it with an analysis similar to what it published in a final rule promulgated in 2021, with several modifications and enhancements. In addition, this final rule amends provisions in the Department's regulations implementing the Family and Medical Leave Act (FMLA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to provide that employee or independent contractor status under those laws should be determined using the Department's FLSA analysis, as the FMLA and MSPA both incorporate the FLSA's scope of employment.

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

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

This final rule sets forth the analysis that the Department will apply to determine whether a worker is properly classified as an employee or independent contractor under the FLSA, FMLA, and MSPA, as the various requirements and worker protections established by these laws apply only to employees. None of these laws defines the term "independent contractor." However, the FMLA and MSPA both incorporate the FLSA's statutory definitions governing employment, suggesting that the analysis applied under the FLSA to determine whether an employment relationship exists should likewise determine whether an employment relationship exists under the FMLA and MSPA.

In relevant part, the FLSA defines the term "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee,"[1] "employee" as "any individual employed by an employer,"[2] and "employ" as "includ[ing] to suffer or permit to work."[3] Courts and the Department have long interpreted the phrase "suffer or permit" as requiring a multifactor test to analyze whether a worker is an employee or an independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker depends on a particular individual, business, or organization for work (and is thus an

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[1] 29 U.S.C. 203(d).
[2] *Id*. at 203(e) (subject to certain exceptions).
[3] *Id*. at 203(g).

employee) or is in business for him- or herself (and is thus an independent contractor). The supporting analysis for answering this question, that is determining employee or independent contractor status under the FLSA, is commonly known as the economic reality test.

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 businesses in any industry to aid the proper classification of employees and independent contractors under the FLSA.[4] While reaffirming the overarching concepts of economic reality and economic dependence, the 2021 Rule set forth a sharpened economic reality test with five distinct factors, instead of the six used by most courts. The 2021 Rule designated two of the five identified factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—as "core factors," which are the most probative and carry greater weight in the analysis.[5] The 2021 Rule stated that if these two core factors point towards the same status (i.e., employee or independent contractor), there is a substantial likelihood that the indicated outcome is the worker's accurate status.[6] The 2021 Rule also identified three less probative non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer, and whether the work is part of an integrated unit of production.[7] The 2021 Rule stated that it is "highly unlikely" that these three non-core factors could outweigh the combined probative value of the two core factors.[8] In addition to providing guidance for each of the five factors, the 2021 Rule advised as a general matter that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible. Finally, the 2021 Rule provided six fact-specific examples applying the rule's factors.[9] The Department explained that

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[4] *See* Dep't of Labor, Independent Contractor Status Under the Fair Labor Standards Act, Final Rule, 86 FR 1168 (Jan. 7, 2021).
[5] *See id*. at 1196–1203.
[6] *Id.* at 1246 (§ 795.105(c)).
[7] *Id.* at 1247 (§ 795.105(d)(2)).
[8] *Id.* at 1246 (§ 795.105(c)).
[9] *Id.* at 1247–48 (§ 795.110).

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 early 2021, the Department engaged in a pair of rulemakings to delay the effective date of and subsequently withdraw the 2021 Rule before it took effect.[10] On March 14, 2022, in response to a legal challenge against the Department alleging that the Delay Rule and Withdrawal Rule violated the Administrative Procedure Act, a district court in the Eastern District of Texas issued a decision vacating the Delay and Withdrawal Rules, concluding that the 2021 Rule "became effective as of March 8, 2021, the rule's original effective date, and remains in effect."[11] WHD applied the 2021 Rule in its enforcement actions for the next 2 years.

Following publication of a Notice of Proposed Rulemaking in October 2022, on January 10, 2024, the Department published a new final rule (2024 Rule) which rescinded the 2021 Rule and replaced it with a new analysis at 29 CFR part 795.[12] While sharing some features with the 2021 Rule, the 2024 Rule set forth a six-factor economic reality test where "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."[13] Explanatory guidance provided for several of the factors differed from the 2021 Rule in ways that made the analysis less likely to indicate independent contractor status.[14] And unlike the 2021 Rule, the 2024 Rule's regulatory text did not include any illustrative examples or address the relevance of parties' actual practice as compared to what may be contractually or theoretically possible (examples were included in

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[10] *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) (Delay Rule); Dep't of Labor, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 FR 24303 (May 6, 2021) (Withdrawal Rule).
[11] *Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-00130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).
[12] *See* Dep't of Labor, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, Proposed Rule, 87 FR 62218 (Oct. 13, 2022); Final Rule, 89 FR 1638 (Jan. 10, 2024).
[13] 29 CFR 795.110(a)(2) (2024).
[14] *See* 91 FR 9941–42.

the 2024 Rule's preamble). The 2024 Rule took effect on March 11, 2024. Five lawsuits were filed challenging the legality of the 2024 Rule; four of these lawsuits remain pending, though proceedings have been stayed by the presiding courts. On May 1, 2025, the Department issued a field assistance bulletin announcing that WHD would no longer apply the 2024 Rule's analysis in its enforcement actions.[15]

On February 27, 2026, the Department published a Notice of Proposed Rulemaking (NPRM) proposing to rescind the 2024 Rule and replace it with an analysis similar to the 2021 Rule.[16] The Department explained in the NPRM that, upon further consideration, the Department has concerns that the 2024 Rule failed to distill longstanding judicial precedent into an analysis for workers and employers properly to distinguish between independent contractors and employees under the FLSA that is both sufficiently clear to apply and results in legally reliable and predictable outcomes. The NPRM stated that the Department is separately concerned that the 2024 Rule's amorphous description of several economic reality factors could be viewed as so vague and expansive that it operates to set a higher bar to find independent contractor status than required by law. Among other harms, an analysis which is overly nebulous can improperly deter businesses from engaging with bona fide independent contractors or cause them unnecessarily to classify such individuals as employees—concerns emphasized by many self-identified independent contractors who participated in the Department's recent rulemakings on this topic.

The Department invited comments on its proposal and received approximately 16,500 timely comments after a 60-day comment period which ended on April 28, 2026. While the Department received many unique comments, the Department also received 14,244 similar "campaign" comment submissions (86.3 percent) in response to seven different organized

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[15] *See* WHD Field Assistance Bulletin (FAB) No. 2025-1, FLSA Independent Contractor Misclassification Enforcement Guidance (May 1, 2025), https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-1.pdf.

[16] *See* Dep't of Labor, Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, NPRM, 91 FR 9932.

initiatives—all of which expressed support for the rulemaking. After considering the feedback from commenters, the Department is finalizing its proposed rule with a few modifications and enhancements.

For the reasons initially explained in the NPRM and further detailed in section III, the Department concludes that it is appropriate to rescind the 2024 Rule and, to a significant degree, return to the 2021 Rule. Accordingly, the Department is finalizing at 29 CFR part 795 the proposed analysis for determining employee or independent contractor status under the FLSA, but has made several changes in response to commenter feedback. Specifically, the Department is revising some of the illustrative examples in proposed § 795.115 and adopting six additional examples to demonstrate how particular factors from the readopted analysis properly apply in factual scenarios involving digital platform workers, farm labor contractors, and truck drivers. These changes to the proposed rule are explained in greater detail below. Additionally, the Department is finalizing its proposal to amend its 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.

The Department believes that this rule is likely to improve the welfare of workers, businesses, and other interested parties. With a clearer test drawn and distilled from federal case law to distinguish between employees and independent contractors, businesses may more confidently engage with independent contractors, which could increase opportunities for individuals who wish to work—whether primarily or in addition to other employment—as independent entrepreneurs. Consumers and the public, in general, will benefit from the rule's clarification that certain requirements in work arrangements regarding compliance with specific legal obligations, health and safety standards, and quality control measures do not constitute control that makes an individual more or less likely to be an employee. At the same time, this final rule provides a robust standard to guard against the misclassification of employees as independent contractors, including added clarity about the factors and common business

practices that are most likely to establish that a worker is an employee because they are economically dependent on an employer for work. Relatedly, the Department expects that this rule will lead to fewer misclassification disputes and more consistent outcomes when such disputes are investigated or adjudicated, as a clearer economic reality test will be easier for all to understand and apply. In this way, the rule will be a valuable resource not only for employers and workers, but also for courts and the Department's enforcement personnel, who often evaluate classification decisions in matters that cross judicial districts and circuits.

The Department emphasizes that it remains committed to preventing the misclassification of employees as independent contractors. Such misclassification undermines the FLSA, FMLA, and MSPA by depriving employees of the protections established by those laws. It also cheats competing businesses that comply with those laws, ultimately harming consumers.[17] However, it is well established that these laws do not cover every work arrangement and were not intended to deter legitimate contracting. Upon reflection, the Department believes that returning to the analysis previously adopted in the 2021 Rule will strike a better balance by promoting the interests of employees and independent contractors alike.

II. Background

A. Relevant FLSA, FMLA, and MSPA Definitions

Enacted in 1938, the FLSA requires covered employers to pay their nonexempt employees at least the federal minimum wage for every hour worked and overtime pay for every hour worked over 40 in a workweek, and it mandates that employers keep certain records regarding their employees.[18] Among other protections, the Act regulates the employment of minors,[19] governs the work and wages of tipped employees,[20] requires employers to provide reasonable break time and a place for covered employees who are nursing to express breast milk

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[17] *See* 29 U.S.C. 202(a)(3).
[18] *See* 29 U.S.C. 206(a) (minimum wage requirement); 207(a) (overtime pay requirement); 29 U.S.C. 211(c) (recordkeeping requirements).
[19] 29 U.S.C. 212.
[20] 29 U.S.C. 203(m)(2); 203(t).

at work,[21] and prohibits retaliation for protected activity.[22] The FLSA's many protections apply only to employees.

Although the Act's definitions do not include the term "independent contractor," it 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."[23] The Supreme Court has recognized that "no definition … solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947).

The Supreme Court has interpreted the phrase "suffer or permit" broadly, extending the phrase to encompass more than the common law standard of employment. 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."[24] 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."

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[21] *See* 29 U.S.C. 218d (added by the PUMP for Nursing Mothers Act, Pub. L. No. 117-328, 136 Stat. 4459 (Dec. 29, 2022)).
[22] *See* 29 U.S.C. 215(a)(3).
[23] 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).
[24] 503 U.S. 318, 326 (1992); *see also United States 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).

Rutherford Food, 331 U.S. at 729. Accordingly, federal courts of appeals have long and uniformly held, and the Department has consistently maintained, that independent contractors are not "employees" for purposes of the Act.[25]

Enacted in 1983, MSPA protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures and recordkeeping.[26] 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.[27] MSPA also requires farm labor contractors to register with the Department and obtain a certificate of registration.[28] It is a 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.[29] Because MSPA's worker protections apply only to migrant and seasonal agricultural workers who are "*employed* in agricultural *employment* of a seasonal or other temporary nature,"[30] they do not apply to agricultural workers who are independent contractors. 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.[31]

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

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[25] *See, e.g.*, *Saleem v. Corp. 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).
[26] *See generally* 29 U.S.C. 1801, *et seq*.
[27] *See* 29 U.S.C. 1821–1823, 1831–1832, 1841–1844.
[28] *See* 29 U.S.C. 1811–1815.
[29] 29 U.S.C. 1855(a).
[30] 29 U.S.C. 1802(8), (10) (emphases added).
[31] 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under [the FLSA, 29 U.S.C. 203(g)].").

leave.[32] 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.[33] An employer cannot interfere with, restrain, or deny an employee's exercise of or attempt to exercise any rights under the FMLA.[34] As with the FLSA and MSPA, the FMLA's protections and employer requirements do not apply to workers who are independent contractors. 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.[35]

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 employees and independent contractors that is still used today in FLSA cases. 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]

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[32] *See* 29 U.S.C. 2611–2614.
[33] *See* 29 U.S.C. 2614.
[34] *See* 29 U.S.C. 2615.
[35] 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).

Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the [NLRA]."[36]

On June 16, 1947, a 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 a worker's employment status. *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 supervision and the workers' lack of opportunity for profit based on initiative and investment.[37] 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.[38]

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

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[36] *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).
[37] *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").
[38] *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.").

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*.[39] The Court also considered whether the work was "a part of the integrated unit of production" (meaning whether the putative independent contractors were integrated into the assembly line alongside the company's employees) to assess whether they were employees or independent contractors under the FLSA. *Id.* at 729–30.

In November 1947, nearly half a year after *Silk* and *Rutherford Food* were decided, the Department of the 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.[40]

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

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[39] 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*.

[40] *See* 12 FR 7966.

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."[41]

Congress rejected the interpretations of the definitions of "employee" adopted in *Hearst* for the NLRA and in *Silk* and *Bartels* for the SSA by amending both acts "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 test of employment" under the FLSA.[42] 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.[43] 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.[44]

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

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[41] *Id*. The Treasury proposal was never finalized because Congress amended the SSA to foreclose the proposal.
[42] 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).
[43] *Id.* at 32.
[44] 503 U.S. at 326 (citing *Rutherford Food*, 331 U.S. at 728).

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, 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."[45] 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."[46]

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."[47] 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

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[45] WHD Op. Ltr. (June 23, 1949).
[46] *Id*.
[47] *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).

serves."[48] 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.[49] 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."[50] To "aid in assessing the total situation," the regulation then identified a partial list of "characteristics of the two classifications which should be considered," including "the extent to which the services rendered are an integral part of the principal's business; the permanency of the relationship; the opportunities for profit or loss; the initiative, judgment or foresight exercised by the one who performs the services; the amount of investment; and the degree of control which the principal has in the situation."[51]

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.[52] 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.[53] Both provisions—29 CFR 780.330(b) and 788.16(a)—remained unchanged until 2021.

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[48] WHD Op. Ltr. (Sept. 30, 1964).
[49] 27 FR 8032; *see* 29 U.S.C. 213(b)(28) (previously codified at 29 U.S.C. 213(a)(15)).
[50] 27 FR 8033 (29 CFR 788.16(a)).
[51] *Id*.
[52] *See* 37 FR 12084, 12102 (introducing 29 CFR 780.330(b)).
[53] *Id*.

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).[54] Courts have also explained that a non-exhaustive set of factors—derived from *Silk* and *Rutherford Food*—frame 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

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[54] *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).

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.[55] First, the "skill required" factor identified in *Silk*, 331 U.S. at 716, is now articulated more expansively by some courts to include "initiative." *See, e.g.*, *Parrish*, 917 F.3d at 379 (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

[55] *See* 85 FR 60603–04.

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 St. Ent., 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." *Cornerstone Am.*, 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.[56] The regulation 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.[57] The regulation further explains that determining employee status "depends 'upon the circumstances of the whole activity' including the underlying 'economic reality.'"[58] 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 or she] serves."[59] 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."

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.[60] The regulation explains that "[t]he definition of the term *employ* may include consideration of whether … an *independent contractor* or *employment* relationship exists under the Fair Labor Standards Act."[61] The regulation advises that in determining if the

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[56] *See* 60 FR 2240.
[57] 29 CFR 825.105(a); *see also* 29 U.S.C. 2611(3).
[58] 29 CFR 825.105(a).
[59] *Id*.
[60] *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]").
[61] 29 CFR 500.20(h)(4).

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.[62] 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."[63] This description of six economic reality factors is very similar to the earlier description of the six-factor 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).

Also in 1997, WHD issued Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)."[64] 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.

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[62] *Id*.
[63] *Id*.
[64] *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 (available at https://www.dol.gov/sites/dolgov/files/WHD/fact-sheets/whdfs13.pdf).

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).[65] 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 reality 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),[66] 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 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

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

[66] 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.

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

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 depends on his employer for work.[67] Specifically, it organized and distilled the longstanding legal analysis and factors in a practical and accessible way, so that workers and businesses could properly apply them, thereby accurately classifying workers in any industry as employees or independent contractors under the FLSA.

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."[68] 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."[69] 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."[70] Similarly, the Department explained that other factors are "less probative and, in some cases,

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[67] 86 FR 1246 (§ 795.105(b)).
[68] 86 FR 1246 (§ 795.105(c)).
[69] *Id*.
[70] *Id*.

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."[71] Ultimately, the Department aimed to combine longstanding judicial frameworks in a practical package—one that could be reliably applied in workplaces across the nation and, therefore, promote certainty for stakeholders, reduce litigation, and encourage economic innovation.

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."[72] The Department identified three other factors to be considered with the two core factors and provided guidance on each: the amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production.[73] 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.[74] 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."[75] The Department also provided six "illustrative examples" of how the factors may be applied in certain factual situations.[76] And, the Department

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[71] *Id*.
[72] 86 FR 1246–47 (§ 795.105(d)(1)(i)–(ii)).
[73] 86 FR 1247 (§ 795.105(d)(2)(i)–(iii)).
[74] 86 FR 1247 (§ 795.105(d)(2)(iv)).
[75] 86 FR 1247 (§ 795.110).
[76] 86 FR 1247–48 (§ 795.115).

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.[77]

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.[78]

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).[79] The Department recognized in the 2021 Rule that "MSPA adopts by reference the FLSA's definition of 'employ,' *see* 29 U.S.C. 1802(5), and that 29 CFR 500.20(h)(4) considers 'whether or not an independent contractor or employment relationship exists under the Fair Labor Standards Act' to interpret independent contractor status under MSPA."[80] 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."[81] 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."[82] 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."[83]

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[77] 86 FR 1248 (§ 795.120).
[78] 86 FR 1246.
[79] 86 FR 1177.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*.

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.[84] The Delay Rule stated that it took effect immediately upon its publication in the *Federal Register*.[85] On May 6, 2021, the Department published a final rule withdrawing the 2021 Rule (Withdrawal Rule).[86] The Withdrawal Rule stated that it took effect immediately upon its publication in the *Federal Register*.[87]

On March 14, 2022, in a lawsuit challenging the Department's Delay and Withdrawal Rules under the Administrative Procedure Act (APA), a district court in the Eastern District of Texas issued a decision vacating the Department's Delay and Withdrawal Rules. *See Coalition for Workforce Innovation v. Walsh*, No. 1:21–CV–130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022). 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,[88] 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.

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[84] *See* 86 FR 12535.
[85] *See id.* at 12537.
[86] *See* 86 FR 24303.
[87] *See id.* at 24320.
[88] 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.

The Department appealed the district court's decision in 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 the 2024 Rule, which rescinded the 2021 Rule and replaced it by adopting a modified analysis for determining employee or independent contractor classification under the FLSA in 29 CFR part 795.[89] Like the 2021 Rule, the 2024 Rule advised 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."[90] The 2024 Rule identified 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.[91] The 2024 Rule did 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."[92] The 2024 Rule noted that the six factors "are not exhaustive" and "[a]dditional

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[89] *See* 89 FR 1638.
[90] 29 CFR 795.105(b) (2024).
[91] 29 CFR 795.110(a)(1), (b)(1)–(6) (2024).
[92] 29 CFR 795.110(a)(2) (2024).

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."[93] The 2024 Rule commented 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."[94]

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 795 that the 2021 Rule had added.[95] Also, like the 2021 Rule, the Department included a severability provision in the 2024 Rule.[96]

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."[97] 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."[98]

Unlike the 2021 Rule, the 2024 Rule's regulatory text did 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

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[93] 29 CFR 795.110(a)(2), (b)(7) (2024).
[94] 29 CFR 795.110(a)(1) (2024).
[95] *See* 89 FR 1741.
[96] *See* 29 CFR 795.115 (2024).
[97] 89 FR 1664.
[98] *Id*.

Department provided examples of how to apply each economic reality factor and addressed the actual practice issue in the 2024 Rule's preamble.[99]

The 2024 Rule took effect on March 11, 2024.

F. Litigation Challenging the 2024 Rule

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

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 did 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 stayed the appeal until it was dismissed by stipulation of the parties in March 2026.

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 did not have standing to do so and also rejecting its various arguments that the 2024 Rule was unlawful. *See*

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[99] *See* 89 FR 1718–22 (discussing the relevance of actual practice); *see also id.* at 1722–24 (discussing commenter feedback on illustrative examples provided in the preamble of the Department's 2022 NPRM).

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 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 did 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 was 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 was 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 was 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) 2025-1, "FLSA Independent Contractor Misclassification Enforcement Guidance" (FAB 2025-1).[100] FAB 2025-1 provided enforcement guidance in FLSA cases and explained that the Department had taken the position in the lawsuits challenging the 2024 Rule that it was reconsidering the rule, including whether to rescind it. This FAB added that "WHD is currently reviewing and developing the appropriate standard for determining FLSA employee versus independent contractor status," and advised Division 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

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

no payment has been made, directly to individuals or to DOL, for back wages [or] civil money penalties as of May 1, 2025." FAB 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."

G. The 2026 NPRM

On February 27, 2026, the Department published an NPRM proposing to rescind the 2024 Rule's analysis of employee or independent contractor status under the FLSA set forth in 29 CFR part 795 and to replace it with a version of the analysis similar to that which it published in the 2021 Rule.[101] Moreover, unlike either the 2021 or 2024 Rules, the NPRM proposed to revise the Department's regulations addressing employee or independent contractor status under the FMLA and MSPA so that the FLSA analysis in part 795 would apply when determining employee or independent contractor status under the FMLA and MSPA as well. The Department added that its proposed rescission of the 2024 Rule would operate independently of any regulatory guidance adopted in its place, as the Department intended for its proposed rescission of the 2024 Rule to be independent and severable from its proposal to readopt guidance from the 2021 Rule.

In the NPRM, the Department expressed concern that the 2024 Rule failed to provide an analysis for distinguishing between independent contractors and employees under the FLSA that was sufficiently clear and led to predictable outcomes. The Department expressed a separate concern 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 longstanding judicial precedent, and that an analysis which is ambiguous or perceived as too restrictive of independent contracting could deter businesses from engaging with bona fide independent

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[101] The NPRM specifically proposed 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. *See* 91 FR 9961.

contractors. The Department explained that replacing the 2024 Rule with a modified and updated analysis from the 2021 Rule would avoid this outcome and facilitate the more accurate and reliable 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.[102]

H. Commenter Feedback

The Department received approximately 16,500 comments during the NPRM's 60-day comment period.[103] These came from a diverse array of stakeholders, including workers, self-identified independent contractors, businesses, trade associations, labor unions, advocacy groups, law firms, policy experts, members of Congress, and various officials from state and local governments. Of the approximately 16,500 comments submitted, 14,244 (86.3 percent) were either identical or constituted highly similar submissions grouped in seven different comment campaigns—all of which expressed support for the proposal. The Department did not identify any comment campaigns expressing opposition to the proposal.

Apart from the supportive campaign comments, commenter feedback on the proposed rule generally split into three groups. In one camp, numerous businesses, business advocacy groups, management-side law firms, self-identified independent contractors, and some elected officials expressed strong support for the NPRM, asserting that it would better facilitate legitimate independent contracting arrangements by increasing clarity and reducing legal risk as compared to the 2024 Rule. Among this group of commenters, many requested modifications or additions to the proposed analysis, including additional "safe harbor" provisions for certain business practices or illustrative examples specific to particular industries or occupations.

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[102] *See* 91 FR 9939.

[103] As in the 2021 and 2024 Rules, the Department has provided a round estimate of the total number of comments received due to a small number of duplicate comments submitted in each rulemaking. *See* 89 FR 1639; *see also* 86 FR 1171.

By contrast, many labor unions, worker advocacy groups, plaintiff-side law firms, some individual workers, and other elected officials expressed strong opposition to the NPRM, asserting that it would increase the misclassification of employees as independent contractors and disadvantage businesses that hire workers as employees. Many of these commenters criticized specific features of the NPRM, including its identification of two core factors, its description of particular economic reality factors, and its emphasis on the actual practice of the parties over contractual abilities.

Some commenters—including several truck drivers and digital platform workers—were neutral or generally supportive of the NPRM but requested the Department to address certain business practices they believe to be coercive or exploitative.[104] As one anonymous commenter wrote: "My goal is not to be reclassified as an employee. My goal is to preserve legitimate independent contracting while ensuring that companies cannot exert hidden or algorithmic control over workers while still claiming we are independent." *See also, e.g.*, Digital Platform Worker ("[W]hile the flexibility [of independent contractor status] is real, there are areas where the system could be improved so that independent contractors, customers, and the platform itself all benefit more fairly"); Terry Bratt (truck driver who generally supported the NPRM but believed that "it doesn't go far enough" in protecting independent owner-operators from certain business practices). One group representing many independent contractors, the Owner-Operator Independent Drivers Association (OOIDA), "generally support[ed]" the NPRM, but requested that the Department "amend or clarify the NPRM to ensure that [motor] carriers cannot micromanage owner-operators through 'safety' requirements" that are not required by law and separately "protect truckers by … address[ing] lease-purchase agreements in a final rule," which OOIDA characterized as "[a] blatant example of misclassification" which resembles "indentured servitude."

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[104] Apart from addressing business practices that may be relevant in the analysis used to distinguish between employees and independent contractors under the FLSA, FMLA, and MSPA, this rulemaking cannot and does not purport to address business practices in general.

Farmworker Justice and National Center for Law and Economic Justice asserted in their comments that it was "impossible for the public to provide thoughtful and complete comments on the [NPRM] without the opportunity to fully review [the Department's proposed rule on joint employer status] [105] that was released on April 23, 2026, several days prior to the April 28th deadline for submission of comments for the [NPRM]." Northwest Workers' Justice Project (NWJP) agreed, saying that it was "a procedural error and indication of inadequate and flawed reasoning to attempt to address the rules separately" and requested additional comment time to "analyze the proposed rules together." The Department disagrees. Like the legal frameworks from which they are derived, the independent contractor and joint employer proposed rules each provide a separate legal standard and distinct reasons for adopting the respective standards. Neither the standards nor reasoning in either is dependent on or otherwise tied to the other; the public did not need to be aware of both to comment on this NPRM. Moreover, the Department afforded a 60-day period to comment on this NPRM, and nothing prevented any person from addressing joint employment in the manner suggested by these commenters. This is the Department's third major rulemaking addressing employee or independent contractor status over the past six years (excluding the Delay and Withdrawal rulemakings), so the Department believes that interested parties were well-positioned to provide informed comments on any aspect of the proposal, including implications for joint employment.

The Department appreciates the commenter feedback submitted in response to the NPRM and has carefully considered commenter views and arguments. Significant issues raised in the comments received are discussed in subsequent sections of this preamble, along with the Department's responses to those comments.[106] Comments germane to the need for this

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[105] *See* Dep't of Labor, Joint Employer Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, Notice of Proposed Rulemaking, 91 FR 21878 (Apr. 23, 2026).

[106] The Department received some comments addressing issues unrelated to this rulemaking, such as alleged fraud in the H-2B visa program. This final rule does not address or respond to commenter views on issues outside the scope of this rulemaking.

rulemaking are discussed in section III, comments about the NPRM's specific proposals are discussed in section IV, and comments about the potential costs, benefits, and other impacts of this rulemaking are discussed in sections VI and VII. All comments received may be viewed on the *http://www.regulations.gov* website, docket ID WHD-2026-0001.

III. Need for Rulemaking

As a general matter, this rulemaking achieves three objectives: (1) rescission of the 2024 Rule, which the Department ceased applying in its enforcement actions; (2) restoration of the streamlined analysis distilled from federal case law for both workers and businesses more easily and accurately to determine employee or independent contractor status under the FLSA adopted in the 2021 Rule, with a few enhancements; and (3) clarification that the analysis used to determine employee or independent contractor status under the Act also should be applied to make that determination under the FMLA and MSPA, which incorporate the FLSA's scope of employment provisions. The NPRM provided an extensive explanation of the need to achieve—and value of achieving—these objectives, highlighting:

- concerns that the 2024 Rule failed to provide an analysis for determining independent contractor and employee status under the FLSA that is sufficiently clear and amenable to application by workers and businesses, thus failing to produce predictable outcomes;
- concerns that the 2024 Rule's description of several economic reality factors could have been viewed as setting a higher bar to find independent contractor status than required under the law;
- concerns over the 2024 Rule's compatibility with the modern economy, including that the predictive accuracy of certain economic reality factors may be waning due to the evolution of work in America;
- concerns over negative effects if the 2024 Rule were left in place, including the unnecessary classification of economically independent workers as employees and

the deterrence of bona fide independent contracting and related efficiencies and innovations in the broader economy; and

- the need for uniformity and consistency in the analysis of employee or independent contractor status under the FLSA, FMLA, and MSPA.

The subheadings below summarize the NPRM's discussion of these policy concerns and respond to commenter feedback on them, as well as commenter views on other issues relevant to the need for this rulemaking. The Department's response to commenter feedback on the analysis proposed to replace the 2024 Rule appears in section IV, while the potential economic consequences of this final rule are discussed in greater detail in the regulatory impact analysis in section VI.

A. Concerns That the 2024 Rule Failed to Provide A Clear Analysis for Workers and Businesses Properly to Classify Workers As Employees or Independent Contractors

As explained in the NPRM, the Department believes that the principal flaw of the 2024 Rule was its failure to provide effective guidance on how different factors in its multifactor balancing test should be weighed or applied together. In the absence of such guidance, engaging individuals as independent contractors was both confusing and potentially posed significant legal risk, especially when different factors arguably pointed to different classification outcomes. One can frame a myriad of 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. As Judge Frank Easterbrook noted, "'[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."[107]

[107] *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).

Indeed, it was this very ambiguity that initially motivated the Department to propose regulations in 2020 for analyzing employee or independent contractor status under the FLSA. In that rulemaking, after reviewing decades of judicial decisions applying *Silk* and *Rutherford Food*, the Department determined that federal courts tend to focus on two of the economic reality factors—control and the opportunity for profit or loss. The Department concluded 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 reliable indicators of employment or independent contractor status. As the Department explained, this is because control and opportunity "strike at the core of what it means to be in business for oneself."[108] It is logical that those factors would and should have primacy in position and weight in assessing the legality of an independent contractor arrangement over 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.[109]

In recent rulemakings, numerous independent contractors and business stakeholders that engage independent contractors asserted that the 2021 Rule's identification of core factors brought helpful clarity and assurance.[110] While the Department disagreed with such views in the 2024 Rule and the Withdrawal Rule,[111] the Department acknowledged in the NPRM that, upon reflection, the need for added clarity on how different factors from the economic reality test

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[108] 86 FR 1199. The 2021 Rule reflected comprehensive analysis of the case law that has situated the core of the employee or independent contractor analysis in the control and opportunity for profit and loss factors. The 2024 Rule did not cite a single case where these two core factors (when pointing to the same classification) were contrary to the court's ultimate classification decision.

[109] *See* 86 FR 1196–97.

[110] *See* 86 FR 1197 (2021 Rule); 86 FR 24308–09 (Withdrawal Rule); 89 FR 1650, 1666–67 (2024 Rule).

[111] *See* 89 FR 1654 (asserting that the identification of "core" and "non-core" factors "would … likely [cause] confusion and uncertainty" if left in place); 86 FR 24310 ("While the Department is always seeking to improve clarity for workers and employers, the [2021] Rule's formulaic and mechanical weighting of factors is precisely what courts have cautioned against for decades[.]").

should be balanced in a consistent and predictable fashion is compelling. As explained in greater detail in section IV.F. below, the Department can apply an economic reality test grounded in federal case law that provides more clear, reliable, and predictable results 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."[112] In advising the public on how it intends to weigh the different economic reality factors, the Department—taking its lead from the outcomes of decades of federal appellate court decisions—can and should do better than "it depends." *See 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 featured numerous redundancies in its description of the different factors in its economic reality test. For example, the phrases "managerial skill (including initiative or business acumen or judgment)," "business-like initiative," and "independent business initiative" appeared in the guidance provided for three different factors in the 2024 Rule.[113] Both the "control" and the "opportunity for profit or loss" factors considered whether the worker determines or negotiates their pay.[114] The "opportunity" factor considered "whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space,"[115] despite a separate factor examining "evidence of capital or entrepreneurial investment."[116] The control factor examined "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,"[117] while the "permanence" factor separately

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[112] 29 CFR 795.110(a)(2) (2024).
[113] 29 CFR 795.110(b)(1), (3), and (6) (2024).
[114] *Compare* 29 CFR 795.110(b)(1) (2024) (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").
[115] 29 CFR 795.110(b)(1) (2024).
[116] 29 CFR 795.110(b)(2) (2024).
[117] 29 CFR 795.110(b)(4) (2024).

inquired whether "the work relationship is … exclusive of work for other employers."[118] Finally, the "permanence" factor stated 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,"[119] which of course is the overarching inquiry of the economic reality test.[120] And, the factor further stated 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" was separately considered under the 2024 Rule's "opportunity" factor.[121]

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 not be "flexible enough to apply to all kinds of work, and all kinds of workers."[122] While some degree of factual overlap may be inevitable in a multifactor analysis, the Department now believes that the 2024 Rule crossed the line from natural overlap into unhelpful repetition—particularly where the same concepts (such as "business initiative") were presented as required elements of multiple factors but applied for different purposes. These redundancies risked 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. Indeed, the 2024 Rule not only added unnecessary and unhelpful elements to the tests employed by federal circuit courts, but it also emphasized the breadth of potential

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[118] 29 CFR 795.110(b)(3) (2024). 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.").
[119] 29 CFR 795.110(b)(3) (2024).
[120] 29 CFR 795.110(a)(1) (2024) (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").
[121] 29 CFR 795.110(b)(1) (2024). Marketing is also arguably an example of "business-like initiative," a required element of the 2024 Rule's "skill and initiative" factor.
[122] 89 FR 1670.

considerations in each while at the same time declining to explain—much less demonstrate—how they should be applied. As explained in the NPRM, the Department concludes that a clear articulation and deduplication of the elements of each factor together with unambiguous direction regarding their application and several examples will not only enhance the utility of the Department's regulations on the economic reality test but also make it more likely that workers will be properly classified.

As in previous rulemakings, many businesses and independent contractors asserted that the 2021 Rule would provide greater clarity and consistency as compared to the 2024 Rule or the Department's current enforcement policy, which applies the Department's pre-2021 interpretive guidance.[123] For example, U.S. Chamber of Commerce asserted that "[t]he 2021 Rule provided workers and businesses with an easily understood, unambiguous, updated, and uniform test to determine whether a worker was an employee or an independent contractor," whereas "the [Department's] pre-2021 formulations (as well as the 2024 Rule) … failed to produce consistent outcomes, which is what truly matters to stakeholders." Self-identified independent contractor Connie Kirkpatrick commented that "[b]y refusing to weight any factor more heavily than another, the [2024 Rule] created a situation in which the classification of a worker could shift unpredictably depending on the circumstances of each individual engagement," which "[f]or a contractor like me, whose services vary from client to client by design, … was a daily operational problem." *See also*, *e.g.*, National Newspaper Association ("Without guidance on which elements of independence made the most sense, publishers were perplexed and frustrated [under the 2024 Rule]."); Portfolio Resources Group ("A more predictable standard allows firms to focus resources on serving clients rather than defending classification decisions."); Transportation Intermediaries Association ("A framework that does not clearly indicate which factors are most telling invites inconsistent enforcement and defensive overclassification of independent contractors as employees.").

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[123] *See supra* n.100.

Several commenters agreed with the NPRM's assessment that the 2024 Rule had too many overlapping considerations among its different economic reality factors. For example, Coalition for Workforce Innovation (CWI) commented that "permitting considerations to overlap among the multiple factors creates confusion about how to evaluate a set of facts without affording outsized weight to those facts merely because they tangentially touch on multiple factors." Similarly, Coalition to Promote Independent Entrepreneurs asserted that the "uncertainty and unpredictability of the [2024 Rule's] open-ended multi-factor test … was exacerbated by the test's redundant consideration of the same facts for purposes of multiple factors." *See also, e.g.*, American Securities Association ("[M]inimizing overlap among factors provides greater clarity and efficiency."); Forest Resources Association et al. (asserting that "the [2024 Rule's] use of the same or similar language to describe the application and analysis of the factors [was], in the real world, of no practical use to parties seeking to establish an understanding of their relationship"); Littler Mendelson's Workplace Policy Institute (Littler WPI) (asserting that the NPRM would "avoid inefficient, duplicative, and often confusing analyses that historically resulted from the overlap of certain factors").

By contrast, numerous commenters opposed to the NPRM asserted that restoring the 2021 Rule would reduce clarity because, in their view, most courts will continue to apply a more holistic analysis based on longstanding circuit court precedent. *See, e.g.*, Getman, Sweeney & Dunn, PLLP; National Employment Law Project (NELP); Nichols Kaster, PLLP. For example, AFL-CIO predicted that the proposal would result in a "fragmentation" in the analysis applied across jurisdictions as "different courts may give varying degrees of deference to the Department's interpretation," asserting that "[w]orkers, employers, and enforcement agencies will be forced to test the contours of the new framework in court, resulting in years, if not decades, of uncertainty as conflicting interpretations are resolved." *See also* NWJP (predicting "a deluge of new litigation to understand whether, and to what extent, the law has shifted"). In a joint comment, Allegheny County, PA, the City of Baltimore, MD, the County of Santa Clara,

CA, and the City and County of San Francisco, CA (Allegheny County et al.) asserted that "predictability about the Department's analysis is not helpful to workers and employers if courts rightfully disregard it in favor of a more faithful reading of the statute and longstanding court precedent." *See also* American Federation of State, County and Municipal Employees (AFSCME) ("The Department cannot, by fiat, resolve judicial differences in the application of this test, and in attempting to do so, will only misinform employers and expose them to legal liability[.]"); International Brotherhood of Teamsters (IBT) ("A clearer rule that produces wrong answers is worse than a totality test that requires careful analysis."); International Association of Sheet Metal, Air, Rail and Transportation Workers & the Sheet Metal and Air Conditioning Contractors' National Association (SMART & SMACNA) ("Even the most pro-employer management law firms acknowledge that employers would act at their own peril in choosing to ignore 80 years of judge-made law in favor of the proposed regulations[.]").[124]

Two commenters, NWJP and a coalition of various state or city labor agencies and attorneys general (Coalition of State Officials), asserted that the NPRM would cause confusion by creating different "economic reality" tests under state and federal law.[125] One organization

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[124] Many commenters disagreed with concerns over whether courts will adopt the NPRM's proposed analysis. For example, Landmark Legal Foundation commented that "[b]usinesses applying the [NPRM's] framework would be better positioned in litigation precisely because they would be working from a standard that courts are likely to affirm[.]" *See also, e.g.*, CPAC Foundation Center for Regulatory Freedom ("By aligning more closely with longstanding doctrine, the proposed rule contributes to a more stable and predictable regulatory environment."); Center for Workplace Compliance (asserting that the NPRM is "consistent with the economic reality test that has been applied for decades by both federal appellate courts and the Department," notwithstanding "targeted refinements that … promot[e] more consistent and administrable application while preserving the test's holistic nature"); Washington Legal Foundation (characterizing the NPRM's analysis as "the best reading of the statute") (quoting *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024)).

[125] Flex Association, which commented in support of the NPRM, "urge[d] the Department … to affirmatively acknowledge this divergence as a policy concern, and to express its view that state courts and administrative agencies adjudicating worker classification questions under state wage and hour laws … should give meaningful weight to the Department's interpretive guidance," as "[u]ptake by state authorities would multiply the already substantial benefits the rule promises to create." *See also* National Home Delivery Association ("[M]any states have wage and hour statutes patterned on the FLSA and look to the FLSA interpretations as persuasive, so the Proposed Rule's predictability and consistency effects will apply, in some cases, to litigation under parallel state laws."); Scopelitis, Garvin, Light, Hanson & Feary P.C. (similar statement).

opposed to the proposal, The Workers Lab, stated that it "share[s] the Department's stated goal of clarity" and agreed that "[t]he current patchwork of classification standards is genuinely difficult for workers and businesses alike to navigate," but asserted that the NPRM's proposed analysis would "not meaningfully simplify that landscape" because it "narrows protections while leaving the underlying complexity intact." Farmworker Justice noted that the Department concluded in the 2024 Rule that retaining the 2021 Rule "would have a confusing and disruptive effect on workers and businesses alike due to its departure from case law,"[126] asserting that the NPRM "does not explain [the Department's] reversal of this conclusion." *See also* Signatory Wall and Ceiling Contractors Alliance (SWACCA) (quoting from the Department's Withdrawal Rule to assert that the 2021 Rule would "cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty, as intended").[127] Relatedly, SMART & SMACNA commented that "subregulatory and regulatory guidance that changes with every presidential administration provides no long-term predictability or clarity"—a concern that some supporters of the NPRM seemed to share. *See* National Small Business Association (urging the Department "to consider the cumulative toll that repeated, administration-by-administration reversals of classification standards have taken on the small-business community" and asserting that "clarity of substance alone is insufficient if the regulatory framework remains vulnerable to wholesale reversal with each change of administration"); *see also* National Lumber and Building Material Dealers Association (NLBMDA) ("To provide lasting clarity and stability, NLBMDA urges the Department to work with Congress to codify this framework and prevent future regulatory reversals.").

The Department appreciates that commenters disagree over whether this rulemaking will increase or decrease clarity over the analysis to determine employee or independent contractor status under the FLSA, particularly in light of regulatory reversals. Indeed, several commenters

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[126] 89 FR 1639.
[127] 86 FR 14034.

seemed to question the value of any rulemaking in the absence of formal judicial deference. As the Department has previously explained,[128] the value of a regulation such as this one does not stem from a binding command of deference. To the contrary, regulations should reliably explain, clarify, and assist individuals and entities in efforts to follow the law's requirements. Here, the analysis adopted in this rule will facilitate the proper classification of workers at the outset of a work arrangement, which has always remained the Department's objective. Merely pointing to or parroting circuit law as a regulation is not helpful for most workers and businesses, much less the Division's enforcement personnel, who often must apply standards in investigations that bridge multiple circuits. Judicial tests, developed in multiple cases over time, are designed and applied by judges on a factual record compiled via the adversarial process in pleadings, discovery, and trial. Asking lay workers and businesses to correctly identify, understand, interpret, remain current with, and correctly apply federal circuit law to classify workers without a legal record is a recipe for widespread misclassification. Instead, this rule sets forth a test which is distilled from federal circuit law but framed in an accessible way, allowing workers and businesses to apply it in clear, reliable, and predictable ways with accurate and proper classification outcomes that would stand up in court. At the very least, the rule is more calibrated to achieve reliable classification outcomes from workers and businesses than the 2024 Rule.

It is notable that some of the parties most directly affected by this rulemaking—independent contractors and the entities that regularly engage independent contractors—overwhelmingly support the NPRM and view its proposed analysis (i.e., the 2021 Rule's analysis with small modifications) as clearer, simpler, and providing more predictable outcomes than the analysis adopted in the 2024 Rule. The Department agrees with this assessment, which is apparent when comparing the 2021 and 2024 Rules (as the Department does throughout this final rule). Unlike the former, the latter featured an economic reality test with more factors (six

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[128] *See, e.g.*, 86 FR 1176 (explanation in 2021 Rule that the Department "has a long history of offering interpretations in this area and believes this rulemaking has great value regardless of what deference courts ultimately give to it").

instead of five), more overlapping considerations across multiple factors (initiative, investment, marketing, and exclusivity), no guidance on the relative importance of the different factors, no guidance on the relative importance of actual practices versus contractual possibilities, and no illustrative examples.[129] In these respects, the 2024 Rule was a step backwards from the 2021 Rule and its clarifying refinements. Unsurprisingly and tellingly, few commenters who opposed the NPRM defended the 2024 Rule as providing a clearer or more accessible standard for employee or independent contractor classification than the analysis proposed in the NPRM.[130] To the contrary, even some commenters who opposed the proposed analysis seemed to acknowledge the need for a clearer alternative to the 2024 Rule. *See* Joint Center for Political and Economic Studies ("Just as the NPRM outlines, there is a need for simplified, clearer, and unified guidelines to help accurately classify workers under the FLSA, FMLA, and MSPA."); *see also* IBT ("If additional clarity is needed, [the Department should] provide supplemental guidance through illustrative examples tailored to modern employment models[.]").

Some commenters defended the 2024 Rule's "flexibility" as an asset rather than a liability. *See* Coalition of State Officials ("While a six-factor test may lack the virtue of providing definitive guidance to those affected, it allows for flexible application to the myriad different working relationships that exist in the national economy.") (quoting *McFeeley,* 825 F.3d at 241); NELP (asserting that "'nonexclusive and overlapping set of factors' helps to 'ensure that the economic realities test mandated by the Supreme Court is sufficiently

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[129] The 2024 Rule provided illustrative examples in its preamble discussion of the rule's six economic reality factors but did not codify those examples in its regulatory text. As noted in section IV.I., this made the examples less accessible to the public, as regulatory text in the Code of Federal Regulations is easier to locate than preamble language published in the Federal Register.

[130] *But see* Texas RioGrande Legal Aid (asserting that the proposed analysis "introduces a new set of undefined and manipulable concepts"). As explained in greater detail in section IV, the Department disagrees that any of the provisions in its proposed analysis were undefined or manipulable. Moreover, the novelty of the 2021 Rule's identification of two "core factors" is not a persuasive critique in light of its consistency with the outcomes of precedential court decisions and the enhanced predictability it brings to interested parties. In any event, germane to the Department's severable proposal to rescind the 2024 Rule, Texas RioGrande Legal Aid did not defend the 2024 Rule as providing an objectively clear analysis.

comprehensive and flexible to give proper effect to the broad language of the FLSA'") (quoting *Barfield v. N.Y.C. Health & Hospitals Corp*., 537 F.3d 132, 143 (2d Cir. 2008)); *see also* GFI; New York City Comptroller. In response to these comments, the Department agrees that Supreme Court precedent forecloses the adoption of a rigid checklist where the presence or absence of any individual factor would be "controlling" of a worker's employment classification,[131] such as under the "ABC" test adopted in some states.[132] But that is not true of, and does not describe, the analysis adopted in this rule. The Department concludes that an economic reality test with excessive redundancy and no guidance for how the different factors should be weighed, compared, and applied against or in concert with each other is unacceptably opaque,[133] including (and perhaps especially) for individuals wishing to understand their own classification as an employee or independent contractor. Instead, greater clarity and accuracy can be provided in more cases consistent with these principles.

The Department does not share commenter concerns over whether courts will adopt the analysis in this final rule or arrive at different classification outcomes than those produced by this rule. As the Department explained in the NPRM (and in section IV of this rule), this rule's analysis is derived from existing judicial precedent and, as a general matter, the Department does not believe it will result in different outcomes.[134] Thus, the Department disagrees with commenter assertions that this rulemaking risks exposing businesses to potential liability.[135] To

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[131] *See Silk*, 331 U.S. at 716 (advising that "no one [factor] is controlling" in the economic reality test); *see also Rutherford Food*, 331 U.S. at 730 ("[D]etermination of the [employment] relationship does not depend on … isolated factors but rather upon the circumstances of the whole activity.")

[132] *See infra* section VI.G.3.

[133] *See* Pacific Legal Foundation ("The [Supreme] Court has never said that the FLSA demands a balancing test in which no factor can be prioritized, in which weighting is always situational, or in which ex ante predictability is impossible.").

[134] 91 FR 9961; *see also* 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).

[135] The Department notes that the Portal-to-Portal Act of 1947 provides parties with a defense against FLSA liability for any acts or omissions made in good faith reliance "on any written administrative regulation, order, ruling, approval, or interpretation" issued by the Administrator

the extent that the economic reality test adopted in this rule is clearer than the economic reality test described in earlier court decisions, the Department believes that courts (federal or state) will find this rule to be a helpful resource in applying or refining their own judicial precedent, and much more so than the 2024 Rule. That the regulation would not bind or control the courts—only Department investigators—is unremarkable. Courts have always been the final word on the meaning and application of the law. However, the Department's regulation sets forth a national framework for the correct application of important legal standards regarding the coverage of its statutes. Far from a replacement of judicial tests refined in numerous decisions by the Supreme Court and various courts of appeals, the regulation translates those decisions so that they may be correctly applied by workers and businesses. Workers, businesses, courts, and the economy benefit from the proper classification of employees and independent contractors at the outset of a working relationship—not after the fact, years later upon litigation to final judgment. Ultimately, this rule complements the judicial tests and gives the principles in the case law a broader and more practical reach and impact than the 2024 Rule's analysis. Moreover, by engaging in notice-and-comment rulemaking to revise its guidance on FLSA employee or independent contractor status in part 795, the Department has ensured that its revisions have benefited from public input and thorough consideration, which should enhance the persuasive power of this rule in the eyes of federal judges.[136]

The Department appreciates that revisions to its rules are not cost-free, including where—as here—an important rule is delayed, withdrawn, found to have taken effect by a court,

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of the Wage and Hour Division, to the extent such reliance occurs before the guidance at issue—such as this final rule—is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." 29 U.S.C. 259; *see also* 29 CFR 790.13–.19 (elaborating on the requirements for a "good faith reliance" defense under the Portal-to-Portal Act).

[136] *See Loper Bright*, 603 U.S. at 388 (advising that the "weight" of agency interpretive guidance depends in part "upon the thoroughness evident in its consideration") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (noting that, among other factors, "courts have looked to the degree of the agency's care" and "formality" in determining the measure of deference to afford agencies' interpretations of their statutes) (citations omitted).

rescinded and replaced, and finally re-promulgated, even with improvements and enhancements.[137] Such developments can be difficult to follow for regulated entities and the rest of the public. However, the Department is persuaded that the 2021 Rule's clearer analysis of independent contractor status and downstream policy benefits (addressed in sections III.D. and VI.E.) are worth the transition costs, particularly when compared to the 2024 Rule or the absence of any standard. In the absence of federal legislation, the Department is optimistic that this rulemaking will provide interested parties with far greater clarity and certainty over employee or independent contractor status under the FLSA, constituting a much-needed improvement to the status quo. *See* Institute for the American Worker (asserting that "Congress is best equipped to clarify independent contractor status" but supporting the NPRM as "a significant step in the right direction").

B. Concerns That the 2024 Rule's Description of the Factors Could Have Been Perceived as Too Restrictive of Independent Contracting and a Departure from the Supreme Court's Application

In addition to concerns about the 2024 Rule's lack of clarity, the Department expressed a separate concern in the NPRM that the 2024 Rule could be viewed as more restrictive of independent contracting than the law requires. Specifically, several of the economic reality factors in the 2024 Rule were framed in ways that depart from the Supreme Court's articulation of the factors, effectively distorting the analysis. By expanding the test to include additional considerations that must be satisfied, but only for the factor to indicate independent contractor status, the 2024 Rule stacked the analysis so that it could be viewed as more likely to point to employee classification than a conventional application of judicial tests. The Department noted that by making the proper classification of independent contractors more difficult than the law requires, the 2024 Rule could deter businesses from engaging with bona fide independent contractors or induce them to unnecessarily classify such contractors as employees.

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[137] *See supra* section II.B.–G.

The "investments" factor at 29 CFR 795.110(b)(2) in the 2024 Rule is instructive. Before the 2024 Rule, when the Department would enumerate the multifactor 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.[138] 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 business."[139] 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 finds no support in Supreme Court cases. Moreover, comparing investments diminishes the probative value of the investment, if any, by the worker. For example, a worker's investments will almost invariably be smaller than the potential employer's "investments in its overall business,"[140] so comparing their investments is unbalanced in favor of employee status and fails to offer any insight into distinguishing between employee and independent contractor status. In response to commenter concerns on this point, the Department recognized this problem and sought to address it in the 2024 Rule's regulatory text by stating 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."[141] Nevertheless, the 2024 Rule's "investments" factor still undertook this

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[138] *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").

[139] 29 CFR 795.110(b)(2) (2024) (emphasis added).

[140] *Id.*; *see* 89 FR 1683–84.

[141] 29 CFR 795.110(b)(2) (2024); *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").

comparative approach, which departed from *Silk* and significantly reduced the probative value of the worker's investments.

The 2024 Rule's "permanence" factor (in § 795.110(b)(3)) is another example. The operative text advised 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 entities."[142] Here, the conditional language following the word "sporadic" seemed 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 weighed in favor of independent contractor status, the 2024 Rule additionally advised, 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."[143] But there was no corresponding language in the other direction, categorically discounting industries where lengthy professional relationships between businesses and independent contractors might be commonplace. The result was a factor framed in a way that could indicate an FLSA employment relationship when permanence existed but unnecessarily require additional considerations to indicate independent contractor status when permanence did not exist.

