: 4510-27-P

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 780, 788, and 795

RIN 1235-AA34

Independent Contractor Status under the Fair Labor Standards Act (FLSA): Withdrawal

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule; withdrawal.

SUMMARY: This action finalizes the Department of Labor's proposal to withdraw the rule titled Independent Contractor Status under the Fair Labor Standards Act, which was published in the Federal Register on January 7, 2021.

DATES: As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the final rule published January 7, 2021 at 86 FR 1168, and delayed on March 7, 2021 at 86 FR 12535 is withdrawn.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats. Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest Wage and Hour Division ("WHD") district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at https://www.dol.gov/agencies/whd/contact/local-offices for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory and Legal Background

The Fair Labor Standards Act ("FLSA" or "Act") requires all covered employers to pay nonexempt employees at least the federal minimum wage for every hour worked in a non-overtime workweek.[1] In an overtime workweek, for all hours worked in excess of 40 in a workweek, covered employers must pay a nonexempt employee at least one and one-half times the employee's regular rate.[2] The FLSA also requires covered employers to make, keep, and preserve certain records regarding employees.[3]

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

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

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[1] 29 U.S.C. 206(a).
[2] 29 U.S.C. 207(a).
[3] 29 U.S.C. 211(c).
[4] *See* 29 U.S.C. 206 (minimum wage) and 207 (overtime pay).
[5] 29 U.S.C. 203(e)(1).
[6] 29 U.S.C. 203(d).
[7] 29 U.S.C. 203(g).
[8] *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Black)).

traditional agency law principles."[9] Thus, the FLSA expressly rejects the common law standard for determining whether a worker is an employee.[10]

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

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

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[9] *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992).
[10] *See id.*; *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) ("But in determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." (citation omitted)).
[11] *Portland Terminal*, 330 U.S. at 152; *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (workers may not be employees when their work does not "in its essence . . . follow[] the usual path of an employee").
[12] *United States v. Silk*, 331 U.S. 704, 712 (1947) (analyzing the definition of employee under the Social Security Act).
[13] *Rutherford Food*, 331 U.S. at 729 ("There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees.").
[14] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)).
[15] *Goldberg*, 366 U.S. at 32-33.

In *United States v. Silk*, 331 U.S. 704, 712 (1947), an early case applying an economic realities test under the Social Security Act, the Supreme Court acknowledged that "[p]robably it is quite impossible to extract from the statute a rule of thumb" regarding the limits of the employment relationship.[16] The Court suggested that federal agencies and courts "will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision."[17] The Court cautioned that no single factor is controlling and that the list is not exhaustive.[18] The Court went on to note that the workers in that case were "from one standpoint an integral part of the businesses" of the employer, supporting a conclusion that some of the workers in that case were employees.[19]

The same day that the Supreme Court issued its decision in *Silk*, it also issued *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), in which it affirmed a circuit court decision that analyzed an FLSA employment relationship based on its economic realities.[20] The Court rejected an approach based on "isolated factors" and again considered "the circumstances of the whole activity."[21] The Court considered several of the factors that it listed in *Silk* as they related to meat boners on a slaughterhouse's production line, ultimately determining that the boners were employees.[22] The Court noted, among other things, that the boners did a specialty job on the production line, had no business organization that could shift to a different slaughter-house, and

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[16] 331 U.S. at 716. At the time, the Supreme Court noted that "[d]ecisions that define the coverage of the employer-[e]mployee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723-23 (1947). However, Congress amended the Social Security Act in 1948.
[17] 331 U.S. at 716.
[18] *See id.*
[19] *Id.*
[20] *See Rutherford Food*, 331 U.S. at 727.
[21] *Id.* at 730.
[22] *See id.*

were best characterized as "part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment."[23]

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

All of the courts of appeals have followed the economic realities test, and nearly all of them analyze the economic realities of an employment relationship using the factors identified in *Silk*.[25] No court of appeals considers any factor or combination of factors to universally predominate over the others in every case.[26] For example, the Ninth Circuit has explained that some of the factors "which may be useful in distinguishing employees from independent contractors for purposes of social legislation such as the FLSA" are: (1) the degree of the employer's right to control the manner in which the work is to be performed; (2) the worker's

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[23] *Id.* at 729-30.