The 2024 Rule's "skill and initiative" factor operated in a similar fashion. The regulatory text began with straightforward guidance that a lack of skills indicated that a worker was an employee: "This factor indicates employee status where the worker does not use specialized

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[142] 29 CFR 795.110(b)(3) (2024).
[143] *Id.*; *see* 89 FR 1688 n.330.

skills in performing the work or where the worker is dependent on training from the potential employer to perform the work."[144] However, the text did not correspondingly state that specialized skills indicated that the worker is an independent contractor and instead included an additional consideration that had to 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 connection with business-like initiative that indicates that the worker is an independent contractor."[145] Here again, the Department recognizes that some form of this approach is applied by some courts, but the 2024 Rule articulated this factor in a way that made 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 IV.G.1, it has consistently analyzed whether initiative contributes to the success or profitability of the claimed independent business.[146]

The 2024 Rule's "integral" factor departed from *Rutherford Food*'s consideration of whether a worker is part of an "integrated unit," instead examining whether work is "critical, necessary, or central to the potential employer's principal business."[147] This framing may have unreasonably frustrated a finding of independent contractor status because, in some sense, all

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[144] *See* 29 CFR 795.110(b)(6) (2024).
[145] *Id*.
[146] *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").
[147] 29 CFR 795.110(b)(5) (2024).

work performed is in some way necessary to the employer's business. If not, the business would not pay for it to be performed.[148]

Finally, in its descriptive guidance for the "control" factor, the 2024 Rule gave several examples of facts relevant to a potential employer's control over workers but did not provide similar examples of facts relevant to a worker's control, further implying that this factor was not a balanced aid in determining proper classification.[149] Taken together, these aspects of the 2024 Rule appeared to be misaligned with Supreme Court precedent 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 Act.

These features were lost on the regulated community. Numerous commenters asserted that the 2024 Rule's analysis was "slanted," "tilted," or "biased" against findings of independent contractor status. *See* CWI; Financial Services Institute (FSI); Landmark Legal Foundation; U.S. Chamber; *see also, e.g.*, Institute for the American Worker (asserting that the 2024 Rule "presented a thumb on the scale in favor of employment status rather than clear lines between employment and independence"). While many of these commenters agreed with the NPRM's critique of certain economic reality factors in the 2024 Rule (as discussed above), FSI additionally asserted that "the 2024 Rule pushed the overall inquiry toward employee classification by making a lack of entrepreneurial drive or skill count multiple times, across different factors, against independent contractor status." Two commenters, independent contractor Natasha Taylor and Truckers Integral to Our Economy, asserted that the 2024 Rule

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[148] *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring) ("*Everything* the employer does is 'integral' to its business—why else do it?").
[149] 29 CFR 795.110(b)(4) (2024).

effectively established a presumption of employee status. Similarly, the National Association of Small Trucking Companies characterized the 2024 Rule as "exceptionally restrictive, overly complicated, and hostile toward independent contractor status," while the Worker and Farmer Labor Association (WAFLA) asserted that the 2024 Rule's economic reality test was "not neutral" but was instead "structured in a way that made it difficult to conclusively reach [an independent contractor outcome]."

Commenters who opposed the NPRM defended the 2024 Rule by asserting its consistency with longstanding judicial precedent. *See, e.g.*, GFI; Nichols Kaster; United Brotherhood of Carpenters and Joiners of America (UBC). Some of these commenters seemed to embrace the difficulty of classifying workers as independent contractors under the 2024 Rule, quoting from (withdrawn) AI 2015-1 to assert that "most workers" should be FLSA-covered employees under the economic reality test. Coalition of State Officials; NELP; *see also* SMART & SMACNA (asserting that AI 2015-1 "effectively created a presumption that workers are employees under the FLSA" and recommending the Department to endorse a rebuttable presumption for workers in the construction industry). Alternatively, some commenters acknowledged the Department's concerns over the 2024 Rule's description of certain economic reality factors but recommended the Department to consider targeted adjustments to the 2024 Rule in lieu of the proposed replacement. *See* NWJP (acknowledging that the NPRM "raises some … specific small concerns about what [the Department] considers lopsided framing of the 2024 [Rule]" but asserting that "[t]hese small issues do not warrant a wholesale repeal"); UBC ("Instead of [restoring the 2021 Rule], the Proposed Rule could clarify the conditional and other language it finds objectionable in the 2024 Rule."). Merits of the 2024 Rule aside, many commenters asserted that the analysis proposed to replace the 2024 Rule would be inappropriately biased in favor of independent contractor status. *See, e.g.*, Farmworker Justice ("It is clear that the Proposed Rule, like the 2021 IC Rule, aims to classify more workers as independent contractors, by narrowing the test for employment in a way that Congress had

explicitly rejected when enacting the FLSA[.]"); Nichols Kaster (asserting that the NPRM's "[e]mployer-[f]riendly" interpretations of the factors will narrow the scope of FLSA coverage).

The Department reiterates that the goal of this rulemaking is to establish a clear and appropriate analysis for determining employee or independent contractor status under the FLSA—not to favor one status over the other. Given that the 2024 Rule could have been viewed as significantly favoring classification of workers as employees, this final rule, like any middle-of-the-road proposal, could result in *comparatively* more workers being classified as independent contractors.[150] But that does not mean the Department's rule favors contractors in ways that the 2024 Rule favored employees. To the contrary, it returns to the test derived from decades of federal case law that no more favors contractors than it does employees. While courts and the Department have long interpreted the FLSA's "suffer or permit" language as establishing a broader scope of employment than what exists under the common law, neither the FLSA nor any of the Supreme Court cases addressing the classification of independent contractors require an economic reality test that is perceived to lead to an employee rather than independent contractor outcome. For example, to the extent that an individual's lack of specialized skills is correlated with employee status and thus indicative of an employment relationship, the converse should also be true—i.e., an individual's possession of specialized skills should be indicative of independent contractor status, regardless of whether his or her skills are exercised "in connection with business-like initiative." Similarly, if an indefinite or continuous work relationship with a particular hiring party is indicative of an employment relationship, a definite or sporadic work relationship with a hiring party should be indicative of independent contractor status, regardless of whether such impermanence is attributable to "operational characteristics that are unique or intrinsic to particular businesses or industries." Notably, the Department's 1997 MSPA regulation did not feature this kind of language in its application of the "skill" and "permanence"

[150] Although, as explained later in this rule's economic analysis, the effect should be minimal and most of these independent contractors will result from business' creation of new roles.

factors,[151] underscoring that the 2024 Rule represented a departure from the Department's prior application of the economic reality test. Ultimately, the Department's place is not to pick favorites, but rather provide a clear analysis that workers and businesses alike may use to properly classify employees and contractors.

While some commenters defended the 2024 Rule's comparative approach to investment,[152] no commenter disputed the Department's central concern—shared by many commenters—that this approach risks indicating the existence of an employment relationship in many cases simply because the worker's investments are smaller than the potential employer's "investments in its overall business." Here again, as with the "skill" and "permanency" factors, the 2024 Rule's formulation of the "investment" factor departed from the Department's longstanding application of the economic reality test in a way that made a finding of independent contractor status harder than what is required by the law.[153] Thus, having considered commenter feedback, the Department concludes that the 2024 Rule's description of the investment factor could have been perceived as unduly restrictive of independent contracting.

The Department acknowledges that the 2024 Rule's "integral part" factor was generally consistent with the Department's pre-2021 guidance and the way most courts apply this factor today. *See*, *e.g.*, AFL-CIO; Coalition of State Officials; Farmworker Justice. However, as explained in the 2021 Rule and in the NPRM, the Supreme Court in *Rutherford Food* originally examined whether the workers at issue were part of the hiring party's "integrated unit,"[154] which is more probative of employee or independent contractor status than an inquiry into whether

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[151] *See* 29 CFR 500.20(h)(4)(iv)–(v) (1997) (examining "whether the services rendered by the putative employee require special skill" and "the degree of permanency and duration of the working relationship").
[152] *See infra* section IV.F.2.
[153] *Cf*. 29 CFR 500.20(h)(4)(iii) (1997) (considering "[t]he *putative employee's* investment in equipment or materials required for the task, or the *putative employee's* employment of other workers") (emphasis added); *see also Silk*, 331 U.S. at 719 (holding that "where the arrangements leave driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors," noting that the drivers at issue "own their own trucks" and "hire their own helpers").
[154] 331 U.S. at 729.

services are "integral" (i.e., "critical, necessary, or central") to the hiring party. Upon reconsideration, the Department believes that the 2024 Rule's "integral part" factor was a missed opportunity to return to *Rutherford Food's* original focus on integration.

The Department notes that many commenters who opposed the NPRM objected that its proposed analysis would "make it easier" to classify workers as independent contractors. Center for WorkLife Law; Farmworker Justice; North America's Building Trades Unions (NABTU); Sen. Elizabeth Warren. As the Department has noted repeatedly, the objective is the proper classification of workers under the law—not to make classification in any direction more or less *easy* or *difficult* than another. Indeed, the Department believes that the clearer distillation of the legal analysis will be easier for entities to apply than a confusing one; in this respect, the Department expects that this rule will make it easier for entities to appropriately classify all workers, including employees. More fundamentally, it is not the Department's role to encourage, discourage, expand, or restrict independent contracting any more or less than employment. The law allows—and workers, businesses, and the economy benefit from—the diversity of opportunities and protects those workers who are employees. Indeed, the Department recognized in the 2024 Rule that "independent contractors and small businesses play an important role in our economy,"[155] expressing at the time that the 2024 Rule was "not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves."[156] Upon reconsideration, the Department shares the expressed concerns of many commenters that retaining the 2024 Rule would have such a disruptive effect, in part because the 2024 Rule's description of various economic reality factors appeared to be more restrictive of independent contractor classification than the Department's pre-2021 guidance, or the Supreme Court's application of the economic reality test. Ensuring that the Department's enforcement of federal wage and hour law does not deter or inhibit legitimate independent contracting or result

[155] 89 FR 1646.
[156] 89 FR 1638.

in the unnecessary or mistaken classification of economically independent workers as employees are appropriate policy considerations.

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.[157] 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."[158] However, as discussed earlier in section III.A., generalizing an already complicated legal analysis in ways that expand "flexibility" injects further ambiguity and 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 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.

Numerous self-identified independent contractors and business organizations asserted that the 2024 Rule is ill-suited for the modern economy. Many of these commenters emphasized

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[157] *See* 86 FR 1175.
[158] 89 FR 1649.

that, instead of a "flexible" standard, businesses need regulatory certainty to plan, invest, and innovate. *See* Christine Byrne ("I need to be able to rely on a consistent and predictable standard when making decisions about how to structure my business."); CPAC Foundation Center for Regulatory Freedom ("When the classification standard is unclear, firms may be reluctant to experiment with new approaches … [and] potential entrants may delay or abandon new ventures due to concerns about compliance risk."). Several commenters asserted that regulatory uncertainty imposes a disproportionate burden on independent contractors and small businesses, which lack the resources of larger firms. *See* American Society of Travel Advisors; Institute for the American Worker; National Federation of Independent Business (NFIB); Small Business Administration (SBA) Office of Advocacy. Many commenters emphasized the critical role that independent contracting plays in their industries, which they believed would be harmed if the 2024 Rule were left in place. *See, e.g*., American Association of Advertising Agencies; Direct Selling Association; National Association of Home Builders; National Association of Realtors; National Council of Agricultural Employers; Truckload Carriers Association. Relatedly, several commenters criticized the 2024 Rule's retention of an "integral part" economic reality factor, asserting that the factor fails to recognize the degree to which independent contractors are critical, necessary, or central. *See, e.g.*, National Association of Home Builders; ShiftKey; Transportation Intermediaries Association.

As with the "integral part" factor, several commenters asserted that changes in the economy have diminished the predictive accuracy of the skill and permanence factors, which the 2024 Rule places on equal footing with control and opportunity. For example, in questioning the need for a factor examining a worker's amount of skill, CWI asserted that "[t]oday's expansive independent work opportunities encompass a far wider array of individuals who may not possess a 'skill' that is a part of a traditional learned profession or trade" and that "almost anyone [can] enter into distribution and other service industries and design their own opportunity, often by accessing platforms that connect workers with business opportunities." *See also* U.S. Chamber;

Littler WPI. Similarly, several commenters questioned the probative value of the "permanence" factor, noting that many independent contractors choose to voluntarily reengage with particular entities in the context of a successful business relationship. *See, e.g.*, CWI; FedEx; Scopelitis, Garvin, Light, Hanson & Feary P.C. (Scopelitis); U.S. Chamber.

Some commenters defended the 2024 Rule as more compatible with the modern economy than the NPRM. For example, GFI asserted that because "independent contracting—both in legitimate forms and via misclassification—occurs through a wide variety of working arrangements," the Department should retain a "flexible, comprehensive" analysis instead of one that "focus[es] on core factors that may not capture all relevant features of the relationship." *See also* Coalition of State Officials (asserting that "the gig economy, changes in technology, and their impacts on workplace dynamics … highlight[] the need for a flexible test, like the one set forth in the 2024 rule"). Coalition of State Officials additionally commented that, unlike the NPRM's proposed analysis, the 2024 Rule included language identifying "whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically)" as a relevant consideration within the control factor,[159] asserting that the NPRM's silence on such control contradicts the stated rationales for this rulemaking. *See also* Allegheny County et al. (asserting that the NPRM "ignores that modern employers commonly use technology and algorithms to automatically and invisibly track, supervise, and control the conditions of work for supposed independent contractors"); NELP (asserting that the NPRM "misses the sophisticated yet nuanced ways that corporations set or control the material terms of the work … including [with] productivity trackers, webcam monitoring, wearable devices, and algorithms and apps used for wage-setting").

Having reviewed these comments, the Department remains persuaded, as it made clear in 2021, that the diversity of work arrangements in the modern economy underscores the need for an analysis that provides more predictable outcomes than the 2024 Rule. In particular, the 2024

[159] 89 FR 1743.

Rule's failure to provide guidance on the relative importance of the different economic reality factors was a missed opportunity to promote more consistent classification outcomes—even in similar factual circumstances.[160] While some degree of flexibility in the economic reality test is necessary and required by Supreme Court precedent,[161] an analysis which is too flexible can result in arbitrary and unpredictable outcomes. "People are entitled to know the legal rules before they act, and only the most compelling reason should [justify] an approach under which no one can know where he stands until litigation has been completed."[162]

Moreover, an analysis which affords equal weight to every economic reality factor fails to account for the fact that some characteristics no longer correlate as strongly as they once did with a particular classification outcome—and is at odds with how courts have considered and applied these factors in practice. To be specific, commenter feedback (described above) suggests that more independent contractors today lack "specialized skills," perform work which is "integral" to their clients, and have lengthy, recurring relationships with their clients. Accordingly, a rule prioritizing the economic reality factors that remain most relevant and indicative of the difference between employees and independent contractors—control and opportunity—would be a better fit for the modern economy than the 2024 Rule.

Finally, as explained later in section IV.F.1. of this final rule, the Department's omission of regulatory text from the 2024 Rule noting that workers may be supervised through "technological means" is not tantamount to "[e]ncouraging courts to ignore these practices," as

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[160] As the Department noted in the 2021 Rule, judicial application of an unweighted economic reality test has resulted in conflicting classification outcomes. 86 FR 1170; *compare Lauritzen*, 835 F.2d at 1534–35 (applying a six-factor economic reality test to hold that pickle pickers were employees under the FLSA), *with Brandel*, 736 F.2d at 1117 (applying the same six-factor economic reality test to hold that pickle pickers were not employees under the FLSA); *compare also Cromwell v. Driftwood Elec. Contractors, Inc*., 348 F. App'x 57 (5th Cir. 2009) (holding that cable splicers hired by BellSouth to perform post-Katrina repairs were employees), *with Thibault v. BellSouth Telecomms., Inc.*, 612 F.3d 843 (5th Cir. 2010) (holding that a cable splicer hired by the same company to perform the same post-Katrina repair work was an independent contractor).

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

[162] *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).

asserted by Coalition of State Officials. As under the 2021 Rule, where the NPRM's proposed regulatory text identified considerations which should be excluded from the analysis, the text does so explicitly—including in the control factor.[163] As explained in greater detail in section IV.F.1, the Department believes that all relevant facts should be considered, including ways in which new technologies can both empower individuals to be in business for themselves and can serve to control employees as supervisors or managers have historically done. To the extent that the 2024 Rule's regulatory text implied that any technological influence in a work arrangement is evidence of employment, the Department agrees with the advocacy group TechNet that such a perception "would undermine both innovation and the Department's broader goals of preparing the workforce for an AI-driven economy" in a manner neither required by law nor advisable as policy.

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

As a downstream consequence of the 2024 Rule's analytical flaws, the Department is concerned that leaving the 2024 Rule in effect could have led to undesirable policy outcomes. Specifically, a classification analysis which is ambiguous or is perceived as overly restrictive of independent contracting may induce businesses to unnecessarily classify economically independent workers as employees or deter businesses from engaging with such individuals at all—outcomes with harmful consequences for the broader economy.

As the Department acknowledged in the 2024 Rule, "independent contractors and small businesses play an important role in our economy."[164] Independent contracting offers individuals

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[163] *See* 91 FR 9974 ("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.").

[164] 89 FR 1646.

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.[165]

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.[166] A rule that operates to complicate or discourage these arrangements may inadvertently limit work opportunities for individuals seeking flexibility due to caregiving responsibilities, education, retirement, geographic constraints, or other personal circumstances. For businesses, unclear or one-sided regulations can deter growth and investment. To the extent that the 2024 Rule curtailed or discouraged legitimate independent contracting, investment, and innovation, it may have led to negative effects on consumers, who may have faced higher prices and a reduced number of alternatives to meet their needs. These potential effects are discussed in greater detail in the regulatory impact analysis for this rule in section VI. Ultimately, this rule helps workers and businesses properly classify employees and independent contractors under the law at the outset of their work arrangements. It neither favors nor disfavors employees or independent contractors—and it neither facilitates nor complicates classification in any one direction over the other.

Many commenters agreed with the NPRM's assessment that leaving the 2024 Rule in place could have harmful policy consequences. As an initial matter, several commenters asserted

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[165] *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").

[166] 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 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).

that the 2024 Rule's classification analysis imposed avoidable compliance costs for independent contractors and their business partners. *See, e.g.*, Competitive Enterprise Institute; Engine Advocacy; Small Business & Entrepreneurship Council; U.S. Hispanic Business Council. For example, SBA's Office of Advocacy reported that, to mitigate perceived legal risk, "multiple small businesses commented [at a recent SBA roundtable] that they only hire independent contractors that form their own business entity," while independent contractor Connie Kirkpatrick wrote that, in her view, the 2024 Rule resulted in her having to use formal written contracts with clients, which felt "disproportionate to the scope of what [her clients] were seeking." Some of these commenters elaborated that time and resources expended in response to the 2024 Rule were diverted from more productive economic activity. *See* Louisville Beauty Academy (asserting that "[s]mall school owners were forced to spend thousands of dollars on HR consultations to determine if a guest educator visiting for one day might trigger an audit or misclassification lawsuit," and that such "costs are a drain on resources that could otherwise be used for student scholarships or tuition matching"); *see also* CPAC Foundation Center for Regulatory Freedom; Truckers Integral to Our Economy.

Several commenters asserted that legal risk attributable to the 2024 Rule resulted in the unnecessary "overclassification" of economically independent individuals as employees. CPAC Foundation Center for Regulatory Freedom commented that "[t]he consequences of misclassification—particularly the potential for back wages, penalties, and litigation—are significant, while the consequences of overclassification are comparatively limited. This imbalance creates a strong incentive for businesses to adopt conservative classification practices, even when those practices do not reflect the underlying economic reality of the working relationship." *See* American Society for Travel Advisors ("[O]ut of either an abundance of caution or genuine confusion, [businesses] may simply choose to classify all workers as employees … [which is not] desirable for the business in question or from a macroeconomic perspective."); *see also* Brittany VanDerBill (independent contractor); Littler WPI;

Transportation Intermediaries Association. Many self-identified independent contractors expressed their perception that they would not or could not continue working if the structure of their working relationships were changed. *See, e.g.*, Delivery Platform Worker 1; Delivery Platform Worker 2; Delivery Platform Worker 3; Delivery Platform Worker 4; Delivery Platform Worker 5; Karla White; *see also* FSI (reporting a survey finding that "'up to a fifth of independent financial advisors' would potentially retire if they were reclassified as employees").

Many commenters also asserted that, instead of defensive "overclassification," many independent contractor arrangements would be avoided or discontinued altogether if the 2024 Rule were left in place. For example, FSI speculated that "[i]f reclassification under the 2024 Rule were to drive medium-sized businesses that frequently hire independent contractors above the [Affordable Care Act's] fifty-employee threshold, they may respond by laying off employees to remain under the threshold and so avoid the requirement to provide health insurance."[167] Americans for Tax Reform asserted that because "small businesses are much less able to absorb new labor costs" than larger businesses, "[m]any could be forced to shut down if they are forced to cease their collaborations with independent contractors." Some commenters alleged that the 2024 Rule has already resulted in the avoidance or discontinuation of certain work opportunities. *See* Connie Kirkpatrick ("Despite clear contract language and my direct reassurances that the agreement did not commit them to an ongoing relationship, some [of my] clients declined to proceed."); CWI ("Member companies have deferred or abandoned independent contractor arrangements due to legal uncertainty."); Flex Partners ("[A] significant client eliminated all contractors—including [Flex Partners]—following the [2024 Rule], which was viewed as less predictable and riskier."); Louisville Beauty Academy ("Schools began eliminating guest artist programs to avoid legal risk, directly reducing the quality of instruction and the variety of

[167] Under the Affordable Care Act, employers with 50 or more full-time employees must either offer health insurance coverage to their employees and their dependents or pay an "employer shared responsibility payment" to the federal government. *See* 26 U.S.C. 4980H. The Department notes that this rule solely pertains to the FLSA, FMLA, and MSPA; it does not affect the scope of employment for purposes of other federal laws such as the Affordable Care Act.

techniques available to students."). Citing to various studies, Littler WPI asserted that "[a] large and growing body of literature has shown that overly strict classification rules destroy jobs."

Many commenters emphasized potential harms to consumers and the broader economy if the 2024 Rule were left in place. For example, noting that "the trucking industry continues to face driver recruitment challenges and supply chain pressures," the Intermodal Association of North America commented that retaining the 2024 Rule would result in workforce disruption, supply chain instability, reduced investment and entrepreneurship, and increased costs for consumers. *See also* Truckers Integral to Our Economy ("At a time when policymakers across the political spectrum have identified supply chain resilience as a national priority, restoring clarity in independent contractor law is a directly supply-chain-strengthening action."). Similarly, FSI asserted that retaining the 2024 Rule "would lead to mass retirements of independent financial advisors, raise the cost of obtaining critical retirement planning and other financial guidance, and reduce services for underserved populations, including rural areas." *See also* First Command Financial Services; National Association of Insurance and Financial Advisors. Finally, several commenters asserted that the 2024 Rule's narrower exclusion from the control factor of "[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" would deter businesses from adopting safety or consumer protection measures which exceed minimum legal requirements. *See* FSI ("The 2024 Rule's approach created a perverse incentive for businesses to seek only minimal regulatory compliance; a race to the bottom in workplace safety, financial services, and other areas is the opposite of what the government should encourage."); *see also* Lyft; WAFLA.

Commenters who opposed the NPRM generally did not address the possibility that leaving the 2024 Rule in place could have negative consequences for independent contractors, businesses, and consumers. *But see* Adam Anderson (asserting that the NPRM provided "theoretical concerns rather than evidence" of such harms); Coalition of State Officials (similar).

Instead, many commenters asserted that rescinding the 2024 Rule and replacing it with the NPRM's proposed analysis would result in the reclassification or misclassification of employees as independent contractors, which they alleged would have various downstream harms. *See, e.g.*, Coalition of State Officials (asserting that "unscrupulous or unsophisticated employers may take advantage of the confusion which may arise from this rule to misclassify their workers and incur certain savings"); Economic Policy Institute ("DOL's NPRM will encourage misclassification schemes and a race to the bottom, where employers will be able to reclassify their employees as independent contractors and evade their obligations under [the FLSA, FMLA, and MSPA]."); National Urban League ("If finalized, this rule would significantly narrow the scope of workers entitled to federal labor protections … and weaken the economic security of those who drive the economy."). Several commenters noted that the Department previously determined that the 2021 Rule could have such effects in the 2024 Rule, asserting that the NPRM failed to explain the Department's reversal of its earlier findings. *See* GFI; NWJP; SWACCA.

Commenters who opposed the NPRM asserted that employees reclassified or misclassified as independent contractors as a consequence of this rulemaking would no longer enjoy worker protections established under the FLSA, FMLA, or MSPA, such as the right to receive no less than the federal minimum wage, the right to receive overtime pay, and the right to take job-protected leave for serious medical conditions. In a joint comment, the National Partnership for Women & Families and 35 other organizations asserted that this rulemaking would have "especially harmful consequences" for women workers because depriving workers of FLSA employee status "will strip workers of the right to be free from pay discrimination and to access workplace lactation accommodations" under the Equal Pay Act and PUMP Act, which are codified in the FLSA.[168] *See also* Center for Worklife Law; National Women's Law Center. Several commenters asserted reclassification or misclassification facilitated by this rulemaking would shift payroll tax burdens to workers and deprive federal and state governments of tax

[168] *See* 29 U.S.C. 206(d); 29 U.S.C. 218d.

revenue for certain employment and safety net programs, such as Social Security, Medicare, unemployment insurance, and workers compensation insurance. *See, e.g.*, AFL-CIO; Allegheny County et al.; IBT. Numerous commenters asserted that this rulemaking would place law-abiding employers at a competitive disadvantage against businesses that misclassify their workforce as independent contractors. *See* AFL-CIO; Allegheny County et al.; Mechanical Contractors Association of America; NABTU; Reps. Bobby Scott and Ilhan Omar; SWACCA. Some commenters asserted that confusion and increased misclassification attributable to the NPRM would burden state and local governments by forcing them to increase spending on labor law enforcement or public outreach. *See* AFL-CIO; Allegheny County et al.; Coalition of State Officials. Invoking many of the alleged harms described in this paragraph, AFL-CIO asserted that the NPRM "fails to account for the substantial reliance interests that have developed around the existing interpretation of the FLSA" for workers, unions, employers, and enforcement institutions. *See also* GFI (asserting that the NPRM "fails to adequately consider the serious reliance interests of workers who have depended on the current regulations for legal certainty"). Finally, AFL-CIO, Center for Law and Social Policy (CLASP), and GFI objected that the NPRM would exacerbate "fissuring" in the labor market, where lead companies outsource core functions to smaller subcontractors and independent contractors rather than hiring employees directly.

The Department appreciates that commenters strongly disagree on the potential risks and benefits of the analysis contained in the 2021 and 2024 Rules. On balance, the Department is persuaded by commenter feedback that the latter carries greater risks than the former—though to be clear, the Department does not agree that either rule would result in all of the consequences asserted by their respective critics and certainly not to the same degree. The Department notes that several commenters attributed the loss or discontinuation of specific independent contracting opportunities to the 2024 Rule, whereas commenters who opposed this rulemaking did not present any examples attributing the misclassification of employees as independent contractors

to the 2021 Rule.[169] More importantly, the Department disagrees that the analysis adopted in this rulemaking will increase the misclassification of employees as independent contractors. A primary objective of this rule is the proper classification of workers; it neither tolerates the misclassification of employees as independent contractors nor the "overclassification" of independent contractors as employees. While most commenters tended to criticize one effect or the other, the Department rejects the premise that it must choose between the lesser of these two evils. As explained more fully in section IV of this notice, the economic reality test adopted in this rulemaking is consistent with longstanding judicial precedent, notwithstanding refinements that will make the test more predictable and easier to apply. The adopted analysis establishes a broader scope of employment than a common law control test, but is neither more nor less permissive of independent contracting than the Department's current (and pre-2021) enforcement policy.[170]

The Department acknowledges that, in the 2024 Rule, it 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."[171] However, apart from highlighting statements made by some commenters,[172] the Department did not demonstrate that

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[169] Responding to the Department's observation in the NPRM that there did not appear to be any significant reclassification of employees as independent contractors following publication of the 2021 Rule, *see* 91 FR 9961, SWACCA asserted that such a finding "is a *non sequitur* because DOL withdrew the 2021 final rule before it took effect." However, as discussed in section II.D. of this rule, a federal district court invalidated the Department's withdrawal of the 2021 Rule on March 14, 2022, and the Department subsequently applied the 2021 Rule to assess independent contractor status in enforcement actions involving work performed on or between March 8, 2021, and March 10, 2024 (before the 2024 Rule's rescission of the 2021 Rule formally took effect on March 11, 2024).

[170] *See infra* section VI.G.

[171] 89 FR 1658.

[172] 89 FR 1656–57.

the 2021 Rule was actually being misapplied in ways that resulted in the misclassification of FLSA-covered employees as independent contractors.[173] To the contrary, the Department issued numerous press releases between 2022 and 2024 announcing successful enforcement actions where WHD applied the 2021 Rule's analysis.[174] This suggests that the 2021 Rule was no impediment to the Department to appropriately identify, pursue, and remedy the misclassification of FLSA-covered employees as independent contractors, consistent with its duty to enforce the FLSA.

As noted in the NPRM, the Department estimates that this rulemaking will reduce the likelihood that businesses will unnecessarily classify economically independent workers as employees. The downstream consequences of reducing defensive overclassification are addressed in greater detail in the regulatory impact analysis in section VI of this rule. However, the Department notes that policies which facilitate legitimate independent contracting do not necessarily come at the expense of traditional employment. To the contrary, several commenters asserted that independent contractors can help to create and preserve employee jobs. For example, emphasizing the importance of freelance photographers and other independent contractors in the local newspaper industry, the National Newspaper Association commented that "[w]e do not see the use of independent contractors as a deterrent to employment. Rather the contractors strengthen the product, which draws more subscribers and helps our employees to keep their jobs." Similarly, Flex Association commented that "[g]rocery delivery workers bring

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[173] *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).

[174] *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 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.

new revenue to grocery stores, which can then hire more employees. Meal-delivery workers bring new revenue to restaurants, which can also hire more employees. Rideshare drivers bring revenue to all kinds of local businesses, which can hire even more people. … What's more, the companies that power these transactions also employ their own workers—engineers, customer-service agents, salespeople, marketing professionals, and more. In short, self-employment and W-2 employment do not compete with each other; instead, they feed into a virtuous cycle of job growth."

With respect to commenter concerns over increased "fissuring" in the labor market, the Department does not believe that this rulemaking will result in any substantial outsourcing of work from employees to independent contractors.[175] In any event, consistent with the scope of its authority, the Department's objective in this rulemaking is to set forth an analysis which more clearly and consistently distinguishes between employees and independent contractors—not to shape or reshape the broader labor market.

The Department disagrees that this rulemaking will disadvantage law-abiding employers or burden state and local governments. Commenter assertions to this effect are premised on the assumption that this rulemaking will increase the misclassification of employees as independent contractors which—as discussed earlier and throughout this rule—the Department does not anticipate. Although the FLSA was enacted in part to prevent "unfair method[s] of competition in commerce,"[176] the Act was not intended to disrupt legitimate independent contracting.[177] The Department notes that none of the federal wage and hour statutes at issue in this rulemaking preempt state law, so states and localities remain free to enforce or enact tests that are more restrictive of independent contracting if they so choose.[178]

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[175] *See infra* section VI.
[176] 29 U.S.C. 202(a).
[177] *See Rutherford Food*, 331 U.S. at 729–30 (acknowledging that the FLSA permits independent contracting and distinguishing the workers at issue from "the typical independent contractor").
[178] 29 U.S.C. 218(a); *see, e.g.,* section VI.G.3. (analyzing the "ABC" test adopted by some states as a regulatory alternative to the analysis adopted in this rule).

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 is adopting a rule that is more consistent with Supreme Court precedent, provides a cogent synthesis of the over 80 years of case law since the FLSA's enactment that has helped to interpret 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 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, as noted in the NPRM, the Department's regulations have not reflected a single standard for the three statutes.[179] For example, the MSPA regulation noted that MSPA and the FLSA share the same employment definitions and advised that a determination of employee or independent contractor status "may include consideration of whether" there is an employee or

[179] 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).

independent contractor relationship under the FLSA.[180] However, the regulation also advised that determining whether agricultural workers or farm labor contractors are independent contractors "should be resolved in accordance with the factors set out" therein, "based upon an evaluation of all of the circumstances."[181] Those factors are not exactly the same as the factors that the Department is adopting in this rule, and of particular relevance, the MSPA regulation did not—like this rule's FLSA analysis—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 applied under the FLSA beginning in May 2025. 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 any FLSA guidance issued by the Department on this topic—including the analysis adopted 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 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 resolves these concerns and provides 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 defined "Employee" as having the same meaning as that term has under the FLSA and noted that the

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[180] 91 FR 9943 (citing 29 CFR 500.20(h)(1)–(4) (1997)).

[181] 29 CFR 500.20(h)(4) further advised 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: *Real v. Driscoll Strawberry Assocs.*, *Inc.*, 603 F.2d 748 (9th Cir. 1979); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987); *Beliz v. McLeod*, 765 F.2d 1317 (5th Cir. 1985); and *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983).

"definition of employ for purposes of FMLA is taken from the [FLSA]."[182] However, the FMLA regulation did 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 explained generally that "courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship."[183] It further advised 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 or 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.[184] The Department believes that adding cross-references to part 795 in 29 CFR 825.102 (definition of "Employee") and 825.105(a) addresses this concern and provides useful guidance when making the determination under the FMLA.

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

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[182] 91 FR 9944 (citing 29 CFR 825.102, 825.105(a) (1995)).
[183] 29 CFR 825.105(a) (1995).
[184] *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.").

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.[185] However, to the extent the MSPA regulation's specific articulation of the economic reality test differed in meaningful ways from

[185] *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.

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,[186] emphasizing in the 2021 Rule, for example, the Department's preference to "proceed incrementally."[187] 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 scope of employment.

Many commenters agreed with the NPRM's assessment that the analysis for independent contractor status should be the same across the FLSA, FMLA, and MSPA. Noting that the three laws share the same definition of "employ," the Washington Legal Foundation commented that "harmonizing the relevant FLSA regulatory definition with the FMLA's and MSPA's is just good housekeeping." Numerous commenters asserted that adopting a uniform classification analysis across all three laws would reduce confusion and compliance costs. *See*, *e.g.*, Association for Competitive Technology; FSI; National Watermelon Association; NFIB. The Wisconsin Institute of Liberty commented that "[w]orkers, employers, and small businesses should not be required to navigate multiple classification standards across statutes administered by the same agency."

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

[187] 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).

Though several commenters made policy or legal criticisms of the NPRM's proposed analysis which were unique to the FMLA and MSPA,[188] few commenters opposed to the NPRM disagreed that analysis for assessing independent contractor status should be the same under the FLSA, FMLA, and MSPA. *See* IBT (commenting that IBT would "strongly support" a uniform test if the test at issue were "accurate, comprehensive, and faithful to law"); Justice for Migrant Women (asserting that NPRM's proposed analysis would be contrary to the FLSA, FMLA, and MSPA because all three statutes share the same understanding of the term "employ"). However, the Department received a small number of comments suggesting that a uniform approach among all three statutes is not required. *See* Coalition of State Officials (asserting that a "one-size-fits-all-statutes" rule is unnecessary); Farmworker Justice ("Because the FLSA and the [MSPA] use the same definitions of 'employ,' the case law under each statute can be applicable, but [MSPA] decisions are not always applicable to FLSA cases.") (citing *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1177 (11th Cir. 2012)). Coalition of State Officials asserted that "unique structures and provisions" of the FMLA and MSPA require "reasoned consideration" before proceeding with a uniform approach. With respect to the FMLA, the Coalition asserted that the Department must consider the requirements set forth at 29 U.S.C. 2611(2)(A)–(B) for an employee to be eligible for FMLA-protected leave as well as the Department's joint employment regulation at 29 CFR 825.106. With respect to MSPA, the Coalition contended that the applicability of the FLSA's definition of "employ" to MSPA is "only for the purposes of implementing the FLSA" and subject to "limits that the proposed rule fails to address."

Relatedly, some commenters asserted that the Department did not adequately explain its reasons for amending the FMLA and MSPA regulations now when it declined to do so in 2024 and 2021. *See* Coalition of State Officials; National Women's Law Center; NWJP. Some of these commenters relied on the Department's prior conclusion that it did not see a "compelling need"

[188] These commenter arguments are addressed later in section IV.J. of this notice.

to revise the MSPA regulations, *see* 86 FR 1177, to suggest that the Department must have a "compelling need" now. *See* Coalition of State Officials; NWJP.

Having considered commenter feedback, the Department disagrees that its regulations can or should continue to feature different independent contractor analyses under the FLSA, FMLA, and MSPA, as Congress plainly intended for the FMLA and MSPA to follow the FLSA in determining whether there is an employment relationship. *See* 29 U.S.C. 2611(3) (providing that "employ" and "employee" have the "same meanings given such terms" in the FLSA); 29 U.S.C. 1802(5) (providing that "employ" has "the meaning given such term" under the FLSA); *see also Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) ("Both [FLSA and MSPA] utilize the same definition of 'employ,' so if the growers employed the farmworkers under one statute, they necessarily employed them under the other."); *Layton*, 686 F.3d at 1177 (in FLSA joint-employer case, declining to apply MSPA case law because, while MSPA defines the employment relationship by reference to the FLSA, the reverse does not necessarily hold true—the FLSA employment relationship is not "invariably defined" by reference to MSPA). Commenters' suggestions that uniformity is not required only confirm that there is ambiguity over what analysis should apply to the FMLA and MSPA. The Department resolves that ambiguity now.

Regarding the "unique structures and provisions" of the FMLA and MSPA, Coalition of State Officials did not explain what bearing they should have on the question of what analysis to apply when determining employee or independent contractor status. The Department recognizes that an individual's eligibility for the rights and protections of the FMLA depends upon not only whether the individual is employed by a business but also whether the business employs a threshold number of employees near the individual's worksite, among other considerations. *See* 29 U.S.C. 2611(2)(A)–(B). The FMLA is clear that the FLSA's definitions of "employ" and "employee" apply for purposes of determining both whether the individual is employed by the business and whether the business has the requisite number of employees, *see* 29 U.S.C. 2611(3),

and the Department's FMLA regulations have consistently reflected that fact, *see* 60 FR 2185–86; 29 CFR 825.102 ("Employee"). The applicability of the FLSA's definition of employ to MSPA is somewhat more limited because some of MSPA's requirements apply regardless of whether there is an employment relationship. *See, e.g.*, 29 U.S.C. 1823(a) (imposing requirements for the safety and health of housing on "each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers"). Nothing in this rulemaking alters the application of such requirements.

The Department acknowledges that it must have "good reasons" for amending its prior regulations. *See Food & Drug Admin. v. Wages & White Lion Investments, L.L.C.*, 604 U.S. 542, 570 (2025) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). But the Department need not "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id*. Therefore, the fact that the Department stated in 2021 that it did not find a "compelling need" to revise the MSPA regulations, *see* 86 FR 1177, does not mean that it must articulate a "compelling need" now. In light of clear congressional intent to have the same scope of employment apply to the FLSA, FMLA, and MSPA, and for all the reasons the Department has explained for amending the FLSA regulations, the Department finds good reasons to amend the FMLA and MSPA regulations.

In sum, this rulemaking is motivated partially by the fact that the analysis for distinguishing between employees and independent contractors should be the same under the FMLA and MSPA as it is under the FLSA. Workers and businesses alike will benefit from the simplicity and certainty of having a single uniform standard for assessing employee or independent contractor status under all three laws.

IV. Final Regulatory Provisions

For all the reasons discussed above, the Department is rescinding the 2024 Rule's regulatory guidance on employee or independent contractor status and, separately, readopting at 29 CFR part 795 the 2021 Rule's regulatory guidance, with modifications and enhancements that

are explained in the sections below. In the Department's view, this rule's rescission of the 2024 Rule is independent and severable from the regulations adopted in its place, which includes:

- an introductory provision in § 795.100 explaining the purpose of part 795 (with a minor modification to the version of this provision that was adopted in the 2021 Rule);
- a provision in § 795.105(a) explaining that independent contractors are not employees under the FLSA;
- a provision in § 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), with additional context on the meaning of economic dependence that was not in the 2021 Rule;
- provisions in § 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,[189] as well as three other factors that may serve as additional guideposts in the analysis;[190]
- a provision in § 795.110 advising that the parties' actual practice is more relevant than what may be contractually or theoretically possible;
- a provision with 14 fact-specific examples in § 795.115, including updates to three of the six examples that originally appeared in the 2021 Rule and eight new examples;[191] and

[189] Each of these factors includes a modification from what the NPRM proposed (and what was in the 2021 Rule) resulting from the Department's consideration of the comments received. *See infra* sections IV.F.1.-2.
[190] The Department has made one minor non-substantive change to the regulatory text in § 795.105(d)(2)(iii) as compared to the 2021 Rule, as explained below.
[191] In response to commenter feedback, the final rule includes three pairs of contrasting illustrative examples that were not proposed in the NPRM.

- a severability provision in § 795.120.

Additionally, this rule revises 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. In particular, this rule revises 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 revises 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.

This rule does not 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.[192]

As noted above and for the reasons provided herein, the Department believes that the analysis adopted in this rule 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. The Department's response to commenter feedback on the specific features of this rule is provided below.

A. Introductory Statement (§ 795.100)

The Department proposed an introductory statement, § 795.100, at the beginning of the FLSA regulatory provisions. The proposed introductory statement advised 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]"; "prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under

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

the [FLSA]" are rescinded to the extent that they "are inconsistent or in conflict with" part 795; 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.[193]

The Department explained that the proposed introductory statement would provide clarity as to how WHD intends to use part 795 and how employers, businesses, workers, and courts should use part 795. The proposed introductory statement would also address how part 795 relates to prior interpretations and explain how employers can rely on part 795 for purposes of the good faith reliance defense in the Portal-to-Portal Act. The Department further explained that the proposed introductory statement would clearly and concisely summarize the purposes of part 795.[194]

The Department received very few comments addressing the introductory statement or related issues. Center for Workplace Compliance supported proposed § 795.100 and its explanation of the purpose and scope of part 795 and how "the Department's interpretations may be relied upon consistent with the Portal-to-Portal Act." Trevar D. Kolodny, who identified himself as a Visiting Fellow at the Heritage Foundation commenting in his individual capacity, stated that the proposed introductory statement was a "considerable improvement" compared to the introductory statement in the 2024 Rule, and he particularly disputed the basis for citing *Skidmore* in the 2024 Rule's introductory statement (the proposed introductory statement in this rulemaking did not cite to *Skidmore* or any other case).

Relatedly, Flex Association urged the Department to confirm in this final rule "that prior subregulatory guidance inconsistent with the rule is no longer operative"—particularly AI 2015-1 and "pre-2008 versions of Fact Sheet #13." The Department agrees that, by the plain language

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[193] 91 FR 9973.
[194] *Id.* at 9945.

of § 795.100, AI 2015-1 and the pre-2008 versions of Fact Sheet #13 are rescinded by this final rule (to the extent that they had not already been rescinded) as they are inconsistent or in conflict with part 795 as adopted herein. Flex Association suggested that FAB 2025-1 and Opinion Letter FLSA2025-2, on the other hand, will remain part of "the Department's operative interpretive position." Unlike the analysis adopted herein, however, FAB 2025-1 and Opinion Letter FLSA2025-2 reflected six- and seven-factor analyses with no core factors. Accordingly, they are necessarily rescinded as they are inconsistent or in conflict with part 795 as adopted herein. That does not mean that the Wage and Hour Division's conclusion in Opinion Letter FLSA2025-2 that the service providers who used the "virtual marketplace" company described therein were independent contractors of that company under the FLSA would be different if the analysis in this final rule were applied. Nonetheless, § 795.100 plainly provides that prior guidance from the Division is rescinded to the extent that it is inconsistent or in conflict with part 795. The Division will endeavor to provide subregulatory guidance consistent with part 795 for the benefit of stakeholders and interested parties.

In this final rule, the Department is replacing the reference to the Department in first sentence of § 795.100 with a reference to the Wage and Hour Division since the interpretations discussed in this section are, to be precise, those of the Division. Otherwise, the Department finalizes § 795.100 as proposed.

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

As explained in the following sections, the Department is readopting—with some modifications and augmentation—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 (§ 795.105(a))

The Department proposed to readopt the regulatory text of § 795.105(a) from the 2021 Rule, which recognized a foundational legal truism—that independent contractors are not employees under the Act. This provision explains 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 obligations for employers under sections 6, 7, and 11 of the FLSA do not apply with respect to services received from the independent contractor.[195] The 2024 Rule contained a similar provision.[196] Having received no substantive comments on this section, the Department is now finalizing as proposed this provision that it has included consistently across rulemakings.

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

The Department proposed to readopt, with a few modifications, the regulatory text of § 795.105(b) from the 2021 Rule. The proposed section explained, as the Supreme Court and courts of appeals have long held, that economic dependence is the ultimate inquiry—to which the underlying factors are directed—when determining an individual worker's status under the FLSA. The section referenced the relevant statutory provisions, 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 further explained 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.[197]

In the NPRM, the Department noted that in the 2021 Rule, the Department explained that the "touchstone" of the economic reality test is "economic dependence." 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 business for the opportunity to render service or are in business for themselves.'" *Id.* (quoting

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[195] 91 FR 9946; 86 FR 1177–78.
[196] 29 CFR 795.105(a) (2024).
[197] 91 FR 9946.

Saleem, 854 F.3d at 139). Moreover, as explained in the NPRM, 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 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 at issue. *Id*.

The 2024 Rule contained a similar provision, 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.[198] The Department therefore proposed 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

[198] 29 CFR 795.105(b) (2024).

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." *Id.* at 268.

Consistent with the explanations above, and to provide further context on the meaning of economic dependence, the Department proposed to make two modifications to the regulatory text of § 795.105(b) as compared to the 2021 Rule. The purpose of the first modification was 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 was 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 proposed adding the following sentences to the end of the 2021 Rule's version of § 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."[199]

Commenters in favor of and opposed to the proposal overall generally agreed with the additional explanatory language that the Department proposed. *See, e.g.*, Flex Association ("Flex endorses the Proposed Rule's focus on an individual's dependence for *work* rather than for *income*"); IBT (agreeing that "a proposed rule should correctly distinguish dependence-for-work from dependence-for-income," elaborating that the focus should be "on whether the workers are dependent on a particular business or organization for their continued employment"); Littler WPI

[199] 91 FR 9946.

(commenting that the new language "captures the core of the economic-reality test"); Society for Human Resource Management (SHRM) (expressing support for the modified definition, which "aligns with SHRM's position that [the] analysis must focus on the specific worker-business relationship rather than individual financial circumstances"); Uber ("The Rule correctly points out that economic dependence is not synonymous with income. Economic dependence does not turn on whether a worker gets most or all of her revenue from a single source. Instead, it turns on whether the worker relies on a single source for continued work."). U.S. Chamber of Commerce supported the first proposed clarifying sentence but opined that "the presence of multiple income sources does matter" because "one of the most desired and characteristic aspects of independent contracting is the availability of multiple sources of income." U.S. Chamber of Commerce thus requested that the Department amend the second sentence or clarify that "the opportunity to work for other businesses, and to seek other revenue streams, still weigh in favor of independent contractor status."

FSI supported the Department's proposal but commented that the Department should ensure that its broader articulation of economic dependence "does not inadvertently reintroduce the 2024 Rule's flawed premise that entrepreneurial drive and business acumen are indispensable characteristics of independent contractors." International Franchise Association (IFA) supported the inclusion of the sentence explaining that "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," but it did not agree that "economic dependence" is the ultimate inquiry according to Supreme Court precedent but rather the "economic realities" and whether the workers are in business for themselves. IFA also asked the Department to state that "the economic reality of the typical franchisor and franchisee relationship reflects an independent contractor relationship where the franchisee is not economically dependent upon the franchisor for purposes of the FLSA." Similarly, Instacart supported the statement that "economic dependence does not turn on income

level" but requested that the Department add a sentence stating that "[a]n individual's engagement in work on a part-time, intermittent, or supplemental basis, including in combination with other employment or income sources, does not, by itself, indicate economic dependence on a potential employer."

In response to U.S. Chamber of Commerce's comment about the need to clarify that the opportunity to work for other businesses and seek income from multiple sources still weighs in favor of independent contractor status, the Department confirms that the control factor in § 795.105(d)(1)(i) addresses this in regulatory text by stating that "the ability to work for others, which might include the potential employer's competitors, weighs towards the individual being an independent contractor." With regard to the concern raised by FSI, the Department does not agree that it is reiterating any language from the 2024 Rule that the commenter found objectionable. Regarding IBT's concern that the proposed language in this section might replace the analysis of the worker's relationship with a particular business, the Department emphasizes that the language in this section describes overarching concepts and is not a substitute for applying the economic reality factors to the working relationship at issue. With respect to IFA's concerns, the Department believes that IFA may have misconstrued the term "economic dependence" in § 795.105(b) in this section, as it is part of the consideration of whether "as a matter of economic reality, the individual is economically dependent on that employer for work," and is therefore an employee, or whether "the individual is, as a matter of economic reality, in business for him- or herself," and is therefore an independent contractor. *Id*. Further, the Department declines to make any absolute or categorical statement about the economic reality of any work relationship such as the statement IFA asked the Department to make about franchisees; as IFA accurately states in its comment, the "economic realities" always need to be considered. Finally, the Department does not agree with Instacart that it would be helpful to add the clarifying language that Instacart proposed stating that a combination of intermittent work with various income sources "does not, by itself, indicate economic dependence on a potential

employer." As the Department makes clear throughout this rule, no one factor or fact alone is determinative of economic dependence or employment classification.

The Department is finalizing this section as proposed.

E. Determining Economic Dependence and Identifying Core Factors (§ 795.105(c))

In the Department's proposal, the readoption of § 795.105(c) represented the most critical change from the 2024 Rule's multifactor analysis in which no factor carries any particular weight to the 2021 Rule's multifactor test that highlights two primary, or core, factors: control and opportunity for profit or loss. Specifically, the Department proposed to readopt the regulatory text of § 795.105(c) from the 2021 Rule, which explains that the control and opportunity for profit or loss factors are more probative in determining whether an individual is an employee or independent contractor under the FLSA.[200] As in the 2021 Rule, the Department proposed that these two primary factors 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 also proposed that the three additional factors described in § 795.105(d)(2)—skill, permanence, and whether the work is part of an integrated unit of production—provide additional direction for the analysis, but are less probative (and, in some cases, may not be probative at all). As a result, these factors would be 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 proposed that this provision also explains that all these "economic reality" factors are not exhaustive, and that no single factor is dispositive.

As the Department explained in the NPRM, this provision was proposed 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 the Department

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[200] 91 FR 9947–50; 86 FR 1246 (§ 795.105(c)).

refers to as the "core" factors. 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). As the Department explained in its proposal and 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 application of the analysis.[201] However, even within the multifactor, totality of the circumstances test, courts have tended to focus on the two principal factors as the primary, central 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 primary 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."[202] Even though no one test can perfectly harmonize the variations of factors, language, and emphasis among 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 NPRM and the 2021 Rule, highlighting the combined probative value of the two primary 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. And

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[201] 91 FR 9947; *see also* 85 FR 60606–07, 60620.
[202] 86 FR 1196.

in the seminal Supreme Court cases applying the economic reality test under the FLSA, 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 him- or herself.[203] The NPRM further explained that, as part of the 2021 rulemaking, the Department reviewed the results of federal appellate decisions since 1975 applying the economic reality test under the FLSA, noting "a remarkably consistent trend" where "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."[204] 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. In other words, "courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so."[205]

The Department acknowledged in the NPRM that proposing to return to the 2021 Rule's core factor analysis represented a change with respect to the interpretation of the economic reality analysis as compared to the 2024 Rule.[206] However, the Department believed such a change was warranted for significant and valid legal and policy reasons—primarily that providing a more focused analysis distilled from judicial precedent would offer greater certainty for employers, employees, and those who wish to engage with or as independent contractors.

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[203] *See Silk*, 331 U.S. at 716–19; *Rutherford Food*, 331 U.S. at 730–31; *Whitaker House*, 366 U.S. at 32.
[204] 91 FR 9947 & n.140 (citing 86 FR 1196–97).
[205] 91 FR 9948 (citing 86 FR 1198).
[206] 91 FR 9948.

Additionally, the Department reviewed the concerns identified in the 2024 Rule about the 2021 Rule's approach and considers them misplaced,[207] as discussed further below.

The Department sought comments from the public regarding their experiences using the economic reality analyses provided in the 2021 and 2024 Rules, and why one might be preferable to another. The Department also welcomed comments about any other effective and reliable circuit court analyses, or other appropriate analyses for determining employee or independent contractor status. Additionally, the Department solicited input on whether further streamlining of the two-core-factor analysis would provide even greater clarity and focus on the question whether an individual is an employee or an independent contractor under the FLSA. To that end, the NPRM presented for commenters' consideration an alternative analysis to the two-core-factor approach, in which the control factor would be considered first and, if it points to employee status, the analysis would end there and the worker would be an employee. Under this analysis, the opportunity for profit or loss and other factors would be considered only if the control factor is inconclusive or points to independent contractor status.[208] The comments received, and the Department's responses, are discussed below.

1. Comments and responses regarding the alternative "control first" streamlined analysis

A wide range of commenters opposed the proposed alternative of a further streamlined "control first" analysis. Commenters representing businesses and workers alike stated that it is inconsistent with longstanding case law providing that no single factor is dispositive under the economic reality test. *See, e.g.*, Coalition to Promote Independent Entrepreneurs; Coalition of State Officials; National Retail Federation; National Partnership for Women & Families et al.; UBC; U.S. Chamber. Many commenters stated that the proposed alternative resembles a common law control test and is therefore inconsistent with the economic reality test applied under the FLSA and with the Department's rejection of the common law test. *See, e.g.*, Coalition

[207] *Id*. at 9948–49.
[208] *See* 91 FR 9949–50.

of State Officials; CWI; Flex Association; Nichols Kaster; SHRM. Commenters from the business community characterized it as imbalanced and stated that it would tilt the scales in favor of employee status. *See, e.g.*, American Bakers Association; Coalition to Promote Independent Entrepreneurs; Flex Association; Littler WPI; National Retail Federation; U.S. Chamber.

Three commenters expressed support for this proposed alternative. CHRO Association and ShiftKey applauded what they viewed as the enhanced predictability and efficiency of this alternative. Landmark Legal Foundation argued that this alternative is grounded in Supreme Court precedent establishing that the FLSA's employment definitions were intended to capture workers beyond the common law control test. By "leading with control," this alternative "would ensure that workers who are unambiguously subject to an employer's direction are covered without requiring further inquiry," while consideration of opportunity for profit or loss and other factors would preserve the "broader reach of the 'suffer or permit' standard for cases where control alone is inconclusive."

Upon consideration of these helpful comments, the Department declines to adopt this proposed alternative analysis. Although the control-first analysis proposed in the NPRM would differ from the common law control test, the Department recognizes that the proposed alternative engendered significant confusion on this point. As the Department has explained throughout this rulemaking and in prior years, it does not intend to adopt a common law control test and believes it is legally constrained from doing so. Consistent with this position, the Department declines to adopt an analysis that considers control as the potentially only factor. Having considered these comments and as discussed below, the Department believes that approach of two principal, central factors strikes the right balance in providing a clear and predictable framework while still considering the other economic reality factors and the circumstances of the whole activity.

2. Comments and responses regarding the proposed "two core factor" analysis

Commenters from the business community widely supported the Department's proposal to adopt the 2021 Rule's analysis for determining employee or independent contractor status

under the FLSA by focusing on the two primary factors of control and opportunity for profit or loss. *See, e.g.*, American Trucking Association; Americans for Prosperity Foundation; CWI; DoorDash; Flex Association; Independent Work Coalition; Littler WPI; National Association of Convenience Stores et al.; Small Business & Entrepreneurship Council; SHRM; U.S. Chamber. A number of these commenters agreed that these two factors are practically the most probative of economic dependence. American Trucking Association; Americans for Prosperity Foundation; Littler WPI; U.S. Chamber. Additionally, commenters who work as freelancers applauded the Department for highlighting the two core factors as "the defining elements of being an independent contractor," explaining that "[i]t feels like common sense to us that if we're deciding when, where and what we do, and if we can do more or less of it however we please, then we are our own bosses." Kim Kavin et al.

Commenters that supported the analysis with two primary central factors also generally praised it for providing greater predictability and more consistent outcomes. *See, e.g.*, Americans for Prosperity Foundation; CWI; CPAC Foundation Center for Regulatory Freedom; FSI; Flex Association; Independent Work Coalition; National Retail Federation; Scopelitis; U.S. Chamber. For example, Flex Association commented that the "Proposed Rule's principal strength is its predictability." *See also* CPAC Foundation Center for Regulatory Freedom ("The prior framework's reliance on an unweighted, multi-factor balancing test created substantial ambiguity by failing to specify how competing considerations should be evaluated…. [This] can produce divergent outcomes[.]"). FSI explained that "[a]lthough the core factors are not where the test ends, those factors anchor the analysis. Businesses and workers know what is very likely to be most important and can structure their arrangements accordingly." Similarly, CWI commented that "[w]hile the Proposed Rule may not present absolute certainty, which is rarely attainable through rulemaking, it provides far clearer guidance than the 2024 Rule did." Pacific Legal Foundation urged the Department to provide even more certainty by creating a rebuttable presumption that "[w]hen control and opportunity for profit or loss both indicate independent

contractor status, the worker *is* an independent contractor, absent extraordinary circumstances that the Department or private plaintiff must affirmatively establish." *See* American Society of Travel Advisors (similar). Other commenters suggested that if the two primary factors favor independent contractor status, "that should be the end of the analysis." Americans for Prosperity Foundation; *see* Connie Kirkpatrick (similar).

Several commenters maintained that an economic reality analysis focused on the two core factors aligned well with case law construing the FLSA. *See, e.g.*, CWI; DoorDash; FSI; Flex Association; Independent Work Coalition; National Retail Federation; U.S. Chamber. In particular, FSI conducted its own analysis of the 49 post-1975 circuit court cases cited in the preamble to the Department's proposed employee or independent contractor rule in 2022 and concluded that the two-core-factor "framework is fully consistent with Supreme Court precedent and accurately encapsulates how circuit courts have applied the various factors in practice." FSI attached a table showing that "[i]n the overwhelming majority of those cases (44/49, or 90%)," the two core factors "both pointed in the same direction as the classification ultimately reached by the circuit court." Further, in a small number of cases, "(5/49, or 10%), one of the two core factors was either uncertain or pointed in the opposite direction." Because "in *no case* did both factors point the other way" from the court's ultimate decision, they noted that this bore out the reasoning underlying the Department's 2026 proposal and the 2021 Rule.

Several commenters also agreed with the Department's proposal that the additional factors should not have the same weight as the two primary factors. Americans for Prosperity Foundation; National Retail Federation; U.S. Chamber. National Retail Federation, for example, commented that "[w]hile these factors provide additional insight into the nature of the relationship between the worker and potential employer, their value should mainly arise when the core factors point in opposite directions." U.S. Chamber of Commerce supported the proposed framework but also requested the Department to "direct that evaluations of the core (and additional factors) with respect to any worker relationship must, in fact, analyze the

particular worker's relationship with the business," rather than being determined by "another worker's relationship with a business," and also "fine tune its framework to eliminate any confusion or ambiguity over whether the two core factors have equal weight in the analysis." To the extent there is any confusion or difference of opinion on these two issues, the Department makes clear that evaluating the factors necessarily involves analyzing the worker's relationship with the business. However, as U.S. Chamber of Commerce noted, "[a]ll relevant evidence must be explored," which may involve consideration of other workers at the worksite as well.[209] Further, the Department clarifies that the two core factors generally carry the same weight in the overall analysis; nothing in the operative language in § 795.105(c) suggests that one core factor is more or less important than the other. Of course, in a particular case, a core factor that strongly indicates a particular classification outcome (in either direction) will have more relevance than a core factor with conflicting facts where the indicated outcome is ambiguous or a closer call. As the Department explained in 2021, "a factor's probative value as a general matter [is not the same as] its specific weight in a particular case," which depends on "how strongly specific facts within the factor, on balance, favor[] a particular classification."[210]

Some commenters opposed the Department's proposal to adopt this analysis from the 2021 Rule, for a variety of reasons. These commenters often contended that designating two central factors was inconsistent with Supreme Court precedent that did not give particular weight or priority to any particular economic reality factor. *See, e.g.*, AFL-CIO (citing *Silk*, 331 U.S. at 716, for the proposition that "the Court explained that degrees of control, opportunities for profit or loss, investment, permanency, and skill are all 'important for decision,' but '[n]o one is controlling nor is the list complete'" and *Rutherford Food*, 331 U.S. at 730 for the proposition that "the determination of the relationship does not depend on such isolated factors but rather

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[209] *See, e.g., Rutherford Food*, 331 U.S. at 729 ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act.").
[210] 86 FR 1199; *see also id.* at 1202 ("[T]he Department declines to assign an invariable relative weight between the two core factors.").

upon the circumstances of the whole activity"); Allegheny County et al.; IBT; NELP; New York City Comptroller; Nichols Kaster; NWJP; Southern Poverty Law Center. AFL-CIO criticized the Department's proposal for "encouraging employers to structure relationships around a select set of favored factors while minimizing others" and "substituting a manipulable framework for the statute's command that courts look to the full economic reality of the relationship." IBT argued that "[b]y declaring certain factors 'core' and others merely supplemental, the Department is making a policy choice that is not supported by statute or precedent, and that will predictably harm the workers the FLSA was designed to protect[.]" *See* Allegheny County et al. (same). NWJP further critiqued the Department's case law analysis, asserting that the Department did not provide evidence to support its "subjective reading of court opinions" as "giving some factors more weight while saying no factor is dispositive and all facts must be considered." And Coalition of State Officials asserted that "[c]reating greater alignment with precedent is not an accurate description of the basis of this rule, since the proposed test departs from decades of Supreme Court and circuit court precedent." Additionally, IBT emphasized that the "demotion of permanence, skill, and integrality also directly contradicts binding case law reaffirmed in every circuit decision and every Supreme Court case since 1947."

As noted in section III.A., commenters who opposed the Department's proposal asserted that the two-core-factor test would generate more confusion and less predictable outcomes—contrary to the Department's goal in this rulemaking and the views of many commenters that supported the proposal—because the analysis differs from prior judicial precedent and Departmental interpretation. *See e.g.* Coalition of State Officials; Getman, Sweeney & Dunn; National Women's Law Center; NWJP; REAL Women in Trucking; SMART & SMACNA; Texas RioGrande Legal Aid. For example, NWJP opined that "[g]iven the weight of 80-plus years of case law in the Supreme Court and across the circuits," and 75 years of Departmental interpretation, courts and litigants' understanding would be "muddied" by the Department's adoption of a new analysis. This commenter added that "the new rule will also lead to more

confusion" due to "changes in what the factors include as well as how to apply the two core factors." Getman, Sweeney & Dunn also urged the Department not to adopt the proposed analysis, which it characterized as not "consistent with long standing court precedents," and thus "very likely [to] create a split between agency enforcement and judicial application of the FLSA. Such a divergence between the agency and judicial tests would make it exceedingly difficult for employers to understand how to apply the standard, and for workers to know and understand their rights."

Some commenters who opposed the Department's proposal also viewed the focus on the two central factors of control and opportunity for profit or loss as being too similar to the common law control test, which the Supreme Court rejected for purposes of the FLSA. *See, e.g.*, AFL-CIO; Coalition of State Officials; NELP; Nichols Kaster. Several further believed that it would lead to more misclassification of employees as independent contractors, largely because they viewed the elevation of control and opportunity for profit or loss as core factors and the designation of the other factors as having less probative value as a narrowing of the considerations in the "totality of the circumstances" test. AFL-CIO; Allegheny County et al.; Coalition of State Officials; Congressional Labor Caucus; IBT; National Women's Law Center; U.S. Representatives Scott and Omar-U.S. House of Representatives Committee on Education and Workforce, Subcommittee on Workforce Protections. For example, Representatives Scott and Omar, ranking members respectively on the House Committee on Education and Workforce and the Subcommittee on Workforce Protections, contended that "[b]y narrowing the test to determine employee status, the Proposed Rule takes a less holistic view … providing less opportunity to properly assess the totality of circumstances" which could result in improper reclassification of workers from employee to independent contractor or employers "hir[ing] workers as independent contractors where they would otherwise be classified as employees, misclassifying these workers." Similarly, Coalition of State Officials argued that the Department's proposal would "improperly narrow the inquiry into a worker's status, leading to

misclassification of employees as independent contractors." *See also* Congressional Labor Caucus ("Overly narrow interpretations of this relationship expose workers to greater risk of misclassification[.]").

AFL-CIO in particular expressed concern that the two core factors are "uniquely susceptible to manipulation" because employers could "rely on contractual disclaimers of control, even where control is exercised in practice," "manufacture illusory 'entrepreneurial opportunity' through theoretical or employer-created mechanisms," and "recharacterize work that is plainly central to the business as somehow ancillary." As an example, it posited that the framework in the Department's proposal would allow "a delivery company [to] classify its drivers as independent contractors by contractually disclaiming control, while simultaneously dictating routes through an app, setting non-negotiable prices, imposing performance metrics, and retaining the right to deactivate workers who do not meet those standards. The company could further point to the driver's ability to accept or reject assignments or work for multiple platforms as evidence of 'entrepreneurial opportunity,' even though the worker has no meaningful ability to negotiate rates, build an independent customer base, or operate a truly independent business."

Some commenters asserted that diminishing the relative importance of non-core factors would be especially prejudicial to agricultural workers. For example, Farmworker Justice asserted that the NPRM "improperly diminishes the potential weight of th[e skill] factor to the detriment of farmworkers, whose labor is largely unskilled" and that "[e]levating two core factors and diminishing this one, would likely lead to misclassifying agricultural workers in positions that often require unskilled labor, as independent contractors." Similarly, CLASP asserted that "[d]e-emphasizing [the "skill required" and "integral part" factors in favor of core factors] … would make it more difficult to determine the status of farmworkers and incentivize farm operators to adopt more exploitative working arrangements like sharecropping or share-farming."

Finally, the ranking members of the House Education and Workforce Committee and Subcommittee on Workforce Protections contended that the Department's proposed analysis exceeded the Department's statutory authority: "Congress has not delegated rulemaking authority to the DOL with respect to the scope of the employment relationship under the FLSA, and by extension, the FMLA and the MSPA. The Department only has interpretive rule or guidance authority on this issue, but such interpretations cannot conflict with the text of or intent behind the FLSA, as this proposal does." *See also* Allegheny County et al. ("Because the proposed rule conflicts with the text of the FLSA as well as with Supreme Court and circuit court authority interpreting the statute, it constitutes an improper exercise of the Department's rulemaking authority."); AFSCME ("The Department … lacks authority to recast the economic-realities inquiry by elevating two factors above the totality of the circumstances."). Representatives Scott and Omar added that the 2024 Rule's application of the FLSA's "suffer or permit" standard properly "made clear the importance of the broad, multifactor test in determining employee status under the FLSA."

After considering the comments received, the Department is finalizing § 795.105(c) as proposed. The Department agrees that it is important and useful to adopt a practical economic realities analysis distilled from federal case law that both workers and businesses may readily, accurately, properly, and reliably apply to classify employees and independent contractors. Rather than set forth a myriad of factors and considerations without direction regarding their application, the Department considers the standard it finalizes best suited to facilitate accurate classification at the outset of relationships, not after years of costly litigation. This provides more certainty and predictability for employers, employees, and independent contractors. The standard is consistent with the way courts have decided employee or independent contractor cases under the FLSA for decades. As a result, all persons can gain efficiencies in their interactions, and there will likely be a reduced need for litigation in cases where the rule is properly applied, reducing the number of instances in which a court must ultimately reach a conclusion years later

about the proper classification of one or more individuals. And though the Department understands why commenters such as the Pacific Legal Foundation seek even more certainty through a rebuttable presumption if the two primary factors point in the same direction, the Department believes a rebuttable presumption improperly injects burdens of proof into an analysis where all factors are properly considered, even though some factors are generally considered to be more probative than others.

The Department disagrees with commenters contending that the Department's proposal is contrary to case law stating that no single factor in the economic reality test is determinative and that the totality of the circumstances must be considered in a holistic rather than mechanical fashion. The core factor analysis finalized by the Department centers on two primary factors—that is, first to be considered and first in importance in most cases—and does not run afoul of this precedent. Specifically, this final rule in § 795.105(c) states—*consistent* with judicial precedent—that no one factor is determinative, nor are the enumerated factors exhaustive. To be clear, by identifying two factors that encompass the considerations that are generally most relevant to determining economic dependence, the Department is certainly not implying that either one of these two core factors alone would be determinative. To the contrary, as the Department has repeatedly explained, these two factors in combination and pointing to the same classification (employee or independent contractor) are rarely going to be outweighed by the probative value of the other economic reality factors. This is not because the Department declares it so, but rather because decades of federal courts applying the tests from which the Department derived this rule demonstrate that such is the practical reality. Indeed, the Department continues to be unaware 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. Moreover, the Department

has not found any commenter that has identified such a case.[211] Submissions by commenters appear to confirm the point. For example, an analysis submitted by FSI supports the Department's decision to highlight control and opportunity for profit or loss as core factors, as its independent review of almost 50 appellate cases also concluded that "in no case did both factors point the other way" from the court's ultimate decision.

The more important point remains. For decades, the outcomes of federal appellate court decisions have overwhelmingly (if not unanimously) aligned with the Department's approach, indicating the saliency of examining the two central factors first. Put another way, according to the courts, the Department's test—properly applied—will produce accurate results. And this further bolsters the reasoning underlying the Department's proposal and negates the view that such a focus is inconsistent with the relevant FLSA case law. The point of disagreement between these commenters and the Department is at bottom a difference between two accurate observations of the governing FLSA case law. The Department's approach recognizes that, notwithstanding courts' general articulations of the test, the two primary factors—when pointing in the same direction—are in effect, synonymous with the classification outcome. On the other side, the commenters in opposition correctly observe that courts have not specifically and

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[211] Texas RioGrande Legal Aid asserted that the four FLSA cases identified in the MSPA legislative history as informing the worker classification inquiry for purposes of MSPA "displayed one or both of the indicators of independent contractor status" for the core factors even though the court's ultimate conclusion was that the workers were employees. The Department has reviewed those cases (*Rutherford Food, Driscoll, Mednick,* and *Usery*) and does not agree that any of those decisions include a mismatch where the court's findings on the two core factors were outweighed by the combined probative value of other factors. The Department is aware of a recent district court decision (now on appeal to the Eleventh Circuit) in which the court concluded that the worker was an independent contractor after finding that the control factor favored employee status, the opportunity factor "slightly" favored employee status, the investment factor did not weigh in favor of either status, and the special skill, permanence, and integral part factors favored independent contractor status (permanence favored it "slightly"). *Piedra v. Faneuil Ent., Inc.,* No. 25-60953-CIV-SMITH, 2025 WL 4060062 (S.D. Fla. Dec. 19, 2025), *appeal pending*, No. 26-10063 (11th Cir.). Even if the Eleventh Circuit affirms the district court, such an outcome would not be inconsistent with the analysis adopted in this rule, which expressly provides that non-core factors can "outweigh the combined probative value of the two core factors." In any event, one divergent federal appellate case would not render the entire analysis unworthy of being used.

explicitly elevated any factors over the others, as the Department's approach does in this rule.[212] Within this space, it is appropriate for the Department to set forth an analysis distilled from the case law in the effort to promote a more practical and efficient way to determine employee or independent contractor status.

The two principal factors are also more probative because the rule relocates to them the most probative aspects of certain other factors. To reduce overlap and confusion, exclusivity, which has traditionally been considered under both permanence and control, is more appropriately analyzed under control, as explained in greater detail in section IV.F.1. of this preamble. Similarly, initiative, which is often considered under skill, is more appropriately analyzed under opportunity for profit or loss.[213] This reorganization necessarily increases the probative value of the two core factors because they now incorporate considerations that other formulations distribute among the permanence and skill factors. Correspondingly, the remaining aspects of permanence and skill are generally less probative once exclusivity and initiative are considered elsewhere. The rule therefore does not omit or diminish relevant evidence. It does the opposite by placing the most probative considerations within the factors to which they most directly relate while avoiding duplicative consideration of the same facts.

Further, the two principal factor analysis provided in § 795.105(c) does not run afoul of judicial admonitions to avoid a mechanical application of the economic reality test because the regulatory text recognizes that these two factors "typically" (but not necessarily) carry more weight. The regulatory text also makes clear that alignment of the primary factors creates a

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[212] Although the Department had not explicitly elevated any factors over others in its subregulatory guidance prior to the 2021 Rule, this approach does not break 75 years of consistent Departmental interpretation, as some commenters contended. As noted above in section II.B.2.a., the Department has at times highlighted certain factors. For example, in WHD Op. Ltr. FLSA-314 at 1 (Dec. 21, 1982), the Department said, "we considered the key factors to be: (1) the control maintained by the jobber; (2) the amount of investment by the agents, and (3) the agents' opportunities for profit or loss." And in WHD Op. Ltr. FLSA-164 (Jan. 18, 1990), the Department discussed only four factors (control, opportunity for profit or loss, investment, and skill).

[213] *See infra* section IV.F.2.

"substantial likelihood," not a conclusive presumption, of the indicated classification. Decades of federal appellate decisions support the Department's construction, confirming that courts of appeals have not reached a classification contrary to that indicated when control and opportunity for profit or loss both clearly pointed in the same direction. Although a contrary result remains possible—and the rule requires consideration of the remaining factors—the consistency of appellate outcomes over decades is itself probative and warrants bringing to the attention of regulated parties. Recognizing that consistent decision pattern does not make the analysis mechanical.

Moreover, the core factors will not always align or point clearly toward either classification. As the Department explained in the NPRM and the 2021 Rule, 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."[214] For example, in *Carrell v. Sunland Constr., Inc.*, the two central factors did not clearly point toward the same classification because the court found some of the facts germane to control and opportunity for profit or loss indicated employee status and some indicated independent contractor status.[215] In that case, the court relied more heavily on other factors to conclude that the welders at issue were "as a matter of economic reality, in business for themselves."[216] The court noted that many of the welders spent little time working for Sunland and they "worked from job to job and from company to company"; the welders were also highly skilled and had invested significantly in the equipment that they supplied to perform their

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[214] 91 FR 9949; 86 FR 1199.

[215] 998 F.2d 330, 332–34 (5th Cir. 1993) (regarding control, Sunland dictated the welders' schedule and assigned them to specific work crews, but it "had no control over the methods or details of the welding work"; regarding opportunity for profit or loss, Sunland paid the welders an hourly rate that was rarely negotiable and their compensation was based on the hourly rate and the number of hours worked as dictated by Sunland, but welders supplied their own equipment averaging $15,000 per welder and their profits "depended on their ability to control their own costs" and they worked for numerous companies each year).

[216] *Id.* at 334.

work.[217] Thus, analyzing the non-core factors including skill and permanence provided a more complete picture that allowed the court to reach its conclusion regarding the welders' classification. As this case illustrates, identifying two factors as core factors does not mean that the analysis is or should be applied mechanically or simplistically, but rather makes clear that it must be administered 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.

As the Department explained in the 2021 Rule and reiterates here, the "other economic reality factors—skill, permanence, and integration—are also relevant as to whether an individual is in business for him- or herself,"[218] and "each factor should be analyzed."[219] In cases where the two core factors clearly weigh in favor of a particular classification, there would be less need to rely on the other factors, though they should still be considered to determine if they would either individually or collectively outweigh the combined probative value of the two core factors.[220] For example, in *McFeeley*, 825 F.3d at 244, after determining that the control, opportunity for profit or loss, and investment factors favored employee status, the court stated that "[t]he final three factors are more peripheral to the dispute here and will be discussed only briefly: the degree of skill required for the work; the permanence of the working relationship; and the degree to which the services rendered are an integral part of the putative employer's business."

In response to comments that warned about a confusing legal landscape were the Department to adopt the two-core-factor approach, which has never been formally or explicitly adopted by a federal court, the Department reiterates that the landscape is already confusing and fraught with uncertainty that was only exacerbated by the 2024 Rule. As a great number of commenters explained (as discussed above), simply describing the factors without providing any

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[217] *Id.*
[218] 86 FR 1196.
[219] *Id*. at 1201.
[220] *See* 91 FR 9949.

additional guidance as to how they should be weighed or which are more likely to be salient to a court and to align with the court's outcome—like the 2024 Rule did—leaves stakeholders uncertain as to how to proceed. Additionally, during the time period following the district court's decision ruling that the 2021 Rule had taken effect (between March 2022 and March 2024), there was no surge of litigation based on lack of clarity regarding that rule's analysis, contrary to the assertions made by some commenters (discussed earlier in section III.A). Therefore, the Department believes these concerns are overstated, speculative, and are not a basis for declining to adopt the two-core-factor analysis from the 2021 Rule.

In response to comments contending that elevating control as one of the two central factors brings the analysis closer to the common law control test that courts have rejected when interpreting employee or independent contractor status under the FLSA, the Department believes that a multifactor analysis that recognizes a different core factor (opportunity for profit or loss), requires the consideration of three other factors, and allows for the consideration of additional factors (provided that such factors are germane to economic dependence) is readily distinguishable from a control test. As discussed further below, the opportunity for profit or loss factor that the Department is again proposing to adopt 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 (§ 795.105(b)), which is different from the common law's inquiry into control.[221]

In response to comments that raised concerns about increased misclassification of employees as independent contractors due to the proposal's "narrowing" of the facts that should be considered when determining employee or independent contractor status, the Department believes that focusing on core factors that are typically more probative does not eliminate or narrow the relevant considerations. Notably, the analysis does not stop at the two primary factors, but rather identifies three other economic reality factors and also provides for the possible consideration of additional factors in § 795.105(c) and (d) that may be relevant in certain cases. Although the other factors are generally likely to be less probative, and in some cases, may not be probative at all, the analysis still requires the remaining factors to be considered when determining economic dependence. Again, as the Department has stated previously, 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," *id.* at 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*. The Department thus believes that all relevant facts can and will be considered, as detailed below in the discussions of each factor.

Under the Act, actual practice trumps written descriptions when they conflict. Far from being uniquely susceptible to manipulation because employers could "rely on contractual disclaimers of control, even where control is exercised in practice" and "manufacture illusory 'entrepreneurial opportunity' through theoretical or employer-created mechanisms," the "primacy of actual practice" provision in § 795.110 (discussed in more detail below) makes unutilized contractual disclaimers of control, hypothetical potentialities, and theoretical

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[221] *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *see also* section VI.G.1, *infra* (discussing the common law control test as a regulatory alternative that the Department is not adopting in this rulemaking).

opportunities less relevant than actual practices and events. Despite some comments, nothing in the rule, which is devoted to ascertaining the economic *reality* of a relationship, provides for the theoretical to govern the actual. In other words, just because control and opportunity for profit or loss are designated as core factors, that does not mean that an employer has the ability to manufacture facts that would favor independent contractor status for these factors. Nor would contrived, "illusory," or vague assertions of "entrepreneurial opportunity" prevail over contrary actual practice under the rule.

Commenters' concern on this point is curious; notably, the 2024 Rule did not include regulatory text emphasizing the primacy of actual practice.[222] In this respect, the analysis adopted in this rule could be more effective in curbing the kind of abuse described by AFL-CIO. For example, in the scenario AFL-CIO posited where a delivery company could classify its drivers as independent contractors by contractually disclaiming control, while simultaneously dictating routes through an application, setting non-negotiable prices, imposing performance metrics, and retaining the right to deactivate workers who do not meet those standards, the Department would (and any court, worker, or business applying the rule should likewise) look at the control that the company was actually exercising. Similarly, if the company pointed to opportunities that are illusory or otherwise effectively meaningless, the Department would rely on what actually happens. The rule does not countenance determinations regarding any factor in the analysis that are based on illusory options. As a result, the Department does not agree that the two-core-factor approach is inherently more susceptible to manipulation that would achieve a result that does not reflect the economic reality of the working relationship. To further illustrate some of these points, and as discussed further below, the Department is adding an illustrative example pertaining to platform work in § 795.115(b)(2) and (b)(3).

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[222] *See* 89 FR 1718–22 (rejecting commenter requests for retention of the 2021 Rule's provision emphasizing the primacy of actual practice).

The Department appreciates commenter concerns that purportedly diminishing certain factors could particularly prejudice farmworkers, but believes they are misplaced because case law shows that the control and opportunity factors almost always indicate that farmworkers are employees.[223] *See, e.g.*, *Castillo v. Givens*, 704 F.2d 181, 189–92 (5th Cir. 1983); *Lauritzen,* 835 F.2d at 1536; *see also id.* at 1544 (Easterbrook, J., concurring) ("The purposes Congress identified in § 2 [of the FLSA] … strongly suggest that the FLSA applies to migrant farm workers."); *but see Brandel*, 736 F.2d at 1116–20 (affirming trial court's finding that pickle harvesters were independent contractors). The Department's analysis in this rule should yield no different result as to farmworkers' status as employees than courts reached in such cases as *Lauritzen*, *Castillo*, and *Perez v. Howes*, 7 F. Supp. 3d 715 (W.D. Mich. 2014), *aff'd*, 790 F.3d 681 (6th Cir. 2015), where the control and opportunity for profit or loss factors aligned with the workers' status as employees.

Finally, in response to the members of Congress and other similar commenters who asserted that this rule exceeds the Department's statutory authority because Congress has not delegated rulemaking authority to the Department with respect to the scope of employment relationships under the FLSA, and by extension, the FMLA, and MSPA, and therefore the Department can only issue an interpretive rule or guidance that does not conflict with the text of or intent behind the FLSA. The Department's response is twofold.

First, the Department disagrees that this rule conflicts with the text of the Act. To start, that text itself cannot definitively resolve the employee-or-independent-contractor question, especially in the myriad of working relationships across the economy. As discussed at length in this preamble, the rule is consistent with the factors used by courts to determine employee or

[223] This observation does not apply to workers engaged as farm labor contractors by agricultural employers or agricultural associations, who may be independent contractors (and thus properly farm labor contractors under MSPA, 29 U.S.C. 1802(7)) or misclassified employees. To provide additional guidance on this category of workers, the Department has added a pair of illustrative examples to this final rule (§ 795.115(b)(4) and (b)(5)) applying the control factor in the context of farm labor contractors (as discussed below in section IV.J.).

independent contractor status based on their interpretation of the text and purpose of the FLSA and is likewise consistent with the effective weight that courts have placed on those factors when making such determinations.

Second, the Department has authority to interpret the FLSA as the Division possesses authority to administer and enforce it, just as it did in 2021 and 2024. *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). Congress has also expressly delegated rulemaking authority to the Secretary under the MSPA and FMLA. 29 U.S.C. 1861(a), 2654. Thus, this rule is within the Department's authority to promulgate.

For all these reasons, the Department is finalizing § 795.105(c) as proposed, with the exception of a minor non-substantive edit (changing "whether or not" to "whether").

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

This Section F discusses the comments specific to each of the primary, or core, factors.

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

The Department proposed to readopt the regulatory text of § 795.105(d)(1)(i) from the 2021 Rule, which discussed the first economic reality core factor—the nature and degree of control over work.[224] This provision explains 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). By contrast, the control factor would weigh in favor of the individual

[224] 91 FR 9950–52; 86 FR 1246–47 (§ 795.105(d)(1)(i)).

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.

Additionally, the Department proposed 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."[225] This includes "[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)."[226] For example, as illustrated in the example in § 795.115(b)(1) (which the Department is finalizing as proposed, 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 that the owner-operator is 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.

Many commenters expressed support for the Department's proposed formulation of the nature and degree of control as a primary factor in the analysis of whether a worker is economically dependent on a business for work. *See, e.g.*, CWI; DoorDash; FSI; Flex

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[225] 86 FR 1247 (§ 795.105(d)(1)(i)).
[226] *Id*.

Association; National Retail Federation; Uber; U.S. Chamber. However, the vast majority of commenters that generally supported the Department's proposal requested further refinements, industry-specific language, examples, and additional regulatory text. *See, e.g.*, Associated Builders and Contractors; CWI; Flex Association; Independent Work Coalition; Instacart; Littler WPI; National Retail Federation; Scopelitis; ShiftKey; Uber; U.S. Chamber. Other commenters opposed the proposed formulation of the control factor for a variety of reasons. *See, e.g.*, AFL-CIO; Coalition of State Officials; IBT; NELP; New York City Comptroller; Nichols Kaster; NWJP; Richard Reibstein; Texas RioGrande Legal Aid. As in the 2024 rulemaking, the aspect of the control factor that generated the largest number of comments—in support, with requests to modify, and in opposition—is the provision stating that "[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act." Many commenters also had specific suggestions regarding the impact of Super Intelligence (SI) and other technology on control concepts. *See, e.g.*, Instacart; U.S. Chamber. The comments and the Department's responses are addressed below in more detail.

a. Comments generally in support with requests to modify

The Department cannot describe in detail in this preamble every commenter request to modify the control factor by adding language to the regulatory text, modifying the examples that were proposed, or adding new examples, as they are too voluminous. The Department has endeavored, however, to provide an overview focusing on the same types and categories of modifications requested by commenters.

CWI and U.S. Chamber of Commerce urged the Department to include specific examples of evidence of control by the worker over the work, including the worker's ability to make decisions regarding how the work is performed without prior approval, control over the supplies,

tools, and equipment used (or not used) in performing the work, control over time flexibility that exists regarding the work, and decision-making regarding how much of the work the worker will perform and how much to contract out to others. U.S. Chamber of Commerce also recommended the Department to include examples of evidence that is "*not* indicative of a business's control over the work of the worker," including providing orientation or information sessions about business practices, products, services, customers or operating systems, providing training required by law, exerting control in contract or in fact regarding the final result to be accomplished by the worker, providing customer specifications/details and feedback relating to the work (including requesting confirmation from the worker that the customer feedback has been addressed), providing time constraints for completion, providing "pass-through customer requirements" and contract-performance oversight, controlling where the work is to be performed, enforcing contractual obligations, providing emergency or cleaning supplies or other safety equipment in the event of an emergency, providing customers with estimates of completion time for services requested, providing business identification or a logo on uniforms or vehicles, providing suggestions, recommendations, guidance, or tips relating to the services the worker provides, incorporating quality standards, professional certification requirements, audit processes, and safety protocols into independent contractor agreements, and paying the worker by the hour where it is customary to do so. U.S. Chamber of Commerce also suggested that the Department add language affirmatively stating that "businesses are encouraged to maintain robust compliance oversight without fear that doing so will be construed as employee control."

Instacart also proposed a long list of suggested additions to the regulatory text, including, for example, requesting the Department to clarify that under § 795.105(d)(1)(i) the following do not constitute control that indicates an employment relationship: (a) the use of automated systems to match, prioritize, or present work opportunities based on objective criteria such as location, availability, or customer demand where the individual retains discretion to accept or

decline such opportunities; (b) ratings systems and performance-based incentives; (c) incentives that encourage "mutually beneficial behavior," including peak-period bonuses, promotional offers, and surge pricing; (d) the confirmation of whether contractual obligations have been met, including in an application-based setting through automated status updates or other data recorded through the application; (e) the voluntary non-exercise of discretion by a worker, including the choice not to exercise contractual rights to work for competitors, to set individualized rates, or to negotiate terms; and (f) the presence of operational practices adopted by a business in response to applicable legal or regulatory frameworks, including food-safety handling requirements, transportation and vehicle-safety regulations, consumer-protection standards, background-check obligations, and public-health mandates.

Preliminarily, the Department notes that many of the items for which these commenters requested additional examples and clarification already fall within the provision stating that requiring an individual to comply with legal obligations or to meet contractual deadlines, quality-control standards, or other similar terms typical of contractual relationships between businesses does not constitute control or—even assuming some deem these elements control—the type or nature of control that makes the individual more or less likely to be an employee. As discussed in more detail in the section addressing comments received regarding that provision, the Department declines to add numerous additional examples. The Department's overall intent in this rulemaking is to provide an analysis that takes a balanced approach and does not favor either employee or independent contractor outcomes. Therefore, the Department declines to make these many changes requested to the control factor that would imbalance the factor in favor of independent contractor status by detailing the many ways in which workers control work but businesses do not, including delving into increasingly detailed examples of requirements that extend beyond the rule's balanced requirements. The Department certainly agrees that businesses should maintain robust compliance oversight in general and ensure they and their contractors are abiding by the law, and that such general requirements are not indicative of employer-employee

controls. However, it also recognizes that at some point extensive and detailed prescriptions and restrictions may indicate such control, as discussed further in section IV.F.1.d.

CWI and U.S. Chamber of Commerce further requested the Department to clarify that a lack of supervision is probative of independent contractor status under the control factor, in contrast to the 2024 Rule, which stated that "[a] lack of supervision is not alone indicative of independent contractor status, such as when the employer's business or the nature of the work make direct supervision unnecessary." Additionally, Flex Association urged the Department to clarify that "routine supervision or monitoring of the status of work is not control indicative of employee status," commenting that monitoring is common in the commercial market and that obtaining information about the status of work is distinct from controlling the work. The Department declines to provide in this rule that both a lack of supervision and routine supervision favor independent contractor status. Not only is this not borne out by logic, it is inconsistent with case law. Several federal appellate cases have held that a lack of supervision does not negate employee status, and that routine supervision may indicate employee status.[227] That being said, the Department recognizes, as did these commenters, that there are situations in which a lack of supervision does indicate independent contractor status,[228] and that routine monitoring is often done for operational purposes and is targeted toward the particular goods or

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[227] *See, e.g.*, *Superior Care,* 840 F.2d at 1060 ("An employer does not need to look over his workers' shoulders every day in order to exercise control."); *DialAmerica*, 757 F.2d at 1383–84 (concluding that homeworkers were employees even though they were subject to little direct supervision); *Driscoll,* 603 F.2d at 756 (farmworkers could be employees of a strawberry farming company even where the employer exercised little direct supervision over them); *compare Scantland*, 721 F.3d at 1314 (finding "meaningful supervision and monitoring" in part because the employer required cable installers to log in and out of a service on their cell phones to record when they arrived on a job, when they completed a job, and what their estimated time of arrival was for their next job).

[228] *See, e.g.*, *Nieman v. Nat'l Claims Adjusters, Inc.*, 775 F. App'x 622, 624–25 (11th Cir. 2019) (insurance claims investigator was properly classified as an independent contractor, in part, because the investigator worked largely without supervision when setting up appointments, and deciding where to work and how and when to complete his assignments); *Chao v. Mid-Atlantic Installation Servs., Inc.,* 16 F. App'x 104, 106–08 (4th Cir. 2001) (agreeing with the district court's analysis that the ability to complete jobs in any order, conduct personal affairs, and work independently is evidence that leans toward identifying a worker as an independent contractor).

services at issue rather than the manner and means by which a worker performs work. An employment relationship would not be indicated in such circumstances. The regulatory text does not speak to supervision, and so does not prohibit either factual scenario or classification outcome. In this space, this rule's analysis is best constructed to allow for proper consideration of these elements given the diversity of the work arrangements in which they apply.

Associated Builders and Contractors, Independent Work Coalition, Littler WPI, and Scopelitis addressed the concept of exclusivity within control, urging the Department to make clear that where a worker has the ability to work for others but chooses not to, this does not make it less likely that the worker is an independent contractor. Rather, they argued, the question is whether the business restricts the individual's ability to work elsewhere, which would indicate an employment relationship. Scopelitis also requested that the Department remove the word "indirectly" from the provision that states "this factor weighs in favor of the individual being an employee under the Act to the extent the potential employer…exercises substantial control over key aspects of the performance of the work, such as by … directly or indirectly requiring the individual to work exclusively for the potential employer" because federal motor carrier leasing regulations make it difficult to work for others and the commenter was concerned that this might be construed as "indirectly" prohibiting a lessee from working for others. This commenter also requested the Department to make clear that the focus in this factor is on actual control, not theoretical or contractual rights of the employer to control.

In the Department's view, the proposed regulatory text in the NPRM and that is being finalized appropriately addresses these issues. With respect to exclusivity, the regulatory text states that the ability to work for others weighs toward the individual being an independent contractor—this is not conditioned on whether the worker chooses not to do so, provided that the worker is not, as a practical matter, prevented from exercising that choice. This is because it is the ability to *choose*, not *how* the choice is exercised, that indicates an independent contractor. An individual who exercises that independence to work a packed schedule with a wide variety of

other entities is no more or less an independent contractor than another who carefully selects fewer contracts for larger or more lucrative contracts. Additionally, the regulatory text states that "directly or indirectly requiring the individual to work exclusively for the potential employer" weighs in favor of employee status, which is what commenters suggested. Where there are particular legal rules such as the federal motor carrier regulations, an action taken to ensure compliance with those rules would not be viewed as control that makes the worker more or less likely to be an employee under § 795.105(d)(1)(i). Therefore, the Department does not believe that it is necessary to provide the further clarification on these points requested by commenters.

Finally, several commenters requested the Department to include statements that certain activities in the commenters' respective industries would not constitute control. *See, e.g.*, Associated Builders and Contractors (requesting clarification or an example showing that "a construction industry general contractor's management of subcontractors to ensure timely completion of a project, meet sequenced deadlines and generally ensure safe and efficient performance is not" evidence of control), National Retail Federation (requesting statements that limitations on work schedules based on business operations and "ownership of goods or inventory by a potential employer, standing alone, does not constitute control."), ShiftKey (requesting clarification that "credential verification, background screening, reliability scoring, and account deactivation for repeated shift abandonment" do not constitute control). Categorical regulatory pronouncements regarding specific practices in particular industries are not generally appropriate in this rule of general applicability. For that reason, the Department is retaining the general control concepts that were proposed rather than providing a multitude of industry-specific examples. The Department encourages members of the public who have questions or seek clarification about specific scenarios to request from the Wage and Hour Division an opinion letter or other guidance appropriate for answering particular questions regarding applicability.

b. Comments generally in opposition

In addition to two specific areas discussed below where significant comments were received regarding certain aspects of the control factor, several commenters raised general concerns in opposition. One such concern was that the Department's proposal was contrary to judicial precedent because it improperly focused on the worker's control over the work, rather than the employer's control over the worker. *See, e.g.*, Coalition of State Officials; Nichols Kaster; Texas RioGrande Legal Aid. Texas RioGrande Legal Aid, for example, argued that "as the courts have recognized for 70 years, the proper question is the degree to which the *employer* exercises control over the worker," which necessarily involves consideration of how much control the employer needs to exercise, for example, in situations involving homeworkers and farmworkers, where courts have recognized that "it is the nature of the farming business that the farmer has to depend on his workers—the farmer cannot be in the fields supervising at all times." This objection was raised during the 2021 rulemaking as well. And as the Department explained at the time regarding the same regulatory text in § 795.105(d)(1)(i), the rule's treatment of both the individual worker's control and the potential employer's control is consistent with the approach taken by courts, which also generally consider both the worker's control and the potential employer's control.[229] The Department affirms its view that, in light of the way in which courts have approached the question, both the nature and degree of control over the work by the worker and by the potential employer is properly considered to determine whether control indicates employee or independent contractor status.

Another concern raised by NELP and NWJP is that the Department's proposed control factor does not reference reserved control or the right to control, thereby in their view improperly making the proposed economic reality analysis narrower than the common law "right to control"

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[229] 86 FR 1180 (citing, *e.g.*, *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 142 (3d Cir. 2020); *Hobbs*, 946 F.3d at 829; *Saleem*, 854 F.3d at 144–45; *Karlson*, 860 F.3d at 1096); *see also id.* (discussing *Silk*, 331 U.S. at 716, which described the economic reality test's control factor as "degrees of control," which does not indicate a focus on either the individual worker or the potential employer).

test even though the FLSA's "suffer or permit" standard has been deemed to be broader than the common law. *See also* Coalition of State Officials ("The 2024 rule aligned with … precedent by emphasizing that the relevant consideration is 'the employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship.'"). More generally, NELP contended that the NPRM's focus on only three types of control – ability to set work schedule, ability to select projects, and ability to work for others – is inconsistent with case law "in which workers were found to be employees even when they had the ability to set their own schedule, choose their assignments, or work for others." NELP also argued that these considerations were too narrow and failed to take into account other indicators such as the "ability to set or meaningfully negotiate" pay. Richard Reibstein also took issue with the types of control referenced in this provision, contending that a more useful approach would be to identify whether a potential employer controls "*how* the work is done or retains the right to do so."

The Department notes that it has addressed the issue of reserved rights, such as the right to control, in § 795.110. That section acknowledges that reserved rights may be relevant, depending on the individual facts and circumstances, but that the parties' actual practice will be more relevant. Thus, although reserved rights to control are not explicitly mentioned in the regulatory text for the control factor that the Department proposed, as they were in the 2024 Rule, reserved rights are discussed separately and may certainly apply (see additional discussion in § 795.110). Additionally, as the Department explained in the NPRM and the 2021 Rule, the three examples of control identified in the regulatory text that may indicate employee or independent contractor status (setting schedules, selecting projects, and working exclusively for the employer or working for others) are illustrative and not intended to be exhaustive, nor were these types of control listed in an attempt to narrow or limit the control factor analysis. To the contrary, any type of control over work by the individual worker or the potential employer must be considered, including whether pay and other aspects of the work arrangement are dictated by

the hiring party (indicating employment) or, in the alternative, if such terms are negotiated or dictated by the individual (indicating independent contractor status).[230] Further, considerations within these areas 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. The regulatory text is purposefully broad to encompass various types of control that the individual worker and the potential employer may exercise over the working relationship and avoid incentivizing gamesmanship predicated on excessive specificity. Moreover, the Department agrees that the task of identifying who controls the manner and means by which the work is performed is a critical component of the control analysis, and the regulatory text reflects the importance of these elements, and it is also well suited to the task.

Finally, Texas RioGrande Legal Aid disputed the probative value of the ability to work for others, particularly competitors. It noted that a "part-time worker employed during mornings at McDonalds does not become any less of an employee because he or she works a second job at the counter of a Wendy's restaurant in the afternoon. Individuals may work for more than one employer without losing their status as employees under the FLSA." The Department does not disagree, but the rule would not compel a different result. More important, however, courts often take into account whether workers have the ability to work for others or are prohibited from or impeded in doing so.[231] Like other elements of the analysis designed to ascertain economic reality, this aspect of the control factor may or may not be probative in any particular case.

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[230] 91 FR 9950–51; 86 FR 1180–82; *compare, e.g.*, *Superior Care*, 840 F.2d at 1060 (considering the fact that "[the defendant company] unilaterally dictated" the nurses' hourly wage as evidence of employer-like control); *and Med. Staffing of Am.*, 147 F.4th at 387 (same) *with*, *e.g.*, *Eberline v. Media Net, LLC*, 636 F. App'x 225, 227 (5th Cir. 2016) (jury had sufficient evidence to conclude that a worker exerted control over meaningful aspects of his business in part due to "testimony that installers could negotiate prices for custom work directly with the customer and keep that money without consequence").

[231] *Compare, e.g.*, *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018) (finding control factor favored independent contractor status in part because worker could and did work for other employers); *Saleem*, 854 F.3d at 141–43 (drivers' ability to work for business

c. Comments regarding SI, electronic monitoring, and other technology

In proposing to adopt the 2021 Rule's formulation of the control factor, the NPRM's description of the control factor did not include language from the 2024 Rule stating that "facts relevant to the potential employer's control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically)."[232] The NPRM did not disagree with this guidance from the 2024 Rule, but expressed a preference for "the more straightforward and focused explanation of the control factor in the 2021 Rule," explaining that "[i]t 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."[233]

Many commenters addressed how Super Intelligence (SI), electronic monitoring systems, and other technology should be considered under the control factor.[234] *See, e.g.*, AFL-CIO; Coalition of State Officials; CWI; Flex Association; Instacart; IBT; NELP; The Scaffold Initiative; Uber; U.S. Chamber. Several commenters who opposed the NPRM criticized it for omitting guidance on "technological" or "algorithmic" control. *See, e.g.*, AFL-CIO; Allegheny

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rivals and transport personal clients showed less control by and economic dependence on the employer); *and Herman v. Express Sixty-Minutes Delivery Serv.*, 161 F. 3d 299, 303 (5th Cir. 1998) (control factor "point[ed] toward independent contractor status" in part because the "Independent Contractor Agreement" did not contain a covenant-not-to-compete and drivers could work for other courier delivery providers) *with*, *e.g.*, *Brant v. Schneider Nat'l, Inc.*, 43 F.4th 656, 669–70 (7th Cir. 2022) (despite having the contractual ability to haul freight for other carriers, a driver alleged that the company maintained a "system for approving and monitoring trips made for other carriers" that was "so complex and onerous that Drivers could not, as a practical matter, carry loads for anyone other than" the company, which the court determined weighed in favor of employee status); *Off Duty Police*, 915 F.3d at 1060–61 (non-compete clause preventing workers from working for employer's customers for two years after leaving employment was among evidence supporting finding that control factor indicated employee status); *Keller*, 781 F.3d at 813–14 (although worker was not prohibited from working for other companies, "a reasonable jury could find that the way that [the employer] scheduled [the worker's] installation appointments made it impossible for [the worker] to provide installation services for other companies").

[232] 29 CFR 795.110(b)(4) (2024).

[233] 91 FR 9951.

[234] In this rule, the Department uses the terms "SI" and "Super Intelligence" instead of "AI" and "Artificial Intelligence," as required by section 2 of Executive Order 14434 of September 29, 2026. See 91 FR 63129.

County et al.; Coalition of State Officials; IBT; New York City Comptroller Mark Levine. Conversely, many commenters praised the NPRM for not stating that a business's reliance on common technologies or algorithms is indicative of employer-like control, which they asserted was the case under the 2024 Rule, though such commenters requested further clarification on this point. *See* Flex Association; TechNet; Uber; U.S. Chamber. The Scaffold Initiative, an organization "dedicated to [SI] literacy and workforce development for sole proprietors, freelancers, and independent workers in underserved communities," advocated for a neutral approach by explaining how the use of SI could be considered as both a tool for worker-controlled entrepreneurship or as a tool for "granular, real-time control … that no human supervisor could match."

Flex Association and Uber supported the omission of the 2024 Rule's language on technological supervision in the Department's proposal, with Uber characterizing the language as a "special disfavor for technology" and Flex asserting that "routine supervision or monitoring of the status of work" does not become control "simply because it is mediated by technology." Both Flex and Uber noted that almost all work in 2026 is mediated through some form of technology (email, phone, text, webchat channels, calendaring software, etc.). Flex observed that this was no different than when the FLSA was enacted in 1938, though there were different types of technology then such as a telegraph. Flex stated that "[f]or purposes of employee/contractor classification, the FLSA has never differentiated between workers who use technology and those who do not, and special rules for technology-enabled work make no more sense today than they did when the FLSA was enacted." Uber noted that "[t]echnology isn't what makes these actions control; it is the actions themselves, which limit the employee's autonomy and make the employee dependent for continued work."

Flex Association and other commenters such as Instacart and Uber requested the Department to expressly state that various business practices commonly used by digital platform companies are not indicative of control, such as: implementing surge pricing; sending deadline

notifications or customer specifications to workers; collecting "ride-level" data related to the location and timing of every ride; collecting and using customer service ratings; suspending the accounts of workers with excessive cancellation rates; using GPS location technology to match drivers and riders; providing bonuses and other incentives for certain types of work, and maintaining "platform-integrity" policies. Flex Association argued that such practices are not indicative of control or employee status because they are "not comparable to a supervisor overseeing and directing a worker's performance."