[24] *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

[25] *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382-83 (3d Cir. 1985); *McFeeley v. Jackson Street Entm't, LLC*, 825 F.3d 235, 241 (4th Cir. 2016); *Acosta v. Off Duty Police Services, Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019); *Secretary of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987); *Karlson v. Action Process Service & Private Investigation, LLC*, 860 F.3d 1089, 1092 (8th Cir. 2017); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001).

[26] *See, e.g.*, *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) (stating that it "is impossible to assign to each of these factors a specific and invariably applied weight" (citation omitted)); *Martin v. Selker Bros*., 949 F.2d 1286, 1293 (3d Cir. 1991) ("It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive."); *Scantland*, 721 F.3d at 1312 n.2 (observing that the relative weight of each factor "depends on the facts of the case").

opportunity for profit or loss depending upon his or her managerial skill; (3) the worker's investment in equipment or materials required for his or her task, or employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the employer's business.[27] The Ninth Circuit repeated the Supreme Court's instruction that no individual factor is conclusive and that the ultimate determination depends upon the circumstances of the whole activity.[28]

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

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

B. Prior Wage and Hour Division Guidance

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[27] *Real*, 603 F.2d at 754.
[28] *See id.*
[29] *See Usery*, 527 F.2d at 1311.
[30] *See Hobbs v. Petroplex Pipe and Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020).
[31] *See*, *e.g.*, *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x 74, 76 (2d Cir. 2020).
[32] *See, e.g.*, *Franze*, 826 F. App'x at 76; *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 142-43 (3d Cir. 2020) (cert. pet. filed Apr. 8, 2021); *Gilbo v. Agment, LLC*, 831 F. App'x 772, 775 (6th Cir. 2020).
[33] *See, e.g.*, *Superior Care*, 840 F.2d at 1054.

Since at least 1954, the Wage and Hour Division (WHD) has applied variations of this multifactor analysis when considering whether a worker is an employee under the FLSA or an independent contractor.[34] In a guidance document issued in 1964, WHD stated, "The Supreme Court has made it clear that an employee, as distinguished from a person who is engaged in a business of his own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business which he serves."[35] Like the courts, WHD has consistently applied a multifactor economic realities analysis when determining whether a worker is an employee under the FLSA or an independent contractor.[36]

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

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[34] *See* WHD Opinion Letter (Aug. 13, 1954) (applying six factors very similar to the six economic realities factors currently used by courts of appeals).
[35] WHD Opinion Letter FLSA–795 (Sept. 30, 1964).
[36] *See, e.g.*, WHD Opinion Letter, 2002 WL 32406602, at *2 (Sept. 5, 2002); WHD Opinion Letter, 2000 WL 34444342, at *3 (Dec. 7, 2000); WHD Opinion Letter, 2000 WL 34444352, at *1 (Jul. 5, 2000); WHD Opinion Letter, 1999 WL 1788137, at *1 (Jul. 12, 1999); WHD Opinion Letter, 1995 WL 1032489, at *1 (June 5, 1995); WHD Opinion Letter, 1995 WL 1032469, at *1 (Mar. 2, 1995); WHD Opinion Letter, 1986 WL 740454, at *1 (June 23, 1986); WHD Opinion Letter, 1986 WL 1171083, at *1 (Jan. 14, 1986); WHD Opinion Letter WH–476, 1978 WL 51437, at *2 (Oct. 19, 1978); WHD Opinion Letter WH–361, 1975 WL 40984, at *1 (Oct. 1, 1975); WHD Opinion Letter (Sept. 12, 1969); WHD Opinion Letter (Oct. 12, 1965).
[37] WHD Fact Sheet #13 (July 2008) is available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf (last visited April 28, 2021).

"degree of independent business organization and operation." The fact sheet identifies certain other factors that are immaterial to determining whether a worker is an employee covered under the FLSA or independent contractor, including the place where work is performed, the absence of a formal employment agreement, and whether an alleged independent contractor is licensed by a State or local government.[38]

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

On July 15, 2015, WHD issued Administrator's Interpretation No. 2015–1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of

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[38] WHD maintains additional sub-regulatory guidance addressing whether a worker is an employee or independent contractor under the FLSA. For example, WHD's Field Operations Handbook, in its section titled "Test of the employment relationship," cross-references Fact Sheet #13. *See* section 10b05 of Chapter 10 ("FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits") of WHD's Field Operations Handbook, available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf (last visited April 28, 2021); *see also* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/misclassification-facts.pdf (last visited April 28, 2021). And the section of WHD's elaws Advisor compliance-assistance materials addressing independent contractors provides guidance very similar to that of Fact Sheet #13. *See* https://webapps.dol.gov/elaws/whd/flsa/scope/ee14.asp (last visited April 28, 2021).