Additionally, several of the same commenters requested the Department to state that supplying individuals with SI tools, providing training and guidelines on the use of such tools, or using SI tools to monitor the quality of a product or service does not constitute control indicative of an employment relationship. *See* CWI; Instacart; SHRM; U.S. Chamber; *but see* The Scaffold Initiative (requesting the Department to advise that "[a] worker who chooses to use [SI] tools is exercising independence" but "[a] worker who is required to use [SI] tools configured and controlled by the hiring entity is subject to control"). Such commenters often proposed lengthy regulatory text that they wanted the Department to add to the control factor on these points. *See* Instacart; U.S. Chamber. While these commenters suggested that the Department expressly state that business use of SI would not indicate control, they asked the Department to state that a worker's ability to use SI would indicate a worker's control over the work. U.S. Chamber.

Several commenters also urged the Department to clarify that technological, electronic, or algorithmic monitoring that is used to ensure legal compliance, workplace safety, customer requirements, and consumer protection is not indicative of control. *See, e.g.*, CWI; Flex Association; Instacart; U.S. Chamber. ShiftKey, which describes itself as operating a "digital marketplace platform" in the healthcare industry, similarly requested the Department to state that "platform-integrity measures" such as credential verification and background screening do not constitute control. It claimed that in the healthcare field, these measures protect patients and

healthcare facilities, comply with applicable state and federal licensing requirements, and "ensure the integrity of the marketplace" rather than supervise the performance of work.

By contrast, commenters who opposed the NPRM criticized the proposed control factor because it did not address how control is often exercised through algorithmic management, digital monitoring, and platform rules. *See* AFL-CIO; Allegheny County et al.; Coalition of State Officials; IBT; NELP; New York City Comptroller Mark Levine. For example, AFL-CIO contended that "[i]ncreasingly, control is not exercised through direct supervision or traditional managerial oversight, but through algorithmic management systems that determine how, when, and under what conditions work is performed. In many sectors, particularly app-based and logistics industries, companies use digital platforms to assign tasks, set prices, monitor performance in real time, impose discipline, and terminate workers through automated systems." NELP described its recent report documenting "the rise of 'Bossware' technology, tools used to monitor, manage, and evaluate workers, including productivity trackers, webcam monitoring, wearable devices, and algorithms and apps used for wage-setting."[235] IBT contended that due to such technology, "[w]orkers may appear to 'choose' their hours or accept or reject assignments while in reality pay rates are unilaterally set, assignments are determined through algorithms, deactivation is one-sided, and real-time surveillance monitors productivity."

Relatedly, dozens of individual commenters—including numerous DoorDash and Instacart workers who often voiced support for the NPRM and their independent contractor status as a general matter—requested the Department to address technological practices they believed to be coercive or unfair, including the use of acceptance-rating metrics, time-limited windows to review job offers, the withholding of material information (such as total pay, order size, delivery location, etc.) prior to the acceptance of a job offer, and punishment for events

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[235] Irene Tung, Paul Sonn, Maya Pinto, Sally Dworak-Fisher & Josh Boxerman, *When 'Bossware' Manages Workers: A Policy Agenda to Stop Digital Surveillance and Automated-Decision-System Abuses*, National Employment Law Project, July 15, 2025, at 11, www.nelp.org/app/uploads/2025/07/When-Bossware-Manages-Workers-Policy-Agenda-July-2025.pdf.

outside their control, such as traffic delays or delays attributable to third party merchants. *See, e.g.*, Anonymous 0059 ("Practices such as acceptance-rate tiers, hidden pay until after acceptance, and algorithmic penalties for declining orders undermine genuine independence."); Delivery Platform Driver 1 ("[A]lgorithmic management tools, such as 'Acceptance Rates,' constitute a significant degree of employer control….When platforms use an Acceptance Rate metric to prioritize orders or gate access to higher-paying work, they're effectively penalizing me for making rational business decisions to decline unprofitable contracts."); Delivery Platform Driver 2 ("The app calls this 'independent work,' but the work is heavily controlled by the system. The algorithm controls access to orders, timing pressure, ratings, and contract violations. A driver may technically be free to log in or log out, but once logged in, the system dictates the pace and punishes delay without properly accounting for real-world conditions"); Delivery Platform Driver 3 (driver who supported the NPRM but asserted that "[p]latforms should not be allowed to exercise 'employe[r]-like' control through hidden algorithms or deactivation threats while denying us basic business protections").

The Department appreciates the breadth of input provided on this issue, particularly because SI and similar technology has evolved—and continues to evolve—rapidly and extensively since the Department began general rulemaking on employee or independent contractor classification under the Act in 2020, and technology certainly has continually changed since the FLSA was enacted in 1938. The Department has considered the comments received and agrees with Flex Association and Uber that there have always been forms of technology through which work is mediated, and the key questions are not whether or which form of technology is used with which workers but what the effect or result is. For example, whether a supervisor historically used a phone to call an employee to monitor the status of the work but now would use an SI tool to monitor the status of the work does not change the fact that the inquiry is always about the economic reality of a work relationship. As Uber commented, "[t]echnology isn't what makes these actions control; it is the actions themselves, which limit the employee's autonomy

and make the employee dependent for continued work."

The Department thus responds to commenters like The Scaffold Initiative that criticized the Department's proposal for not providing guidance on how to distinguish between a worker who uses SI in their work to exercise independence and a worker who is subject to algorithmic control by explaining that the same concepts that have guided the analysis since the 1940s continue to apply today: what is the economic reality of the situation, and is the worker economically dependent on the potential employer for work? That overarching inquiry does not change when the technological tools change. While it is certainly always helpful to have an understanding of the technology being used in any particular case to better understand the economic realities, the Department does not believe that the technologies themselves change how specific factors in the economic reality test are applied, contrary to the views of many commenters.

As this discussion illustrates, the Department reiterates that all facts relevant to control should be considered. Where technological tools are performing the kinds of activities that human supervisors historically handled in terms of, for example, setting schedules, assigning work, reviewing work, and providing rewards for good work and discipline or termination for bad work, those activities are just as relevant to the analysis as they would be if a human supervisor carried them out.

Nevertheless, to be responsive to commenter feedback requesting that the Department provide more guidance regarding technology and control, the Department has added a pair of examples in the final rule (§ 795.115(b)(2) & (b)(3)) to provide additional clarity on the kinds of technological practices that are indicative of employer-like control or indicative of independent contractor status. In these examples, an individual earns money by making food deliveries to customers from restaurants and grocery stores through an application operated by a digital platform company. In one example (adopted in § 795.115(b)(2)), the company pressures drivers to accept job offers by giving them seconds to accept delivery opportunities with limited

information about the pay, size, or timeframe for the delivery, penalizes drivers who fail to accept a certain percentage of delivery orders by demoting their status in a tiered "rewards" program such that they lose access to preferred delivery orders, and makes it practically impossible to "multi-app" and still complete the minimum number of deliveries or avoid negative consequences for declining work. In this example, the control factor weighs toward employee status because the company is exercising substantial control over key aspects of the performance of the work, including the individual's ability to select her own projects, manage the workload, and work for others. *See Scantland*, 721 F.3d at 1313, 1316–17 (finding control indicative of employee status where the workers at issue "could not bid for jobs or negotiate the prices for jobs" and "could not reject a route or a work order …without threat of termination or being refused work in the following days").

By contrast, in the second example (adopted in § 795.115(b)(3)), the digital platform company allows drivers to decline delivery opportunities without consequence and "multi-app" with competing businesses, although the company will terminate a driver's account if they cancel too many accepted deliveries. The company's application dynamically adjusts its pricing, shares pay information with drivers before they accept work, and remotely monitors driver locations while the application is engaged to efficiently match drivers to delivery opportunities. In this example, the control factor weighs toward independent contractor status because the individual is exercising substantial control over key aspects of the work. *See Gray v. Killick Grp., LLC,* 113 F.4th 543, 550 (5th Cir. 2024) (finding independent contractor status in part because the worker "possessed the freedom to accept or reject projects without retaliation"). That the company monitors the location of drivers while the application is engaged, dynamically adjusts prices in response to supply and demand, and terminates the account of drivers with excessive cancellation rates are not indicative of an employment relationship under these facts. Using technology to facilitate business operations does not indicate control over the driver; in fact in this example it also serves as an aid for the driver to make informed decisions about delivery

opportunities. Further, termination of a driver's account due to excessive cancellation of accepted deliveries is a quality control measure to ensure food safety and edibility, and timeliness requirements are typical of contractual relationships between businesses, so such termination does not constitute control that makes the individual more or less likely to be an employee. Both examples demonstrate how the use of technology such as a digital platform and application may be relevant in determining whether the control factor weighs in favor of employee or independent contractor status.

The Department declines to provide any additional regulatory text, including commenter requests for the Department to state that various business practices commonly used by digital platform companies are not indicative of control, and that business use of SI would not indicate control but that a worker's ability to use SI would indicate a worker's control over the work. The Department does not believe this would be consistent with the balanced approach in this rule that does not favor either employee or independent contractor outcomes, as all these requests appear to lean in favor of an independent contractor outcome. Finally, with respect to the commenter requests about the use of technology to comply with legal obligations, such practices would appear to fall within the provision stating that requiring an individual to comply with legal obligations does not constitute control that makes the worker more or less likely to be an employee, as discussed below.

d. Comments regarding compliance with legal obligations, safety standards, contractual deadlines or quality control standards

As noted above, the Department proposed to adopt the 2021 Rule's language in the control factor, § 795.105(d)(1)(i), stating that "[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act." The Department noted that this was a change from the 2024 Rule, which stated 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."[236]

As in previous FLSA independent contractor rulemakings, this provision was addressed in a large proportion of the comments regarding the control factor. Business advocacy groups and management-side law firms were supportive of the proposal to adopt this language, frequently noting that it benefited society overall to promote greater legal and safety compliance rather than disincentivize compliance measures out of concern that they would indicate an employment relationship. *See, e.g.*, American Securities Association; American Trucking Association; CHRO Association; CWI; FSI; Independent Work Coalition; IFA; Littler WPI; Lyft; National Association of Home Builders; National Retail Federation; Scopelitis; SHRM; Uber. Several worker advocacy groups and affiliated commenters opposed this language, contending that it was contrary to case law, that it was so vague and broad that it could encompass any type of control a business might exert over an individual. *See, e.g.*, AFL-CIO; NELP; Nichols Kaster; NWJP.

For example, Nichols Kaster argued that it was contrary to judicial precedent for the Department to take this position, citing, *inter alia*, *Keller*, 781 F.3d at 814-15, for the proposition that "a jury could find the level of control exercised supported employee status where the control was exercised to ensure technicians complied with defendant's client's specifications," and *Schultz v. Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1271 (10th Cir. 1970) ("The arguments that an independent contractor relationship is shown by … the need to comply with regulations of federal and state agencies do not persuade us."). Similarly, AFL-CIO contended that the case law is "settled" and "squarely forecloses the Department's approach." Commenters opposed to

[236] 29 CFR 795.110(b)(4) (2024).

this provision frequently cited *Scantland* for the proposition that "[t]he economic reality inquiry requires us to examine the nature and degree of the alleged employer's control, not why the alleged employer exercised such control. Business needs cannot immunize employers from the FLSA's requirements. If the nature of a business requires a company to exert control over workers to the extent that [the putative employer] has allegedly done, then that company must hire employees, not independent contractors." 721 F.3d at 1316. Although the Department notes the cases cited by these commenters, it does not agree with these commenters' conclusion about the state of the case law. As the Department explained in the 2021 and 2024 rulemakings and the NPRM, in the Department's view, the case law is not settled nor uniform on this aspect of the control factor.[237] Indeed, the Department's proposed provision is supported by case law that the commenters did not address or distinguish, rather than being foreclosed, as AFL-CIO asserted.[238] Moreover, the relevant section of *Keller* states that "a jury could therefore find that Miri controlled Keller's job performance through its initial training and hiring practices," 781 F.3d at 814, which the Department views as weak support at best for the proposition that exercising control to ensure that technicians complied with defendant's client's specifications supports employee status.

NWJP argued that this provision "expands" the proposition that "employer control necessary to comply with legal standards may not indicate an employment relationship" so broadly that it could arguably be "applied to any type of control a business might wish to exert over an individual and will make it almost impossible to demonstrate control." NWJP also asserted that the NPRM incorrectly implied that "having deadlines and quality control standards are common in business but not in employment contracts" because "many if not most employers require their employees to meet deadlines and produce quality work." The Department disagrees

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[237] 86 FR 1183; 87 FR 62247–48; 89 FR 1693–94; 91 FR 9952.

[238] For example, some courts have viewed employer requirements on workers 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; *Mid-Atl. Installation*, 16 F. App'x at 106.

that this provision can be read so broadly that it would be almost impossible to find control indicative of employment and also disagrees that it is equally common for at-will employees to have employment contracts specifying deadlines and quality standards as it is for contracts between businesses.

By contrast, there was broad support for this provision among the business community, which often commented that the Department's position was supported by judicial precedent. *See, e.g.*, American Securities Association, FSI. Supporters of the Department's proposal frequently urged the Department to go farther by adding multiple refinements to the regulatory text and examples (often to address industry-specific contexts), as well as stronger assurances that businesses' efforts to ensure compliance with legal and contractual obligations would not constitute control indicative of an employment relationship. *See, e.g.*, Associated Builders and Contractors, American Securities Association, CWI, Flex Association, IFA, Littler WPI, National Retail Federation, Uber, U.S. Chamber. However, the Department believes that the language proposed in the NPRM is sufficient and declines to add industry-specific regulatory text or examples, as this is intended to be a balanced rule of general applicability.

Independent Work Coalition stated that "[a]s written, the proposed rule does not draw any explicit distinction between federal, state, and local legal obligations" and it recommended that the Department clarify whether this provision extends to "actions taken in response to state and local laws, regulations, ordinances, and mandates." The Department affirms that its view of the regulatory language "legal obligations" would encompass state and local laws, regulations, ordinances, and mandates as long as they are specific and identifiable (see discussion below).

Several commenters that supported the Department's proposal asked for a refinement to remove the word "specific" from the proposed regulatory text ("[r]equiring the individual to comply with specific legal obligations"). *See* Independent Work Coalition; National Home Delivery Association; Scopelitis. For example, Independent Work Coalition contended that "legal and regulatory requirements often are structured in a manner that demands businesses to

exercise judgment in determining how to implement them," and when businesses exercise such judgment in good faith, this "should not itself be treated as probative of control." Further, this commenter felt that removing the word "specific" would "better reflect the realities that businesses face when structuring their operations alongside varying legal and regulatory schemes across jurisdictions while bearing in mind broadly accepted responsibilities to advance the health and safety of the public and their customers."

Scopelitis explained that trucking is a highly regulated industry, and that the Federal Motor Carrier Safety Regulations (FMCSRs) are "highly prescriptive in some instances" but "set broad standards affording discretion on the part of the carrier" in other instances. Scopelitis argued that "[r]equiring drivers to adopt or participate in measures to improve or facilitate compliance with applicable safety laws or reduce crashes is inevitably in furtherance of a motor carrier's general obligation under the FMCSRs, but may be viewed as not complying with a *specific* legal obligation. Elimination of the adjective 'specific' would keep the term from being accorded unintentional weight and is consistent with court decisions." On the other hand, OOIDA supported "the Department's proposal that compliance with a *specific* legal obligation should not be considered as a factor related to control, especially when there is a regulation that states this factor is not determinative of an employee or independent contractor relationship," explaining "we believe limiting any exemption of the 'control' factor to 'specific' obligations would help improve clarity and remove ambiguity."

In the 2021 Rule, some of the same commenters had requested that the Department remove the word "specific" from this provision.[239] At that time, the Department declined to do so.[240] The Department concluded that "retaining the word 'specific' is consistent with the Department's position that, although requiring workers to comply with legal obligations could be some manner of control, such requirements reflect the applicable legal regime more than the

[239] 86 FR 1183–84.
[240] *Id*.

potential employer's control[.]"[241] The Department again declines to remove the word "specific" in the final rule based on the same reasoning. Additionally, this provision regarding compliance with legal obligations generated a significant number of comments when the NPRM for the 2024 Rule proposed that "control implemented … to comply with legal obligations, safety standards, or contractual or customer service standards may be indicative" of employee status,[242] leading the Department to clarify its interpretation in the final 2024 Rule by advising that "actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control" whereas "[a]ctions taken by the potential employer that *go beyond* compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control."[243] The Department has thus consistently viewed compliance with specific legal obligations to be not indicative of control, and chooses to continue that approach.

Another issue that came up frequently in comments on this aspect of the control factor is whether the Department intended to include *voluntary* safety and health standards. For example, National Association of Home Builders commented that "because 'standards' in the context of health and safety usually refers to regulatory requirements, the proposed reference to 'health and safety standards' is ambiguous as to whether it encompasses a putative employer's requirement that a worker comply with workplace safety practices and protocols developed and voluntarily enforced by the employer." This commenter suggested an alternative formulation where "practices" would be substituted for "standards." National Home Delivery Association and Scopelitis urged the Department to "ensure there is no ambiguity that *voluntary* safety measures in furtherance of general legal obligations or customer requirements are not employer-like control."

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[241] *Id*.
[242] 87 FR 62275 (proposed § 795.110(b)(4)).
[243] 89 FR 1694 (emphasis added).

Demonstrating stakeholder confusion, SHRM read the proposal to address only "mandatory legal compliance" rather than "voluntary safety training that exceeds the legal minimum," and Chamber of Progress viewed the proposal as "creat[ing] the wrong incentive by discouraging companies from going beyond legal minimums," whereas Lyft commended the NPRM for "mak[ing] clear that the voluntary safety measures companies take, including requiring a worker to satisfy health and safety standards to protect workers and the public above the legal floor," would not be evidence of an employment relationship.

OOIDA urged the Department to amend or clarify the NPRM to "ensure that carriers cannot micromanage owner-operators through 'safety' requirements," noting that "[a]llowing a carrier to claim any requirement implemented for safety would authorize them to exert significant control over an individual while effectively exempting themselves from the control factor." *See also* Bowen Family Transport LLC ("As an independent contractor … I believe it should be illegal to put a device controlled by [SI] that can slam on the [brakes] on an interstate"); Samantha Taylor (independent contractor objecting to the required use of "cameras and a governor [ ] (speed limiter)" in her truck).

The Department is hereby clarifying that this provision encompasses health and safety standards that are not legally required. The Department believes the plain language of this provision—"[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards"—demonstrates that the "legal obligations" phrase is separate from the "health and safety standards" phrase, such that it is properly read to not limit "health and safety standards." Employers could thus implement voluntary (i.e., not required legally) health and safety standards without those standards making the worker more or less likely to be an employee. However, the term "standards" connotes an accepted workplace standard, not any requirement that arguably fits under the broad labels "health" or "safety." Contrary to certain comments, this rule clarifies that specific basic standards that are broadly accepted in workplaces across the country are not somehow indicative of the type of control between an employer and

employee. Therefore, the Department would view rules requiring satisfaction of such standards with an eye toward whether they actually pertain to health and safety, as opposed to being pretext for the type of control exercised over workers to meet the business' own needs.

The breadth of comments and views on this aspect of the control factor has prompted the Department to provide additional clarification on how it should be understood and applied. Merely labeling requirements "health and safety," for example, does not automatically mean they could not possibly indicate employer-type controls regardless of their nature, content, or extent. The inquiry turns on the substance and practical operation of the requirement, not the characterization of its purpose. A measure that genuinely establishes a health or safety standard typical of a business-to-business relationship would not indicate employee status. But detailed instructions governing how, when, or where the worker must perform the work may constitute employer-like control even if described as promoting health or safety. Otherwise, a potential employer could evade the control analysis simply by attaching a safety rationale to directives that, in practice, substantially govern the performance of the work. The Department has decided to add explanatory text to this provision in the control factor in order to strike the proper balance and sufficiently describe when such compliance measures will not make a worker more or less likely to be an employee. The newly-added explanatory text is the following: "The nature of a particular requirement turns on its substance and practical operation, not the characterization of its purpose. For example, detailed instructions governing how, when, or where the worker must perform the work may indicate control typical of an employment relationship even if described as promoting health or safety or maintaining quality control standards."

Other than the additional text described above (as well as a minor non-substantive edit changing "and/or" to "or"), the Department is finalizing the control factor as proposed.

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

The Department proposed regulatory text in § 795.105(d)(1)(ii) describing the second core factor—an individual worker's opportunity for profit or loss. The proposed factor indicated

independent contractor status if the individual worker "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." The proposed factor explained that, "[w]hile the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor." The proposed factor indicated employee status if the worker "is unable to affect his or her earnings or is only able to do so by working more hours or faster."[244] The example in proposed § 795.115(b)(3) illustrated this point in the context of a construction worker who was "paid a fixed hourly rate" by a company that determined "how many and which tasks she performs."[245]

As proposed, the factor advised that both the individual worker's exercise of initiative and management of investment should be considered even though the factor could indicate independent contractor status based on only one. The NPRM explained that, "[p]roviding 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 …."[246] The NPRM elaborated on the "capital" nature of the investment, explaining that, consistent with the economic dependence inquiry, an investment must indicate an independent business by the worker, as opposed to merely being required by the potential employer, for it to indicate an opportunity for profit or loss.[247]

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[244] 91 FR 9974.
[245] *Id.* at 9974–75.
[246] *Id.* at 9952.
[247] *Id.* (citing 86 FR 1187).

Like the 2021 Rule, but unlike the 2024 Rule, the NPRM considered the worker's investment within the opportunity for profit or loss factor – not as a standalone factor. The NPRM explained that considering investment as part of opportunity for profit or loss is "consistent with the Supreme Court's decision in *Silk*."[248] The NPRM further explained that the Second and D.C. Circuits consider opportunity for profit or loss and investment as one factor, as they are often conceptually or factually related.[249] The NPRM recognized that "a majority of circuit courts articulate opportunity for profit or loss and investment as separate factors," but also discussed how some of those courts have described the opportunity and investments factors as interrelated or relating logically to one other.[250] Thus, the Department viewed its proposal to consider the worker's investment as part of the opportunity for profit or loss factor as representing "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."[251] The NPRM stated that "[u]nderstanding the relationship between opportunity for profit or loss and investment and considering them together would make the analysis clearer to apply and avoid duplication."[252]

The NPRM added that 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.[253] As explained in the 2021 Rule, the economic reality factors are limited to the worker's "claimed independent operation" (i.e., the work that is claimed to be done as an independent contractor).[254] The example in proposed § 795.115(b)(3) illustrated this point in the context of a worker who "works full time performing home renovation and repair services for a residential construction company" and also "earns

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[248] *Id.* (citing *Silk*, 331 U.S. at 718–19); *see also* 86 FR 1174 and 1186.
[249] *Id.* at 9952–53 (citing cases).
[250] *Id.* at 9953 (citing cases).
[251] *Id*.
[252] *Id*.
[253] *Id.* (citing *Parrish*, 917 F.3d at 384).
[254] *Silk*, 331 U.S. at 716; *see also* 86 FR 1178.

substantial profits" from a food truck that she operates on weekends.[255] The example explained that the food truck "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."[256]

Also like the 2021 Rule, but unlike the 2024 Rule, the proposed opportunity for profit or loss factor considered the individual worker's investment only—not the relative investments of both the worker and the potential employer. The NPRM explained that comparing the relative investments does not illuminate the worker's economic dependence or independence (the ultimate inquiry) and instead merely compares their respective sizes and resources.[257] The potential employer almost always is larger and has greater resources than the worker, and the relative comparison thus sheds little, if any, light on the worker's economic dependence or independence and is not probative.[258]

The 2024 Rule did not compare "the dollar values of investments or the sizes of the worker and the potential employer" and instead focused 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."[259] The NPRM explained, however, that the 2024 Rule's version of comparing investments did not make the consideration of relative investments probative and unnecessarily introduced the potential employer's size and resources into the analysis.[260] The NPRM further explained that considering the worker's investment only "is more consistent with the Supreme Court's articulation of the economic reality test," which "has never compared a worker's investment to that of the potential

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[255] 91 FR 9974–75.
[256] *Id*.
[257] *Id.* at 9953 (citing 86 FR 1188).
[258] *Id*.
[259] 29 CFR 795.110(b)(2) (2024).
[260] 91 FR 9953.

employer."[261] The Department acknowledged in the NPRM that its proposed approach is different from how some (but not all) circuit courts have since considered investment, but explained that "application of the Supreme Court's analysis takes precedence."[262] The example in proposed § 795.115(b)(2) illustrated how only the individual worker's investment should be considered.[263]

The NPRM also explained that "it is well-settled that an individual worker's initiative should be considered as part of opportunity for profit or loss," elaborating 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.[264] The 2024 Rule similarly described 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."[265] Consistent with the 2021 Rule, the Department proposed 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, explaining 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."[266]

The Department received many comments addressing the proposed opportunity for profit or loss factor. Numerous commenters addressed the inclusion of investments within the opportunity factor and its consideration of the individual worker's investment only instead of considering the relative investments of both the worker and the potential employer. The Department addresses these two issues first, then addresses other issues raised by commenters,

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[261] *Id.*; *see also Silk*, 331 U.S. at 719 (recognizing 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).
[262] 91 FR 9953.
[263] *Id.* at 9974.
[264] *Id.* at 9953 (citing 86 FR 1189 (collecting cases)).
[265] 29 CFR 795.110(b)(1) (2024).
[266] 91 FR 9953.

before finally discussing two new examples in the regulatory text that the Department adds in response to comments.

a. Comments Regarding Considering Investment within the Opportunity for Profit or Loss Factor

Numerous commenters opposed the NPRM's consideration of investment within the opportunity for profit or loss factor. For example, Coalition of State Officials asserted that the NPRM did "not justify its decision to diverge from … case law, or address the confusion that would result from that divergence, except to offer, without support, that its approach would provide 'greater explanation and clarity'" (quoting NPRM). NWJP stated that opportunity for profit or loss and investment "are not necessarily related and by combining them into one factor, the Department's proposed rule only confuses the analysis" and "also unfairly tips it towards independent contractor status." Nichols Kaster commented that "relegation of this critical piece of the economic reality test to a subpart of another factor … is unfounded and will make it easier for businesses to deny workers the protection of the FLSA." *See also*, *e.g.*, NELP ("Although the two factors are linked, they are hardly duplicative and separately serve as useful indicia of an entity's status under the FLSA, as the Supreme Court's tests note."); SEIU (describing it as "a notable departure from the existing standard").

Numerous other commenters supported the NPRM's consideration of investment within the opportunity for profit or loss factor. For example, FSI commented that "[i]nvestment is properly considered as part of the 'opportunity for profit or loss'" factor and that this would "eliminate redundancy and double counting." American Association of Advertising Agencies asserted that, "[b]y integrating investment into the broader profit-and-loss inquiry, the Department properly recognizes that [representative expenditures by a freelancer] are entrepreneurial tools used by creative professionals to increase their marketability, enhance their project efficiency, and ultimately drive their own business profits." Flex Association "support[ed] eliminating 'investment' as a stand-alone factor," saying that "[i]nvestment is an entrepreneurial activity: perhaps the most fundamental choice an entrepreneur makes is where to

allocate and invest her capital. Whether she is buying equipment, taking out ads, or taking skills training to enhance her human capital, she is engaged in the core business activity of allocating [scarce] resources. Investments are therefore properly considered under the 'opportunity' factor." *See also*, *e.g.*, National Retail Federation (describing the 2024 Rule as "misguided in attempting to make investment its own factor" because "[a]ny investments naturally impact a contractor's ability for profit or loss," and "investments are so interrelated with profits and losses that analyzing them separately would be duplicative"); Littler WPI (stating that including investment in the opportunity factor "is a welcome change that will bring clarity and reduce overlap," and adding that "[w]ise decisions about investments are perhaps the clearest path to increasing profits or suffering losses").

Having considered the comments on this issue, the Department adopts its proposal to consider investment as part of the opportunity for profit or loss factor. As an initial matter, whether opportunity and investment are articulated as separate factors, the worker's investment is a longstanding consideration, is particularly probative of a worker's status, and should be considered in all cases, and the Department's inclusion of investment within the opportunity factor reflects this important reality. However, mechanically articulating the worker's investment as a separate factor in the analysis because that is how a majority of courts *recite* the factors overlooks how courts actually *consider and apply* investment when determining a worker's status.

In *Silk*, for example, the Supreme Court articulated opportunity and investment separately but analyzed them together. In particular, the Court found that coal unloaders were employees because they had "no opportunity to gain or lose except from the work of their hands and [] simple tools," while truck drivers who invested in their own vehicles had "opportunity for profit from sound management" of that investment by, for instance, hauling for different customers.[267] The Court thus framed the analysis as whether workers are more like unloaders whose profits

[267] *Silk,* 331 U.S. at 717–19.

were based solely on "the work of their hands and [] simple tools" or the drivers whose profits depended on their initiative and investments.[268]

The Second Circuit considers "the workers' opportunity for profit or loss and their investment in the business" as one factor,[269] explaining that "[e]conomic investment, by definition, creates the opportunity for loss, but investors take such a risk with an eye to profit."[270] Thus, as the Court explained decades ago and as the Second Circuit noted much more recently in *Saleem*, investment frequently is a pathway to opportunity for profit or loss. The D.C. Circuit has adopted the Second Circuit's consideration of opportunity for profit or loss and investment as one factor.[271] Additionally, although the Fourth Circuit articulates the factors separately, it has acknowledged that the two concepts "relate logically to one other."[272] The Seventh Circuit similarly articulates them separately but has explained that investment "is interrelated to" opportunity for profit or loss.[273]

In addition to the supportive case law of the Supreme Court, the Second and D.C. Circuits, and others, considering investment within the opportunity for profit or loss factor simplifies the application of the analysis by deduplicating elements separated under the 2024 Rule. Considering investment within opportunity avoids unnecessary and duplicative analysis of the same facts under two factors, thereby facilitating its proper application by both businesses and workers. *See*, *e.g.*, *Mid-Atl. Installation*, 16 F. App'x at 106–07 (finding that the worker's capital investments in tools, equipment, and a truck indicated independent contractor status under both the opportunity and investment factors). Considering investment within the opportunity factor rather than in isolation also prevents an investment by the worker that is unrelated to, and

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[268] *Id*. at 717–18.
[269] *Saleem*, 854 F.3d at 139 n.19 (citing *Silk,* 331 U.S. at 716 and *Superior Care*, 840 F.2d at 1058–59); *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x 74, 76 (2d Cir. 2020).
[270] *Saleem*, 854 F.3d at 144 n.29.
[271] *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001) (citing *Superior Care*, 840 F.2d at 1058–59).
[272] *McFeeley*, 825 F.3d at 243.
[273] *Lauritzen*, 835 F.2d at 1537.

outside of, the business from becoming part of the analysis. *See*, *e.g.*, *Parrish*, 917 F.3d at 384 (giving weight to consultant's investment in, and losses relating to, a goat farm that was unrelated to his consulting work for an oil drilling company that was the issue in the case). As explained above, the economic reality factors are limited to the individual's "claimed independent operation," and anchoring investment in opportunity helps to ensure that the analysis does not drift away from that focus.[274]

In sum, the Department finds the Second Circuit's approach to opportunity for profit or loss and investment to be particularly persuasive and best aligned with the Department's goal in this rulemaking of sharpening the employee/independent contractor analysis, including by avoiding duplication among the factors.

b. Comments Regarding Considering the Individual Worker's Investments Only Instead of Relative Investments

Some commenters opposed the NPRM's consideration of the individual worker's investments only instead of comparing the worker's investments to the potential employer's investments. For example, Nichols Kaster asserted that the NPRM, "to the clear detriment of workers, assigns no relevance to how the workers' investment compares to the size of the putative employer's investments," adding that "[t]his focus solely on workers' investment, without an analysis of how it compares to the putative employer's investment, is contrary to established law" and "unfounded" and "will make it easier for businesses to deny workers the protection of the FLSA." Farmworker Justice commented that the NPRM fails to "consider that a worker's relatively small investment is unlikely to sway an operation to a point of profitability" and that "[i]t is impossible to understand whether a worker's investment was relevant to profit or loss without understanding its overall impact, which requires an analysis of the potential

[274] The example in § 795.115(b)(7) 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, her investment in the food truck "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."

employer's contribution." NWJP argued that this aspect of the NPRM "contradicts existing case law," "does not offer any guidance for how one should evaluate investment related facts in absence of [comparing the worker's investments to that of the potential employer]," and "only confuses." This commenter added that the 2024 Rule "adequately addresses the Department's named concern that when comparing amount of money invested the business will frequently have more money on the table by instructing one to compare the types of investment as well." SEIU stated that "[t]his is a notable departure from the [2024 Rule], which … compares the employer's investments to the worker's."

Numerous other commenters supported the NPRM's consideration of the individual worker's investments only instead of comparing the worker's investments to those of the potential employer. For example, Independent Bakers Association asserted that "[t]he relevant question is whether the *worker* has a significant investment in his or her business," "[t]he other party's investment amount is beside the point," "[a]nd comparing investments could result in a contractor's status changing simply based on the size of the party with which they contract, surely an illogical outcome." Landmark Legal Foundation commented that the Supreme Court in *Silk* "focused exclusively on the worker's own investments" and that the "2024 Rule departed from that approach" by adopting a "comparative framework [that] has no support in Supreme Court precedent." This commenter added that the 2024 Rule's comparative framework "produces a structurally biased result" because "[i]n most cases an independent contractor's investments will be smaller than a corporate client's total business investment," and "the comparison will systematically show employee status regardless of whether the worker is genuinely in business for herself." CWI agreed, saying that the 2024 Rule's comparative investment approach "was inherently skewed against finding an opportunity for profit or loss" because a "sole proprietor's investment will almost always appear small in comparison with a corporate client's total capitalization," adding that the NPRM's approach "is consistent with the Supreme Court's ruling in *Silk,* where the Court found that the truck drivers held independent contractor status despite

the coal companies' far greater total capitalization." Uber stated that a worker's investments "should be considered on their own terms—not in comparison to investments by some other party," adding that "[w]hen the worker invests in things that will support her own business, it is irrelevant whether someone else also invests a larger sum;" otherwise, "no small business could contract with a larger one." Littler WPI argued that comparing investments "provides no useful insight as to whether that worker is in fact in business for him- or herself" and has little relevance to the economic reality test. Other supportive commenters included American Association of Advertising Agencies, American Council of Life Insurers, Associated Builders and Contractors, Coalition to Promote Independent Entrepreneurs, FSI, Private Care Association, Scopelitis, ShiftKey, Transportation Intermediaries Association, and WAFLA.

Having considered the comments on this issue, the Department adopts its proposal to consider the worker's investments only instead of comparing the worker's investments to the potential employer's investments. Throughout this rule, the Department is seeking to articulate the factors in a way that connects them to the ultimate inquiry of economic dependence and actually delineates clearly between employee and independent contractor status (if a factor points always or usually in one direction, it has little to offer). Everyone agrees that the nature and scope of the worker's investments (or the lack thereof) is probative of the worker's economic dependence. And as it did in the 2021 Rule,[275] the Department believes that comparing the worker's investments to the investments of the potential employer saps the probative value from the consideration of investments. Instead of shedding light on the worker's economic situation and capacity to operate as an independent business, comparing the worker's investments to those of the potential employer merely compares their respective sizes and resources. In almost all cases, the potential employer is larger than and has greater resources than the individual worker (which would constantly indicate one status over the other). Yet, if that individual worker has made a meaningful investment in, or capital expenditure on, helpers or equipment or material to

[275] 86 FR 1188.

further his or her work, then that consideration indicates a degree of economic independence that should not be overridden by the size of the potential employer. For this reason, the approach of the 2024 Rule, to the extent it was perceived to compare solely the size of the worker's investments to the size of the potential employer's investments, could have created absurd results. For example, this factor might indicate employee status for a worker who has made such meaningful investments if engaging with a massive corporation and independent contractor status if engaging with a small business. This is because the comparative value of investment is far less probative of economic independence than the nature and extent of the worker's investment in his or her business. Considering the worker's investments without comparing them to those of the potential employer thus ensures that this consideration remains tied to the ultimate inquiry of the economic dependence and can indicate employee or independent contractor status as appropriate depending on the facts.

The Department's position is consistent with the Supreme Court's articulation of the economic reality test, which has never compared a worker's investments to those of the potential employer. In *Silk*, for example, the Court recognized that the truck drivers' ownership of their vehicles supported independent contractor status even though the coal company that engaged them undoubtedly had far greater overall capital investments.[276] And the Court recognized that the unloaders' lack of meaningful investment (they "provided only picks and shovels") supported employee status without regard to the coal company's investment.[277] In other words, the Court found the realities of the respective workers' investments to be probative – not the coal company's investments.

Of course, the Supreme Court's analysis takes precedence over decisions of the circuit courts. Nonetheless, some circuits do consider the worker's investments without comparing them to the potential employer's investments in its business. For example, the Seventh Circuit found

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[276] 331 U.S. at 719.
[277] *Id.* at 716–17.

that the investments factor indicated that a truck driver was an employee without considering the trucking company's investments in its business.[278] The Second Circuit found that the fact that the workers "invested heavily in their driving businesses" indicated that they were independent contractors without comparing their investments to those of the potential employer, adding that, under the economic reality test, whether the worker has "'large capital expenditures'—as opposed to 'negligible items, or labor itself'—are highly relevant to determining whether an individual is an employee or an independent contractor."[279] The Eleventh Circuit has likewise focused on the nature of the worker's investments without comparing them to the potential employer's investments.[280]

The Department recognizes that a number of circuits compare the worker's investments to those of the potential employer.[281] The Department notes, however, that, among these circuits, how the Fifth and Eighth Circuits have applied the comparative investments approach to the facts of cases reveals that the approach has little probative value. In *Cornerstone Am.*, for example, the Fifth Circuit stated that it was of course "clear that [the insurance company's] investment—including maintaining corporate offices, printing brochures and contracts, providing accounting services, and developing and underwriting insurance products—outweighs the personal

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[278] *Brant*, 43 F.4th at 670-71.
[279] *Saleem*, 854 F.3d at 144 (quoting *Snell*, 875 F.2d at 810); *see also Franze*, 826 F. App'x at 77–78 (purchasing delivery routes "without any financial assistance from Bimbo" constitutes a substantial financial outlay that weighs in favor of independent contractor status).
[280] *Scantland*, 721 F.3d at 1317–18; *see also Nieman*, 775 F. App'x at 625.
[281] *See*, *e.g.*, *Off Duty Police*, 915 F.3d at 1056 (explaining that "[t]his factor requires comparison of the worker's total investment to the 'company's total investment, including office rental space, advertising, software, phone systems, or insurance'") (quoting *Keller*, 781 F.3d at 810); *Verma*, 937 F.3d at 231 (summarizing how courts have viewed this factor in cases examining the employment status of exotic dancers: "all concluded that 'a dancer's investment is minor when compared to the club's investment'") (quoting the district court's decision); *Paragon*, 884 F.3d at 1236 ("To analyze this factor, we compare the investments of the worker and the alleged employer."); *McFeeley*, 825 F.3d at 243 (comparing the potential employers' payment of rent, bills, insurance, and advertising expenses to the workers' "limited" investment in their work); *Driscoll*, 603 F.2d at 755 (strawberry growers' investment in light equipment, including hoes, shovels, and picking carts was "minimal in comparison" with employer's total investment in land and heavy machinery).

investment of any one Sales Leader."[282] The court, however, never explained how this fact was probative of the Sales Leaders' economic dependence, and when summing up the entirety of the facts and analyzing whether the workers were economically dependent on the insurance company as a matter of economic reality, the court did not even mention the insurance company's larger investment.[283] And in *Parrish*, the Fifth Circuit compared the relative investments, but noted that "[o]bviously, [the oil drilling company] invested more money at a drill site compared to each plaintiff's investments" and accorded the factor little weight in light of the other evidence.[284] In *Karlson*, the Eighth Circuit found that comparing the worker's investment with the potential employer's total operating expenses had little relevance because "[l]arge corporations can hire independent contractors, and small businesses can hire employees."[285]

Additionally, the Department notes that this final rule preserves a totality-of-the-circumstances inquiry, which is particularly important when analyzing opportunity for profit and loss. The enumerated factors focus the analysis on the facts within that totality that ordinarily matter and why. But additional facts or considerations may nevertheless be relevant (and, therefore, should be considered) if they indicate whether the worker is in business for himself or herself or is economically dependent on the potential employer for work. A comparison of the parties' relative investments is one such unenumerated consideration and may be examined when it meaningfully illuminates that inquiry in a particular case. For the reasons explained above, however, the Department believes that such a comparison will ordinarily have little or no value because it measures the parties' relative scale rather than the worker's economic independence. Incorporating that comparison as an enumerated component of the investment consideration would therefore dilute, rather than enhance, the opportunity factor's probative force. This rule

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[282] 545 F.3d at 344.
[283] *Id.* at 346.
[284] 917 F.3d at 383.
[285] 860 F.3d at 1096.

accordingly does not foreclose comparison of relative investments in uncommon circumstances in which it may be genuinely informative, but it declines to make that generally unhelpful comparison part of the enumerated investment analysis.

The 2024 Rule considered the worker's and the potential employer's relative investments but acknowledged that strict comparisons of the investments were not helpful.[286] The 2024 Rule thus took an approach that did not simply compare "the dollar values of investments or the sizes of the worker and the potential employer" and instead focused "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."[287] This approach, however, still injects the potential employer's investments into the analysis without any basis for why the potential employer's investments are probative of the economic dependence or independence of the individual worker at issue. In sum, comparing the relative investments in any manner does not illuminate the worker's economic dependence or independence. By contrast, as explained herein, analyzing the extent to which the individual worker has an opportunity for profit or loss because of his or her investment in, or capital expenditure on, helpers or equipment or material to further his or her work is probative of the worker's economic dependence or independence.

Relatedly, several commenters raised issues regarding how the opportunity factor would apply to workers with small investments. For example, Farmworker Justice stated that "a worker's relatively small investment is unlikely to sway an operation to a point of profitability," and "[f]armworkers make de minimis, if any, 'capital contributions' to their employers' businesses." Although other facts would have to be considered too, the Department agrees that such farmworkers do not seem to have an investment indicating that they have an opportunity for

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[286] 89 FR 1684 ("[T]he Department understands the concerns raised by many commenters with merely comparing the size of and dollar expenditures by the worker to those of the employer, especially for workers who are sole proprietors.").
[287] 29 CFR 795.110(b)(2) (2024).

profit or loss. Philadelphia Legal Assistance similarly commented that "[s]mall spending on transportation or tools does not reflect business independence and is unlikely to meaningfully affect whether the business makes money." The Department does not disagree and reiterates that, although other facts would need to be considered too, small spending on transportation or tools does not seem to be an investment indicating an opportunity for profit or loss. Indeed, as explained in the 2021 Rule,[288] the investment must be capital in nature and consistent with the worker being in business for him or herself for the investment to indicate an opportunity for profit or loss. UBC took issue with the example in proposed § 795.115(b)(2), saying that "[t]his example will be interpreted as supporting independent contractor status for construction workers dispatched to a job site through an app if they have tools—and all building trades workers will have tools." This example, however, does not mention tools and explains that the facts presented indicate independent contractor status under the opportunity for profit or loss factor because the worker "is able to meaningfully increase his earnings by exercising initiative and business acumen and by investing in his own equipment," notwithstanding that the potential employer has made a substantially larger investment in its own business operations.[289]

American Society of Travel Advisors suggested that "the regulations expressly recognize that workers in many service industries may make only a minimal investment in equipment or materials and in such situations this consideration, by itself, should not be taken to weigh in favor of employee status." The Department declines to do so. A minimal investment in equipment or tools, by itself, does typically indicate employee status. Adopting this suggestion would be contrary to the Department's general approach to articulating the factors in this final rule, unlike how the 2024 Rule articulated certain factors, in a way that is neutral toward employee or independent contractor status. More generally, a worker who makes a minimal

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[288] 86 FR 1186.

[289] In this final rule, the Department is adopting the example proposed in § 795.115(b)(2) (now renumbered as § 795.115(b)(6)) except that it is changing "app" to "application" and, as Trevar D. Kolodny pointed out in his comment, "meaningful" to "meaningfully" to correct a typographical error.

investment in equipment or tools may have an opportunity for profit or loss indicating independent contractor status if the worker may earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment).[290] And as the Department explained in the 2021 Rule,[291] the absence of a substantial capital investment may be less probative in more knowledge-based occupations and industries, and for example, freelance journalists, graphic designers, or consultants may be entrepreneurs with little more than a personal computer and smartphone. As Judge Easterbrook has explained, "possess[ing] little or no physical capital … is true of many workers we would call independent contractors. Think of lawyers, many of whom do not even own books. The bar sells human capital rather than physical capital, but this does not imply that lawyers are 'employees' of their clients under the FLSA."[292]

Finally, National Association of Home Builders expressed concern that "the proposed description of th[e opportunity] factor may unnecessarily limit consideration of entrepreneurial investments that are not capital in nature" and suggested that the Department "consider alternative or additional regulatory text that allows for the consideration of entrepreneurial investments that are not capital in nature." The regulatory text in § 795.105(d)(1)(ii) identifies

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[290] *Meyer v. United States Tennis Ass'n*, 607 F. App'x 121, 123 (2d Cir. 2015) (concluding that workers who invested little were independent contractors primarily because of their control over the work and their initiative).

[291] 86 FR 1187.

[292] *Lauritzen*, 835 F.2d at 1540–41; *see also Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 275–76 (5th Cir. 2020). Independent Work Coalition suggested that the Department "add an example involving a knowledge-economy worker, such as a freelance marketing consultant, financial services professional, or technology specialist who sets their own rates, markets services to multiple clients, selects which engagements to accept, and invests in tools or professional development to expand their capabilities" because "[s]uch an example would illustrate that the factor encompasses a broad range of entrepreneurial activity and is not limited to workers who make large physical or capital investments." The U.S. Hispanic Business Council similarly suggested that the Department "include an additional example involving a knowledge-economy worker, such as a freelance marketing consultant, financial services professional, or technology specialist, to reflect that this factor applies broadly and is not limited to workers making large capital investments." The Department believes that its discussion above addresses these commenters' suggestion and that an additional example is therefore unnecessary. The Department further believes that its discussion above addresses the point in the comment by News/Media Alliance that it is "vital" that "the Department focus holistically on a worker's use of skill, acumen and judgment in securing opportunities to generate a profit or risk a loss, and does not measure this in terms of capital expenditures."

the worker's "investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work" (emphasis added). Although the Department believes that capital expenditures and entrepreneurial investments are similar, the regulatory text does not limit consideration to capital expenditures, and entrepreneurial investments that affect a worker's opportunity to earn profits or incur losses are considered too.

c. Other Comments Regarding the Opportunity for Profit or Loss Factor

The Department received numerous additional comments regarding the opportunity for profit or loss factor.

For example, several commenters stated that the Department drafted the proposed opportunity factor to favor findings of independent contractor status. AFSCME commented that this factor "favors independent contractor status on the whole when either opportunity or investment favor independent contractor status, while both aspects must point to employee status in order for it to favor employee status as a whole," thus it "is structured to give the advantage to independent contractor status rather than consideration of all the relevant facts for each of these two aspects of the test." Nichols Kaster stated that the proposed opportunity factor "indicates independent contractor status if there are facts that support *either* worker initiative or investment (even if either a lack of initiative or lack of investment suggests that the worker is an employee)." OOIDA commented that, "[i]f the Department intends to say there doesn't need to be skill exercised when making an investment for this factor to weigh toward independent contractor, then we believe it may indicate independent contractor status where it isn't warranted." On the other hand, National Retail Federation asserted that "initiative alone—without any corresponding investment—can be sufficient to satisfy this factor," especially considering that, "in today's economy, there is less of a barrier to entry to starting and operating a business thanks to technology and other developments that streamline business operations and lower overhead costs."

As an initial matter, both the individual worker's exercise of initiative and management of investment should be considered in all cases under the opportunity for profit or loss factor even if the factor may indicate independent contractor classification based on only one. The worker's exercise of initiative and management of investment are longstanding considerations and particularly probative of a worker's status. The Department's inclusion of them within the opportunity factor reflects that. However, the ultimate focus of this factor is the worker's opportunity for profit or loss, which the Department believes is a core or primary indicator of a worker's status as explained above. While exercising initiative *and* managing investments would certainly be stronger evidence that a worker has the opportunity for profit and loss, providing that the worker *must* both exercise initiative and manage investments for this factor to indicate independent contractor status would detract from this factor's ultimate focus on the worker's opportunity and would impose an unwarranted mechanical element or checklist on how this factor is applied. Thus, although initiative and investment are both paths to arrive there, a worker must have, as a matter of economic reality, an opportunity for profit or loss to indicate independent contractor status.

Ultimately, the focus of this factor is whether the worker has a meaningful opportunity for profit or loss characteristic of an independent business. Such an opportunity may arise from the worker's exercise of initiative, management of investment, or both; the worker need not demonstrate it through both considerations. Initiative and investment should each be considered where relevant, but they are neither applied mechanically nor tallied against each other. Evidence relating to either consideration does not automatically determine the factor's direction without regard to contrary evidence regarding the other. Rather, evidence concerning initiative and investment must be evaluated together to determine whether the worker possesses a genuine entrepreneurial opportunity to affect profits or losses. Thus, one consideration may be sufficient for the factor to indicate independent contractor status when it meaningfully establishes such an opportunity, but weak evidence under one consideration may be outweighed by stronger contrary

evidence under the other. Weak evidence under one consideration favoring independent contractor status, for example, could be outweighed by strong evidence under the other consideration favoring employee status, and vice versa. Undoubtedly the particular facts of each case will produce rules along the scale between independent contractor and employee status. This certainly includes cases in which the evidence, considered as a whole, points equally in opposite directions or does not point meaningfully in either direction. In these and other indeterminate circumstances, the factor may be neutral. To make clear that initiative and investment should be considered as a whole under this factor and to avoid any confusion when applying this factor, the Department has added: (1) "or both" to the end of the first sentence in the regulatory text; and (2) a sentence in the regulatory text explaining that evidence under one consideration pointing to either independent contractor or employee status could be outweighed by more persuasive evidence under the other consideration pointing in a different direction.

AFL-CIO asserted that the proposed factor "conflates true entrepreneurial independence with ordinary variations in wages or output that exist in many employment relationships," and added that "[w]orkers who can increase earnings by working longer hours, accepting more assignments, or marginally adjusting how they perform tasks are not thereby operating independent businesses." Similarly, IBT stated that merely working more or faster is more like piecework than an enterprise requiring entrepreneurial judgment. The Department does not disagree and believes that such concerns are already addressed by the regulatory text for this factor, which states that this factor indicates employee status if the worker "is unable to affect his or her earnings or is only able to do so by working more hours or faster." Indeed, Farmworker Justice, although it opposed the proposed analysis generally, acknowledged that the NPRM did "appropriately explain that, for those workers with a fixed hourly rate, where the employer determines the tasks to perform, the worker does not have a meaningful opportunity for profit or loss."

Among commenters that generally supported the proposed analysis, Americans for Prosperity Foundation suggested that the factor's final sentence (explaining that it indicates employee status if the worker "is unable to affect his or her earnings or is only able to do so by working more hours or faster") be removed, saying that it "is overbroad and could be construed to extend to circumstances where individuals use their initiative, skills, and judgment to perform more efficiently and thus earn greater profit or invest in their own … tools to allow them to achieve this result." On the other hand, Center for Workplace Compliance asserted that distinguishing "between entrepreneurial opportunity driven by managerial skill, initiative, and business decisions" and "changes in earnings that depend primarily on working more hours or working faster … aligns directly with the economic dependence inquiry and helps distinguish workers who are in business for themselves from those who depend on another entity for work." Similarly, CWI endorsed the proposal's articulation of this point as compared to the 2024 Rule but requested clarification that accepting additional engagements "through one's own independent business operations reflects the exercise of entrepreneurial *initiative* relevant to the opportunity-for-profit-or-loss Core Factor."

The Department declines to remove the final sentence of this factor's regulatory text. To the extent that a worker who is paid a fixed hourly rate or a fixed rate per piece is only able to affect his or her earnings "by working more hours or faster," the Department believes that this fact indicates that the worker is an employee. This is well-settled in the case law.[293] And the

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[293] *See*, *e.g.*, *Rutherford Food*, 331 U.S. at 730 ("While 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."); *Rosenwasser*, 323 U.S. at 361–63 (rejecting argument that workers paid by the piece cannot be covered employees under the FLSA); *Off Duty Police*, 915 F.3d at 1059 (explaining that the fact that workers "earned a set hourly wage regardless of the skill they exercised" indicated employee status); *Schultz v. Capital Int'l Sec.*, *Inc.*, 466 F.3d 298, 308 (4th Cir. 2006) (explaining that opportunity factor indicated employee status because the employer "paid the agents a set rate for each shift worked" and "dictated the number of shifts available and the hours worked," and they could not "finish a shift more efficiently or quickly in order to perform additional paid work"); *Snell*, 875 F.2d at 809 (explaining that "toiling for money on a piecework basis is more like wages than an opportunity for 'profit'").

Department agrees that this sentence is consistent with its discussion of economic dependence in this final rule (§ 795.105(b)) as a worker who can affect his or her earnings only by working more or faster is dependent on the employer for those more hours or pieces (i.e., the work) rather than having the nature and character of a business owner who has a separate business.[294] The Department acknowledges though that working more hours or completing more pieces for an employer is different than accepting additional engagements from an employer through the worker's own independent business operations, in which case the opportunity factor could indicate independent contractor status provided there is exercise of initiative or management of investment.

Relatedly, Texas RioGrande Legal Aid commented that, "[u]nder the proposed regulation, factors as unremarkable as a worker's opportunity for earning tips based on their customer service skill or bonuses based on their managerial or sales skill somehow weigh in favor of independent contractor status." As an initial matter, the NPRM did not mention tips or bonuses, and certainly did not state that receiving such compensation, standing alone, indicates independent contractor status. The relevant inquiry is whether the worker's ability to earn tips and bonuses reflects an opportunity for profit or loss arising from the worker's own initiative, managerial judgment, or investment, rather than an earning opportunity created and controlled by the potential employer.

For example, a musical performer who decides when and where to perform, obtains engagements at different venues, manages those different performance opportunities, maintains her own equipment, and earns tips based on the success of each performance may have an opportunity for profit or loss reflecting operation of an independent business. The relevant

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[294] The example at § 795.115(b)(7) 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 explains 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."

evidence would not be the receipt of tips, but the performer's ability to obtain and manage engagements and affect earnings through independent initiative and investments. By contrast, a musician who, as a matter of actual practice, is required to perform exclusively for one venue, works according to opportunities and conditions determined by that venue, uses equipment provided by that venue, and can increase earnings only through tips received while performing the assigned work would more likely be an employee. The mere possibility of earning tips would not convert that employment relationship into an independent business.

The same principle applies to bonuses. Bonuses may arise in either employment or independent contractor relationships, and the existence of a bonus is not itself significant. What matters is whether the worker can affect profits or losses through independent business decisions or instead receives additional compensation under terms and opportunities controlled by the potential employer.

Texas RioGrande Legal Aid further commented that the proposed opportunity factor "chang[es] the focus from whether the *business* dictates the worker's ability for profit and loss to whether the *worker* has an opportunity for profit and loss." However, although the proposed opportunity factor is different in ways than the 2024 Rule's opportunity factor, they are both focused on the worker's opportunity. Indeed, the 2024 Rule's opportunity factor "considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work."[295] In fact, the 2024 Rule's opportunity factor references the worker 10 times and does not mention the potential employer's business once.[296] Although actions by the potential employer may be relevant, the proposed opportunity factor properly focuses on the worker's opportunities.

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[295] 29 CFR 795.110(b)(1) (2024).
[296] *Id*.

Texas RioGrande Legal Aid also commented that, "contrary to the proposed rule, a worker's ability to hire helpers does not in and of itself indicate the existence of the sort of freestanding business organization that is likely to be an independent contractor under the FLSA." The proposal did not say that, however, and there are factors in addition to the opportunity factor and considerations within the opportunity factor in addition to whether the worker invests in helpers to further his or her work. In any event, *Silk*[297], circuit courts of appeals[298], and the Department[299] have considered whether the worker invests in hiring helpers to be relevant.

Richard Reibstein commented that the proposed opportunity for profit or loss factor "focuses on opportunity for profit and fails to give any attention to or description of the types of losses that bear on the independent contractor status of the worker." He also gave several examples of how, in his view, a worker "can be subject to loss." The Department does not intend for this factor to give more attention to profits than losses. In particular, this factor's focus on the worker's management of investments implicates possible losses just as much as possible profits. As the Second Circuit explained in *Saleem*, "[e]conomic investment, by definition, creates the opportunity for loss, but investors take such a risk with an eye to profit."[300] Profits and losses necessarily go together, and to be clear, this factor considers the worker's opportunity for both.

Several commenters addressed workers who use for their work materials and equipment that they already own for personal use. CWI stated that the "conversion of personal property into

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[297] 331 U.S. at 719 (concluding that workers were independent contractors, in part, because "[t]hey hire their own helpers").
[298] *See*, *e.g.*, *Brant*, 43 F.4th at 667–68 (although the worker had only a "theoretical ability" to hire helpers, explaining as a general matter that "[w]hen a worker hires helpers to assist in a job, that fact weighs against employee status"); *Saleem*, 854 F.3d at 143 (fact that workers permitted others to drive for them indicated independent contractor status); *Scantland*, 721 F.3d at 1311–12 (stating that "employment of helpers" is relevant); *Driscoll*, 603 F.2d at 754 (same).
[299] *See*, *e.g.*, WHD Opinion Letter FLSA2025–2 at 5 (describing the "amount of the worker's investment in facilities, equipment, or helpers" as relevant); 86 FR 1676 (describing in an example the fact that the worker "decides when and whether to hire helpers to assist with the work" as one consideration among others leading to the conclusion that the opportunity factor indicated independent contractor status for that worker).
[300] 854 F.3d at 144 n.29.

a business use (thereby decreasing business expenses, while facilitating profits) [is not] reflective of anything other than an exercise of entrepreneurial initiative" and requested the Department to specify that "the use of a vehicle for business purposes, even when it has some other personal use, is entrepreneurial in nature." National Retail Federation commented that "[m]any bona fide independent contractors use materials or equipment for their businesses that they already own for personal use, limiting their need for additional investments for their businesses." U.S. Chamber of Commerce asserted that "individuals often purchase cell phones for personal use and later choose to monetize them through gig work," disputed the "notion that certain items must be rigidly categorized as either 'personal' or a business 'investment,'" and requested the Department to clarify that "the use of pre-owned equipment deployed for business purposes may cause the opportunity for profit or loss factor to weigh in favor of independent contractor status." Having considered these comments, the Department agrees that, when applying the opportunity for profit or loss factor, there should be no barrier to considering a worker's use in his or her work of already-owned materials or equipment that have personal uses too. To the extent that such use affects a worker's opportunity to earn profits or incur losses, it is a probative fact under this factor.

IBT expressed concern that employers would be able to create an opportunity for profit or loss indicating independent contractor status by requiring truck drivers to "purchase equipment, bear fuel and maintenance costs, or absorb rate fluctuations," adding that the "fact that these drivers bear the full cost of vehicle wear, fuel, and insurance creates the appearance of business risk." The Department disagrees; requiring an employee to bear certain costs does not mean that the opportunity for profit or loss factor indicates independent contractor status. As the Department explained in the NPRM and consistent with the economic dependence inquiry, an investment must indicate an independent business by the worker, as opposed to merely being required by the potential employer, for it to indicate an opportunity for profit or loss.[301] Thus,

[301] 91 FR 9952 (citing 86 FR 1187).

whether an employee who is required to bear certain costs has an opportunity for profit or loss involves an inquiry into the nature of the possible investment and his or her ability to manage it. For example, a company that hires independent contractors to haul freight may obviously require that drivers bring their own vehicles.[302] In contrast, a requirement to "invest" in specific, company-provided equipment would not be consistent with the worker being in business for him- or herself.[303]

Several commenters addressed the meaning of initiative under the opportunity for profit or loss factor. NELP criticized the factor for "elevat[ing] the word 'initiative', a vague word that may encompass activities not indicative of self-employment," and stated that the 2024 Rule's articulation of this factor "emphasizes the necessary and specific characteristic (managerial skill)." The Department, however, fails to see any appreciable difference between this rule's focus on "initiative (such as managerial skill or business acumen or judgment)" and the 2024 Rule's focus on "managerial skill (including initiative or business acumen or judgment)." National Association of Home Builders expressed concern that the "parenthetical elaboration on the worker's exercise of initiative, i.e. 'such as managerial skill or business acumen or judgement,' implies that the worker's exercise of initiative should not be considered if it lacks some level of sophistication, especially since the guidance fails to provide an example to the contrary and given that the proposed example of initiative for this factor identifies construction work with the absence of the type initiative that should be considered." However, whether the worker exercises initiative in a manner affecting his or her opportunity to earn profits or incur losses is more probative than any level of sophistication, and the fact that the worker who does not exercise initiative in the example in § 795.115(b)(7) worked in the construction industry does

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[302] *Silk*, 331 U.S at 719.

[303] *Cf. Scantland*, 721 F.3d at 1318 (concluding that technicians' "expenditures [in equipment and materials] detract little from the[ir] economic dependence on Knight" in part because "many technicians purchased specialty tools from Knight directly via payroll withholdings").

not mean that no worker in that industry exercises initiative indicating an opportunity for profit or loss – the examples are fact-specific.

Several commenters appreciated the inclusion of initiative within the opportunity for profit or loss factor. American Securities Association commented that, "[b]y considering initiative primarily within the opportunity for profit or loss factor (a core factor) rather than dispersing consideration of initiative across multiple factors, the analysis becomes more focused and consistent with how courts have applied the economic reality test." Private Care Association and Coalition to Promote Independent Entrepreneurs commented that they support including the worker's initiative in the opportunity for profit or loss factor. Landmark Legal Foundation added that restoring "initiative as a distinct and meaningful consideration, rather than a subordinate qualifier on the skill factor, better reflects the [Supreme] Court's actual analysis and reduces the artificial burden the 2024 Rule placed on establishing independent contractor status through th[e skill] factor." NABTU disagreed, stating that the Department's inclusion of initiative in the opportunity rather than the skill factor "does precisely the opposite" of what the Department intends, because "it *creates* overlap by placing skill considerations under both the skill factor *and* the opportunity for profit or loss factor." However, the skill considerations are different and separate under each factor. Only the worker's managerial skill (i.e., how the worker operates as an independent business, if at all) is considered under the opportunity factor, and (as explained more in the discussion of the skill factor below) only the worker's skills, if any, in actually performing the work are considered under the skill factor.

Lyft commented that a "driver's ability to earn more by exercising initiative, investing in their business, choosing rides that suit the driver's preferences and managing their time and resources strategically are all considerations the control factor alone may not capture" and requested the Department to state that "these forms of initiative are evidence of the opportunity for profit and loss." Uber commented that, applying the opportunity factor, "multi-apping" by drivers "shows more starkly than anything else that the worker is not beholden to any specific

platform," "has multiple possible workstreams available simultaneously," and "is powerful evidence of independence." The Department agrees that these actions by drivers may indicate independent contractor status when applying the opportunity factor assuming that they affect the driver's opportunity to earn profits or incur losses. National Retail Federation stated that the Department should "clarify that an opportunity for profit or loss may arise from the exercise of managerial skill in selecting, timing, and performing work or in controlling costs — not solely from the ability to set or negotiate prices." Although the NPRM did not state that an opportunity for profit or loss may arise solely from the ability to set or negotiate prices, the Department agrees with this statement.

National Retail Federation requested the Department to state that "the 'opportunity' and 'ability' for profit or loss is what matters in the analysis, not the worker's actual levels of investment or initiative shown" because a worker "choosing not to engage in certain practices or take on certain risks that would further impact the level of their profit or loss shouldn't result in a finding that the individual is not an independent contractor, unless that worker is prevented from doing so by the potential employer." U.S. Chamber of Commerce similarly requested the Department to clarify that "a worker's access to the *opportunity* to exercise entrepreneurial choices that could lead to profit or loss is what matters for that factor, rather than requiring the exercise of said opportunities." FSI requested the Department to "clarify that a worker's *lack* of entrepreneurial drive and business acumen is not indicative of employee status." Scopelitis commented that "the deliberate decision not to invest resources is as much a hallmark of an independent business decision as the decision to do so." FedEx commented that "the best example of an entrepreneurial decision is the calculation whether to grow, shrink, or stay the same size as a business."

Having considered these comments, the Department believes that the ultimate outcome of independent entrepreneurship (profit or loss) is separate from the actions indicative of entrepreneurship (initiative, investment, or both) that largely determine that outcome, and this

factor makes clear that independent contractors typically "exercise … initiative," "manage[] … investment," or both. Thus, as explained in the 2021 Rule, a lack of profit or loss viewed in hindsight says little about a worker's economic independence; instead, the focus is the degree to which the worker actually exercised initiative or actually managed investments.[304] The provision in § 795.110 that "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible" applies to all of the factors and applies regardless whether it suggests employee or independent contractor status. As further explained in the 2021 Rule, a worker's theoretical ability to, for example, exercise initiative is weaker evidence than the worker's actual practices.[305] On the other hand, a worker's conscious decision to not make a particular investment (especially when choosing among a range of investments) or to not take a particular action (especially when choosing among a range of options) may constitute an affirmative exercise of initiative to consider among others when evaluating opportunity for profit or loss. In sum, in the context of the opportunity factor, the focus is the individual worker's opportunity for profit or loss, as shown by meaningful investments or the exercise of personal initiative; actual profits or losses are less relevant.

Finally, some commenters who supported the proposal suggested numerous additional considerations or examples for inclusion in the Department's discussion of the opportunity for profit or loss factor in this final rule. For example, U.S. Chamber of Commerce suggested twelve "examples of a worker's initiative or investment that may impact a worker's profit or loss" and three "examples of fact situations which are neutral in the analysis of whether the worker controls their profits and losses." For this (and each other factor), the Department's goal, however, is to provide a clear and generally-applicable standard that can point to independent contractor or employee status depending on the facts presented. The Department is of course

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[304] 86 FR 1188.

[305] *Id.* (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1371 (9th Cir. 1981) ("[T]he fact that Sureway's 'agents' possess, in theory, the power to set prices … and advertise to a limited extent on their own is overshadowed by the fact that in reality the 'agents' … charge the same prices, and rely in the main on Sureway for advertising.")).

addressing many of the specific considerations and examples raised by commenters to provide as fulsome guidance as possible, but identifying every possible consideration would undermine the Department's overall goal of providing a clear, workable, and generally-applicable standard.

For all these reasons, the Department is finalizing the regulatory text in § 795.105(d)(1)(ii) describing the opportunity for profit or loss factor with two additions as set forth above.

d. New Examples Regarding Drivers who Lease Trucks from Motor Carriers

A number of commenters addressing the trucking industry requested more examples and guidance in applying the factors to truck drivers. The commenters generally recognized that truck drivers may be properly classified as employees or independent contractors depending on their circumstances and discussed drivers who are owner-operators and who lease trucks. For example, Real Women in Trucking expressed concern that "any leasing arrangement between a driver and the company for which they drive would likely suggest independent contractor status." OOIDA, although it generally supported the proposed analysis, requested clarification that a lease-purchase agreement is not the type of investment that indicates independent contractor status. SBA Office of Advocacy reported that its roundtable participants from the trucking industry requested that the Department address fraud or abuse in lease-purchase programs. National Association of Small Trucking Companies discussed various business models for one-driver, one-truck operators and how they can grow into small motor carriers themselves. And Truckers Integral to Our Economy discussed the role that company-drivers and independent owner-operators play in the economy and requested clear guidance so that owner-operators can structure relationships to preserve their economic independence.

Having considered these comments, the Department generally believes that the fact that a driver owns a truck and exercises initiative in how to operate it seems to plainly indicate independent contractor status under the opportunity for profit or loss factor. How that factor applies to drivers who lease trucks seems more nuanced, and accordingly, the Department is

adding to the final regulatory text (in § 795.115(b)(8) and (9)) two new examples illustrating how the factor can indicate employee or independent contractor status.

The first example (in § 795.115(b)(8)) involves a driver who leases a truck from and hauls freight for a motor carrier company. The company determines the rates that it pays the worker for each shipment, does not negotiate those rates, and assigns shipments to the worker without informing him of the rates before he must commit to the shipment. The worker's monthly lease payments to the company may theoretically allow him or her to purchase the vehicle one day, but the reality of the economic terms of the lease agreement most likely prevents the worker from ever reaching that point. Those facts would indicate employee status under the opportunity for profit or loss factor.

The second example (in § 795.115(b)(9)) likewise involves a driver who leases a truck from and hauls freight for a motor carrier company. Unlike the circumstances of the worker in the above example, the company offers the worker shipments at proposed rates, and the worker is able to negotiate those rates before committing to shipments. When possible, the worker seeks to negotiate a separate shipment for the return leg (i.e., a "backhaul") to avoid driving an empty vehicle. The economic terms of the lease agreement actually provide an opportunity for the worker to own the vehicle in the future. Those facts would indicate independent contractor status under the opportunity for profit or loss factor.

The Department believes that these two new examples will provide sufficient clarification in response to a multitude of comments on this topic.

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

This section discusses the comments addressing the three other factors proposed by the Department in addition to the two core factors. As discussed in § 795.105(c) above, these other factors are less probative than the core factors, and in some cases, they may not be probative at all. Nevertheless, they are still 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.

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

The Department proposed regulatory text in § 795.105(d)(2)(i) describing the first other economic reality factor—the amount of skill required for the work. This proposed factor indicated independent contractor status "to the extent the work at issue requires specialized training or skill that the potential employer does not provide," and it indicated 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."[306] Consistent with the 2021 Rule, the Department explained that this factor would "focus on training and skill because an individual 'who is in business for him- or herself typically brings his or her own skills to the job rather than relying on the client to provide training.'"[307]

The proposed skill factor did not include the consideration of initiative (the proposed opportunity for profit or loss factor considered initiative). The Department explained that the Supreme Court articulated the factor as "skill required" in *Silk* and that, as set forth in the 2021 Rule, multiple courts of appeals articulate the factor as "the degree of skill required to perform the work."[308] The Department further explained that "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)."[309] The Department added that "[t]his would be consistent with the proposed analysis' focus on economic

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[306] 91 FR 9974.
[307] *Id.* at 9954 (quoting 86 FR 1191).
[308] *Id.* (citing *Silk,* 331 U.S. at 716; 86 FR 1191).
[309] *Id.* (citing 86 FR 1191).

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."[310]

The 2024 Rule similarly provided that 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." The 2024 Rule, however, provided that when the worker has specialized skills, this is not itself indicative of independent contractor status "because both employees and independent contractors may be skilled workers." The 2024 Rule further provided that it "is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor."[311]

The NPRM explained that the 2024 Rule incorporated an additional consideration (compared to the 2021 Rule) when applying this factor by stating that the worker needs to use the specialized skills in connection with business-like initiative for this factor to indicate independent contractor status. The NPRM further explained that "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 an analysis that is more amenable to accurate and reliable application by workers and businesses, namely one whereby relevant facts are considered under a particular factor rather than overlappingly considered under multiple factors."[312] The NPRM proposed that the worker's business-like initiative would instead 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."[313] The Department added 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," which "treated the

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[310] *Id*.
[311] 29 CFR 795.110(b)(6) (2024).
[312] 91 FR 9954.
[313] *Id*.

probative value of the worker's initiative as being tied to the success or profitability of the worker's claimed independent business."[314] The Department acknowledged that "some (but not all) circuit courts" have nonetheless articulated the skill factor as including initiative, but expressed belief that "application of the Supreme Court's analysis takes precedence."[315]

The Department received numerous comments addressing the proposed skill factor.

For example, commenters addressed how the worker's initiative was not considered in this proposed factor and was instead considered in the opportunity for profit or loss factor. Landmark Legal Foundation commented that "*Silk* treated initiative as a freestanding and direct indicator of independent contractor status, asking whether a worker's own judgment and energy drove the success of an independent business," but "[t]he 2024 Rule departed from that framework by merging initiative into the skill factor and requiring an extra showing—that specialized skills be used with 'business-like initiative'—before they could weigh in favor of independent contractor status." National Retail Federation stated that the 2024 Rule "created significant overlap and confusion" by including considerations of initiative in the analysis for multiple factors and complimented the Department for "address[ing] this error by removing them from the analysis for the *amount of skill required* factor and including [them] exclusively under the *opportunity for profit or loss* factor." This commenter added that "[t]his approach will ensure the analysis is not duplicative or contradictory." FSI asserted that the proposal properly eliminated initiative from the skill factor. U.S. Chamber of Commerce supported "refram[ing] the skill factor so that it does not tether skill to the exercise of 'business-like initiative'" and agreed that this would create a clearer analysis and avoid confusing overlap. And as mentioned in the discussion of the opportunity for profit or loss factor above, American Securities Association, Private Care Association, and Coalition to Promote Independent Entrepreneurs also

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[314] *Id.* (citing *Silk*, 331 U.S. at 716; *Rutherford Food*, 331 U.S. at 730).
[315] *Id*.

supported including the worker's initiative in the opportunity for profit or loss factor—not the skill factor.

Other commenters opposed the Department's proposal to not consider the worker's initiative in the skill factor. For example, NABTU argued that the 2024 Rule's approach to this factor "reflects the longstanding interpretation adopted by many federal courts and reduces the risk of misclassifying skilled and experienced employees as independent contractors," and disagreed that "the Supreme Court's decisions in *Silk* and *Rutherford Food* require excluding business-like initiative from the skill factor," saying that "[t]hose cases involved workers performing unskilled and low-skill tasks, so the Court had no occasion to consider whether a worker deploying specialized skills in connection with business-like initiative should be treated differently." This commenter also argued that the proposed approach would not avoid duplication as intended and actually "*creates* overlap by placing skill considerations under both the skill factor *and* the opportunity for profit or loss factor" because the example in proposed § 795.115(b)(5)(ii) states that "[t]he 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." UBC commented that the skill factor should be "redrafted to consider if the workers' skill incorporates whether the worker used their skill in a business-like initiative, as was done in the 2024 Rule." SMART and SMACNA cited cases in which courts have considered whether the workers used specialized skills in connection with initiative. Farmworker Justice added that "[t]he inclusion of initiative in th[e skill] factor provides important context" when applying the factor to farmworkers. And although it generally supported the proposal, American Society of Travel Advisors asserted that the skill factor "should not weigh in favor of employee status where it can be shown that the worker exercises initiative which demonstrates he or she is not economically dependent on the engaging party" and thus "disagree[d] with the Department that the element of initiative should be either disregarded or considered separately from the skill factor."

Having considered the comments, the Department adopts its proposal to not consider the worker's initiative as part of the "skill required" factor. As an initial matter, the Department recognizes the significant probative value of the worker's exercise of initiative when determining whether the worker is an employee or independent contractor, and accordingly, this rule provides that initiative is considered when applying the opportunity for profit or loss factor—a core factor which carries greater weight in the overall analysis. Thus, not considering initiative in the skill factor should not be a concern. Moreover, the Department believes that not considering initiative in the skill factor avoids overlapping or duplicative considerations among the factors. Finally, the Department's approach is supported by *Silk* and circuit case law. In *Silk*, the Supreme Court articulated this factor as the "skill required in the claimed independent operation."[316] Numerous circuit courts take a similar approach.[317] The Department recognizes that other circuit courts consider initiative as part of the skill factor,[318] but doing so dilutes the consideration of skill, considers initiative in multiple parts of the test, and may improperly unbalance the factor toward employee status by requiring an additional showing when the work requires specialized skill for the factor to indicate independent contractor status.[319]

Relatedly, CWI recommended that the Department reject the skill factor "as a stand-alone factor" and incorporate the consideration of skill into the opportunity for profit or loss factor, commenting that "because the amount of skill required relates to initiative and investment[,] that analysis of it belongs in the second Core Factor." Although this approach would further

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[316] 331 U.S. at 716. Contrary to NABTU's suggestion, the Court identified skill among other factors as generally "important for decision" and in no way indicated that those factors applied because of the facts of that case. *Id*.

[317] *See*, *e.g.*, *Brant*, 43 F.4th at 671 (considering "special skills required to perform the work"); *Paragon*, 884 F.3d at 1235, 1237 (articulating the factor as "the degree of skill required to perform the work" and focusing on "the degree of skill that [the worker] needed for the job"); *Iontchev*, 685 F. App'x at 550 (finding that "[t]he service rendered by the Drivers did not require a special skill"); *Snell*, 875 F.2d at 811 (analyzing whether specialized skills were required for the work).

[318] *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").

[319] *See supra* section III.A.-B.

streamline the economic reality test, consolidating both investment and skill into the opportunity for profit or loss factor would make the resulting factor too unwieldy. In any event, the Supreme Court specifically identified "skill required in the claimed independent operation" as a consideration that is "important for decision." *Silk*, 331 U.S. at 716. And the federal courts of appeals uniformly identify skill in some form as its own factor in the analysis. The Department therefore maintains skill as a separate factor, even if it may not be probative as a separate consideration in every case. *See Saleem*, 854 F.3d at 141, 144 (resolving classification question without analyzing drivers' skill). The National Retail Federation sought clarification "if the term 'specialized' is intended to apply to skill as well as training" in the skill required factor and added that the Department "may want to consider eliminating the qualifier entirely, as it is vague and can be interpreted differently depending on the individual conducting the analysis." In response, the Department clarifies that "specialized" applies to both "training" and "skill" in its description of this factor and that "specialized" is consistent with this factor's focus on the skill required for the work.

Some commenters that generally opposed the NPRM's analysis raised concerns that the proposed skill factor would lead to incorrect independent contractor outcomes. For example, AFSCME commented that the factor "plainly associates skill with independent contractor status in a way that completely ignores the economic realities of many professional and white-collar employees who by necessity or employer preference, can and do bring skills from outside the firm to do their work but are nonetheless economically dependent on their employer and do not use those skills in any independent way" (internal quotation marks omitted). Farmworker Justice stated that the proposed skill required factor "suggests that anyone with skills or experience in their field of work is likely an independent contractor" and "will unfairly act to classify workers who should be employees as independent contractors." UBC asserted that the proposed factor and the example in proposed § 795.115(b)(5) involving a roofer "makes every skilled construction craft journeyperson an independent contractor." NWJP commented that the

proposed factor does not contain "language acknowledging that some skilled workers are employees," which "will result in significant confusion about whether workers commonly understood to be employees might not be based on their experience and skill in completing their tasks as employees." This commenter added that "[t]his impression is exacerbated" by the example in proposed § 795.115(b)(5) "which implies that an experienced roofer may be an independent contractor on that ground alone." SMART and SMACNA stated that "while low-skilled work is a factor that can shield a worker from a finding of independent contractor status, a high amount of skill should not be a sword," and that "[s]kills are not the monopoly of independent contractors." Smith Summerset & Associates described the examples in proposed § 795.115(b)(4) and (5) as "specifically crafted to provide DOL-endorsed instructions on how to better assert independent contractor status for construction workers and by implication for workers in all industries."

Conversely, some commenters that generally supported the proposal raised concerns that the proposed skill factor would lead to incorrect employee outcomes. For example, Americans for Prosperity Foundation asserted that "there are many examples, such as those where the independent contractor works in the transportation sector (e.g., delivery drivers), where little or no specialized training is necessary and yet the status of the worker as an independent contractor is not in doubt," and that "while a worker with special skills is more likely to be an independent contractor, the converse is not true." This commenter added that the final rule "should reflect that while specialized skill is not necessary to be an independent contractor, it tilts toward independent contractor status." CWI expressed concern that "this factor will be inappropriately weighted against independent workers who may possess enormous initiative and business acumen that drive profitability and success in their independent work relationships, even though they do not have a traditionally recognized specialized skill," and provided an example of a courier "who does not need a specialized skill to pick up a package and deliver it" but has "unique abilities to control their work in a way that maximizes their profits *as a result of their*

business acumen and other traits." Richard Reibstein expressed concern that workers with less, little, or no skills may be deemed to be employees even though other considerations indicate that they are independent contractors, and he provided examples of a limousine or black car driver and an "individual that has an odd-jobs business." Littler WPI argued that "this factor requires the Department and the courts to single out some workers as 'unskilled'—a pejorative label—and potentially deny such 'unskilled' workers the opportunity and choice to start their own businesses or to work independently," adding that "[i]ndividuals with all types of training and skills can be in business for themselves." U.S. Chamber of Commerce requested that the Department "affirmatively state that the absence of a traditionally recognized 'specialized skill' does not preclude independent contractor status, particularly where the worker exercises meaningful initiative, business acumen, or multi-homing." This commenter also objected to the example in proposed § 795.115(b)(4) for "codifying a broad principle that a worker who acquires skills on the job is therefore more likely to be an employee."

Having considered the comments, the Department does not share commenters' concerns that the skill factor will incorrectly indicate either employee or independent contractor status when properly applied as part of this rule. These comments overlook that "no single factor is dispositive" (§ 795.105(c)), "skill required" is just one factor, and it is not a primary factor. Accordingly, contrary to the suggestions in some comments, the fact that the work requires specialized training or skill will not automatically result in a finding of independent contractor status, and the fact that the work does not require specialized training or skill will not automatically result in a finding of employee status. Although courts have traditionally considered "skill" as evidence of economic independence, skilled workers can be employees, and unskilled workers can be independent contractors. Put simply, skills are not the monopoly of independent contractors or employees. Indeed, to the extent that commenter feedback suggests that such outcomes are more common in the modern economy than in decades past,[320] such a

[320] *See supra* section III.C.

trend supports the Department's decision to afford skill less weight as a non-core factor in the analysis. In any event, adopting commenter suggestions to revise the application of this factor to favor one status or the other would be inconsistent with the balance in this rule that avoids framing the analysis and factors in ways that favor either employee or independent contractor outcomes. More importantly, the Department believes that its description of this factor is consistent with the ultimate inquiry whether the worker is economically dependent on the potential employer for work or is in business for him- or herself. To the extent that the work requires specialized training or skill that the potential employer does not provide, the fact that the worker brings specialized training or skills to the work indicates a degree of independence. And to the extent that the work requires no specialized training or skill or the worker depends on the potential employer to provide any necessary skills or training, those facts indicate a lack of independence.

Thus, comments about the example in proposed § 795.115(b)(5) by UBC (it "makes every skilled construction craft journeyperson an independent contractor") and NWJP (it "implies that an experienced roofer may be an independent contractor on that ground alone") plainly misapprehend and misapply both the example and the overarching analysis. The example in proposed § 795.115(b)(5) involving a roofer simply illustrates a fact pattern under which the skill factor would indicate independent contractor status. No single factor is dispositive (§ 795.105(c)), and whether that roofer (or any construction worker) is an employee or independent contractor would be determined by applying all the factors, particularly the core factors.

Relatedly, NABTU urged the Department to withdraw the examples in proposed § 795.115(b)(4) and (5), saying that the examples "will generate confusion among construction contractors and heighten the risk of independent contractor misclassification in the construction industry" and "will embolden contractors to misclassify construction workers who have invested time and effort in completing registered apprenticeship programs to master their trade, as well as

seasoned workers who have developed their skills through years of informal on-the-job experience." This commenter added that "only apprentices and new entrants – workers who have not yet had the opportunity to acquire the skills of their trade – would be insulated from the harmful implications of the roofer examples," and "as soon as those workers gain experience and develop the very skills the industry depends on, they would become more vulnerable to being treated as independent contractors and denied the workplace rights and protections afforded to employees." SMART and SMACNA also advocated for the removal of these examples, saying that they "do not take into account that, in the construction industry, on-the-job training obtained while enrolled in a registered apprenticeship program is a dominant model for skill acquisition," and that they "would be most counterproductive and threaten to create the anomalous result that experienced workers would lose their 'employee' status once they developed the skills to perform the specialized work without mentorship." This commenter added that "hard-earned specialized skills and source of training in the construction industry are not factors that count against a construction worker's employee status," and "[u]se of the source of training as a factor, particularly in industries requiring specialized skills that are acquired over many years, would potentially deprive apprentices and other newcomers to an industry of FLSA protection once they become proficient in their occupation." Smith Summerset & Associates similarly commented that these examples should be rewritten because they "plainly imply that even a few years of on-job-experience may achieve a level of specialized skill requisite for independent contractor status," and "plainly invite employers to take advantage of this proposal" by characterizing prior on-the-job experience as specialized skill supporting independent contractor status. This commenter criticized these examples and the proposed skill required factor generally for "confusingly combin[ing] the concept of training with the concept of skill" and "wrongly emphasiz[ing] training instead of skill" when "training is not equivalent to skill" but is instead "ancillary to skill."

Having considered these comments, the Department is retaining the examples proposed in § 795.115(b)(4) and (5), has renumbered them as § 795.115(c)(1) and (2) in the final regulatory text, and deleted an extraneous word ("worker") from the example in § 795.115(c)(1). In response to the concerns raised by these commenters, the Department reiterates its earlier response to other comments: "skill required" is just one factor, it is not a core factor, no single factor is dispositive, skilled and unskilled workers can be employees (just as they can be independent contractors), and whether a skilled construction worker is an employee or independent contractor is determined by applying all of the factors, particularly the core factors. In that vein, the suggestion that this factor will necessarily indicate independent contractor status for experienced workers is unfounded. Experience is not the same as skill, and, even if the worker is skilled through experience, this factor will indicate employee status if the work at issue requires no specialized training or skill or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job. Thus, if no specialized training or skill is required for the work, this factor suggests employee status regardless of the experience, skill, or training possessed by the worker. The Department understands that workers with more experience, training, or participation in apprenticeship programs may bring more required skill (assuming skill is required) to a working relationship. But if that is the case, it is one non-core factor among multiple factors and likely will not impact the determination. Additionally, while the Department does not believe that training is equivalent to skill, it does believe that training is relevant. If the work does not require any training or the worker needs the potential employer to provide the training necessary to perform the work, that indicates economic dependence for the work consistent with the ultimate inquiry for determining a worker's status, much as courts have held repeatedly.

OOIDA generally supported the proposed skill factor but suggested that "ongoing or corrective training required by a hiring carrier indicates that the driver does not possess the necessary skill and should weigh in favor of employee status." The Department agrees that,

applying the skill factor, such necessary training would indicate employee status. FSI commented that the Department "should clarify that optional offerings such as seminars on macroeconomic and market trends or training on new SI tools are not the type of 'skills or training necessary to perform the job'" because "[t]hese trainings are broadly educational and applicable across numerous industries, and firms provide them as a service to attract and retain financial advisors." ShiftKey requested the Department to clarify that "the 'skills or training necessary to do the job' does not take into account certain orientation measures or policies of a work environment" because, "[o]ften in the healthcare environment, there are policies that are necessary to orient an independent healthcare professional to a work site to ensure patient safety." Applying the skill required factor, these types of trainings would not be taken into account if they are not necessary to perform the work, but it is not clear that such is the case based on the commenters' descriptions.

Relatedly, Littler WPI requested that the Department delete certain language from the proposed skill factor explaining when the factor may indicate employee status ("the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job"). This commenter argued that this language "overlaps with the … opportunity for profit or loss factor, which includes consideration of whether the individual or potential employer invest in equipment or have initiative to improve skills through training" and "fails to distinguish between voluntary and mandatory training, creating an unresolved conflict with … the control factor." The Department disagrees. It does not believe that there is any overlap with the consideration of investment because only the worker's investment—not the potential employer's investment—is considered, as explained in the discussion of the opportunity for profit or loss factor above. Additionally, the Department also does not believe that there is any conflict with the control factor because the consideration under the control factor is whether the training is provided "to comply with specific legal obligations, satisfy health and safety standards," etc., whereas the consideration under the skill factor is whether the training is

necessary to perform the work. Moreover, the proposed deletion would unbalance this factor's description of when it points to employee status and when it points to independent contractor status.

American Society of Travel Advisors commented that "where skills are required for the performance of the contracted work, … the provision of those skills by the engaging party should not weigh in favor of employee status if the individual has the freedom, both under the contract and in fact, to acquire those skills from a source other than the engaging party." The Department declines to adopt this suggestion because, as explained above, the potential employer's provision of the skills required to perform the work suggests, as a matter of economic reality and actual practice, that the worker is economically dependent on the potential employer for the work.

American Council of Life Insurers suggested that the final rule "identify insurance sales and financial advising as services that require skill and initiative indicative of independent contractor status." American Association of Advertising Agencies recommended that the final rule "include a non-trades example to reflect the modern professional services landscape" and "provide a necessary signal that this factor applies equally to the knowledge economy." Independent Work Coalition also recommended that the final rule include an "example from a non-trades context, such as a software developer, graphic designer, or other knowledge-economy worker who brings specialized technical skills to an engagement without receiving training from the engaging business, to signal that the factor applies with equal force outside the construction industry." *See also* U.S. Hispanic Business Council (commenting that "the Department should include a non-trades example, such as a software developer or graphic designer"). In response, the Department reiterates that the skill factor, like the rest of the analysis, does not point to employee or independent contractor status for all workers in any particular industry, but rather, like the judicial framework from which it is derived, is generally-applicable across industries, including the knowledge economy.

American Association of Advertising Agencies "urge[d] the Department to clarify … that a worker's skill should be evaluated based on the nature of the expertise rather than the presence of formal credentials or professional licensure" and suggested that "many of the most highly skilled independent contractors developed their expertise through independent experience, self-directed study, or specialized project work rather than traditional degree programs." Uber commented that the proposal did "not address skill developed through work experience," adding that "[p]eople often start as neophytes and become experts through repetition" and such "expertise should not be discounted simply because it was earned through work." U.S. Hispanic Business Council suggested that "the absence of formal credentials or licensure is not determinative, and that skill developed through a worker's independent experience is consistent with independent contractor status." Flex Association stated that "skills learned by providing services over time can be consistent with independent-contractor status—all professionals get better through experience." Independent Work Coalition asserted that "the absence of formally credentialed or licensed skill is not dispositive under this factor, and that skill developed over time through a worker's own independent experience across an engagement or engagements is consistent with independent contractor status and does not indicate the kind of employer-provided training that weighs toward employee status." *See also* U.S. Chamber (commenting that "'specialized training or skill' does not need to be something learned through formal education").

In response to these comments, the Department believes that a worker's specialized skills can come—and, indeed, often do come—from multiple sources, and are not limited to degrees, credentials, and licensures. In response to the comment by American Association of Advertising Agencies, skill can come from work experience, independent study, or simply practice and repetition. The absence of a formal license or certification is not dispositive of whether a worker has specialized skills. Of course, skill can also come from educational or training programs

which award degrees, credentials, and licenses.[321] Indeed, as the name of the "skill required for the work" factor indicates, the fact that a worker possesses skills does not necessarily indicate independent contractor status; the factor specifically examines whether the work at issue requires specialized training or skill and whether the potential employer provides the specialized training or skill (if it is required). In other words, this rule is not a box-checking exercise, or an inventory list, but rather sets forth an analysis designed to resolve whether the economic reality of a particular worker is that of an independent contractor or employee.

National Home Delivery Association urged the Department "to explicitly recognize a CDL reflects specialized skill" and asserted that last-mile home delivery of big and bulky items is also a specialized skill. Scopelitis likewise urged the Department "to explicitly recognize a CDL reflects specialized skill," and it asserted that a worker who "provid[es] delivery services in equipment that does not require a CDL also possesses specialized skill." As these commenters noted, the 2024 Rule recognized that "drivers performing work requiring [CDLs] are likely using specialized skills as compared to drivers generally."[322] The Department reaffirms its position in both 2021 and 2024 that, if a CDL is required to perform the work and the worker brings a CDL to the relationship, then, absent other evidence, the skill factor should lean toward independent contractor status. Regarding delivery services more generally, however, the possible circumstances are too varied (compared to a CDL) for the Department to agree or disagree with these commenters' requests regarding delivery work not involving a CDL; it depends on the facts, including whether the delivery work requires specialized training or skill and, if so, whether the potential employer provides it.

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[321] Although a license can be a source of skill, the Department has historically found that whether the worker is him- or herself licensed by a State or local government is not material to the determination of the worker's status, as explained in the section below discussing additional factors.

[322] 89 FR 1714. In response to comments stating that a CDL can demonstrate specialized skill, the Department in the 2021 Rule "agree[d] that credentials such as certifications and licenses can be helpful indicators of specialized skill, though they are by no means the only indicators of such skill." 86 FR 1191.

For all these reasons, the Department finalizes the "skill required" factor in § 795.105(d)(2)(i) as proposed, with the exception of a minor non-substantive edit (changing "and/or" to "or").

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

The Department proposed to adopt the regulatory text from the 2021 Rule, § 795.105(d)(2)(ii), which describes the degree of permanence of the working relationship between the individual and the potential employer, as the second other economic reality factor. The Department proposed that this factor would weigh in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. The proposal also provided that this factor would weigh in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous. The Department further proposed in the NPRM to not include the concept of exclusivity in the permanence factor, as exclusivity is more directly related to the control factor.[323]

Many commenters supported the framing of the permanence factor as proposed in the NPRM. *See, e.g.*, FSI; Flex Association; Independent Work Coalition; National Retail Federation; U.S. Chamber. They generally felt that this factor was appropriately categorized as a secondary, less-probative factor, *see, e.g.*, FSI; U.S. Chamber, though some commenters thought that this factor should be eliminated altogether, *see* American Trucking Association; CWI; FedEx. Additionally, several commenters supported the proposal to not consider the exclusivity of the relationship as an aspect of the permanence factor, *see* CWI; National Association of Home Builders; U.S. Chamber, whereas others felt that exclusivity was critical, urging the Department to "clarify in the final rule that the duration of a working relationship is only

[323] *See* 91 FR 9954–55.

probative of employee status under this factor when the potential employer has actually imposed requirements or restrictions that prevent the worker from being in business for themselves — such as exclusivity requirements or prohibitions on working for others," National Retail Federation; *see also* American Society of Travel Advisors; American Trucking Association.

Business commenters frequently emphasized their concern that focusing on the length of a work relationship was not appropriate because it would encompass many situations in which contractors and businesses choose to have or negotiate continual, repeat, or long-term engagements with one another that do not indicate economic dependence. *See, e.g.*, Bowling Proprietors Association of America; CWI; Flex Association; Independent Work Coalition; Littler WPI; U.S. Chamber. For example, U.S. Chamber of Commerce urged the Department to revise this factor to focus on the "indefiniteness of the relationship, not the length of the relationship," explaining that "[i]ndependent workers and businesses enter into long-term contracts and contracts that are renewed regularly due to superior service, competitive costs, or the lack of alternative service providers, and these relationships are not evidence of the permanence of the relationship or employee status." CWI similarly believed that this factor "penalizes long-term contractor relationships that both parties voluntarily renew because the relationship works well" and encouraged the Department to revise the language to focus instead on the parties' contractual terms and "whether the relationship is contractually indefinite by design, not merely long-running in practice." Some of these commenters specifically noted the nature of work engagements in particular industries, contending that the application-based, trucking, and construction industries often use discrete task-based or project-based engagements, and that each of these must be considered independently rather than as a continuous relationship. *See* Flex Association; Independent Work Coalition; Instacart; Littler WPI; Scopelitis.

On the other hand, some worker organizations noted that in certain industries where work has fixed end points, such as construction and agriculture, the fact that there is a fixed term should not favor independent contractor status as it does not indicate economic independence.

See IBT; NWJP; SMART and SMACNA. For example, NWJP argued that the Department should retain the language from the 2024 Rule that provided guidance that permanence should be considered in the context of the type of business or industry, such as how the agricultural industry relies heavily on seasonal labor, which it noted is well-established in case law. Similarly, SMART and SMACNA highlighted the importance of the "proper application" of the permanence factor in the project-based construction industry and urged the Department to recognize that this factor is "generally less likely to be probative of worker status in industries characterized by seasonal, temporary, sporadic, or project-based work relationships but permanent and exclusive employment for the duration of a project weighs in favor of employee status." And IBT requested additional guidance explaining that "a worker's lack of permanent or indefinite employment status is in many cases not due to the worker's own business initiatives but rather to the employer's unilateral structuring of the relationship."

Another frequent request raised by business commenters was for the Department to address "continuity driven by employer requirements" as compared to choices that workers make to accept future work or to continue working for a particular entity. TechNet; *see also* Flex Association; Instacart; National Retail Federation. For example, Instacart requested revisions to the regulatory text to provide that "[c]ontinuity that originates with the worker's own choices is fundamentally different from continuity that originates with the employer's expectations and requirements."

Several commenters emphasized the importance of permanence in the analysis. For example, SHRM conducted a survey of its members to determine which of the economic reality factors organizations found most useful when determining employment status under the FLSA, and commented that survey respondents consistently ranked permanence as the second most useful indicator (following control, which they ranked as the most useful indicator). And IBT commented that "[u]nder decades of jurisprudence, permanence strongly indicates economic

dependence. Workers who rely on a firm for steady, ongoing work, even when paid per task, are employees."

After considering the comments received on this factor, the Department believes it is appropriate to retain permanence as one of the less-probative factors in the economic reality analysis and declines to eliminate this factor. As noted in the NPRM, courts and the Department routinely consider this factor when applying the economic reality analysis under the FLSA to determine employee or independent contractor status.[324] Indeed, the Department is not aware of a circuit that does not identify permanence as a standalone factor. As the SHRM survey showed, this factor is viewed as a useful indicator among human resources professionals as well.

Moreover, the Department believes that its regulatory text ameliorates many of the concerns raised by commenters. First, regarding the concern that this factor fails to recognize that business entities often have repeat work engagements without their relationship being one of employer-employee, the regulatory text explicitly states that "this factor weighs in favor of an individual being an independent contractor to the extent the work relationship is by design definite in duration … which *may include regularly occurring fixed periods of work*" (emphasis added). As American Association of Advertising Agencies observed in supporting this language, this may encompass situations in which, for example, advertising agencies "frequently re-engage specialized independent contractors…for successive defined-duration client campaigns" that are "dictated by the specific needs of [the campaign] rather than an indefinite employment relationship."

Additionally, commenters that were concerned that their long-standing business relationships with particular service providers or specialized contractors alone would somehow override the two primary factors and establish an employment relationship seem to misunderstand the analysis. *See, e.g.*, Bowling Proprietors Association of America, WAFLA.

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[324] *See* 91 FR 9954 (citing 86 FR 1192-93 (referring to WHD Opinion Letter FLSA2019-6 at 4; *Razak*, 951 F.3d at 142; *Hobbs*, 946 F.3d at 829; *Karlson*, 860 F.3d at 1092-93; *McFeeley*, 825 F.3d at 241; *Keller*, 781 F.3d at 807; *Scantland*, 721 F.3d at 1312)).

The Department has clearly stated—both in the preamble and regulatory text—that the two core factors are the first properly considered and most important in making the proper classification—and that the other factors such as permanence 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." § 795.105(c). Thus, it should be clear that a long-standing relationship alone would not disqualify an individual from recognition as an independent contractor under the economic reality test.

The Department does not believe it is necessary to provide any additional guidance on this issue or to establish a more rigid approach that prioritizes the definite or indefinite nature of the work (including discrete "engagements") over the duration of the working relationship between the parties, as requested by some commenters. In response to similar comments received during the rulemaking for the 2021 Rule, the Department similarly declined to change the regulatory text. At the time, the Department noted that because the focus of the economic realities test is not on technical formalities, it may be that a long relationship could be evidence of permanence despite a contract with a definite end, and an employer may have a permanent relationship with an employee despite requiring the employee to enter into annual employment contracts or a potential employer may have a long-term relationship reflected in several short-term contracts.[325] Although the Department viewed indefiniteness as a strong indicator of permanence, it still viewed the length of a working relationship as relevant to this factor. The Department continues to believe this is the appropriate view and proper approach.

Second, the Department agrees with the commenters that emphasized that case law supports recognizing that the seasonal nature of work is not necessarily associated with independent contractor status. Indeed, the regulatory text for this factor explicitly states that "the seasonal nature of work by itself would not necessarily indicate independent contractor classification." § 795.105(d)(2)(ii). The Department explained in the NPRM that the seasonal

[325] *See* 86 FR 1192.

nature of work would not indicate independent contractor status where the worker's position is permanent for the duration of the relevant season and where the worker has done the same work for multiple seasons.[326] Additionally, as the Department explained in the 2021 Rule and the NPRM, ''in certain industries where employees are often employed for short periods, a short term of employment would not indicate independent contractor status.''[327]

Regarding the issue of worker choice versus continuity requirements imposed by an employer, the Department does not believe that further explanation in the regulatory text for the permanence factor is necessary. The Department agrees with the commenters who posited that whether a work relationship is exclusive is best considered under the control factor, and it sees these types of employer-imposed continuity requirements as akin to requirements that workers work for that employer rather than for others. Rather than blurring these concepts by considering them under both the control and permanence factors, the Department elects to maintain consideration of these concepts under control. Further, as explained when responding to similar comments in the 2021 Rule, "explicitly stating that a relationship is not permanent whenever the worker chooses for it to be long-term is not accurate. After all, every employee to some extent chooses whether to continue working for their employer, and … [a] long-term relationship is always the result of choices by both the potential employer and the worker."[328]

Finally, as this rule is intended to be generally applicable to all industries, the Department declines to provide additional industry-specific regulatory text or examples on how the permanence factor would be applied in particular industries, as several commenters requested. *See, e.g.*, American Association of Advertising Agencies; IFA; National Restaurant Association;

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[326] *See* 91 FR 9955 (citing *Paragon*, 884 F.3d at 1236–37); *see also* § 795.115(c)(3) (example of housekeeper who returns each year during ski season and whose work is long-term, indefinite and continuous, weighing in favor of employee status). In this final rule, the Department is adopting this example (proposed in § 795.115(b)(6), now renumbered as § 795.115(c)(3)) with the correction of a small typographical error where the word "the" was missing in the last sentence.

[327] 86 FR 1193; 91 FR 9955.

[328] 86 FR 1193.

WAFLA. The Department believes that the regulation discussing permanence is generally understandable and applicable in all industries. Accordingly, the Department finalizes § 795.105(d)(2)(ii) as proposed.

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

In § 795.105(d)(2)(iii), the Department proposed to return to considering "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" and weighs in favor of an 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."

As the NPRM explained, the Department believes the "integrated unit" framework is more probative of whether a worker is economically dependent on the potential employer for work than the 2024 Rule's consideration of whether the work is "an integral part of the employer's business." The NPRM further explained that the 2024 Rule's inquiry into whether the work is "critical, necessary, or central to the potential employer's principal business" lacks sufficient precision for the modern economy.[329]

Most business-side commenters expressed support for the "integrated unit" factor as compared to the "integral part" framework. *See, e.g.*, American Association of Advertising Agencies; American Society of Travel Advisors; CWI; FSI; Independent Bakers Association; Instacart; Littler WPI; Private Care Association; ShiftKey. For example, SHRM stated that this framework "more accurately captures the distinction between independent contractors and employees and provides a clearer, more administrable standard for worker classification." Coalition to Promote Independent Entrepreneurs observed that "whether a specific service is a component of a client's integrated production process for a good or service is readily apparent to

[329] *See* 91 FR 9956.

an independent contractor and the client at the outset," while the "integral part" analysis "interjects profound uncertainty into worker-status determinations" by requiring two highly factual determinations—defining the potential employer's "principal business" and assessing whether the worker's services are "critical, necessary, or central" to that principal business. *See also* IFA ("[B]usinesses do not pay employees or independent contractors to engage in work that is not in some sense critical or necessary to their operations."); Flex Association ("Businesses that pay for non-critical, non-essential, unnecessary work tend not to stay in business very long. So the work's importance says very little about a worker's classification.").

Some commenters expressed uncertainty regarding the meaning of "integrated unit of production" as applied in the modern service-oriented, technology-based economy. *See, e.g.*, Littler WPI (stating that "a 'production line' analogy is of limited usefulness in an economy becoming more and more service-oriented and technology-based"); Richard Reibstein (asking the Department to clarify this factor using "words that include businesses that provide services"). A small number of commenters suggested that this factor should be eliminated altogether due to the difficulty of defining a potential employer's "production process" in the modern economy. *See* National Home Delivery Association ("Despite a step in the right direction, NHDA believes this factor has little probative value in today's service-based economy and should be eliminated altogether."); Institute for the American Worker ("If the Department determines, after considering comments, that the integrated-unit factor remains difficult to apply consistently even in its corrected form, we would alternatively urge the Department to eliminate this factor from the analysis altogether.").

Several worker-side commenters criticized the departure from the "integral part" framework and its consideration of the centrality of the work, which they described as more consistent with Supreme Court and circuit court precedent. *See, e.g.*, AFL-CIO; AFSCME; Coalition of State Officials; NWJP. These commenters criticized the relative narrowness of the "integrated unit" approach and the relegation of this factor to non-core status. *See, e.g.*, AFL-

CIO (asserting that this rule would permit employers to "label essential functions such as delivery, driving, warehousing, and customer service as peripheral or externally provided, even where those functions define the business itself"); Farmworker Justice (emphasizing the centrality of farmworkers' role in farming operations).

Having considered these comments, the Department adopts the "integrated unit" factor as proposed. As the NPRM explained, the Department believes that the Supreme Court's articulation of this factor in *Rutherford Food*—which considered whether the work is "part of the [potential employer's] integrated unit of production," 331 U.S. at 729—better reflects how it considered this factor in both *Rutherford Food* and *Silk*. The "integral part" language in *Silk* was not included among the enumerated factors that the Court identified as "important for decision." 331 U.S. at 716. To the extent it can be read as such a factor, it was not very probative because both groups of workers at issue in that case were "integral," but one group of workers were employees and the other independent contractors. *Id*. at 717–19. Elsewhere in *Silk*, the Court used "integrated" in relation to the scope of a potential employer's business: "[f]ew businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors." *Id*. at 714. Thus, it is integration rather than integrality that determines the scope of a potential employer's business and whether it encompasses a specific worker's services.

As it did in the NPRM and in the 2021 Rule, the Department acknowledges that its approach diverges from that taken by most circuit courts. The Department nonetheless finds the divergence appropriate based on how those courts have considered integrality. There are many cases in which integrality bears little weight in the final analysis, demonstrating its lesser probative value. *See Express Sixty-Minutes*, 161 F.3d at 305 (finding independent contractor status despite arguments that "the work performed by the drivers is an integral and indispensable part of Express' business"); *Paragon*, 884 F.3d at 1237–38 (integrality supported independent contractor status but was outweighed by factors supporting employee status); *Flint Eng'g*, 137

F.3d at 1443–44 (finding that rig welders' work was "important" but not reiterating that fact when summarizing the ultimate conclusion that they were employees); *see also Mednick*, 508 F.2d at 300–01 (finding "no clear cut conclusion" from the fact that plaintiff's work was "not an integrated part" of the defendant's business but "may have been very useful or even necessary"). There are also some cases in which the integrality of the work is functionally synonymous with its integration into the potential employer's business, such that focusing on integration will have the same result. *See, e.g.*, *Castillo*, 704 F.2d at 191 (describing cotton chopping interchangeably as "part of an 'integrated economic unit'" and "an integral phase" of the defendant's cotton growing operation); *Antenor*, 88 F.3d at 937 (in joint employer context, describing snap bean pickers' work as "a routine line-job integral to the growers' business" and "one part of an 'integrated economic unit' operated by the growers"). The critical difference between the two approaches rests in this rule's curtailment of considerations of "importance" or "necessity," which extend beyond the original meaning of this factor in *Rutherford Food* and fail to provide meaningful guidance. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 73 (2d Cir. 2003) ("Interpreted broadly, this factor could be said to be implicated in *every* subcontracting relationship [in the joint employer context], because all subcontractors perform a function that a general contractor deems 'integral' to a product or a service."); *Lauritzen*, 835 F.2d at 1541 (Easterbrook, J., concurring) ("*Everything* the employer does is 'integral' to its business—why else do it?").

The divergence recognized above should not be mistaken for divergence regarding the overarching legal framework because consideration of "integrality" is not itself integral to the economic reality test. The Fifth Circuit, for example, typically does not include integrality among its enumerated factors, yet that variation has never been understood to create a circuit split. This rule—like the legal precedent from which it is distilled—is not mechanical, and courts may organize and articulate factors differently while applying the same ultimate inquiry into economic independence. Nor is consideration of whether a worker's services are "integral" to the

potential employer's business prohibited by this rule. The economic reality inquiry remains a totality-of-the-circumstances analysis, and § 795.105(d)(2)(iv) permits consideration of facts and factors beyond those enumerated to the extent they indicate whether the worker is operating an independent business or is economically dependent on the potential employer for work. Integrality may be considered when the circumstances make it relevant. For the reasons explained above, however, the Department believes that integrality—understood as the importance, centrality, or necessity of the work—will ordinarily have little or no probative value. Nearly every business obtains work because it regards that work as useful or necessary, including work performed by independent contractors. Treating importance as evidence of employee status tends to produce the same answer regardless of the worker's actual economic independence. This rule does not prohibit consideration of integrality where appropriate but declines to include that generally uninformative consideration among the enumerated factors and instead includes, consistent with Supreme Court precedent, consideration of integration into the potential employer's business.

Regarding the criticisms from the business community, the Department does not believe that applying the "integrated unit" factor poses any special difficulties in the modern economy. As the regulatory text explains, this factor is intended to apply to production processes "for a good or service" and is, therefore, not limited to businesses with production lines and is not incompatible with a service-based economy. The Department recognizes that there may be cases where the scope of a particular business's integrated operation, and whether it encompasses a particular individual's work, may be difficult to ascertain. However, the Department does not believe the task is so difficult that it is necessary to exclude a factor that was important to the decision in *Rutherford Food* and that has some bearing on the ultimate inquiry, particularly in cases where the two core factors do not both point toward the same classification.

Beyond expressing general support for or criticisms of the "integrated unit" factor, many business commenters requested specific language to delineate, elevate, or diminish the relevance

of certain considerations. *See, e.g.*, Flex Association (requesting four specific criteria to find that a worker is integrated into a potential employer's business); Richard Reibstein (requesting clarification that providing "services that no one else at the company provides" weighs in favor of independent contractor status); Uber (requesting language stating that a potential employer's production process "terminates with a usable product or service" and "does not extend to independent uses of the product"). The Department does not attempt to identify every potentially relevant consideration under this factor, nor will it demarcate any specific consideration as relevant in every case. What is relevant in one case may not be relevant in another. Steering this factor toward specific considerations that may not always be relevant, or perhaps even intelligible as applied to a specific business or service, will only complicate the analysis, diminishing the utility and value of the rule, especially to the Department, to the detriment of the Department's goal of fostering predictable outcomes.

Institute for the American Worker requested the Department to state that this factor "does not weigh against independent contractor status merely because the worker performs the same type of service that the hiring entity provides to its customers." Whether a worker performing the same type of service as a business is integrated into the business's production process depends on the facts of the case. For example, a waiter who takes orders from, and delivers food to, customers dining in a restaurant performs the same type of service as the restaurant itself, i.e., serving food to the restaurant's customers. The waiter in this scenario is part of the restaurant's integrated production process for food services. On the other hand, a law firm may hire an outside lawyer to represent it in a matter unrelated to the legal services that it provides to its own clients. Despite performing the same type of service as the law firm, the lawyer is not a part of the law firm's integrated production process for legal services. As these examples illustrate, the fact that a worker performs the same type of service as the potential employer may be highly relevant in some cases but not so relevant in others.

U.S. Chamber of Commerce requested that this factor be revised to state that a worker who "performs the majority of services off the premises of the business, including at consumer locations, in transit, or via remote means, is generally not part of an integrated unit of production." As the Department explained in the 2021 Rule, whether work is performed on the business's physical premises is not always relevant to this factor.[330] And more generally, as explained in the discussion of possible additional factors below (§ 795.105(d)(2)(iv)), the Department is confident that where the work is performed is not material to the determination of employee or independent contractor status. In any event, there are many instances where an employee may be part of an integrated unit despite performing work at a different location than other employees, including at consumer locations and in transit, and vice versa. *See, e.g.*, *Whitaker House,* 366 U.S. at 32 (holding that workers who produced copies of a sample product at home were employees); *Thomas v. Brock*, 617 F. Supp. 526, 535 (W.D.N.C. 1985), *aff'd in part, modified in part on other grounds*, 810 F.2d 448 (4th Cir. 1987) (door-to-door seller of cookies and candy was "completely integrated" in the distributor's business). There are also instances where a worker may perform work on a business's physical premises that is discrete, segregable, and unrelated to any integrated process. *See, e.g.*, Richard Reibstein (suggesting that "a landscaper that mows the lawn on a company's suburban headquarters" is a "classic misapplication of this factor"). Thus, although the location of the work may inform whether particular work is part of the integrated unit of production, it is not always the case that it will be probative.

Some commenters requested the Department to clarify that a worker's use of systems or technologies provided by a business does not mean the worker is part of the business's integrated unit of production. Securities Industry Financial Markets Association (financial advisors' use of a broker-dealer's platform to effect securities transactions); U.S. Chamber (workers' use of SI tools or protocols provided by a business). The relevance—whether to the "integrated unit"

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[330] 86 FR 1195.

factor or to any other factor considered under this rule—of a worker's use of technologies provided by a business will depend on all the circumstances of each case. Particularly for technologies that are constantly evolving, it is not possible to draw any firm conclusions about their use in this generally applicable rule.

Some commenters requested clarification that this factor does not depend on whether a worker's output is "commercially significant" or "valuable" to a business. *See* CWI; Instacart. Relatedly, U.S. Chamber of Commerce requested that the Department revise the example in proposed § 795.115(b)(8) to illustrate that a worker may produce work that is important to a business for commercial reasons, such as increasing revenue, without being a component of the business's integrated unit of production. It is true that the commercial value of work does not necessarily make it integrated. For example, a successful advertising campaign can have significant value for a business without necessarily rendering the individual who came up with the campaign a component of the business's integrated operation. The Department believes the regulatory text properly addresses this distinction by differentiating integrated work from work that is merely "important."

Finally, many commenters requested that the Department clarify, through explanations or examples, how this factor would apply in specific industries, including trucking, construction, financial advising, insurance, food services, and delivery services, or to specific contractual arrangements, such as franchising. *See* American Council of Life Insurers; American Securities Association; Associated Builders and Contractors; IFA; National Restaurant Association; National Retail Federation; OOIDA. Many commenters requested examples involving multi-sided platforms, particularly an example involving a worker who provides services to end-market consumers through a digital platform, modeled after the virtual marketplace company described in WHD Opinion Letter FLSA2025-2 (though the opinion letter used the "integral part" formulation, not the "integrated unit" formulation). *See, e.g.*, Flex Association; Independent Work Coalition; Littler WPI; U.S. Chamber; U.S. Hispanic Business Council. The facts that

inform the "integrated unit" factor are too circumstance-specific to apply blanket statements to entire industries or broad types of contractual arrangements. Any particular task that is common in a particular industry may be performed in one instance by a worker who is part of an integrated unit of production and in another instance by a segregable unit. In other words, this factor may point in a different direction for workers who perform similar duties in the same industry but who are more or less integrated into the potential employer's processes based on the potential employer's business model. That said, the Department appreciates that examples are helpful to understanding how each factor operates, which is why the Department is readopting the related examples in proposed § 795.115(b)(7) and (8), now reordered to § 795.115(c)(4) and (5), which involve an editor and a journalist respectively.

The Department received some requests to revise or eliminate these examples, including from self-identified freelance writers and editors. One freelance writer, Brittany VanDerBill, requested that the Department eliminate proposed § 795.115(b)(7), which she compared to "prong B of the disastrous ABC test," referring to the test used in some states which requires work to be outside the usual course of the potential employer's business in order for the worker to be an independent contractor. Another freelance writer, Karen Anderson criticized proposed § 795.115(b)(8) for "suggest[ing] that a freelance journalist shouldn't be submitting anything more than once every two to three weeks, and that the submission must be subjected to being either accepted or rejected by the publisher[.]" U.S. Chamber of Commerce requested that the Department abandon or revise proposed § 795.115(b)(7), specifically objecting to the phrase "entire production process" as a "looser formulation" that risks encompassing nonemployees such as management consultants or lawyers who may have "some kind of 'involvement' with a business's 'entire production process.'" Three freelance writers and editors submitted a joint comment that was generally supportive of these examples but suggested several modifications. *See* Kim Kavin et al. Among other suggestions, they advised changing the potential employer in both examples from a newspaper to a "media brand" to reflect the types of entities that are more

common in the modern technological environment. Regarding proposed § 795.115(b)(7), they asserted that laying out articles should not indicate employee status because modern publishing software allows freelancers to deliver content where layout choices are made simultaneously with the writing. Regarding proposed § 795.115(b)(8), they objected that a frequency of one article submission every 2 to 3 weeks is "as antiquated as the idea of print-only newspapers." They also criticized proposed § 795.115(b)(8) for suggesting that a freelancer's communications with the potential employer should be limited to a single employee, noting that a freelancer may have many reasons to communicate with several different employees regarding, for example, handling rights to artwork accompanying the freelancer's work or the freelancer's invoice for payment.

Upon consideration of these comments, the Department will retain these examples with modifications. The Department believes the commenters that have requested elimination of these examples have misunderstood them. To be clear, neither of these examples conclude that the worker is an employee or independent contractor. Like all the examples in § 795.115, these examples focus on a single factor. Under this rule, the ultimate determination requires consideration of all the factors, with control and opportunity for profit or loss being the most probative. The fact that one worker's work is part of an integrated unit while another worker's is segregable does not automatically mean that one is an employee and the other is an independent contractor. Therefore, these examples neither resemble an ABC test nor require freelancers to conform their conduct to specific parameters to continue being independent contractors. Finally, the phrase "entire production process" in proposed § 795.115(b)(7) (now § 795.115(c)(4)) is not meant to indicate that the editor is involved in the production process in a generalized or tangential sense but rather the opposite. The editor not only writes articles but also assigns them, reviews and revises them, and publishes them in coordination with other editors. Therefore, the editor is involved in the entire production process and not segregable from it.

Although the Department is retaining these examples, it takes the point made by several freelancers that the proposed regulatory text does not accurately reflect journalistic practices in the digital age. Accordingly, it has made revisions to modernize these examples. First, the Department has changed the context from a newspaper to a digital news outlet to reflect the increasing prominence of online-only media sources. For simplicity and ease of understanding, the Department maintains the focus on a publisher of a single type of content that is generally familiar to the public (news articles). Second, instead of layout decisions, these examples use decisions regarding the timing of publication to illustrate the extent of each worker's integration into the publication's production process, with the editor being responsible for determining when articles will be published and setting deadlines accordingly, while the journalist is responsible only for the specific articles he writes. The purpose of this revision is to reflect digital editorial practices in which individual contributors may make layout decisions without involvement in the overall production process. Third, the Department has deleted the reference to a specific frequency of article submissions in § 795.115(c)(5)(i). The Department did not intend to imply that a specific threshold of productive output would determine whether an individual is part of an integrated production process and therefore omits this reference to avoid confusion. Finally, the Department has revised the sentence in § 795.115(c)(5)(i) describing the journalist's interactions with the potential employer's employees to distill the salient point that the journalist does not work in concert with the employees. *See* 86 FR 1196 (noting that employee status is indicated where a worker "performs identical or closely interrelated tasks" as employees); *see also Rutherford Food*, 331 U.S. at 726, 729 (finding that workers "work[ing] alongside admitted employees of the plant operator" were part of an integrated economic unit). This sentence as proposed indicated that the journalist communicated with only one of the potential employer's employees, but a journalist may need to communicate with many different persons employed by a single entity on matters relating to his otherwise segregable work. Whether a worker's interactions with employees demonstrate integration will depend more on the content of the

communications than the fact of them. As revised, this sentence now shows how the journalist's work is distinct from the employees' rather than how many employees interact with the journalist.

For all the reasons explained above, the Department finalizes § 795.105(d)(2)(iii) as proposed and finalizes the related examples in § 795.115(c)(4) and (5) with modifications.

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

The Department proposed regulatory text in § 795.105(d)(2)(iv) providing that: "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."[331]

The Department explained in the NPRM that it and courts "have consistently stated that the identified factors are not exhaustive and additional factors may be considered" and that both the 2021 Rule and the 2024 Rule provided for consideration of additional factors.[332] The Department advised that additional factors are relevant only to the extent that they help answer the ultimate inquiry—i.e., whether the individual worker is in business for him- or herself or is economically dependent on the employer for work. Citing the 2021 Rule, the Department further 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 potential employer, are not relevant.[333] The Department invited comments on whether it should identify in the 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.

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[331] 91 FR 9974.
[332] *Id.* at 9956–57 (citing *Silk*, 331 U.S. at 716; WHD Opinion Letter FLSA2025-2 at 5). The Department further explained that this provision was consistent with proposed § 795.105(c) (which stated that the identified "factors are not exhaustive").
[333] *Id.* at 9956 (citing 86 FR 1196).

The Department also addressed in the NPRM the weight that would be given to any additional factors, explaining that, because two factors would be "core" factors that typically carry greater weight than other factors, any additional factors would be less probative than the core factors. The Department added that 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."[334] The Department expressed its expectation that "additional factors will not be considered in many cases because the identified factors will be more than sufficient to make the determination."[335]

The Department received several comments addressing proposed § 795.105(d)(2)(iv), as well as comments identifying certain factors that the commenters believed were material or not material to determining employee or independent contractor status.

As an initial matter, Center for Workplace Compliance supported "the clarification that the enumerated factors are non-exhaustive and must be evaluated in light of the economic dependence inquiry described in § 795.105(b). This emphasis on holistic review preserves longstanding doctrine while providing a clearer analytic framework for applying the economic reality test consistently in practice." FMI – The Food Industry Association commented that the 2024 Rule "cited the additional unnamed factors following the six-factor totality of the circumstances test and thus, was interpreted as if a seven- or more-factors had to be considered in every case to classify a worker." This commenter added that the 2024 Rule's "approach created uncertainty and confusion among businesses" and that proposed § 795.105(d)(2)(iv) "recognizes this misaligned citation, reiterates that the underlying economic reality test is based on two core factors," and clarifies that "'additional factors will not be considered in many cases because the identified factors will be more than sufficient to make the determination'" (quoting

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[334] *Id*.

[335] *Id.* at 9957 (citing 89 FR 1717 (explaining in the 2024 Rule that, "in many instances, consideration of additional factors will not be necessary because the relevant factual considerations can and will be considered under one or more of the enumerated factors")).

proposed § 795.105(d)(2)(iv)). The Department agrees and reiterates that any additional factors are not a sixth factor to consider beyond the five enumerated factors and that additional factors will not be considered in many cases because the five enumerated factors will be more than sufficient to decide the case.

Richard Reibstein commented that courts have "considered *dozens* of other factors that bear on the question of a worker's independence, including (to name just a few) whether the potential employer has the right to terminate the worker for any reason at any time; whether the worker has the right to accept or decline engagements;[336] whether the parties are subject to an agreement indicating an intent to establish an independent contractor relationship; and whether the worker operates in the form of a corporate entity, including as a limited liability company" (emphasis in original). The Department believes that the first two factors identified by Reibstein are already part of the consideration under the control factor.

Like Reibstein, other commenters suggested that the intent of the parties to establish an independent contractor relationship should be considered as part of the analysis. For example, Cetera Financial Group stated that "adding the intention of the parties as a factor in the Economic Realities test is entirely within the province of the Department. It should be deemed a threshold issue, or at the least made one of the core factors in the framework set forth in the Proposal." FedEx similarly commented that "[t]he parties' intent should be a principal element. Documentation of the agreed relationship, the expectations set by contract, and the practical arrangements made by the parties can further inform status, and such evidence should be weighed alongside the core factors." Relatedly, FedEx suggested whether the worker is "responsible for the payment of tax liability and securing independent insurance coverage" should also be considered.

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[336] FedEx also suggested that whether the worker has the right to decline work be an additional factor.

The Department, however, declines to include the intent of the parties, contractual formalities, or related concepts as additional factors. These concepts are particularly manipulable and, as the Department explained in both the 2021 and 2024 Rules,[337] Supreme Court precedent forecloses such considerations from controlling whether the FLSA applies to particular workers.[338] Specific to employee or independent contractor status, the Court held in *Rutherford Food* that, "[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."[339] Accordingly, numerous circuit courts of appeals have rejected the intention of the parties as controlling in the economic reality test.[340]

The Division has historically advised that certain other facts are not relevant to the

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[337] *See* 86 FR 1179, 1193 ("[I]t is not contractual formalities that are relevant to the inquiry, but economic reality."), 1196 ("As has been the case since the concepts underlying the economic realities test was articulated, the test does not depend on labels assigned to workers."); *see also* 89 FR 1670–71.

[338] *See Tony & Susan Alamo,* 471 U.S. at 302 (holding that the FLSA must be "applied even to those who would decline its protections"); *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.") (quoting *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707 (1945)); *see also Lauritzen,* 835 F.2d at 1544–45 ("The FLSA is designed to defeat rather than implement contractual arrangements. If employees voluntarily contract to accept $2.00 per hour, the agreement is ineffectual.") (Easterbrook J., concurring).

[339] 331 U.S. at 729.

[340] *See*, *e.g.*, *Safarian v. American DG Energy Inc.*, 622 F. App'x 149, 151 (3d Cir. 2015) (stating that, even where "the parties structure[] the relationship as an independent contractor, … the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities"); *Scantland*, 721 F.3d at 1311 ("This inquiry is not governed by the 'label' put on the relationship by the parties or the contract controlling that relationship, but rather focuses on whether 'the work done, in its essence, follows the usual path of an employee.'") (quoting *Rutherford Food*, 331 U.S. at 729); *Superior Care*, 840 F.2d at 1059 ("[E]mployer's self-serving label of workers as independent contractors is not controlling."); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir. 1983) (explaining that "[a]n employee is not permitted to waive employee status," and affirming that welders were employees despite having signed independent contractor agreements); *Driscoll*, 603 F.2d at 755 ("Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA."); *but see Saleem*, 854 F.3d at 141 (noting that the workers' "agreements also designated them as independent contractors" and that some of them "formed corporations to operate their franchises" as one aspect of its determination that the workers "demonstrated independence and initiative in selecting franchise agreements that best fit their business plans, and in choosing—independent of Franchisor Defendants—to persist in those affiliations").

determination of employee or independent contractor status. For example, the July 2008 version of Fact Sheet 13 stated that "[s]uch facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status."[341] Flex Association commented that the Department should "restore that discussion [from the July 2008 version of Fact Sheet 13] in a final rule now," but "clarify that while these types of considerations do not indicate employee status, they could indicate independent contractor status when viewed in light of the enumerated economic-reality factors."[342] The Department continues to believe that where the work is performed, the absence of a formal employment agreement, and whether an alleged independent contractor is licensed by State/local government are not considered to be material to the determination of employee or independent contractor status, and that the time or mode of pay does not control the determination.[343] The Department declines Flex Association's suggestion that these facts cannot indicate employee status but can indicate independent contractor status. As the Department has explained throughout this final rule, its goal is to provide an analysis that does not favor an employee or independent contractor outcome. The Department has sought to

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[341] This language was also in the original 1997 version of Fact Sheet 13 (which is discussed *supra* at n.64); *see also Rosenwasser*, 323 U.S. at 363 ("The time or mode of compensation, in other words, does not control the determination of whether one is an employee within the meaning of the Act and no court is justified in reading in an exception based upon such a factor.").

[342] FedEx did not reference Fact Sheet 13 but suggested that whether there is "a written contract between the parties" and whether the worker is "responsible for securing a business license and registration as applicable" should be considered as additional factors.

[343] Though where the work is performed is generally not indicative of employee or independent contractor status, there may be facts regarding a business requiring that work be done onsite alongside employees of the business that are relevant under the control factor or the integrated unit factor as discussed above in the context of those factors. *See, e.g.*, *Rutherford Food*, 331 U.S. at 729–30 (concluding that workers were employees in part because the workers were "part of an integrated unit of production" by performing a job on the employer's production line, using the employer's premises and equipment, where the "managing official of the plant kept close touch on the operation").

describe each factor in this way, and to be consistent, is taking that same approach for any additional considerations. Advising that certain additional considerations cannot indicate employee status but can indicate independent contractor status would be contrary to the Department's overall goal in this final rule.

The Department explained in the NPRM that the preamble to the 2021 Rule had advised that whether an individual has alternate sources of wealth or income and the size of the hiring company are also not relevant when determining employee or independent contractor status.[344] The Department reiterates that those facts are not relevant because they do not bear on the ultimate inquiry of whether the worker is economically dependent on the potential employer for work or is in business for him- or herself. This is also consistent with the discussion of economic dependence in § 795.105(b), which provides that "[e]conomic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income."

Finally, the Department received numerous comments requesting that the final rule state that the provision of (or contributions to) benefits or portable benefits (particularly when required or permitted by state or local law) does not indicate that workers are employees. Commenters that requested some form of this included Associated Builders and Contractors, CHRO Association, Flex Association, Libertas Institute, Littler WPI, National Retail Federation, and the Senate Health, Education, Labor and Pensions (HELP) Committee (Chair and three Majority members).

To the extent that provision of (or contributions to) benefits or portable benefits is required by law, the guidance in § 795.105(d)(1)(i) that "[r]equiring the individual to comply with specific legal obligations … does not constitute control that makes the individual more or less likely to be an employee under the Act" could apply. However, § 795.105(d)(1)(i) may not apply because the provision of (or contributions to) benefits or portable benefits may not involve the potential employer requiring the individual worker to do anything. And in any event, many of

[344] 91 FR 9956 (citing 86 FR 1196).

the commenters focused on the voluntary provision of benefits. Indeed, some states have enacted laws so that the provision of (or contributions to) portable benefits to workers does not make them employees, or is not relevant to determining employee status, under those states' laws. For example, earlier in 2026, Georgia and West Virginia joined states like Tennessee, Alabama, and Utah in enacting such laws. The comment from the Senate HELP Committee (Chair and three Majority members) described efforts in states to pass such laws as well as an analogous bill that was introduced in the Senate.

Commenters offered policy arguments in support of this request. For example, the Senate HELP Committee (Chair and three Majority members) asserted that "entities that work with independent workers fear they are restricted from offering portable benefits," but "labor and employment laws were never intended to prevent workers from accessing benefits," and "[t]his is backwards-looking and unfairly disadvantages independent workers, as most companies decline opportunities to provide non-employees benefits altogether over fears of expensive litigation." Littler WPI stated that "businesses fear to provide such benefits to independent contractors as doing so can bring with it obligations of employment status that are often incompatible with the independent contracting relationships freely entered into by individuals and businesses," and suggested that the Department not "discourage changes in state or other laws that require or permit businesses to provide protections and benefits to their independent contractor partners." CHRO Association commented that "[s]uch clarification would meaningfully encourage the extension of benefits and protections to contingent workers, would further the Department's statutory mission of protecting workers, and would in no way impede the Department's ability to address intentional misclassification where it occurs."

Having considered the comments, the Department believes that it should counter any perceived disincentive and encourage businesses to provide (or contribute to) benefits for non-employee workers consistent with the growing interest in making portable benefits available, which would benefit workers and society. Accordingly, in the Department's view, whether the

potential employer provides (or contributes to) benefits or portable benefits is not relevant in determining whether a worker is an employee or independent contractor. Contrary to Flex Association (which asserted that "a company's decision to participate in a portable benefits program established by a state is not indicative of employment under the FLSA, and, in fact, highly suggests that the worker is an independent contractor"), the Department believes that both the provision and non-provision of benefits should be irrelevant when determining employee or independent contractor status. This is a more balanced approach that does not favor either outcome, consistent with the Department's overall intent in this rulemaking, as explained above, to provide an analysis that does not favor employee or independent contractor outcomes. Thus, the provision of benefits to a worker would not be indicative of employee status, and the non-provision of benefits to a worker or the participation in a portable benefits program geared to non-employee workers would not be indicative of independent contractor status.[345] Additionally, consistent with the discussion of economic dependence in this rule, the provision or non-provision of benefits to workers is not relevant to whether the worker is economically dependent on the potential employer for work (the ultimate inquiry). Whether the worker is provided benefits is often a function of how the potential employer classifies the worker and thus is not necessarily indicative of the economic reality of the worker's working relationship with the potential employer. And providing portable benefits to non-employee workers is a laudable effort to make benefits available to workers for whom benefits were previously not available because of their non-employee status and thus does not reflect the underlying economic reality of those workers' working relationships with potential employers.[346]

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[345] In the 2021 Rule, the Department stated that "providing a worker with the same employer-provided health or retirement plans on the terms that a business also gives its own employees may indicate the worker is not an independent contractor but rather an employee." 86 FR 1185. However, the growing availability of portable benefits programs indicates that circumstances are changing some and that benefits programs in which employers participate are not available solely to employees.

[346] The Department recognizes that the provision of employee benefits is one factor among many that is considered under the common law "right to control the manner and means by which the

For all these reasons, the Department is finalizing § 795.105(d)(2)(iv) as proposed.

H. Primacy of Actual Practice (§ 795.110)

Proposed § 795.110 stated that the actual practice of the parties—of both the individual and the potential employer—is more relevant than what may be contractually or theoretically possible. Proposed § 795.110 further stated that an individual's theoretical abilities to negotiate prices or work for competing businesses are less meaningful if, as a practical matter, the individual is prevented from exercising such rights and, likewise, a business's contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority.

As it did in the 2021 Rule, the Department explained that this principle is grounded in the Supreme Court's holding that "'economic reality' rather than 'technical concepts' is to be the test of employment" under the FLSA.[347] The NPRM further explained that the emphasis on actual practice does not mean that unexercised contractual powers, rights, and freedoms are never relevant but merely less relevant than powers, rights, and freedoms that are actually exercised.

Several worker advocacy organizations criticized this provision for minimizing the significance of a potential employer's unexercised contractual right of control to the question of economic dependence. *See, e.g.*, National Partnership for Women and Families et al.; NWJP. Some commenters emphasized the "implicit threat" that a potential employer may hold over workers where it reserves contractual rights to discipline and terminate them. *See* NWJP ("A right to terminate workers' employment becomes an implicit threat that, of course, makes them more dependent on the business that has that right, regardless of whether a worker ever is terminated."); *see also* Farmworker Justice ("We encourage the DOL to not discount the ultimate

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product is accomplished" analysis for determining employee or independent contractor status. *Reid*, 490 U.S. at 751–52. The ultimate inquiry under the FLSA, however, is not control but whether the worker, as a matter of economic reality, is economically dependent on the potential employer for work or is in business for him- or herself. As explained above, not considering the provision or non-provision of employee benefits is consistent with the FLSA-specific inquiry.

[347] 91 FR 9957 (quoting 86 FR 1203); *see Whitaker House*, 366 U.S. at 33.

control that a business holds when it has the ability to fire or discipline a worker."). Some commenters focused on "indirect approaches [to control] like algorithmic management or productivity tracking." Philadelphia Legal Assistance; *see also* Coalition of State Officials (stating that the Department "ignores the importance of employers' reserved control using modern technology for intense surveillance and algorithmic control of workers"). Coalition of State Officials asserted that the focus on control actually exercised by a potential employer is "read generously, equivalent to the common law standard" and counter to the FLSA's broad standard of employment, citing *New York v. Scalia*, 490 F. Supp. 3d 748, 786–87 (S.D.N.Y. 2020).

Business commenters generally expressed support for this provision, but several of them requested revisions to address circumstances where a party voluntarily chooses not to exercise contractual rights. *See, e.g.*, CWI; Flex Association. U.S. Chamber of Commerce requested the Department to state that a worker's voluntary choice not to exercise a contractual right either indicates independence or is not determinative of his or her employment status, whereas a business's choice not to exercise a contractual right of control should weigh in favor of independent contractor status. SHRM requested that the Department state that a worker's unexercised contractual rights "affirmatively weigh in favor of independent contractor status," but that a business's unexercised contractual rights are "materially less probative than actual practice." Some commenters requested a revision stating that a worker must identify conduct by the potential employer "that, as a matter of fact, prevented the worker from exercising" contractual rights such as the ability to negotiate prices or work for competing businesses. National Home Delivery Association; Scopelitis; *see also* American Bakers Association (requesting that "employee status is suggested only when a potential employer prevented the individual, as a matter of contract or fact, from exercising [certain] rights").

Several labor unions, without specifically addressing § 795.110, supported the importance of looking beyond contractual provisions. IBT stated that "actual practice, not

contract labels or unilateral paper designations by employers, controls the classification inquiry." AFSCME and SEIU invoked Judge Easterbrook's observation that the FLSA is "designed to defeat rather than implement contractual arrangements." *Lauritzen,* 835 F.2d at 1545 (Easterbrook, J., concurring). AFL-CIO criticized the Department for "elevating factors that can be readily shaped through contract design and business structuring," but did not acknowledge that § 795.110 is designed to ensure that the FLSA is "applied in a way that looks beyond 'technical concepts' and contractual labels," AFL-CIO (quoting *Whitaker House*, 366 U.S. at 33).

Having considered the views expressed by commenters, the Department is finalizing § 795.110 as proposed. The Department believes that the primacy of actual practice is a neutral interpretive principle, intended to encompass both workers' and businesses' actual practices, consistent with the way courts and the Department have long applied the FLSA's economic reality test. *See, e.g.*, *Usery*, 527 F.2d at 1312 ("It is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts."). The Department declines commenter suggestions that would disrupt that neutrality by assigning greater weight to one party's unexercised contractual rights but not the other's—both from worker-side commenters placing the emphasis on a business's reserved rights of control and from business-side commenters requesting unequal treatment of individuals' and businesses' decisions not to exercise contractual rights. As the NPRM explained, this provision does not categorically disregard unexercised contractual rights.[348] Parties may proffer evidence regarding unexercised contractual provisions, and such evidence may well be relevant, even if it is not as relevant as evidence of actual practice. *See, e.g.*, *Saleem*, 854 F.3d at 141 (workers' ability to terminate contracts at any time "constituted a significant restriction on the ability of [the potential employers] to exercise control"); *Brant*, 43 F.4th at 665–67 (finding that potential

[348] 91 FR 9957–58.

employer's "right to gather remotely and to monitor huge quantities of data," coupled with "constant threat of termination," favored employee status).

The Department disagrees with Coalition of State Officials' contention that prioritizing control that is actually exercised is equivalent to the common law control test instead of the broader scope of employment that the FLSA requires. In many cases, the actual practices of the parties will establish the existence of an employment relationship despite what a "skillfully devised" contract might suggest. *Silk,* 331 U.S. at 715; *see, e.g.*, *Scantland,* 721 F.3d at 1313–14 (dismissing the probative value of plaintiffs' contractual right to decline work assignments where they testified that doing so led to threats of termination or being refused future work assignments); *Usery*, 527 F.2d at 1312 (contractual right to set hours does not show worker control where the hours are controlled by the potential employer in reality). Furthermore, while the economic reality test is broad in the sense that it covers more workers as a general matter, a reserved right of control that might establish employee status under common-law analysis does not necessarily do so under the economic-reality test. In *Bartels*, the court of appeals concluded that musicians were employees of the dance halls under the common-law test because the contracts gave the halls a right to control their services. *Birmingham v. Bartels*, 157 F.2d 295, 304 (8th Cir. 1946), *rev'd*, 332 U.S. 126 (1947). The Supreme Court reversed, applying the economic reality test to hold that musicians were not employees of the dance halls notwithstanding a contractual stipulation that the halls "shall at all times have complete control of the services which the [musicians] will render." *Bartels*, 332 U.S. at 128 n.1, 132. The Court looked beyond that contractual allocation of control to the circumstances of the parties' relationship as a whole to reach that conclusion. *Id.* at 130–32.[349]

[349] For the same reason, the Department disagrees with the suggestion that the actual-practice provision is contrary to *New York,* 490 F. Supp. 3d at 786–87. The joint employer rule at issue in that case made it a necessary condition for an entity to be considered a joint employer that the entity "actually exercised" control based on at least one of four control factors. *Id*. Under the instant rule, control is neither necessary nor sufficient.

The Department also disagrees with the interpretation suggested by various business commenters that only affirmative conduct by a potential employer to prevent a worker from exercising contractual rights should diminish the relevance of such rights. The extent to which such a right is probative depends on whether it represents a genuine and practicable opportunity, rather than merely appearing in a written agreement. Courts have therefore discounted rights that were hypothetical or could not realistically be exercised. *See, e.g.*, *Hobbs*, 946 F.3d at 833 (discounting the proposition that welders "could hypothetically negotiate their rate of pay" where the evidence did not show negotiation in practice); *Keller*, 781 F.3d at 808 (finding a genuine dispute of fact concerning whether a technician could work for other companies where his schedule was dictated by circumstances outside his control, including customer locations and availability); *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 109 (5th Cir. 1961) (discounting a watchman's contractual right to furnish services to others based on practical constraints affecting his ability to do so). Affirmative interference by the potential employer may be strong evidence that the right lacks practical significance, but such interference is not required. At the same time, a particular worker's voluntary decision not to exercise an otherwise available contractual right does not, standing alone, make that right merely theoretical. Evidence that similarly situated workers exercise the same contractual right may demonstrate that the opportunity is real and practically available even though the particular worker whose status is at issue elects not to pursue it. The relevant inquiry is whether the worker has a genuine ability to exercise the right under the actual circumstances.

Finally, the Department received some requests for minor clarifications or revisions. Some business commenters requested the Department to clarify that "nothing in the proposed rule changes the burden of proof in a challenge to a worker's classification under the FLSA." National Home Delivery Association; Scopelitis. The Department confirms that nothing in this rule is intended to alter the burden of proof in FLSA misclassification cases. That said, the Department considers it unnecessary to revise proposed § 795.110, which does not address the

burden of proof but rather the weight of the evidence. Some business commenters requested the Department to clarify that contractual terms that accurately reflect the actual practices of the parties may be relevant. Flex Association; Instacart; TechNet; *see also* IFA (arguing that contracts are relevant as "one part of the economic reality" and should not be "completely disregarded"). As discussed, this rule does not categorically disregard the relevance of contractual terms. Where the evidence regarding the parties' actual practices is consistent with terms of the applicable contractual agreement, such terms may have substantial probative value.[350] The probative value of such terms follows from their consistency with actual practice. Accordingly, § 795.110 properly confirms the primacy of actual practice.

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

In the NPRM, the Department proposed to readopt most of 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.[351] The NPRM included a factual revision to the 2021 Rule's first illustrative example,[352] a minor edit to another example (changing the word "rewrites" to "revises"), and two new examples applying the "amount of skill required for the work" factor, which would ensure that this section provides examples on all of the economic reality factors identified in § 795.105(d). Consistent with the 2021 Rule, 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. The discussion in each "Application" section would be "limited to substantially similar factual situations."

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[350] *See* 91 FR 9949.
[351] *See* 86 FR 1247–48.
[352] The NPRM proposed to revise § 795.115(b)(1) from the 2021 Rule by replacing references to a speed limiting device imposed by a motor carrier with references to drug and alcohol testing. The Department explained that it proposed the change to avoid potential confusion over whether federal motor carrier safety regulations require the installation of speed limiting devices. *See* 91 FR 9958.

Commenter feedback on the NPRM's proposed illustrative examples is addressed in the preamble discussions for the economic reality factor applied in each example (Sections IV.F.-G. of this notice). However, as a general matter, many commenters expressed support for the adoption of illustrative examples. *See, e.g.*, Association for Competitive Technology; CPAC Foundation Center for Regulatory Freedom; Center for Workplace Compliance. For example, SHRM commented that "those responsible for day-to-day implementation do not always have the capacity to parse dense legal and regulatory text, and clear, real-world examples can help translate complex standards into actionable guidance." *See also* NFIB (similar). U.S. Chamber of Commerce commented that "examples possess many of the benefits of the Department's other forms of subregulatory guidance," and, "[w]hile not as fact intensive as opinion letters, … nonetheless 'provide valuable insight into how an agency interprets the laws it is responsible for enforcing.'"[353] Washington Legal Foundation commented that "[w]hile [the proposed] examples can't cover every contingency, each one brightens the lines drawn by the rest of the regulation. That kind of clarity is always welcome." Many commenters urged the Department to adopt more illustrative examples. *See, e.g.*, Pacific Legal Foundation (characterizing illustrative examples as "the single most important vehicle through which the Department can deliver clarity"); *see also* Elizabeth Gardner; Truckload Carriers Association. Conversely, while several commenters offered criticisms or suggested edits to some of the NPRM's proposed examples, the Department identified only one comment opposing the adoption of any examples. *See* NWJP (asserting that the NPRM's examples "inappropriately encourage a mechanical application of the test because they each focus on a single factor not considered in relationship to other facts and factors").

Commenter feedback indicated widespread appreciation for examples showing how the economic reality factors apply. Indeed, the Department stated in the 2024 Rule that "examples

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[353] This commenter quoted Keith E. Sonderling & Bradford J. Kelley, The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies, 86 Mo. L. Rev. 1171, 1176 (2022).

are helpful to workers and businesses alike."[354] Like the 2021 Rule, the 2024 Rule provided examples "to illustrate the application of each factor of the economic reality test as applied to various factual scenarios."[355] Unlike the 2021 Rule, the 2024 Rule provided the examples in the preamble rather than in the regulatory text (following the discussion in the preamble of each factor were examples applying the factor). The 2024 Rule explained 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."[356]

Upon further consideration, the Department believes that including examples in the regulatory text makes 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 constitute a clearly delineated section in that regulatory text following the discussion of the factors in the regulatory text and therefore are not meaningfully "disconnected." No commenters expressed a preference for the adoption of illustrative examples in the preamble discussion rather than in the regulatory text.

Many commenters requested the adoption of additional illustrative examples involving specific occupations, industries, and workplace practices. Nearly all of these requests were submitted by businesses and the associations and law firms that represent them, which recommended guidance advising that various facts or business practices would either be indicative of independent contractor status or at least not indicative of employee status. *See, e.g.*, CWI; Flex Association; IFA; myBasePay; ShiftKey; Shared Economy Services; SHRM; U.S. Chamber; Littler WPI; *but see* IBT (generally opposing the rulemaking but acknowledging the

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[354] 89 FR 1724.
[355] *Id.* at 1722.
[356] *Id.* at 1724.

potential benefit of "illustrative examples tailored to modern employment models, including algorithmic control, subcontracting layers, and exclusive dealing arrangements").

The Department appreciates the interest in more illustrative examples from business stakeholders that wish to engage independent contractors. However, because the purpose of this rulemaking and the analysis adopted herein is not to classify more workers as independent contractors, the Department has decided to add three pairs of examples to those it proposed in the NPRM, with each pair juxtaposing factual circumstances that would be indicative of employment and independent contractor status, respectively. The three pairs of examples would address: (1) application of the control factor to individuals who obtain work assignments through a digital platform application; (2) application of the control factor to individuals who may be farm labor contractors;[357] and (3) application of the opportunity for profit or loss factor to truck drivers who lease their truck from a motor carrier. These new examples are discussed in greater detail in section IV.F and will be located in § 795.115(b)(2)-(5) and (8)-(9) in the final regulatory text. To make the examples easier to find, the Department has relocated certain examples from where they originally appeared in the 2021 Rule and NPRM so all of the examples will be grouped together by factor.

Finally, the Department notes that, in response to commenter feedback, it has revised the two examples in proposed § 795.115(b)(7)-(8) (applying the "integrated unit" factor to an editor and a journalist, respectively), which now appear in § 795.115(c)(4)-(5) of the final regulatory text. These revisions are discussed earlier in section IV.F.2.

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[357] While a farm labor contractor who is in business for him- or herself is not "an employee of an agricultural employer or agricultural association" under MSPA, 29 U.S.C. 1802(7), agricultural employees are sometimes wrongly classified as farm labor contractors. The Department decided to add a pair of examples addressing individuals who may be farm labor contractors because, unlike the 2021 Rule, this rulemaking implicates the Department's MSPA regulations. Moreover, as CWI noted in its request for such examples, "agricultural workers and farm labor contractors operate in substantially different factual circumstances than white collar workers."

J. Changes to the FMLA and MSPA Regulations

The Department proposed 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. For the FMLA regulations, the Department proposed to revise the definition of "Employee" in 29 CFR 825.102 by adding a statement that "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 also proposed to revise 29 CFR 825.105(a) by adding the following sentence: "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." Additionally, the Department proposed to delete the following sentence in 29 CFR 825.105(a): "Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship." For the MSPA regulations, the Department proposed to revise 29 CFR 500.20(h)(4) to remove the six economic reality factors (as well as reference 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 NPRM explained that both the FMLA and MSPA statutorily incorporate the FLSA's definitions regarding the scope of employment and the Department's FMLA and MSPA regulations recognize that the scope of employment under those statutes is determined by the FLSA.[358] The NPRM explained that it proposed these revisions to confirm that a uniform analysis should apply under the FLSA, FMLA, and MSPA, consistent with Congressional intent. The NPRM also explained that it proposed to delete the sentence in the FMLA regulations

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[358] 91 FR 9959; *see* 29 U.S.C. 1802(5) (providing that "employ" for purposes of MSPA has the meaning given such term under section 3(g) of the FLSA); 29 U.S.C. 2611(3) (providing that "employee" and "employ" for purposes of the FMLA have the same meanings given such terms in sections 3(e) and (g) of the FLSA).

advising that "[m]ere knowledge by an employer of work done" is sufficient to create an employment relationship, which was added to the regulations as part of a general discussion of the employment relationship, to further confirm that the multifactor analysis in 29 CFR part 795 will apply when determining an individual worker's classification as employee or independent contractor under the FMLA.[359]

Overall, commenters' opinions on the proposed revisions to the FMLA and MSPA regulations tracked their opinions on the proposed revisions to part 795. Many commenters that supported the proposed FLSA analysis also supported its application to the FMLA and MSPA on the basis that a uniform standard across all three statutes will enhance its clarity and predictability. *See, e.g.*, Americans for Prosperity Foundation; Center for Workplace Compliance; CWI; Competitive Enterprise Institute; Goldwater Inst.; Senate HELP Committee (Chair and three Majority members); U.S. Chamber; U.S. Hispanic Business Council; Washington Legal Foundation; Wisconsin Inst. For Law & Liberty. Many commenters that opposed the proposed FLSA analysis also opposed its application to the FMLA and MSPA on the grounds that it is inconsistent with the broad scope of employment Congress intended for all three statutes. *See, e.g.*, A Better Balance; Center for WorkLife Law; IBT; Joint Center for Political & Economic Studies; Legal Aid at Work; Nichols Kaster; Reps. Bobby Scott and Ilhan Omar; SEIU. Many opposed commenters expressed concerns that extending the FLSA analysis to the FMLA and MSPA will exacerbate the misclassification that they believe to be the likely consequence of its application to the FLSA. *See, e.g.*, 114 State Legislators; A Better Balance; Allegheny County et al.; Center for WorkLife Law; CLASP; Economic Policy Institute; National Women's Law Center; PHI; Reps. Bobby Scott and Ilhan Omar; Sen. Bernard Sanders et al.

Aside from these across-the-board expressions of support or opposition, the Department received a small number of comments addressing specific aspects of the FMLA and MSPA. Adding to their concerns regarding increased misclassification, worker advocacy groups

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[359] 91 FR 9959.

expressed concerns of concomitant harms that they perceive as likely due to unique aspects of the FMLA and MSPA. These commenters asserted that reclassification of employees to independent contractors will weaken the FMLA's protections for all workers because it will reduce the number of employees an employer employs, which determines, in part, whether the employees are eligible for FMLA-protected leave. *See, e.g.*, AFSCME; CLASP; National Partnership for Women & Families et al. These commenters reported that 44 percent of workers are currently ineligible for FMLA-protected leave, with 15 percent of workers ineligible due solely to employer worksite size, and expressed concerns that this number would increase.[360] Farmworker advocacy groups asserted that "certain unique structures in farm work, like the use of farm labor contractors (FLCs), leads to farmworker mistreatment and attempts to shift liability away from farms," that farm labor contractors are "the most common violators of federal wage and hour laws in agriculture," and that farm labor contractors are "often undercapitalized and, in practice, difficult or impossible to sue for damages." Farmworker Justice; National Center for Law and Economic Justice; *see also* Philadelphia Legal Assistance (making similar observations and stating that farmworkers' "economic vulnerability through the seasonal nature of their work, the isolation that long periods of travel and distance from their support systems cause, and limited English proficiency" lead to their "widespread mistreatment and exploitation").

Specific to MSPA, some commenters argued that the diminishment of non-core factors would make it more difficult to find that agricultural workers are employees and may even "incentivize farm operators to adopt more '[e]xploitative' working arrangements like sharecropping or share-farming." CLASP; *see also* Farmworker Justice.[361] Some commenters asserted that the determination of employee or independent contractor status under MSPA must align with a specific set of cases previously identified as relevant by Congress or the Department. *See* Farmworker Justice; NWJP; Texas RioGrande Legal Aid. In a report accompanying MSPA,

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[360] *Key Facts: The Family and Medical Leave Act* (Jan. 2026), National Partnership for Women & Families, https://nationalpartnership.org/report/fmla-key-facts/.
[361] *See supra* section IV.E.

the House Committee on Education and Labor identified four specific cases as "determinative" on questions of employee or independent contractor status. H.R. Rep. No. 97-885, at 7 (1982) (citing *Rutherford Food,* 331 U.S. 722; *Driscoll,* 603 F.2d 748; *Mednick,* 508 F.2d 297; and *Usery,* 527 F.2d 1308). In its 1997 regulations, the Department cited five specific cases (two of which were also cited in the House Committee's report and three of which were decided subsequently) to aid in resolving whether a worker is an independent contractor or employee. 62 FR 11747 (amending 29 C.F.R. 500.20(h)(4)) (citing *Rutherford Food,* 331 U.S. 722; *Driscoll,* 603 F.2d 748; *Lauritzen,* 835 F.2d 1529; *Beliz,* 765 F.2d 1317; and *Castillo,* 704 F.2d 181).

Finally, as described above in section III.E, some commenters asserted that the Department did not adequately explain its reasons for amending these regulations now when it declined to do so in 2024 and 2021. *See* Coalition of State Officials; National Women's Law Center; NWJP. Coalition of State Officials contended that the Department's stated reason of avoiding confusion regarding what analysis should apply constitutes "unsubstantiated speculation" and fails to consider the confusion arising from "abruptly changing course on a longstanding policy." This commenter further contended that unique provisions of the FMLA and MSPA must be considered before proceeding with a uniform approach. Except as described above and in section III.E, the Department did not receive any comments addressing specific aspects of the FMLA or the substance of the proposed revisions to 29 CFR part 825. In addition to the comments described above, the Department received comments addressing specific aspects of MSPA and the substance of the proposed revisions to 29 CFR part 500, which are discussed further below.

For all the reasons that the Department has explained for finalizing the proposed rule for the FLSA, the Department finalizes its proposal for the FMLA and MSPA as well, with additional minor, non-substantive edits (changing "whether or not," "and/or," "his/her," and "he/she"). The Department reiterates that it believes this rule provides clear guidance that is

consistent with how courts have applied the economic reality factors and is well-suited to remedying misclassification without discouraging legitimate independent contractor relationships. As discussed in the NPRM and above in section III.E, the Department believes that uniformity among the FLSA, FMLA, and MSPA is not only consistent with Congress's intent but also beneficial to employers, businesses, and workers because it will encourage consistent results.

In finalizing the proposed revision to the MSPA regulations, the Department is not rejecting the case law relied on by the House Committee on Education and Labor when Congress enacted MSPA and by the Department when it promulgated the 1997 regulations. *See* H.R. Rep. No. 97-885, at 7 (citing *Rutherford Food,* 331 U.S. 722; *Driscoll,* 603 F.2d 748; *Mednick,* 508 F.2d 297; and *Usery,* 527 F.2d 1308); 62 FR 11747 (citing *Rutherford Food,* 331 U.S. 722; *Driscoll,* 603 F.2d 748; *Lauritzen,* 835 F.2d 1529; *Beliz,* 765 F.2d 1317; and *Castillo,* 704 F.2d 181). The Department recognizes that these cases have been foundational in shaping the analysis that it finalizes today. As the Department has explained, it believes that this rule is, in some respects, more aligned with *Rutherford Food* than the 2024 Rule was.[362] As for the circuit court cases, the Department believes that they provide several helpful principles and are generally consistent with the economic reality factors described in this rule. Yet they do not cohere into one generally applicable rule, as this rule seeks to do. The House Committee acknowledged that the cases it cited "give a slightly different description of the five or six factors which are to be considered in making this determination, but each eschews the traditional common law 'right to control' test." *See* H.R. Rep. No. 97-885, at 7. Indeed, those four cases cited in the House Report illustrate some of the variations in the economic reality test with which the Department has grappled in fashioning a cohesive rule, such as whether investment is part of the opportunity factor, *see Mednick*, 508 F.2d at 301 (characterizing plaintiff's investments in inventory as a "means of increasing his 'profits'"), and whether initiative should be considered

[362] 91 FR 9941–42.

under the skill factor, *see Usery*, 527 F.2d at 1314. Most notably, each case takes a different approach to integration. *Rutherford Food*, 331 U.S. at 729 (introducing the "integrated unit of production" formulation); *Driscoll*, 603 F.2d at 750 (characterizing strawberry growers as "an integral part of Driscoll's strawberry growing operation, rather than an independently viable enterprise"); *Mednick*, 508 F.2d at 300–01 (using an "integrated part" formulation but also noting that the plaintiff's work "may have been very useful or even necessary"); *Usery*, 527 F.2d at 1311 (omitting this factor altogether). The House Committee's instruction that this case law "be determinative" cannot mean that it must apply mechanically to all subsequent cases—except with respect to its uniform rejection of the common law control test.

The cases previously cited by the Department similarly vary in the methods by which the courts arrive at their conclusions. While the Seventh and Ninth Circuits recited a similar six-factor test, *Driscoll*, 603 F.2d at 754; *Lauritzen,* 835 F.2d at 1535, the Fifth Circuit identified the "critically significant" factors as "(1) how specialized the nature of the work is, and (2) whether the [alleged independent contractor] is 'in business for himself.'" *Beliz*, 765 F.2d at 1327–28 (quoting *Castillo*, 704 F.2d at 190). The Fifth Circuit collapsed skill, permanence, and integration within the first of these factors, while the second factor incorporated control and opportunity for profit or loss. *See id.* at 1328. Notwithstanding these variations, all these cases concluded that the relevant workers were most likely employees of the defendant farmers/growers. *Beliz*, 765 F.2d at 1320, 1328 (farm labor contractor and the migrant workers he recruited were employees of defendant vegetable producer); *Castillo*, 704 F.2d at 184, 192 (farm labor contractor and the field workers he hired were employees of defendant cotton producer); *Driscoll*, 603 F.2d at 751, 755 (reversing district court's holding that strawberry growers were independent contractors on defendant's strawberry farms); *Lauritzen,* 835 F.2d at 1538 ("No trial is needed to sort out the material facts in these circumstances in order to come to the conclusion of law that these migrant workers are employees, entitled to the protection of the

FLSA."). The Department sees no reason to believe that this rule would produce a different outcome in any of these cases and has no intention for it to do so.

The Department acknowledges that it must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account" when revising regulations. *Wages & White Lion*, 604 U.S. at 570 (internal quotation marks and citation omitted). As it did in the 2021 Rule, the Department believes that the regulatory standard for determining an individual's classification status under MSPA is generally consistent with the FLSA guidance finalized in this rule.[363] Therefore, the Department does not believe that reliance interests will be affected by this rule. In the 2021 Rule, the Department stated that it preferred to "proceed incrementally," thereby signaling its intent to revisit this question at a later date.[364] Having considered the comments and the regulatory history to date, the Department believes that it is appropriate to take this next step now.

Among commenters that generally welcomed the extension of this rule to MSPA, there was one request for a minor revision, plus a few requests for clarifications and examples. Trevar Kolodny proposed a revision to the first sentence of 29 CFR 500.20(h)(4), which currently states: "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." Kolodny argued that the word "may" should be changed to "shall" because application of the FLSA's definition is mandatory. The Department declines this suggestion. The word "may" in this sentence does not mean that the Department may disregard the FLSA's definition of "employ." The sentence simply means that some (but not all) work arrangements governed by MSPA may involve a question of whether an independent contractor or employment relationship exists. Elsewhere, the regulation is clear that the FLSA's definition of "employ" applies. *See* 29 CFR

[363] 86 FR 1177.
[364] *Id*.

500.20(h)(1) ("The term employ has the meaning given such term under section 3(g) of the [FLSA].").

WAFLA, while generally welcoming the revision to the MSPA regulations, requested clarification that it "will not disrupt legitimate farm labor contracting relationships that comply with MSPA's separate registration, disclosure, and operational requirements." WAFLA asserted that a "properly registered FLC that recruits and manages workers across multiple farms, supplies its own workforce management infrastructure, bears payroll and administrative responsibility for its crew, and operates under a separate legal entity plainly satisfies the proposed rule's core factor analysis as an independent contractor of the agricultural employer." The Department has no intention to disrupt legitimate farm labor contracting relationships. However, whether a farm labor contractor is an independent contractor or an employee would depend upon application of all the factors set forth in this rule to the circumstances of the case. WAFLA also requested clarification that the Department is not altering the existing language in 29 CFR 500.20(h)(4) regarding the "downstream effect of FLC classification." WAFLA noted its support for retaining this language. The Department confirms that it is retaining the language in 29 CFR 500.20(h)(4) that provides: "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."

Finally, some commenters requested additional guidance on the extension of this rule to MSPA in the form of examples involving agricultural workers. *See* CWI (requesting at least one example involving agricultural or seasonal labor); National Association of Convenience Stores et al. (requesting practical guidance on MSPA's employment definitions for the benefit of businesses with multi-contractor operations); WAFLA (requesting an agricultural example demonstrating how the permanence factor applies to seasonal specialty crop service providers).

The Department agrees that additional examples involving agricultural workers will be helpful to illustrate the application of this rule in the agricultural context and therefore finalizes new examples in § 795.115(b). Because the Department has received several comments particularly addressing the multilayered relationships among agricultural employers, farm labor contractors, and agricultural workers, the Department believes that an example focusing on control will be most helpful for this purpose. The example in § 795.115(b)(4) illustrates a situation in which a grower exercises substantial control over key aspects of the work performed by an individual engaged as a farm labor contractor, indicating that the individual is an employee of the grower. In this example, if the economic reality test as a whole establishes that the individual is employed by the grower, then the agricultural workers on the individual's crew would also be employees of the grower. Conversely, the example in § 795.115(b)(5) illustrates a situation in which an individual engaged by a grower as a farm labor contractor exercises substantial control over key aspects of the work, indicating independent contractor status.

The Department notes that, while it will assess the employee or independent contractor status of farm labor contractors for FLSA and MSPA purposes using the analysis in this rule, it will continue to assess the employee or independent contractor status of H-2A labor contractors for purposes of the H-2A labor program using the "general common law of agency," as the Department's H-2A regulations provide. *See* 20 CFR 655.103(b) (distinguishing between an "employee" and "H-2A labor contractor"). For statutes that do not incorporate the FLSA's "suffer or permit" standard, the Department will continue to apply other standards to assess employee or independent contractor status.

K. Severability (§ 795.120)

The Department proposed a severability provision in § 795.120 providing that any provision of part 795 found to be invalid or unenforceable or stayed "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."[365] The Department explained that it relied on 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.[366]

Relatedly, the Department explained throughout the NPRM that it was proposing to both rescind the 2024 Rule and adopt a revised part 795 as a replacement. In other words, rescission of the 2024 Rule would be separate from adoption of revised regulations regarding employee or independent contractor status in part 795. Thus, the Department expressed a clear intent in the NPRM 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 acknowledged 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)," and that it "would provide subregulatory guidance for stakeholders" in such case.[367]

The Department further explained in the NPRM that its proposed changes to the FMLA and MSPA regulations were separate from its proposed changes to the FLSA regulations in 29 CFR part 795. Accordingly, the Department clearly expressed that, if the "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."[368]

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[365] 91 FR 9975.
[366] *Id.* at 9960.
[367] *Id*.
[368] *Id*.

The Department received one comment addressing severability. Referring to the Department's expressed intent that rescission of the 2024 Rule would be independent and severable from adoption of the analysis to replace it, Legal Aid at Work criticized the Department for "seek[ing] to generate a scenario where there will be no regulatory guidance on independent contractor definition at all. Without any guidance, the alleged lack of clarity upon which the proposed rule is premised will be made worse." The Department believes in the practical benefits of generally applicable regulations on employee and independent contractor status and that the analysis adopted herein provides clear and consistent guidance going forward, and thus is not seeking to generate the scenario suggested by this commenter. Separately, it has identified many concerns with and negative effects of the 2024 Rule (all discussed earlier in section III of this rule), and for those reasons, the 2024 Rule should not be left in place if the analysis adopted herein is invalidated.

Accordingly, the Department is finalizing § 795.120 as proposed and expressing again its clear intent that, in the event that the regulations adopted in this final rule at 29 CFR part 795 are invalidated, enjoined, or otherwise not put into effect, in whole or in part, then (1) the 2024 Rule and the regulations from the 2024 Rule would still be rescinded for all the reasons set forth by the Department in this rulemaking, and (2) the changes to 29 CFR parts 500 (MSPA) and 825 (FMLA) adopted in this final rule would still remain in effect. The Department reaffirms that it would provide subregulatory guidance for stakeholders if this were to happen.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq*., and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, 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 final rule does not contain a collection of information subject to Office of Management and Budget (OMB) approval under the Paperwork Reduction Act.

VI. Regulatory Review Analysis Conducted in Accordance with Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review, and Executive Order 14192, Unleashing Prosperity Through Deregulation

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review. *See* 58 FR 51735 (Oct. 4, 1993). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (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). Executive Order 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 is an Executive Order 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 final rule and was prepared pursuant to the above-mentioned Executive orders.

A. Need for Rulemaking

As explained more fully in section III of this rule, the Department is concerned that the 2024 Rule failed to provide an analysis for distinguishing between independent contractors and employees under the FLSA that was sufficiently clear and led to predictable outcomes. The Department is separately concerned that the 2024 Rule's description of several economic reality factors could have been 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 cause 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 rescinding the 2024 Rule and largely readopting the 2021 Rule (with some modifications and enhancements), which provided a sharpened economic reality analysis and did not impede successful enforcement actions by the Department to pursue and remedy misclassification of FLSA-covered employees as independent contractors.[369] Additionally, the Department is revising the regulations addressing employee or

[369] *See supra*, nn.170 & 175 and their accompanying text.

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.

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 provided 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 rule 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.[370]

Third, as a result of the improved clarity of the rule, businesses might convert some existing positions from employee status to independent contractor status. Although the Department maintains that the streamlined core factor analysis in this rule is neither more nor less permissive of independent contractor relationships as compared to the Department's prior analysis,[371] the Department expects that this rule could reduce to some degree the voluntary classification of independent contractors as employees—a practice several commenters called

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[370] *See* Liya 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.

[371] As explained in section I.F. of this rule, the Department has been applying its pre-2021 guidance on employee or 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.

"overclassification."[372] This refers to situations where businesses classify workers who are 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 requirements).[373] 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—a scenario that, to the Department's knowledge, no federal appellate court has ever found to be an FLSA employment relationship.

Businesses would only reclassify workers classified as employees into independent contractors if the clarity provided by this rule outweighs 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, in many cases, workers would have a choice of whether to agree to the new independent contractor arrangement in the sense that the worker could decide to end his or her relationship with a business unless he or she remains classified as an employee. AFSCME submitted a comment countering the Department's position that workers would have the freedom to choose to enter into independent contractor arrangements, asserting that the most vulnerable and least informed of workers would either accept such reclassification willingly, are coerced to

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[372] *See supra* section III.D. Several commenters characterized the classification of independent contractors as employees as a form of "misclassification," analogous to the misclassification of employees as independent contractors. However, it is not unlawful to classify a worker as an employee even if he or she is an independent contractor.

[373] *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).

accept, or are unaware of how their employers should classify them. Conversely, the Chamber of Progress submitted a comment emphasizing that many workers prefer the option of an independent contractor arrangement because it affords them greater autonomy and schedule flexibility. 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 that occurred when the 2021 Rule was in effect, nor did commenters note that any significant reclassification occurred.

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),[374] and a recent evaluation of a 2019 California law that changed that state's standard for determining independent contractor classification in a manner that restricted independent contracting[375] (Palagashvili et al., 2024),[376] the Department estimates that the number of independent contractors could increase by 1 to 3 percentage points following the implementation of this rule. On today's labor force of approximately 25 million workers who rely on independent contracting

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[374] 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).

[375] *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. The California legislature subsequently extended exemptions from the ABC test for several professions. These exemptions include certain writers, photographers, videographers, photo editors, and illustrators. *See* AB 2257, Ch. 38, 2019-2020 Reg. Sess. (2020).

[376] 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.

as their primary or secondary job,[377] this would represent between 0.25 million and 0.75 million additional independent contracting relationships, with a central estimate of 0.5 million.[378] The rationale for this estimate is explained in greater detail in section VI.E.3.

The Department assumes that this increase would occur almost entirely 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 that may have been anticipated as the law discouraged independent contractor classification.[379] 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 final 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

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[377] *See infra* section VI.C.

[378] 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 final 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 rule. Because state worker classification standards vary considerably, it is not possible for the Department reliably to estimate the precise number of workers subject to particular standards. Some states apply different classification standards depending on the industry or the law at issue. To illustrate, Indiana applies an ABC test for unemployment insurance but not wage-and-hour purposes, while New York applies an ABC test in the construction industry only. Even states that generally apply an ABC test have numerous exemptions. For example, California law contains more than 100 possible exemptions from its ABC test, including for certain rideshare drivers, freelance writers, and accountants. *See* Palagashvili et al., *supra* n.376. Given the variations within states as to how they apply their laws, the Department does not believe that categorically designating states as either ABC-test or common-law jurisdictions would provide a reliable basis for adjusting its estimates to account for differences in state law.

[379] Palagashvili et al., *supra* n.376.

possess the characteristics of being in business for themselves but are classified as employees due to perceived legal uncertainty. Meanwhile, employers that 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.

The Department estimates that the undiscounted regulatory familiarization costs of this rule would be $495.7 million in the first year. However, the Department estimates that this rule would yield $694.8 million dollars in net cost savings per year.[380] Over a 10-year analytic time horizon, this results in an annualized net cost savings of $638.3 million and $628.8 million using a 3 percent and 7 percent discount rate respectively. In addition, and as discussed below, the Department estimates that the total undiscounted benefits to workers from new labor force entry could amount to $26.3 billion over 10 years, with an additional $10.9 billion accruing to broader society in the form of taxes collected on the earnings of the new labor. These earnings are estimated at $131.7 billion over 10 years as described in section VI.E.3 below. On an annualized basis, the Department estimates that the benefits from increased labor force participation could amount to $2.63 billion at a 7 percent discount rate, depending on the number of new entrants and their characteristics. For purposes of Executive Order 14192, the Department calculated the difference between the total cost savings and the total costs in 2025 dollars, discounted over a perpetual time horizon using a 7 percent discount rate beginning in 2026. This results in an annualized net cost savings over a perpetual time horizon of $628.8 million. Other anticipated costs, benefits, and cost savings are discussed qualitatively. Table 1 below summarizes the

[380] The Department notes that this might be an overestimate of the effects of this rule to the extent that some workers and businesses in certain states with analyses that are more restrictive of independent contracting might not be affected by this rulemaking.

estimated costs and cost savings categorized by their impact on establishments and independent contractors.

Table 1: Summary of Rule Impacts ($2025 Millions)

Impact	**Year 1**	**Years 2-10**	**Annualized Values [a]**	
			7 % Discount	**3 % Discount**
Regulatory Familiarization Costs				
Establishments	187.6	0.0	24.9	21.4
Independent Contractors	308.05	0.0	40.9	35.1
Total	495.7	0.0	65.8	56.5
Cost Savings from Increased Clarity				
Employers	571.3	571.3	571.3	571.3
Independent Contractors	110.1	110.1	110.1	110.1
Total	681.4	681.4	681.4	681.4
Cost Savings from Reduced Litigation	13.3	13.3	13.3	13.3
Total Cost Savings	694.7	694.7	694.7	694.7
Net Cost Savings	199.1	694.7	628.8	638.3

[a] Annualized over 10-years

C. Current Number of Independent Contractors

The Department estimated that there were 24.8 million independent contractors in the United States in 2023, the most recent year of data available.[381] 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. In its comment, the American Association of Advertising Agencies cited a survey conducted by the Upwork Research Institute that claims 64 million Americans performed freelance work in 2023.[382] The Americans for Prosperity Foundation referenced a study by Matthew Zane in its comment that estimates that there are approximately 70.4 million freelance workers in the United States.[383] 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. Estimates from other sources are presented as well 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. Based on the CWS, there were 11.9 million independent contractors in 2023, amounting to 7.4 percent of workers.[384] The CWS measures those who say that their independent contractor job is

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[381] Estimate based on calculation using BLS Current Population Survey (CPS) Contingent Worker Survey (CWS) data. 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.
[382] Upwork Research Institute, *Freelance Forward 2023* (Dec. 12, 2023), https://www.upwork.com/research/freelance-forward-2023-research-report.
[383] Matthew Zane, *How Many Freelancers Are There In The U.S.?* (Feb. 27, 2023) (updated Feb. 7, 2026), https://www.zippia.com/advice/how-many-freelancers-in-the-us/.
[384] *Id.*

their primary job and that they worked at the independent contractor job in the survey's reference week. However, while the Department refers to the CWS measure of independent contractors throughout this analysis, due to the survey's design it should be uniformly recognized as representing a constrained subsection of the entire independent contractor pool. Due to its methodological constraints, the CWS measure should be differentiated from other, more comprehensive measures.

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." Workers reporting that they are self-employed are asked: "Are you self-employed as an independent contractor, independent consultant, freelance worker, or something else?" Those identified as wage and salary workers in the basic CPS are asked: "Last week, were you working as an independent contractor, an independent consultant, or a freelance worker?"

The Department believes that the 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).[385] Therefore, the estimate of independent contractors does not include those who may be employees for their primary jobs but also work as independent contractors for a secondary or tertiary job. 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 source of income.[386] Applying this estimate

[385] 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.

[386] 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.

to the 11.9 million independent contractors estimated from the CWS results in 24.8 million independent contractors.[387]

The 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.[388] For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy.[389] 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.

CWS also uses proxy responses, which may underestimate the number of independent contractors. The RAND American Life Panel (ALP) survey conducted a supplement in 2015 to mimic the CPS CWS questionnaire. The results of the survey were summarized by Katz and

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[387] 11.9 million independent contractors * (1 + (52 ÷ 48)).

[388] 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.

[389] 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.

Krueger (2018).[390] This survey found that independent contractors comprise 7.2 percent of workers.[391] 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).[392]

Another potential source of bias in the CWS data is that some respondents may not self-identify as independent contractors, and others who self-identify may be improperly classified. There are reasons to believe that some workers, who are legally considered independent contractors, would not self-identify as such. For example, individuals who do only informal work may not view themselves as independent contractors.[393] In the CWS, one person answers the

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[390] L. Katz & A. Krueger, *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.

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

[392] 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.

[393] The Department believes that including data on informal work is useful when discussing the magnitude of independent contracting, although not all informal work is done by independent contractors. The Survey of Household Economics and Decisionmaking asked respondents whether they engaged in informal work sometime in the prior month. It categorized informal work into three broad categories: personal services, on-line activities, and off-line sales and other activities, which is broader than the scope of independent contractors. These categories include activities like house sitting, selling goods online through sites like eBay or craigslist, or selling goods at a garage sale. The Department acknowledges that the data discussed in this study might not be a one-to-one match with independent contracting, but it nonetheless provides useful data for this purpose. *See Economic Well-Being of U.S. Households in 2016 - May 2017*, Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/publications/2017-economic-well-being-of-us-households-in-2016-employment-jobs-work.htm.

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.[394]

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 understood to be common. NELP conducted a literature review of federal studies and 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.[395]

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.

Because the CWS estimate represents only the number of workers who worked as independent contractors on their primary job during the survey reference week, the Department applied the research literature and adjusted this measure to include workers who are independent contractors in a secondary job or who were excluded from the CWS estimate due to other factors. As noted above, integrating the estimated proportions of workers who are independent contractors on secondary or otherwise excluded jobs produces an estimate of 24.8 million. Given the prevalence of independent contractors who work sporadically and earn minimal income, adjusting the estimate according to these sources captures some of this population. It is likely that this figure is still an underestimate of the true independent contractor pool.

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[394] 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.

[395] National Employment Law Project, *Public Task Forces Take on Misclassification: Best Practices* (2020), https://www.nelp.org/app/uploads/2020/02/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf.

2. Range of Estimates in the Literature

To further consider the range of estimates available, the Department conducted a literature review, the findings of which are presented in Table 2. Other studies were also considered but are excluded from this table because the study population was much broader than just independent contractors or because they are limited to one state.[396] The RAND ALP[397] and the General Social Survey's (GSS's) Quality of Worklife (QWL)[398] 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.[399] However, the Department chose to use the CWS as our primary estimate over these other sources primarily because of the significantly larger sample sizes.

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[396] *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.389; 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.

[397] L. Katz & A. Krueger, *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.

[398] *See* Abraham et al., *Measuring the Gig Economy: Current Knowledge and Open Issues* (2018) (referring to the 2014 QWL in Table 4), https://www.nber.org/papers/w24950.

[399] 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.

Jackson et al. (2017)[400] and Lim et al. (2019)[401] use tax information to estimate the prevalence of independent contracting. In general, studies using tax data tend to show an increase in prevalence of independent contracting over time 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 is that the data are not publicly available and thus cannot be verified or adjusted as necessary.

Table 2: 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

[400] 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.
[401] Lim et al., *supra* n.386.

[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. Potential Costs

The Department considered several costs in evaluating the rule. The Department quantified regulatory familiarization costs and estimated that they will total $495.7 million in Year 1. Other potential costs, including those raised by commenters, were not quantified, for reasons explained in the sections that follow.

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, 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.[402] 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

[402] 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.

of regulated entities—which is larger than the number of firms. This assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

There may be differences in familiarization cost by the size of establishments; however, the analysis does not assess different costs for establishments of different sizes. Furthermore, the analysis does not revise down for states where the laws may more stringently limit who may be an independent contractor (such as California) and thus this rule will have little to no effect on classifications in those states.[403] To estimate the number of establishments incurring regulatory familiarization costs, the Department used the Statistics of U.S. Businesses (SUSB).[404] In 2022, the most recent year available, there were 8.3 million establishments. These data were supplemented with the 2022 Census of Government that reports 90,888 local government entities, and 51 state and federal government entities for a total universe of 8,389,450 establishments and governments.[405]

The applicable universe used by the Department for assessing familiarization costs of this final rule is all establishments that engage independent contractors, which is a subset of the universe of all establishments. In 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.[406] 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.[407] The Department did not estimate familiarization

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[403] Pursuant to FLSA section 18(a), states and localities may enact wage and hour laws that are broader than the FLSA's provisions. *See* 29 U.S.C. 218(a); *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (section 18(a) demonstrates Congress's intent to allow state regulation to coexist with the FLSA).

[404] U.S. Census Bureau, 2021 SUSB Annual Data Tables by Establishment Industry, 2022 SUSB Annual Data Tables by Establishment Industry.

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

[406] *See* Lim et al., *supra* n.386, at 66 (Table 10: Firm sample summary statistics by year (2001–2015)).

[407] Although firms that do not currently use independent contractors are not counted in this universe of employers, to allow for an error margin, the Department is using a rounded 35 percent of the total number of establishments.

costs for companies that may decide to work with independent contractors only after this rule is finalized, because they would need to familiarize themselves with the current legal framework even in the absence of this rule.[408]

As stated above, even without this rule any firm that does not currently engage any independent contractors but chooses to do so in the future would have to familiarize itself in the baseline case, so this rule does not impact those firms. Essentially, it would be reasonable to assume that any firm without independent contractors that reviews this rule and ultimately decides to hire independent contractors is doing so because the firm believes the new relationship will be beneficial. Such a situation would result in net benefits to the employer that compensate for any familiarization costs.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13-1141) (or a staff member in a similar position) will review the rule.[409] According to the most recent Occupational Employment and Wage Statistics (OEWS) estimates, these workers had a mean wage of $40.54 per hour.[410] Given the clarification to the Department's interpretation of who is an employee and who is an independent contractor, the Department assumes that it will take on average about 1 hour to review the final rule. Based on prior rulemakings, the Department believes that an hour, on average, is appropriate. Assuming benefits are paid at a rate of 42 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $64.46; thus, the average cost per

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

[409] 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).

[410] Occupational Employment and Wage Statistics, U.S. Bureau of Labor Statistics (May 2025), https://data.bls.gov/oes/#/area/0000000/2025.

establishment would be $64.46.[411] Therefore, the undiscounted regulatory familiarization costs for establishments in Year 1 are estimated to be $187.6 million ($64.46 × 2,911,139). Regulatory familiarization costs in future years are assumed to be de minimis. This amounts to a 10-year annualized cost of $20.1 million at a discount rate of 7 percent.

For regulatory familiarization costs for independent contractors, the Department uses its estimate of up to 24.8 million independent contractors and assumes each independent contractor will 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 will likely rely on summaries of the key elements of the rule made available by the Department, worker advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings. This time is valued at $24.85, which is the median hourly wage rate for independent contractors in the CWS of $23.94 updated to 2025 dollars using the gross domestic product (GDP) deflator.[412,413] Therefore, the undiscounted regulatory familiarization costs to independent contractors in Year 1 are estimated to be $308.05 million ($24.85 × 0.5 hour × 24.8 million). The total one-time undiscounted regulatory familiarization costs for establishments, governments, and independent contractors are estimated to be $495.7 million. Regulatory familiarization costs in future years are assumed to be de minimis. Employers and independent contractors will continue to familiarize themselves with the applicable legal framework, so this

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[411] BLS, "National Compensation Survey, Employer Costs for Employee Compensation," https://www.bls.gov/ecec/data.htm (last visited June 3, 2026). For private sector workers, wages averaged $32.36 per hour worked in 2025, while benefit costs averaged $13.79, which is a benefits rate of 42 percent.

[412] 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 full-time work status is 35 hours or more per week ($838 ÷ 35 hours = $23.94).

[413] 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.

rulemaking is not expected to impose costs after the first year. This amounts to a 10-year annualized cost of $51.1 million at a discount rate of 3 percent or $53.0 million at a discount rate of 7 percent.

2. Other Costs

Aside from the familiarization costs described above, it is possible that the rule will result in additional costs. In the NPRM, the Department invited public comment on other potential costs of this rule. Apart from concerns over potential changes that would qualify as transfer effects (addressed in section VI.F.), commenter feedback on the potential costs of this rule generally fell into four categories: impacts to tax revenues; impacts on competition; impacts on minorities and women; and impacts on employer provided benefits. The Department evaluated all of the potential costs that were identified and examined many of the citations provided. Upon review, the Department was unable to confirm or substantiate any of these alleged cost categories in its own research. Therefore, in this section of the analysis, the Department addresses the points raised and discusses the qualitative merits but does not quantify estimates for inclusion in its top line figures.

a. Comments Regarding Impacts to Tax Revenue and Public Assistance

Several commenters asserted that increased independent contracting would reduce state tax revenue and increase reliance on public assistance programs. A group of 114 state legislators from 23 states submitted a joint comment asserting that the NPRM's regulatory impact analysis failed to account for the "quantifiable costs [to states] related to an increase in the number of workers classified as independent contractors." The legislators commented that "[t]he financial architecture of state government depends, in significant part, on the number of workers classified as employees," since "[u]nemployment insurance trust funds," "[w]orkers' compensation systems," "[s]tate income tax withholding, paid family and medical leave programs, and disability insurance funds all rely on the employment relationship as the mechanism through which contributions are collected." Citing a 2026 study from the Economic Policy Institute, the

legislators estimated that the cost to social insurance programs from independent contractor classification "ranged between approximately $600 to $3,045 *annually, per worker*," and, applying the average of that range ($1,941) to the midpoint of the Department's own estimate of 500,000 new independent contracting relationships, calculated "a loss to state social insurance programs of over $970 million *annually, in perpetuity*."[414] The legislators also cited federal government data indicating that independent contractors are "nearly twice as likely as payroll employees to lack health insurance (17.9% compared to 9.0%) and more than twice as likely to rely on public insurance programs (33.9% compared to 15.6%)," and cited state-specific studies estimating unemployment insurance and income tax revenue losses in Wisconsin, Michigan, Massachusetts, and Pennsylvania attributable to independent contractor classification.

Maryland Comptroller Brooke E. Lierman submitted a comment focused specifically on this gap, citing Maryland-specific enforcement data reporting that state investigations found $52 million in unreported taxable wages due to workplace fraud, $3.6 million in tax, interest, and penalties assessed against businesses for misclassification, and 7,767 misclassified workers identified in fiscal year 2025, a "nearly 39% increase over the prior year." Coalition of State Officials raised similar concerns, asserting that the Department "fails to consider the foreseeable administrative and enforcement costs its proposed rule would impose on states as enforcers of state labor laws," including increased wage-and-hour complaints following reclassification and the cost of public outreach in states with independent contractor standards that have historically tracked the federal standard. This coalition cited state-specific data, including a 2022 Pennsylvania report finding that 48,939 employers annually misclassified at least one employee, affecting approximately 259,000 employees, and estimating $91 million in annual losses to its Unemployment Compensation Trust Fund and up to $124.5 million in lost General Fund revenue

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[414] Ismael Cid-Martinez et al., Economic Policy Institute, *Misclassifying workers as independent contractors is costly for workers and social insurance systems* (Apr. 15, 2026), https://files.epi.org/uploads/319535.pdf.

in 2019 attributable to misclassification.[415] The coalition also cited a Minnesota Office of the Legislative Auditor estimate that 22 percent of randomly audited employers in 2018 misclassified at least one employee, and a 2024 Minnesota-focused analysis estimating state tax revenue losses of $506 million to $1.3 billion from payroll fraud and worker misclassification in 2019.

NABTU submitted additional data addressing the fiscal costs associated with misclassification generally, including data specific to the construction industry. NABTU cited a 2006 GAO estimate that in that year, the federal government "lost out on $2.72 billion in Social Security, unemployment, and income taxes," and a Department-commissioned study finding that "misclassifying just one percent of workers annually results in a $198 million hit to unemployment insurance trust funds."[416] NABTU further cited state-specific findings, including that New York lost "more than $7 million in unemployment taxes" to misclassification in 2014; that construction misclassification costs New Jersey "nearly $9 million in state income taxes and up to $6.7 million in unemployment insurance"; that Massachusetts's unemployment insurance fund lost at least $24.5 million in 2019 due to construction misclassification (and lost $91 million in income taxes in 2004 by a separate estimate); that "California recovered approximately $15 million in unpaid unemployment insurance premiums and $18 million in unpaid workers' compensation premiums" in 2018; that Wisconsin lost "$25 million in unpaid workers' compensation premiums over 10 years and $56.7 million in unpaid state income tax in 2021

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[415] Pa. Dep't of Labor & Indus., *Joint Task Force on Misclassification of Employees: Final Report*, at 12 (Dec. 1, 2022), https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/individuals/labor-management-relations/llc/documents/act-85-final-report.pdf.

[416] U.S. Government Accountability Office, GAO 06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* (July 2006), https://www.gao.gov/assets/gao-06-656.pdf; Lalith de Silva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* (2000), https://www.dol.gov/agencies/eta/research/publications/independent-contractors-prevalence-and-implications-unemployment.

alone"; and that Texas's unemployment insurance fund loses an estimated $54.5 million annually to construction misclassification.

As discussed in section VI.C, the Department does not anticipate significant reclassification of existing employees because of this rule and expects most growth in independent contracting to come from new labor force entrants. The 114 State Legislators, Maryland Comptroller, Coalition of State Officials, and NABTU each apply cost estimates for existing worker misclassification, that is, cases where workers who are employees are wrongfully classified as independent contractors under applicable legal standards with no connection to this rule, to project fiscal effects from this rule's clarification of the standard for the FLSA, FMLA, and MSPA. The Department notes that this rule will not change the underlying legal standard for who is an employee or independent contractor, and that any reclassification of existing employees as independent contractors will not be substantial (and will involve to some extent workers who were already in business for themselves, i.e., workers who were properly independent contractors anyway, but the employer defensively classified them as employees due to legal uncertainty). And the Department continues to believe that the population of new independent contractor relationships attributable to this rule will primarily consist of new labor force entrants rather than the reclassification of existing employees as independent contractors. To that extent, the per-worker cost estimates drawn from misclassification audits and enforcement actions, which by definition involve incorrect classification determinations, may not directly translate to the permissible new independent contractor relationships the Department anticipates from this rule. The Department also notes that Maryland's cited enforcement data describes year-over-year increases in misclassification identified under existing law, which is obviously not attributable to this rule, since it has not yet taken effect, and that NABTU's cited figures likewise describe the baseline costs of existing misclassification rather than a projected marginal effect of this rule. The Department acknowledges that misclassification is still likely to occur (both inadvertently and willfully) under this rule. However, as mentioned previously, the

Department expects this rule will aid efforts to reduce the misclassification due to the increased clarity that it provides employers, employees, and independent contractors. Additionally, the clarity provided by the rule will help the Department enforce compliance and detect misclassification violations more easily.

The Department did not identify sufficiently reliable, generalizable data isolating the marginal fiscal effect of this specific rulemaking, as distinct from the existing baseline of state law and enforcement, to support a quantified adjustment to the rule's cost-benefit analysis.

b. Comments Relating to Fair Competition

Mechanical Contractors Association of America (MCAA), joined in substance by several individual commenters, asserted that the rule will "accelerate the race to the bottom" in the construction and mechanical contracting industry. MCAA stated that construction contractors relying on the independent contractor business model "derive an almost 50% cost advantage over MCAA members and other ethical contractors" that invest in a skilled workforce, and cited estimates that the widespread industryuse of independent contractor classification "allows these companies to avoid approximately $2.98 billion per year in Social Security and Medicare taxes," "causes an estimated $1.74 billion annual shortfall in state workers' compensation programs and results in annual state unemployment insurance shortfalls of over $700 million." MCAA further estimated that construction workers classified as independent contractors lose between $12,440.84 and $19,526.77 in annual wages compared to similarly-situated employees, and commented that easing independent contractor classification would make it easier for firms to engage "undocumented workers because businesses are not required to verify the work authorization of independent contractors."

NABTU raised substantially similar concerns, citing additional data on the labor cost differentials that make misclassification attractive to construction employers. NABTU cited studies finding that employers who misclassify workers save as much as 30 percent in labor costs, and a Michigan study finding a labor cost differential of 20 to 40 percent of payroll when

contractors avoid unemployment insurance tax, workers' compensation premiums, the employer share of Social Security, and pension or medical insurance, with avoided workers' compensation premiums alone amounting to as much as 50 percent of wages in some trades. NABTU cited a range of state-level misclassification-rate studies, including findings of 73 percent among Michigan residential construction workers, one-third of construction workers in North Carolina and Texas, 16 percent in Minnesota, 18 percent in Iowa, and one in six construction workers in California. NABTU added that because materials and equipment costs are largely standardized in construction, labor cost savings from misclassification translate directly into a substantial competitive advantage in bidding, disadvantaging contractors who properly classify their workers.

This rule does not alter the underlying legal standard, the economic reality test, and is not intended to make independent contractor classification more permissive; rather, it clarifies how the existing test should be applied. The Department's cost-benefit analysis in this section addresses regulatory familiarization, increased clarity, and litigation cost savings; it does not attempt to quantify the estimates MCAA and NABTU cite regarding existing industry-wide misclassification, because those estimates describe the current baseline level of misclassification under existing law rather than a cost attributable to this rulemaking. The Department notes that the wide range of state-specific misclassification-rate estimates NABTU cites (16 percent to 73 percent depending on the state and study) itself reflects substantial measurement variability that advises caution in attributing any particular figure to this rule's effect. To the extent misclassification already occurs under the applicable legal standards, the Department notes that such conduct is wrong and that resulting violations of the FLSA can be remedied regardless of this rule, which addresses the classification standard rather than the availability of enforcement against violators.

c. Comments Regarding Income Inequality and Impacts on Minorities and Women

Center for Worklife Law commented that this rule would "strip workplace protections" under the FMLA, MSPA, and the PUMP Act, such as employer obligations to accommodate breastfeeding workers and provide leave following childbirth, and that "[r]ather than empowering workers, this reclassification [to independent contractor status] will push many caregivers—particularly low-income mothers—out of the workforce entirely." National Women's Law Center similarly wrote that the NPRM "threatens to exclude many working mothers by encouraging misclassification of employees as independent contractors and empowering employers to deny responsibility for providing appropriate facilities and adequate break time for nursing parents in their workforce." Justice for Migrant Women stated the rule "will worsen the affordability problem for low-wage workers, increase wealth inequality, and impoverish communities with less wages circulating in the local economy."

National Women's Law Center additionally submitted wage-gap and earnings data underlying its concern. It cited its own analysis finding that women working full-time, year-round are typically paid "81 cents for every dollar paid to men, and the gaps are significantly worse for many women of color," citing data from the same analysis regarding the pay differential for Black women (65 cents), Latinas (58 cents), and Native American women (58 cents), and further commenting that "the wage gap widened" between 2022 and 2024, "the first statistically significant decline in the wage gap in two decades." National Women's Law Center also cited a New School Center for New York City Affairs study finding that in New York's personal-services sector, employee wages rose 24.5 percent in inflation-adjusted terms between 2013 and 2018 (a period of state minimum-wage increases) while independent-contractor earnings in the same sector fell 3.9 percent over the same period, which it offered to rebut the Department's assumption that independent contractors generally receive an earnings premium sufficient to offset any lost benefits and legal protections. National Women's Law Center further commented that "misclassification is rampant in low-paid, labor-intensive industries, such as

manicurists/pedicurists, customer service representatives, home care and housekeeping, janitorial services, and app-dispatched work," where "women, people of color, and immigrants tend to be overrepresented" due to "occupational segregation and other labor issues."

Other commenters offered data on the value of independent work for women. American Association of Advertising Agencies noted that "[a] 2019 study from the Freelancers Union found that 45% of female freelancers work in creative or knowledge-based services." Chamber of Progress explained that "[w]omen, in particular, have increasingly turned to gig work after being disproportionately affected by the pandemic," citing school closures and job losses in hospitality, cleaning, and personal services, and stated that women "account for 58% of DoorDash drivers and roughly half of Uber's delivery drivers."

The Department takes these concerns seriously, and notes that this rule does not alter substantive FMLA or PUMP Act obligations for employees; instead, it clarifies the classification analysis used to determine whether someone is an employee or an independent contractor. Regarding National Women's Law Center's earnings data specifically, the Department's earnings-offset analysis discussed in section VI.E below is based on economy-wide CWS data using regression methods (Upjohn Institute; Katz and Krueger) that control for observable worker characteristics, rather than sector-specific data of the kind National Women's Law Center cites. As discussed further in section VI.E, the Department believes the New York personal-services finding National Women's Law Center cites, like other sector-specific studies in the record, examines a population that may not be representative of the broader independent contractor population from which the Department's central earnings estimate is drawn. The Department did not identify a basis to adjust its economy-wide earnings-offset estimate specifically for the subpopulations identified but acknowledges that earnings effects may vary by industry.

E. Potential Benefits and Cost Savings

This rule is expected to result in various benefits and cost savings. For example, this rule will increase clarity concerning whether a worker is an employee or independent contractor under the FLSA, which in turn could lead to more consistent classification outcomes while reducing compliance and litigation costs for firms that engage independent contractors. Relatedly, workers may benefit from having more clarity about their rights related to their work status. Additional benefits may accrue due to increases in availability of services across various sectors, constituting a consumer surplus. Finally, due to increased clarity, there could be a reduction in FLSA litigation involving alleged misclassification.

1. Increased Clarity

The Department anticipates that this rule will increase clarity concerning whether a worker should be classified as an employee or as an independent contractor under the FLSA. This will 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 (not necessarily under the FLSA)—all consequences businesses can avoid with proper worker classification.[417]

The Department expects that this rule will produce cost savings by clarifying the classification process. To quantify this cost-savings, 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

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

undiscounted annual cost savings of $681.4 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, 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.[418] 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. A subset of new independent contractor relationships will have time savings associated with the rule. Such a reduction is 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 classifying workers will lead to compound effects that generate far greater cost-savings over time. Nonetheless, because it is possible that only a subset of new independent contractor relationships receive the cost savings associated with increased clarity, the Department has reduced the number in the estimate by 25 percent.[419] This results in 26.6 million new independent contractor relationships with cost savings to both the engaging firm and the independent contractor.[420]

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[418] Lim et al., *supra* n.386, at 61.

[419] The Department requested comments and data on this estimated reduction, which yielded no substantive data or critiques on its merit. Therefore, the Department believes this is an appropriate assumption in this analysis.

[420] 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.378.

Following a similar methodology to the 2021 Rule, the Department has assumed that employers would save 20 minutes of time and independent contractors would save 10 minutes per each new independent contractor relationship.[421] These numbers are small because they represent the marginal time savings for each relationship, 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 rule provides, the Department applies the following estimates. For employers, this time is valued at a loaded hourly wage rate of $64.46. 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 $24.85 per hour (median wage rate for independent contractors in the CWS of $23.94 adjusted to 2025 dollars using the GDP deflator). Using these numbers, the Department estimates that contracting firms would save $571.3 million annually and independent contractors would save $110.1 million annually due to increased clarity. In sum, this is estimated to be an undiscounted annualized cost savings of $681.4 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 3: Cost Savings Due to Increased Clarity for Employers and Independent Contractors

Parameter	**Value** (upper bound due to interaction with state-level independent contracting laws)
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

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

Adjustment factor	75%
Total	**26,589,063**
Time savings per job (minutes) Employers……... Independent contractors……..	 20 10
Value of time Employers…….. Independent contractors……	 $64.46 $24.85
Total Savings Employers Independent contractors	 $571,297,915 $110,128,261
Total	**$681,426,176**

2. Reduced Litigation

In the NPRM, the Department noted that its proposal, if finalized, could result in decreased litigation due to increased clarity and reduced misclassification, and the Department welcomed feedback on how to quantify the potential reduction in litigation.[422] Having considered this question, the Department estimates cost savings due to reduced litigation by applying the methodology used in the Department's 2021 Rule, which quantified litigation cost savings as being equal to an estimated number of lawsuits avoided because of the rule multiplied by the average litigation cost per lawsuit.[FN]

a. Number of Cases Avoided

According to the Public Access to Court Electronic Records (PACER) system, there were 1,258 Federal Cases relating to the FLSA filed in the first quarter of 2025.[423] Following the methodology used in the 2021 Rule, the Department used a sample of 500 cases from the 1,258 cases filed in the first quarter of 2025 and identified 40 cases (or 8%) as involving disputes over

[422] 91 FR 9966.

[423] The Department examined PACER data from the first quarter of 2025 because this quarter was several months after the 2024 Rule took effect (on March 11, 2024) but before the Department announced on May 1, 2025, that it would no longer apply the 2024 Rule in its own enforcement actions. *See* FAB 2025-1.

employee or independent contractor status.[424] This ratio was applied to the 1,258 cases identified above yielding an estimate of 101 lawsuits related to independent contractor status during the examination period. The Department assumes that the increased clarity of the rule will reduce the number of Federal FLSA cases involving independent contractor status by 10 percent as stakeholders would better understand and be better able to agree on classification determinations without having to litigate.[425] Applying the 10 percent reduction to the 101 independent contractor related cases yields an estimated reduction of approximately 10 cases during the quarter. The Department multiplied the number of cases avoided during the quarter by 4 to determine the number of cases avoided over the course of the year. This results in an estimate of 40 cases related to independent contractor disputes avoided annually. This estimate of reduction in the number of independent contractor lawsuits filed does not take into account any reduction in filings resolved before litigation or by alternative dispute resolution, neither of which are captured in PACER data.

b. Average Litigation Cost Per Case

The Department applied an estimate of litigation costs of $331,014 per case.[426] To obtain this estimate, the Department conducted a search for FLSA cases in the aforementioned sub-sample of 40 cases that contained sufficient litigation cost information to estimate the average

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[424] PACER does not provide a granular classification of FLSA case types to identify the number of cases specific to independent contractor disputes, so the Department performed a keyword analysis with spot checking of a random sample of 500 cases filed in the first quarter of 2025, determining that 8.0 percent of cases were related to independent contractor status (40/500 = 8.0 percent).

[425] This aligns with the methodology the Department used to estimate reduced litigation costs in the 2021 Rule, 86 FR 1234–35, and in the 2019 Regular Rate Under the Fair Labor Standards Act rule, 84 FR 68767–68.

[426] The 40 cases assessed for this analysis were retrieved from Westlaw's Case Evaluator database using a keyword search for case summaries from the first quarter of 2025 mentioning the terms "FLSA", "gig" and "fees." This was not limited to cases associated with independent contracting. Although the initial search yielded 40 responsive cases, the Department excluded 33 cases where the verdict is still pending, and a settlement amount has not been reached. The smaller case sample size, and the narrower range of the plaintiff's total recovery and award amount contributes to the difference in the average litigation cost amount in this rule and the 2021 rule, where the Department used similar methodology to estimate average litigation costs of $654,182 per case. *See* 86 FR 1234-35.

costs of litigation in the Westlaw Case Evaluator tool and on PACER to ascertain how much plaintiffs in these cases were paid for attorney fees, administrative fees, or other costs, apart from any monetary damages attributable to the alleged FLSA violations. After determining the plaintiff's total litigation costs for each case, the Department then doubled the figures to account for litigation costs that the defendant employers incurred. According to the Analysis, the average litigation cost for FLSA cases concluded in our subsample was $331,014.

Applying these figures to the estimated 40 cases that could be avoided each year due to this rule, the Department estimates that avoided litigation costs resulting from the rule total to $13.3 million per year.[427]

3. Increased Labor Force Entry

The Department anticipates that most benefits of this rule will 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 under that state's law 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.[428] The Department believes this rule will have an effect in the opposite direction because it will 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

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[427] The Department's approach to estimating litigation cost savings takes into account the impact of the rule on the number of relevant cases filed. The approach does not take into account the impact of the rule on promoting settlements in the future among cases that are filed (i.e., some cases that may not have settled may now settle, and some cases that would have settled may now settle earlier). Clarifying a rule may increase the settlement rate among cases filed, reducing litigation costs further. *See* Jonah B. Gelbach, *The Reduced Form of Litigation Models and the Plaintiff's Win Rate*, 61 J. Law & Econ. 125 (2018), https://www.journals.uchicago.edu/doi/10.1086/699151.

[428] Palagashvili et al., *supra* n.376. 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.

as a consequence of this rule, which will not change the underlying classification standard (i.e., the economic reality test) and would primarily add clarity. Additionally, this rule will not likely impact some individuals operating in states that have tests under those states' own laws that are more restrictive of independent contracting, though the exact offsetting impact of such state laws is difficult to determine because of significant variation in state laws' exemptions and applications.[429] Accordingly, the Department estimates that the number of independent contractors will increase by 1 to 3 percent.

As explained, 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—suggesting that few independent contractors switched to traditional employment—but that AB 5 resulted in a statistically significant decrease of independent contractors in the labor force.[430] The converse effect will 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 rule 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.

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[429] 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.

[430] Palagashvili et al., *supra* n.376. 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.

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 the workforce as independent contractors, with half being full-time and half being part-time independent contractors.[431] Using the above hourly wage estimate of $24.85 for full-time independent contractors 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 will have the opportunity to earn $51,690 per year. Using the median wage estimate of $415.17 weekly for part-time independent contractors and assuming they work year-round,[432][433] the Department estimates that each new part-time independent contractor will have the opportunity to earn $21,589 per year. Earnings are 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) estimates such net value to range from 10 to 19 percent of earnings. [434] Based on this finding, the Department assigns a midpoint value of 14.5 percent to total earnings to quantify the social benefit derived from increased earnings. Assuming that the

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[431] Based on the 2023 Contingent Worker Supplement (CWS), the Department's estimate of an even distribution of full-time and part-time workers 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.381. 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.378.

[432] The median weekly earnings for part-time workers in the 2023 CWS is $400. The listed wage reflects which is the median weekly wage rate for part-time independent contractors updated to 2025 dollars using the gross domestic product (GDP) deflator.

[433] 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 ($415.17 per week × 52 weeks = $21,589). *See Contingent and Alternative Employment Arrangements - July 2023*, *supra* n.381.

[434] The estimates cited here are drawn from Timothy J. Bartik, "Social Benefits from Job Creation Much Higher in High-Unemployment Local Economies," *Investing in Kids* (July 17, 2015), available at Investing in Kids blog post, https://investinginkids.net/2015/07/17/social-benefits-from-job-creation-much-higher-in-high-unemployment-local-economies/. The blog post summarizes results from Bartik's article, "The Social Value of Job Loss and Its Effect on the Costs of U.S. Environmental Regulations," *Review of Environmental Economics and Policy* (2015)
Timothy J. Bartik, *The Social Value of Job Loss and Its Effect on the Costs of U.S. Environmental Regulations*, 9 Rev. Environmental Econ. & Pol'y 179 (2015).

number of independent contractors increases by the central estimate of 2 percent, this results in estimated additional undiscounted total earnings of approximately $131.7 billion. Applying the 14.5 percent estimate of societal value to this finding yields a societal benefit attributable to those additional undiscounted earnings of $26.3 billion (for 496,000 new entries evenly split between full-time and part-time workers) over 10 years or an annualized increase of $2.63 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 $2.19 billion annually.[435]

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.[436] The Department, however, does not quantify the economic value of additional flexibility (except insofar as it is embedded in the worker surplus quantification above).

4. Consumer Surplus

The Department anticipates that this rule will produce benefits by reducing uncertainty and improving labor market conditions. Removing uncertainty improves labor market efficiency by reducing deadweight loss. As discussed in section III ("Need for Rulemaking") of this rule, the Department believes emerging and innovative economic arrangements that benefit both workers and business require reasonable certainty regarding the worker's classification as an employee or independent contractor. Legal uncertainty may deter businesses from offering independent contractor arrangements or developing them in the first place.[437] If so, the result

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[435] The source for the 17 percent input is https://aspe.hhs.gov/sites/default/files/documents/639756a60fbe7e51786bcec176ad52f1/Standard-RIA-Values-2025.pdf.

[436] Chen et al., *supra* n.374, at 2769.

[437] *See* Griffin Toronjo Pivateau, *The Prism of Entrepreneurship: Creating A New Lens for Worker Classification,* 70 Baylor L. Rev. 595, 628 (2018) ("The continued demand for

would be economic deadweight loss: legal uncertainty prevents mutually beneficial independent contractor arrangements. This rule may produce cost savings by reducing deadweight loss. Nonetheless, due to the abundance of variables at play, the Department has not attempted to quantify the precise amount of that reduction.

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.[438] 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.

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.

Some commenters agreed that expanding independent contracting can lead to employment gains. For example, Americans for Tax Reform cited the results of their 2020 survey that indicated that 72 percent of application-based ridesharing and delivery drivers in California supported California Proposition 22, which provided application-based transportation and delivery companies an exception to AB 5 by classifying their drivers as independent

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innovative work solutions requires a new classification test. Without clarification, parties will be unwilling to engage in new or innovative work arrangements."); *see also* R. Hollrah and P. Hollrah, *The Time Has Come for Congress to Finish Its Work on Harmonizing the Definition of "Employee"*, 26 J. L. & Pol'y 439 (2018), https://brooklynworks.brooklaw.edu/jlp/vol26/iss2/1/.

[438]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.

contractors, rather than employees, while providing certain benefits for the drivers.[439] According to Americans for Tax Reform, these exemptions serve to encourage increased labor market participation by affording workers with increased flexibility. Americans for Tax Reform also reported that "[n]ine in ten drivers said they started driving so that they could have the flexibility of when and where to work, and 68 percent said they would have to stop their work if the state tried to force them into fixed employment arrangements."

Flex Association agreed with the Department's position and noted that 88% of workers with children stated that the flexibility of application-based work makes it easier to balance family and work responsibilities. According to its internal estimates, this flexibility is "estimated to be worth $11 billion to these workers each year," with this work bringing them "an additional $5.1 billion a year in higher income compared to their next best alternative." Flex Association added that independent contractors have benefitted from the flexibility and entrepreneurial opportunity afforded by platform-based work.

F. Potential Transfer Effects

The substantive effect of the final 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 the added clarity of this final rule could lead to an increase in the number of independent contractor arrangements. The Department expects that most of this increase would be attributable to the creation of independent contractor opportunities involving workers who were not previously in the workforce (i.e., increased labor force entry) rather than the reclassification of employees into independent contractors. For example, as explained above, Palagashvili, et al. did not find that AB 5 resulted in a significant increase in traditional employment, suggesting that few independent contractors switched to

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[439] Isabelle Morales, *Survey: App-Based Drivers Want to Maintain Independent Contractor Status*, Americans for Tax Reform (Aug. 7, 2020), https://atr.org/survey-app-based-drivers-want-maintain-independent-contractor-status/.

traditional employment as a result of California's law.[440] The implication is that reclassification due to this final rule would likewise remain small, especially since the Department is not changing the underlying legal standard (i.e., economic reality and economic dependence) but is instead merely clarifying the analysis.

Nonetheless, the Department believes that some reclassification may occur involving workers who are functionally in business for themselves but are currently being (or would be) classified as employees due to legal uncertainty that this rule dispels. To the extent that job conversion costs and other factors such as employee bargaining power deter businesses from reclassifying existing employment relationships, businesses might be more likely to prospectively alter the classification of future work arrangements, suggesting that this "reclassification" effect might be blunted in the short term.

Assuming that this rule alters the classification of some individuals who would otherwise be classified as employees, potential transfers may result from differences in employer-provided benefits, tax liabilities, and earnings between employees and independent contractors. Although affected individuals could experience a decrease in employer-provided benefits and an increase in tax liabilities, 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).[441] Overall, the Department believes the net impact on total compensation should be small in either direction.

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[440] Palagashvili et al., *supra* n.376.

[441] *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

1. Employer Provided Benefits

To the extent that employers currently provide employees benefits such as health insurance, retirement contributions, and paid time off, these would likely decrease with an increase in the use of independent contractors because independent contractors generally do not receive these benefits directly (although independent contractors are able to purchase at least some of these benefits for themselves, and portable benefits are becoming more available). Employer-provided benefits are often a significant share of workers' compensation. According to the BLS's Employer Costs for Employee Compensation (ECEC), the value of employer benefits that directly benefit employees average 21 percent of total compensation.[442] The Department notes that this 21 percent figure is for employees at the 50th (median) wage percentile and may not be representative of the subset of employees whose classification may be impacted by this rule. Since the 21 percent figure includes paid leave (6.9 percentage points) and retirement benefits (3.8 percentage points), and workers may value these benefits at very different levels, applying these elements does not seem reasonable in the context of this analysis.

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

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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).

[442] U.S. Bureau of Labor Statistics, *Employer Costs for Employee Compensation – March 2026* (June 12, 2026), https://www.bls.gov/news.release/ecec.nr0.htm. For Civilian Workers, this includes paid leave ($2.56), insurance ($3.81), and retirement and savings benefits ($1.39). It does not include overtime and premium pay, shift differential pay, nonproduction bonuses, or legally required benefits. Calculated as ($2.56 + $3.81 + $1.39)/$37.01.

benefits may be offset by increased base pay to attract workers because workers consider the full package of pay and benefits when accepting a job.

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

- 74.2 percent of independent contractors have health insurance.
- 84.3 percent of employees have health insurance. Most of these workers receive health insurance through their work (54.4 percent).

Multiple commenters stated that workers newly classified as independent contractors will lose eligibility for unemployment insurance and are less likely to receive employer-provided benefits such as health insurance and retirement benefits, as well as losing their job-protected leave under the FMLA. NELP cited government data indicating that "independent contractors are more likely than employees to be uninsured and to rely on Medicaid."

NABTU separately asserted that classification as an independent contractor "strips [workers] of job protections and access to society's safety nets," including not only FLSA wage protections but access to unemployment insurance, workers' compensation, and OSHA coverage, and that "these changes in coverage come at a huge cost" particularly in construction given the industry's "high rates of illnesses and injuries," as well as "opioid deaths and suicides." NABTU further stated that "making it easier for employers to treat part of their workforce as independent contractors can also have a negative impact on the remaining employees, since they stand to lose various workplace protections if their numbers fall below the coverage thresholds" under statutes such as Title VII, the ADA, and the FMLA.

As discussed in section VI.D.2., the Department believes that in a competitive labor market, reduced benefits are generally offset, at least in part (especially once post-intervention equilibrium has been reached), by higher gross earnings for independent contractors, though the Department acknowledges this offset may not be complete for all workers or in all sectors. Regarding NABTU's point about coverage thresholds, the Department notes that this is a function of the referenced statutes' own employee-count thresholds rather than of this rule,

which does not alter those thresholds or who is an employee under those statutes; the Department nonetheless acknowledges the point as a potential indirect effect worth noting qualitatively.

As explained earlier, the Department estimates a 1 to 3 percent increase in the total number of independent contractors as a result of this rule. The Department assumes that this 1 to 3 percent increase will come almost entirely from people who were otherwise not engaging in paid work and are entering the workforce as independent contractors, as this rule provides an analysis for assessing employee or independent contractor status which is clearer but not more permissive than the analysis applied under longstanding judicial precedent and the Department's pre-2021 guidance. This implies that: (1) most employees who receive the benefits listed above would remain employees and continue to receive those benefits; and (2) most of the workers who are newly independent contractors would not be receiving employer provided benefits in the absence of this rule.

2. Tax Liability

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.[443] For example, the social security component of payroll taxes are split evenly between employers and employees at a rate of 6.2 percent each.[444] Similarly, Medicare tax is paid at a rate of 1.45 percent each for employees and employers.[445] Independent contractors are classified as self-employed workers, and are legally obligated to pay both the employee and employer share of these taxes, an additional 7.65 percent of their earnings. Thus, if workers' classifications change from employees to independent contractors, there may be a transfer in federal tax liabilities from employers to workers.

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[443] Generally, economic models indicate that payroll taxes heavily impact hiring, wages, and business growth, and that regardless of liability, the economic burden of payroll taxes fall primarily on employees. *See* Audrey Guo, *Payroll Tax Incidence: Evidence from Unemployment Insurance* (U.S. Census Bureau, CES 24-35, June 2024), https://www2.census.gov/library/working-papers/2024/adrm/ces/CES-WP-24-35.pdf.

[444] The social security tax has a wage base limit of $184,500 in 2026.

[445] There is no wage base limit for Medicare Tax.

Some commenters were concerned that workers newly classified as independent contractors would assume the full financial cost of Social Security and Medicare contributions rather than sharing that cost burden with their employers. For example, National Urban League stated that "the unnecessary economic burden on workers, who are often responsible for costs such as individual health insurance and the full cost of Social Security and Medicare contributions rather than sharing them with an employer, creates broader economic harm." AFL-CIO expressed concern that widespread worker misclassification under this rule could result in the full burden of social insurance contributions being shifted onto workers while overall system contributions decline, externalizing costs onto workers and the public. As explained elsewhere, the Department disagrees that this rule will result in any wide-scale misclassification or reclassification of workers, and that instances of worker reclassification which do occur would involve individuals who are economically independent. Additionally, the Department expects that any tax-related transfers from employers to workers would likely be offset by higher wages employers pay independent contractors. Employers will not pay payroll taxes for work transferred to workers classified as independent contractors and market forces could compel them to pass the full wage (wage + payroll tax) to the independent contractors.

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

contractors' take-home compensation. However, there are costs to independent contractors if they are out of work or injured or ill on the job because they no longer are protected, unless they purchase their own private insurance. Many of these impacts will depend on the individual risk tolerances of the workers. It is likely that workers who are more comfortable taking risks will be attracted to the potentially higher take-home compensation of independent contractor status, while workers who are risk averse will likely prefer the predictability of traditional employee relationships. It is uncertain how the universe of workers is dispersed, beyond theoretical generalizations. It is further unclear how workers' risk preferences will be distributed across the market for insurance products.

3. Earnings

Potential transfers could also occur through changes to earnings as a result of an increase in independent contracting. These transfers could occur if workers who were employees experience a change in earnings by becoming independent contractors, or if workers who are out of the labor market enter as independent contractors. Although the minimum wage and overtime pay requirements of the FLSA would no longer apply to workers who shift from employee status to independent contractor status, as discussed below, this does not sufficiently explain the potential transfers that could occur as a result of such a shift. As discussed above in section VI.E.3, the Department anticipates an increase in labor force activity, and that each new full-time worker will have the opportunity to earn $51,690 annually.

Several commenters stated that the proposed rule did not take into account the possibility that the proposal would spur widespread job reclassification which would lead to a decrease in wages for reclassified workers. CLASP cited an Economic Policy Institute study showing that "the earnings of independent contractors in poorly-paid occupations lag behind their employee counterparts."[446] National Domestic Workers Alliance also commented that independent

[446] John Schmitt et al., *The Economic Costs of Worker Misclassification*, Economic Policy Institute (Jan. 25, 2023), https://www.epi.org/publication/cost-of-misclassification/.

contractors in low-paid occupations make less than employees, stating: "Misclassification has real-world consequences… [S]ome of these so-called independent contractors do not even earn the federal minimum wage." UBC suggested that "the Proposed Rule fails to address the downward pressure on wages and working conditions that the growing use of dubious independent contractor arrangements is causing in the construction industry."

Coalition of State Officials challenged the Department's "earnings offset" assumption directly, asserting that the Department's statement that "independent contractors ... tend to receive higher gross earnings than employees" is unsupported and "contradicts up-to-date findings that independent contractors often earn less than they would have earned if classified as employees." GFI raised a related concern, citing Economic Policy Institute survey data indicating that "14 percent of gig workers earned less than the federal minimum wage and 29 percent earned less than the applicable state minimum wage," and that gig workers use the Supplemental Nutrition Assistance Program (SNAP) at roughly "twice the rate of employee-designated service sector workers," further citing survey findings that "one in five gig workers could not afford enough to eat and 31 percent could not afford to pay the full amount of their utility bills in the month prior to the survey."[447] National Women's Law Center similarly challenged the Department's earnings-offset assumption, citing a study of New York's personal services sector showing that "minimum wage increases helped to raise inflation-adjusted annual earnings of employees by 24.5 percent between 2013 and 2018, compared to *a decline* in earnings of 3.9 percent for independent contractors in the sector."

If currently unemployed workers or individuals who are out of the labor market enter the market as independent contractors due to this rule, their earnings will increase as they currently have no work-related earnings other than possibly unemployment benefits. The impact on earnings is more ambiguous if employees' classifications change to independent contractors. In

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[447] Ben Zipperer et al., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, Economic Policy Institute (Jun. 1, 2022), https://www.epi.org/publication/gig-worker-survey/.

theory, because independent contractors likely prefer to have at least similar levels of total compensation as they would earn if they were employees, companies would likely have to pay more per hour to independent contractors than to employees because independent contractors generally do not receive company-provided benefits and have higher tax liabilities. Data shows an hourly wage premium for independent contractors when comparing unadjusted mean averages. But as the analysis below illustrates, when controlling for certain differences in worker characteristics, this expected wage premium may not always be observable at a statistically significant level. It should be noted, however, that these estimates do not attempt to incorporate the value of flexibility and satisfaction that many independent contractors cite as key factors in their preference of independent contracting arrangements over being employees.

Furthermore, 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.[448] By contrast, some sources warn employers that classifying a worker as an employee can cost between 25 and 40 percent more in hourly terms.[449] 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

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[448] *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.

[449] *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.

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 CWS data upon which the Upjohn study relied.

The Department acknowledges that the studies commenters cite for a countervailing earnings effect largely examine gig or platform-based workers, or workers in specific sectors such as New York personal services, populations that may not be representative of the broader independent contractor population from which the Upjohn Institute and Katz and Krueger regression estimates above are drawn. The Department's central estimate is based on economy-wide CWS data controlling for observable worker characteristics, rather than sector-specific survey data; the Department believes this remains the most appropriate basis for an economy-wide analysis but acknowledges that earnings effects may vary meaningfully by industry and that low-wage sectors with high concentrations of independent contractors could see different outcomes than the economy-wide average suggests.

4. Misclassification

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

AFSCME and Allegheny County et al. each submitted detailed data on the prevalence of misclassification. For example, AFSCME described a NELP review of state-level task force and audit findings estimating that "10% to 30% of employers (or more) misclassify at least some of their employees as independent contractors," and a 2000 Department-commissioned study finding that "9% to 42% of employers audited by State Unemployment Insurance Departments

misclassified employees as independent contractors with the vast majority of contested claims in some states (up to 95% in some cases) resulting in reclassification of independent contractors as employees." Allegheny County et al. similarly cited data indicating that "widespread occupational segregation means that workers of color are overrepresented in industries that are especially susceptible to increased misclassification, including construction, trucking, transportation, janitorial services, home care, retail, delivery services, and appl-based work" — and that Black and Latino workers are "already segregated into underpaid jobs" — such that "increased misclassification" would "exacerbate … racial income and wealth inequality." Legal Aid at Work likewise commented that the effects of increased misclassification "will disproportionately harm workers of color who predominate low-paying jobs where misclassification rates are more common."

The Department has addressed the evidentiary basis for its labor-force-entry assumption at length in section VI.E.3. The Department agrees that misclassification under the applicable legal standard is a proper subject of enforcement and notes that this rule's clarifying purpose is intended to reduce the ambiguity that itself can contribute to inadvertent misclassification. Regarding the misclassification-rate estimates that AFSCME and Allegheny County et al. cite, the Department notes, as it has elsewhere in this analysis, that these figures describe the baseline prevalence of misclassification under existing law rather than a rate attributable to this rule, which does not alter the underlying economic reality test but instead merely clarifies how it should be applied. The Department has not identified data that is attributable to ambiguity in the legal standard that this rule is intended to clarify, as opposed to unlawful conduct that occurs irrespective of the standard's clarity. The Department believes that the enhanced clarity provided by this rule will support the Department's ability to prioritize its enforcement in this area.

5. Job Reclassification

The comments discussed in section VI.D.2 regarding construction industry misclassification and firms' interest in retaining independent contractors are also relevant to

potential earnings and job-conversion transfers. GFI commented that the Department's discussion of potential reclassification effects fails to adequately weigh the reliance interests of workers who would lose employee status, citing an Economic Policy Institute estimate that a construction worker reclassified from employee to independent contractor could lose as much as $20,399 annually in income and benefits, and that a truck driver could lose up to $23,266, relative to what each would have earned as an employee. GFI further cited the same Economic Policy Institute estimate discussed above in section VI.D.2.a that state and local social insurance systems can lose up to approximately 30 percent of per-worker revenue as a result of misclassification, and stated that this revenue loss compounds the harm to reclassified workers by weakening the social insurance systems on which they might otherwise rely.

The Department has weighed these comments alongside the labor-force-entry evidence discussed in section VI.E.3 and continues to believe the rule's net job-conversion effects would be limited. With respect to GFI's reliance-interest figures specifically, the Department notes that the cited per-worker loss estimates describe the difference between employee and independent contractor compensation generally, rather than an estimate of losses specific to workers who would be reclassified as a result of this particular rule; as discussed in section VI.B above. The Department's central estimate is that reclassification of existing employees attributable to this rule would be minimal, with most growth in independent contracting instead reflecting new labor force entry. To the extent some reclassification does occur, the Department acknowledges that affected individual workers could experience the kind of compensation effects GFI describes, and the Department does not dispute that such effects would be serious for an affected worker.

Additionally as mentioned previously in section VI.B, the Department's position is that businesses would be expected to reclassify workers currently classified as employees into independent contractors only if they determine that the clarity provided by this rule materially shifts the balance of tradeoffs, including legal risk, or to correct a prior classification of a worker's employment status that was mistaken or unnecessary.

G. Alternatives Considered

The Department considered three alternatives to the analysis adopted in this rule, listed below from least to most restrictive of independent contracting:[450]

(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 pre-2021 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 and 2024 rules.[451] 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 it might be helpful in providing greater context on the merits of legislative proposals in Congress.[452]

1. Adopting a Common Law Control Test

The least restrictive (of independent contracting) alternative considered to this 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.[453] The overarching focus of the common

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[450] 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.

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

[452] OMB Circular A-4 advises that agencies should "discuss the statutory requirements that affect the selection of regulatory approach. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act."

[453] *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

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 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

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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).

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 Congress passes legislation that alters the applicable analysis under the FLSA.

Commenters disagreed on the policy merits of a common law control test. For example, PayrollOrg expressed concern about "the conflicting definitions of employee and independent contractor between the WHD's proposed rule and the common law definition used by the Internal Revenue Service (IRS)," asserting that the application of different tests will confuse employers and could yield different results for the same individuals. Similarly, while expressing support for the Department's proposed analysis, FedEx remarked that "the optimal solution is federal legislation that establishes a simple, reliable, and objective test for employment status, replacing amorphous, multi-factor tests based on economic dependence." By contrast, AFSCME asserted that the Congress that enacted the FLSA believed that "[t]o effectively regulate both the

longstanding evil of child labor as well as substandard conditions in modern homework, a much broader definition of employment would be required than the narrow common-law test." *See also* Allegheny County et al. ("By design, the FLSA covers work relationships that exceed the traditional common-law definition of employment—instead including the broad concepts of 'suffering' or 'permitting' someone to work.").

Whatever their views on the merits of a common law control test, almost all of the commenters who addressed the alternative agreed with the Department's determination that controlling Supreme Court precedent forecloses its application in FLSA cases. For example, speculating that "[i]t may well be that on a blank slate the best reading of the FLSA's definition 'employee' … transplants the common law control test from agency law from that old soil to new," Americans for Prosperity Foundation observed that the Department "is not writing on a blank slate," concluding that "[t]o minimize litigation risk and maximize the benefits to worker flexibility and innovation, the safest course is the synthesis of existing precedent under the 'economic reality' framework DOL has proposed[.]" *See also* Washington Legal Foundation ("The [Department] can't jettison the caselaw requiring a multifactor standard—and it hasn't."). The Department appreciates that commenters understand the external constraints on its interpretive authority and emphasizes that this rule adopts an analysis which is meaningfully different than the common law control test.

2. Adopting WHD's Pre-2021 Enforcement Policy

On May 1, 2025, WHD issued Field Assistance Bulletin (FAB) No. 2025-1,[454] 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 instructed 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. Because Opinion Letter FLSA2025-2 reinstated an opinion letter that was rescinded in early 2021, FAB 2025-1

[454] https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-1.pdf.

effectively instructed WHD to enforce its pre-2021 interpretive guidance on FLSA independent contractor or employee status. In relevant part, Opinion Letter FLSA2025-2 applied 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 the multifactor balancing test reflected in Fact Sheet #13 (July 2008) and Opinion Letter FLSA2025-2 is neither materially more nor less permissive of independent contractor relationships as compared to the streamlined, core factors analysis adopted in this rule.[455] Both tests describe the "economic dependence" of the worker at issue as the essential inquiry; both emphasize 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 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."[456] In other words, this alternative would not provide specific guidance on how to weigh the factors when applying the multifactor economic reality analysis and would leave 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 adopting its pre-2021 enforcement policy on independent contractor or employee status.

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[455] *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).
[456] *See* WHD Op. Ltr. FLSA2025-2 at 5.

No commenters specifically addressed the regulatory alternative of replacing the 2024 Rule with the analysis that the Department applied before 2021.[457] Noting that the Department had already stopped applying the 2024 Rule in its enforcement actions after FAB 2025-1, Flex Association asserted that the proposed rule "therefore codifies the Department's existing interpretive baseline, rather than imposing a disruptive change." The Department agrees that the analysis adopted in this rule is not a "disruptive change" from its pre-2021 analysis, but notes that there are some meaningful differences. For example, unlike the 2008 version of Fact Sheet #13 or Opinion Letter FLSA2025-2, the analysis adopted in this rule: (1) identifies "control" and "opportunity for profit or loss" as core factors; (2) consolidates "investment" as a consideration within the "opportunity for profit or loss" factor; and (3) advises that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible. As explained in thorough detail in section IV of this rule, these features are refinements to the Department's pre-2021 analysis which the Department believes will bring added clarity and consistency.

3. Adopting an "ABC" Test

The third and most restrictive (of independent contracting) regulatory alternative considered would be to adopt an "ABC" test like the ones enacted in a number of states to distinguish between employee and independent contractor status.[458] Generally, an ABC test presumes an individual is an employee unless the potential employer can satisfy all three requirements to classify the individual as an independent contractor. The three requirements of

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[457] Many commenters expressing support for the 2024 Rule asserted that it was consistent with the analysis that courts and the Department applied for decades before the 2021 Rule. *See, e.g.*, IBT; National Partnership for Women & Families et al.; SEIU. However, as discussed in section III.B. of this rule, the 2024 Rule's description of certain economic reality factors departed in meaningful ways from how the Department has traditionally applied the economic reality test.

[458] *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).

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.[459]

On its face, an ABC test is more restrictive of independent contracting arrangements than any formulation of an "economic reality" test. 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 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 cannot adopt

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[459] 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).

an ABC test unless the Supreme Court revisits its precedent or Congress passes legislation that alters the applicable analysis under the FLSA.

Some labor unions and worker advocacy organizations expressed support for the adoption of an ABC test. *See* NABTU (asserting that the ABC test "protects workers by making it harder for employers to misclassify and offload their responsibilities"); National Domestic Workers Alliance (asserting that a California-style ABC test would be "best suited to address the unique working conditions of domestic workers and other low-pay industries"); SMART and SMACNA ("A clear and concise statement of worker classification through a presumption of employee status in [a construction] industry rife with worker misclassification would both reduce compliance costs borne by employers and ensure that workers receive the FLSA protections to which they are entitled."). However, the majority of commenters addressing the ABC test were highly critical of it, asserting that its analysis to permit independent contractor arrangements is too rigid and difficult to satisfy. For example, Wisconsin Institute for Liberty commented that "when California implemented the ABC test … businesses immediately terminated their contracts with freelancers across industries" and "ride-share companies like Uber and Lyft questioned whether they could continue to operate in the state." *See also* Truckers Integral to Our Economy ("AB5 swept in approximately 70,000 owner-operators operating in California who had not sought reclassification, who did not want it, and whose actual working relationships reflected genuine independence under any honest application of the economic reality test."). Researcher Liya Palagashvili commented that "ABC test adoption reduced traditional W-2 employment by 4.73 percent, self-employment by 6.43 percent, and overall employment by 4.79 percent."[460] *See also* Flex Association (citing Dr. Palagashvili's research); Littler WPI (same). Several commenters noted that the California legislature subsequently enacted numerous

[460] Liya Palagashvili et al., "ABC Tests and Labor Market Outcomes," (Mercatus Working Paper, forthcoming 2025); Liya Palagashvili & Revana Sharfuddin, "New Study: From Gig to Gone? ABC Tests and the Case of the Missing Workers," Labor Market Matters (Jan. 10, 2025), https://www.labormarketmatters.com/p/new-study-from-gig-to-gone-abc-tests.

occupation-specific exemptions to its ABC test,[461] which they characterized as evidence that the test is not an appropriate or administrable standard. *See* Institute for the American Worker; Manhattan Institute for Policy Research; TechNet; The Transportation Alliance. Finally, CWI and U.S. Chamber of Commerce noted that Supreme Court precedent forecloses the adoption of an ABC test to assess independent contractor status under the FLSA, while a diverse array of commenters emphasized that "no single factor" can determine employee or independent contractor status under the FLSA. *See, e.g.*, Coalition of State Officials; Competitive Enterprise Institute; National Retail Federation; Southern Poverty Law Center.

Having considered the comments, the Department continues to believe that an ABC test would be inconsistent with Supreme Court and federal appellate precedent interpreting and applying the FLSA. As noted above, the Supreme Court has repeatedly explained that "economic reality" is the applicable standard for determining whether a worker is an employee or not under the FLSA. Specific to the distinction between employees and independent contractors, the Supreme Court has explained that "[n]o one [factor] is controlling" of the outcome,[462] but instead it turns upon "the circumstances of the whole activity."[463] Because each of the ABC test's three factors could alone disqualify a worker from independent contractor status, the test would contravene binding Supreme Court precedent. However, even if the ABC test were only a balancing test (instead of a three-pronged checklist), it would still be inappropriate as a regulatory alternative because of its presumption of employee status. As the Department explained in the 2024 Rule, a rebuttable presumption of employee status "would not be consistent with Supreme Court precedent and federal appellate case law interpreting and applying that precedent[.]"[464]

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[461] *See* 86 FR 1242–43.
[462] *Silk*, 331 U.S. at 716.
[463] *Rutherford Food*, 331 U.S. at 730; *see also Bartels*, 332 U.S. at 130 ("It is the total situation that controls.").
[464] 89 FR 1662.

VII. Final Regulatory Flexibility Act Analysis (FRFA)

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.

This final rule: (1) rescinds a 2024 rule addressing employee or independent contractor status under the FLSA that was published on January 10, 2024; (2) replaces the 2024 Rule with a streamlined analysis very similar to what the Department previously adopted in a 2021 rule published on January 7, 2021; and (3) amends the Department's FMLA and MSPA regulations to clarify that the analysis used to determine employee or independent contractor status under the FLSA should be applied to make that determination under the FMLA and MSPA, which both incorporate the FLSA's scope of employment. By rescinding the 2024 Rule and replacing it with regulations that provide greater clarity and predictable outcomes, the Department believes this rule will likely improve the welfare of both workers and businesses on the whole, including those who wish to work as independent contractors.

Although this rule is not expected to have a significant economic impact on a substantial number of small entities, the Department provided an Initial Regulatory Flexibility Analysis (IRFA) in the NPRM to explain that determination.[465] In this FRFA, the Department updates the analysis that it provided in the IRFA and responds to commenter feedback on this rule's potential impact on small entities.

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[465] *See* 91 FR 9970–72.

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

As explained more fully in section III of this rule, the Department is concerned that the 2024 Rule failed to provide an analysis for distinguishing between independent contractors and employees under the FLSA that was sufficiently clear and led 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 rescinding the 2024 Rule and largely readopting the 2021 Rule,[466] which provided a sharpened economic reality analysis and did not impede successful enforcement actions by the Department to pursue and remedy misclassification of FLSA-covered employees as independent contractors.[467] Additionally, the Department is revising the regulations addressing employee or independent contractor status under MSPA and the FMLA so that the analysis in part 795 will apply 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; *Fabri-Centers of Am.,* 308 F.3d at 592–93 & n.8 (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);

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[466] As explained in section IV, the Department is finalizing this rule with certain modifications and enhancements to the 2021 Rule's FLSA guidance, including additional explanatory text in § 795.105(b), § 795.105(d)(i) and (d)(ii), and one non-substantive edit to § 795.105(d)(2)(iii), as well as modifications to three of the illustrative examples and the addition of eight new illustrative examples in § 795.115.

[467] *See supra*, nn.170 & 175 and their accompanying text.

Browning-Ferris, 207 F.3d at 267 ("By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret."); *Sysco Corp.,* 1 F.3d at 603 (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. Significant Issues Raised in Public Comments, Including by the Small Business Administration (SBA) Office of Advocacy

Numerous self-identified independent contractors, small businesses, and organizations representing independent contractors or small businesses submitted substantive comments in support of the NPRM. National Association of Insurance and Financial Advisors commented that the 2024 Rule's guidance "increased the tendency to misclassify independent insurance agents and financial advisors as employees rather than contractors – resulting in significant financial exposure, penalties and fines to independent insurance professionals and small business owners." National Association of Small Trucking Companies commented that this rule's "analysis of economic dependence/independence and the economic reality of a given situation effectively illustrates and substantiates the economic reality of most independent contractors."

Several commenters applauded the rule's efforts to clarify worker classification standards. NFIB expressed support for the rule, commenting that the Department's "proposed rule on independent contractor classification … would make worker classification more straightforward, predictable, and easier for employers, and in particular, small businesses." National Small Business Association also conveyed support for the rule in its comment, praising the "effort to establish a clearer, more administrable standard for worker classification grounded in economic reality and actual workplace practice." Small Business & Entrepreneurship Council shared similar support for the rule commenting that it "appropriately restores clarity and balance by returning to a framework grounded in long-standing judicial precedent while recognizing the realities of modern commerce and work." U.S. Hispanic Business Council also expressed support for the rule, alleging that the 2024 Rule was "overly-broad and complex."

The Department also received comments in support of the rule from self-identified independent contractors. Brittany VanDerBill supported the rule's effort not to restrict independent contractors who own and operate their own businesses, particularly lauding that the rule "offers a simplified, more objective way to determine who is a legitimate independent contractor." In her comment, Christine Byrne stated that "one of the most important components of this proposal is its emphasis on the core factors of control and opportunity for profit or loss. These factors accurately capture the reality of my work and provide a clear, understandable framework for determining that I indeed am an independent contractor." Connie Kirkpatrick commented that the 2024 Rule failed to provide effective guidance on how the different factors should apply together, which led to ambiguity that was compounded at the state-level. This commenter also asserted that the 2024 Rule created compliance costs, legal risk, and the loss of independent contractor opportunities due to uncertainty.

Several commenters asserted that small businesses would reap unique or disproportionate benefits from this rule. For example, many commenters emphasized that independent contractors are small businesses, while other commenters asserted that start-ups and small businesses are more likely to rely on independent contractors to meet their needs than larger businesses. For example, CPAC Foundation Center for Regulatory Freedom commented that "[s]mall businesses are especially vulnerable to the effects of regulatory ambiguity" and may have limited access to legal resources compared to larger organizations. In its comment expressing support for the rule, Institute for the American Worker noted that the Department's estimated cost savings due to legal clarity will primarily benefit small businesses and independent contractors, "who bear the greatest burden of regulatory uncertainty." Trevar Kolodny commented that "[t]his articulated, national standard could be especially helpful for small businesses, and self-employed contractors, who frequently do not have the resources to hire sophisticated counsel, or the institutional experience to understand when independent contract work turns into an employment relationship." Center for Practical Federalism commented that the proposed rule "helps mitigate

the risk of regulatory capture, where large, established firms are better positioned to navigate complex rules than smaller competitors." Similarly, FSI contended that risk-averse companies, which typically include small businesses, may shy away from entering nontraditional work arrangements due to an inability to afford compliance advice and litigation fees, "whereas large corporations will continue to innovate and reap considerable profits when successful, possibly driving their smaller competitors out of the market." From these commenters' perspective, this rule helps level the playing field between large and small businesses. Finally, invoking the RFA, National Association of Convenience Stores et al. asserted that "the 2024 Rule imposed substantial and disproportionate costs on small entities," elaborating that "the restored framework mitigates those costs … [so] any subsequent reversal would need to confront that record directly."

In its comment, SBA Office of Advocacy identified the 2024 Rule as among its "Most Wanted … rules for rescission, withdrawal, or modification to reduce the regulatory burden on small businesses." Asserting that "[m]illions of small businesses and independent contractors rely on the independent worker classification," Advocacy relayed that small businesses felt that the 2024 Rule was "too confusing, because they could not be certain if they were classifying their independent contractors correctly." By contrast, Advocacy commented that "the proposed rule simplifies and clarifies the independent contractor definition," using data provided in the IRFA to estimate that the proposed rule would save $2.0 billion in present value for small employers and independent contractors combined over the next 10 years when using a 7% discount rate, or $282 million per year. Advocacy relayed that small business stakeholders were particularly supportive of the proposal that "[r]equiring [an] individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses" does not constitute control that makes the individual more or less likely to be an employee under the FLSA, noting that many independent

contractors operate in highly regulated industries. The Department appreciates the SBA Office of Advocacy's comment, which reinforces many of the policy considerations motivating this rulemaking.[468]

Some commenters—including several truck drivers and digital platform workers—were neutral or generally supportive of the NPRM but requested that the Department address certain business practices they believe to be coercive or exploitative.[469] For example, several individual commenters objected that platform companies use acceptance rate metrics to compel gig workers to accept unprofitable assignments, while OOIDA requested that the Department "protect truckers by … address[ing] lease-purchase agreements [between truckers and motor carriers] in a final rule," which OOIDA characterized as a "blatant example of misclassification" which resembles "indentured servitude." *See also* SBA Office of Advocacy (reporting that multiple participants at a small business roundtable on the NPRM requested "final regulations or guidance [to] address fraud or abuse in lease-purchase programs, employer-driven debt and tuition repayment arrangements for new entrants, and exploitation of immigrant, women, and vulnerable drivers"). In response to these and other comments, the Department has added two pairs of illustrative examples to the final rule addressing facts germane to digital platform workers and lease-purchase agreements in the trucking industry.[470]

Two labor union commenters, AFL-CIO and IBT, asserted that the proposed rule could harm small businesses. IBT commented that "[l]arge corporations that misclassify their workers can underbid their smaller competitors, creating a race to the bottom where jobs do not pay living wages and smaller companies are compelled to also skirt payroll and unemployment insurance taxes that workers and public coffers rely on." Describing this race to the bottom as

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[468] The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by the SBA Office of Advocacy. Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).
[469] *See* section II.H. (describing comments).
[470] The regulatory text for these new examples appears at § 795.115(b)(2)-(3) (addressing digital platform workers) and § 795.115(b)(8)-(9) (addressing truck drivers subject to a lease-purchase agreement). *See also* sections IV.F.1. & 2 (explaining the new examples).

"the documented reality in trucking, logistics, construction, and warehouse industries where the Teamsters' members compete every day against misclassifying employers," IBT objected that this rule "would provide those companies with a legal framework that validates rather than scrutinizes these arrangements." Similarly, AFL-CIO asserted that the IRFA "fail[ed] to account for the [proposed rule's] competitive effects on small, law-abiding businesses," which would continue to "incur significant costs associated with wage-and-hour compliance, payroll taxes, unemployment insurance contributions, and workers' compensation coverage" that may no longer apply to competitors which might be empowered to "classify similar workers as independent contractors under a more permissive standard."

The Department acknowledges the economic harm experienced by law-abiding employers when competing businesses misclassify employees as independent contractors. However, the Department disagrees that this rule will increase misclassification, as this rule does not establish a "more permissive standard" for independent contracting compared to longstanding judicial precedent and the Department's guidance before 2021.[471] To the extent that a clearer analysis (because a worker's correct status under the law will be more apparent) makes it easier as a practical matter for businesses to engage with independent contractors, every small entity will have the opportunity to reconsider whether its workforce is optimally structured. Whether any entity (regardless of size) chooses to employ workers, engage independent contractors, or do both is an operational choice which is beyond the Department's authority to regulate. While the FLSA was passed in part to prevent "*unfair* method[s] of competition in commerce,"[472] it was "obviously not intended to stamp all persons as employees,"[473] including independent contractors in business for themselves.

AFL-CIO had two other criticisms of Department's IRFA, which, in its view, rendered the IRFA legally deficient. First, AFL-CIO asserted that the IRFA failed to "meaningfully assess

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[471] *See supra* section VI.G.
[472] 29 U.S.C. 202(a) (emphasis added).
[473] *Portland Terminal Co*., 330 U.S. at 152.

the compliance costs and operational burdens that reclassification imposes on [employees] newly classified [as] 'independent contractors,'" who would "assume new responsibilities for tax compliance, insurance, recordkeeping, and business expenses," which they often do not have "the resources or expertise" to handle efficiently. Second, AFL-CIO asserted that the IRFA failed to provide "a meaningful alternatives analysis" by failing to consider "significant alternatives that would accomplish [the Department's] objectives while minimizing economic impact on small entities." AFL-CIO proposed as less burdensome alternatives "maintaining a fully holistic economic reality standard without factor weighting, or clarifying existing doctrine in a manner consistent with judicial precedent."

The Department does not find AFL-CIO's additional IRFA critiques persuasive. Although this rule is expected to result in the reclassification of some small number of individuals from an employee classification to an independent contractor classification, this is only anticipated to affect individuals who are economically independent as a matter of economic reality—*i.e.*, independent contractors who are nonetheless classified as employees by businesses in the absence of this rule due to legal uncertainty.[474] Thus, the Department does not anticipate that the rule will result widespread reclassification of employees who are economically dependent on their employers. . While classification as an employee does confer certain rights, benefits, and tax advantages which independent contractors generally do not enjoy, the Department expects that any worker reclassification attributable to this rule will be small because this rule does not change the overarching legal standard for distinguishing between employees and independent contractors under the FLSA, FMLA, and MSPA (i.e., the economic reality test)—it merely clarifies it.

In response to AFL-CIO's criticism that the IRFA failed to consider regulatory alternatives "such as maintaining a fully holistic economic reality standard without factor weighting," the Department notes that the IRFA did consider such an alternative, concluding that

[474] *See supra* sections III.D. & VI.E.

the economic reality test reflected in the Department's pre-2021 enforcement policy would not provide clear enough guidance regarding how to weigh the economic reality factors, especially in the modern economy.[475] The Department views the core factor analysis as the most clarifying feature of the proposed rule—a sentiment shared by many small entity commenters.

C. Description of the Number of Small Entities Potentially Affected by the Final 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.[476] The Department then applied these thresholds to the U.S. Census Bureau's 2022 Economic Census to obtain the number of firms with employment or sales/receipts below the small business threshold in the industry.[477,478] Next, the Department estimated the number of small governments, defined as having population less than 50,000, from the 2022 Census of Governments.[479] In total, the Department estimates there are 6.4 million small establishments or governments.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

As explained more fully above in section VI.D., the only direct costs to affected entities would be rule familiarization costs. This 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.

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[475] *See* 91 FR 9972; *see also id*. at 9969.
[476] SBA, Summary of Size Standards by Industry Sector, 2022, https://www.sba.gov/document/support-table-size-standards.
[477] The 2022 data are the most recently available with revenue data.
[478] 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.
[479] U.S. Census Bureau, *2022 Census of Governments*, https://www.census.gov/data/tables/2022/econ/gus/2022-governments.html.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) would review this rule.[480] According to the OEWS, these workers had a mean wage of $40.54 per hour. Given the 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. The Department believes that an hour, on average, is appropriate, because while some establishments may spend longer than 1 hour to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Assuming benefits are paid at a rate of 42 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $64.46. Thus, the average cost per establishment conducting regulatory familiarization is $64.46. The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, is $12.43, median hourly wage of independent contractors in the CWS ($24.85) multiplied by 0.5 hour. The Department believes that 30 minutes, on average, is appropriate, because while some independent contractors will spend longer than 30 minutes to review the rule, many will spend little or no time reviewing it.

As discussed in section VI.D.3, the Department calculated cost savings for 8.3 million establishments that will experience cost savings due to increased clarity from the rule. Among those establishments, 6.37 million were identified as small businesses with under 500 employees.[481] Annual payroll estimates for these small business establishments totaled $3.46 billion which is approximately 39 percent of total payroll across all businesses regardless of

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[480] 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).

[481] *See* SUSB, *supra* n.404.

size.[482] The Department applied this percentage to the estimated total cost savings for all employers to derive an estimated 10-year undiscounted cost savings of $2,208 million for small business employers (0.39 × $5,712 million). Over the 10-year analysis period, this yields a cost savings of $1.55 billion at a 7 percent discount rate. Dividing this estimate by the approximately 6.37 million small business firms yields an estimated 10-year cost savings of $243.29 per small employer at a 7 percent discount rate, and an annualized cost savings of $34.64 per small 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 $4.44. The Department calculated this cost savings by dividing the total annualized cost savings for independent contractors ($110,128,261) by the number of independent contractors (24,791,667). Over a 10-year period the cost savings per independent contractor is $31.20 at a 7 percent discount rate, or $4.44 annualized at a 7 percent discount rate. Based on this evaluation, presented below in table 4, the Department estimates that the total 10-year cost savings for small business employers and independent contractors is $2.32 billion at a 7 percent discount rate, or $330.94 million annualized at a 7 percent discount rate.

Table 4: Cost Savings for Small Businesses and Independent Contractors

Type of Entity	Total Cost Savings with 7% Discount	Per Entity	Annualized with 7% Discount	Per Entity
Sm. Employers	$1,550,881,841	$243.29	$220,810,684	$34.64
Contractors	$773,494,822	$31.20	$110,128,261	$4.44
Combined	$2,324,376,663		$330,938,945	

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. The annualized cost savings of $36.94 will be far less than 1 percent of the

[482] 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].

revenue for the smallest of small entities. For example, firms in the residential remodeling and the plumbing, heating, and air-conditioning contracting industries (NAICS 236118 and 238220) with fewer than 5 employees have average annual revenues of $413,317 and $386,166 respectively.[483] $34.64 is about 0.008 percent of the average revenue of the residential remodeling industry and approximately 0.01 percent of the average annual revenue of firms in the plumbing, heating, and air-conditioning contracting industry.[484] The Department therefore certifies that this rule will not have a significant economic impact on a substantial number of small entities.[485]

Potential transfers may be attributed to the reclassification from employee status to independent contractor status due to reduced payroll taxes and benefit costs as independent contractors assume increased tax liabilities and the loss of employer-provided benefits. The Department believes that these transfers are largely offsetting since independent contractors 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.[486] Additional transfers may 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 rule should create undue hardship for small businesses since benefits and cost savings outweigh costs.

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[483] 2022 Statistics of U.S. Businesses (SUSB) Annual Data Tables by Establishment Industry, https://www.census.gov/data/tables/2022/econ/susb/2022-susb-annual.html.
[484] ($36.94/$413,317) = 0.0089 and ($36.94/$386,166) = 0.0096
[485] The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 20 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities.
[486] Lim et al., supra n.386, at 51.

E. Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Final Rule

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

F. Regulatory Alternatives and Steps Taken to Minimize Economic Impacts on Small Entities

The RFA requires agencies to discuss "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[487] In evaluating regulatory alternatives, the department considered whether alternative approaches would minimize economic burdens on small entities.

As discussed in section VI.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 prior enforcement policy as a regulatory alternative. As noted in section VI.G.2., beginning May 1, 2025, WHD applied the analysis from the July 2008 version of Fact Sheet #13, as further informed by Opinion Letter FLSA2025-2, in its enforcement matters.[488] The Department believes that the multifactor balancing test under 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,[489] which the Department is largely readopting. However, FAB 2025-1 lacked specific guidance on how to weigh the factors when applying the multifactor economic reality analysis and may have left stakeholders without clearer guidance to determine employee or independent

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[487] 5 U.S.C. 603(c).
[488] *See* FAB No. 2025-1 (May 1, 2025).
[489] *See* 86 FR 1240.

contractor status under the FLSA, especially in today's modern economy.[490] For these reasons, the Department decided against retaining FAB 2025-1 for determining employee or independent contractor status.

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 a FRFA 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 rulemaking.

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.[491] 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 has prepared a small entity compliance guide to accompany this rule, as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).[492] Therefore, the Department has not adopted differing compliance or reporting requirements for small businesses.

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[490] *See* WHD Op. Ltr. FLSA2025-2 at 5 (advising that "the appropriate weight to give to each factor depends on the facts").
[491] 29 U.S.C. 202(a)(3).
[492] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 212, 110 Stat. 858.

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

This 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.

3. The use of performance rather than design standards

This 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 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, by its statutory terms, 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.

VIII. 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. State and local government commenters did not quantify alleged unfunded mandate costs. The Department continues to believe that this rule 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.

IX. 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 amends 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:

§ 500.20 Definitions.

* * * * *

(h) * * *

(4) The definition of the term *employ* may include consideration of whether an *independent contractor* or *employment* relationship exists under the Fair Labor Standards Act. Under MSPA, questions will arise whether a farm labor contractor engaged by an agricultural employer/association is a bona fide independent contractor or an employee. Questions also arise whether the worker is a bona fide independent contractor or an employee of the farm labor contractor, the agricultural employer/association, or both. 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.

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3. Revise part 795 to read as follows:

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

Sec.

795.100 Introductory statement.

795.105 Determining employee and independent contractor classification under the FLSA.

795.110 Primacy of actual practice.

795.115 Examples of analyzing economic reality factors.

795.120 Severability.

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

§ 795.100 Introductory statement.

This part contains the Wage and Hour Division'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. *See* 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 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, 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 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. The nature of a particular requirement turns on its substance and practical operation, not the characterization of its purpose. For example, detailed instructions governing how, when, or where the worker must perform the work may indicate control typical of an employment relationship even if described as promoting health or safety or maintaining quality control standards.

(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, or both. 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. However, evidence under one consideration pointing to either independent contractor or employee status could be outweighed by more persuasive evidence under the other consideration pointing in a different direction. 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 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) *General*. 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) *Examples applying core factors.* (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 earns money by making food deliveries to customers from restaurants and grocery stores. The individual obtains her delivery orders through an application operated by a digital platform company. The company's application gives the individual seconds to accept each delivery order with no information about the time it will likely take to complete the order, the quantity of the food that needs to be delivered, or the minimum guaranteed payment that the company will make to the individual after the delivery order is complete. Moreover, the individual is penalized if she fails to accept a certain percentage of offered delivery orders through demotion in a tiered rewards program tied to each worker's recorded acceptance rate, and such demotion results in the loss of preferred delivery orders. Although there is no prohibition on "multi-apping," the individual has found that it is not possible to maintain a high enough acceptance rate to avoid demotion on the application if she is simultaneously accepting deliveries with other applications.

(ii) *Application*. In this example, the digital platform company is exercising substantial control over the individual by depriving her of meaningful choices, indicating employee status. By withholding relevant information about each order, pressuring her to accept deliveries using a coercive rewards program, and requiring a minimum amount of work with regularity, thus making it practically impossible to "multi-app," the company is exercising substantial control over key aspects of the performance of the work, including the individual's ability to select her own projects, manage the workload, and work for others.

(3)(i) *Example*. An individual earns money by making food deliveries to customers from restaurants and grocery stores. The individual obtains his delivery orders through an application operated by a digital platform company. The company's application allows the individual to decline delivery opportunities without consequence and "multi-app" with competing businesses, but the company will terminate the individual's account if he cancels too many accepted deliveries. The company's application dynamically adjusts its pricing for customers depending on supply and demand and is transparent with the individual about pay for each delivery. The company's application remotely monitors the individual's locations while the application is engaged to efficiently match him to delivery opportunities.

(ii) *Application*. In this example, the individual is exercising substantial control over key aspects of the work, indicating independent contractor status. Specifically, the individual has the discretion to set his own schedule, accept or decline deliveries without penalty, and work for others (including competitors). That the company monitors the location of the individual while the application is engaged, dynamically adjusts prices in response to supply and demand, and terminates the account of individuals with excessive cancellation rates are not indicative of an employment relationship under these facts. Using technology to facilitate business operations does not indicate control over the individual; in fact, in this example, it also serves as an aid for the individual to make informed decisions about delivery opportunities. And termination of an individual's account due to excessive cancellation of accepted deliveries is a quality control measure to ensure food safety and edibility, and timeliness requirements are typical of contractual relationships between businesses.

(4)(i) *Example*. An individual engaged as a farm labor contractor and his crew work for a strawberry grower. The grower requires the individual to work exclusively for the grower for the duration of the harvest season for a payment amount determined by the grower. The individual receives instructions from the grower several times per day, receives a schedule about when the

individual and his crew are expected to arrive at and depart from the fields throughout the season, and disciplines crew workers at the grower's request.

(ii) *Application*. In this example, the grower is exercising substantial control over the individual's work, indicating employee status. By requiring the individual to work exclusively for the grower, dictating the wages of the individual and his crew, and managing how the individual and his crew perform the work, the grower is exercising substantial control over key aspects of the performance of the work.

(5)(i) *Example*. An individual engaged as a farm labor contractor and his crew work for a lettuce grower. The individual performs agricultural work for multiple farms besides the grower and determines when he and his crew work for a particular grower. Although the individual closely supervises his crew, the individual operates largely free of supervision from the grower. However, the individual must comply with environmental and quality control requirements specified in his contractual agreement with the grower, such as refraining from the use of certain pesticides and promptly refrigerating harvested produce.

(ii) *Application*. In this example, the individual is exercising substantial control over key aspects of the work, indicating independent contractor status. The individual is both allowed to work for other businesses and actually does so, determines his and his crew's schedule, and works with minimal supervision. That the individual must abide by environmental and quality control requirements specified in his contractual agreement with the grower is not indicative of an employment relationship.

(6)(i) *Example*. An individual accepts assignments from a company that provides an application-based service linking those who need home-repair work with those who perform home-repair work. The individual is able to meaningfully 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 application, 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.

(7)(i) *Example*. An individual 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.

(8)(i) *Example*. A worker leases a truck from and hauls freight for a motor carrier company. The company determines the rates that it pays the worker for each shipment, does not negotiate those rates, and assigns shipments to the worker without informing him of the rates before he must commit to the shipment. The worker's monthly lease payments to the company may theoretically allow him to purchase the vehicle one day, but the reality of the economic terms of the lease agreement most likely prevents the worker from ever actually reaching that

point.

(ii) *Application*. The worker does not have an opportunity to earn profits or incur losses based on the exercise of initiative or management of investment or capital expenditure, indicating employee status. The worker does not exercise initiative in negotiating or establishing the economic terms of the lease or the pay rates because the company sets them. And the worker cannot manage the vehicle as an investment. The worker has no information regarding the pay rate for a shipment when the company offers it to him. Finally, although the lease payments are nominally directed toward eventual ownership, the economic terms of the agreement do not provide a realistic path to owning the truck. The payments therefore function as a recurring cost of obtaining work from the company rather than as a capital investment in an asset the worker can own and manage.

(9)(i) *Example*. A worker leases a truck from and hauls freight for a motor carrier company. The company offers the worker shipments at proposed rates, and the worker is able to negotiate those rates before committing to shipments. When possible, the worker seeks to negotiate a separate shipment for the return leg (i.e., a "backhaul") to avoid driving an empty vehicle. The economic terms of the lease agreement actually provide an opportunity for the worker to own the vehicle in the future.

(ii) *Application*. The worker has an opportunity to earn profits or incur losses based on the exercise of initiative or management of investment or capital expenditure, indicating independent contractor status. The fact that the worker has information regarding the pay rate for a shipment when the company offers it and can negotiate the rate shows initiative and is also relevant to managing the vehicle as an investment. Moreover, the fact that the worker is able at times to secure backhauls for return legs, and thus uses the vehicle to generate additional earnings, is further evidence that the worker manages the vehicle as an investment. Finally, because the economic terms of the lease agreement provide a realistic path to owning the truck, the lease payments indicate a capital investment in an asset the worker can manage, rather than

merely a recurring cost of obtaining work from the company.

(c) *Examples applying other factors*. (1)(i) *Example*. An individual 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.

(2)(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.

(3)(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 the ski resort does not end and is indefinite as a matter of economic reality.

(4)(i) *Example*. An editor works part-time for a digital news outlet. The editor works from home and is responsible for assigning and reviewing many articles published on the outlet's website. Sometimes she also writes or revises articles. The editor is responsible for determining when articles appear on the website and setting deadlines accordingly. She makes assignment and timing decisions in coordination with several full-time editors who make similar decisions with respect to different articles on the same website and who are employees of the outlet.

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

(5)(i) *Example*. A journalist writes articles for a digital news outlet on a freelance basis. The journalist does not have an office and generally works from home. He submits articles to the outlet periodically, which the outlet may accept or reject. The journalist corresponds with the outlet's editors regarding what to write about or regarding revisions to the articles that he submits, but he is not otherwise involved in deciding the overall editorial content of the website. The journalist never assigns articles to others nor does he review or revise articles that others

submit. He is not responsible for determining when his article or any other articles appear on the website.

(ii) *Application*. The journalist is not part of an integrated unit of production of the digital news outlet, indicating independent contractor status. His work is limited to the specific articles that he submits and is completely segregated from other parts of the outlet's processes that serve its specific, unified purpose of producing a news website. It is not relevant in analyzing this factor that the writing of articles is an important part of producing the website. 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

4. 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.

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

§ 825.102 Definitions.

* * * * *

Employee * * *

(1) 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;

* * * * *

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

§ 825.105 Counting employees for determining coverage.

(a) The definition of "employ" for purposes of FMLA is taken from the Fair Labor Standards Act, sec. 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 or her own, is one who "follows the usual path of an employee" and is dependent on the business which he or 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.

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Dated: November 17, 2026.

Andrew B. Rogers,

Administrator, Wage and Hour Division.

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