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

[40] *See id*.

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

Employees Who Are Misclassified as Independent Contractors" (AI 2015–1).[42] AI 2015–1 reiterated that the economic realities of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for him or herself. It identified six economic realities factors that followed the six factors used by most federal courts of appeals: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. AI 2015–1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative. AI 2015–1 was withdrawn on June 7, 2017.[43]

In 2019, WHD issued an opinion letter, FLSA2019-6, regarding whether workers who worked for companies operating self-described "virtual marketplaces" were employees covered under the FLSA or independent contractors.[44] Like WHD's prior guidance, the letter stated that the determination depended on the economic realities of the relationship and that the ultimate inquiry was whether the workers depend on someone else's business or are in business for themselves.[45] The letter identified six economic realities factors that differed slightly from the factors typically articulated by WHD previously: (1) the nature and degree of the employer's control; (2) the permanency of the worker's relationship with the employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, and foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the extent of the integration of the worker's services into the employer's

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[42] AI 2015–1 is available at 2015 WL 4449086.
[43] *See* News Release 17-0807-NAT, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance" (Jun. 7, 2017), *available at* https://www.dol.gov/newsroom/releases/opa/opa20170607 (last visited April 28, 2021).
[44] *See* WHD Opinion Letter FLSA2019-6, 2019 WL 1977301 (Apr. 29, 2019) (withdrawn February 19, 2021).
[45] *See id.* at *3.

business.[46] Opinion Letter FLSA2019-6 was withdrawn for further review on February 19, 2021.[47]

C. The January 2021 Independent Contractor Rule

On January 7, 2021, the Department published a final rule titled "Independent Contractor Status Under the Fair Labor Standards Act" with an effective date of March 8, 2021 (Independent Contractor Rule or Rule).[48] The Independent Contractor Rule would have introduced into Title 29 of the Code of Federal Regulations a new part (Part 795) titled "Employee or Independent Contractor Classification under the Fair Labor Standards Act" that would have provided a new generally applicable interpretation of employee or independent contractor status under the FLSA.[49] The Rule would also have revised WHD's prior interpretations of independent contractor status in 29 CFR 780.330(b) and 29 CFR 788.16(a), both of which apply in limited contexts.[50]

The Independent Contractor Rule explained that its purpose was to establish an economic realities test that improved on prior articulations that the Rule viewed as "unclear and unwieldy."[51] It stated that the existing economic realities test applied by WHD and courts suffered from confusion regarding the meaning of "economic dependence," a lack of focus in the multifactor balancing test, and confusion and inefficiency caused by overlap between the factors.[52] The Rule explained that the shortcomings and misconceptions associated with the test were more apparent in the modern economy and that additional regulatory clarity would promote innovation in work arrangements.[53]

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[46] *See id.* at *4.
[47] *See note at* https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA (last visited April 28, 2021).
[48] *See* 86 FR 1168. WHD had published a notice of proposed rulemaking requesting comments on a proposal. *See* 85 FR 60600 (Sept. 25, 2020). The final rule adopted "the interpretive guidance set forth in [that proposal] largely as proposed." 86 FR 1168.
[49] *See* 86 FR 1168.
[50] *See id*.
[51] 86 FR 1172.
[52] 86 FR 1172-75.
[53] *See* 86 FR 1175.

The Independent Contractor Rule further explained that under the FLSA, independent contractors are not employees and are therefore not subject to the Act's minimum wage, overtime pay, or recordkeeping requirements.[54] The Rule would have applied an "economic dependence" test under which a worker is an employee of an employer if that worker is economically dependent on the employer for work and is an independent contractor if that worker is in business for him or herself.[55]

The Rule's new economic realities test would have identified five economic realities factors to guide the inquiry into a worker's status as an employee or independent contractor.[56] These factors would not have been exhaustive, and additional factors would have been considered if they "in some way indicate[d] whether the [worker was] in business for him- or herself, as opposed to being economically dependent on the potential employer for work."[57] Under the Rule's economic realities test, no one factor would have been dispositive, but two of the identified factors were designated as "core factors" that would have carried greater weight in the analysis. If both of those factors indicated the same classification, as either an employee or an independent contractor, there would have been a "substantial likelihood" that the classification indicated by those factors was the worker's correct classification.[58] In support of this elevation of two core factors, the Rule noted that the Department had conducted a review of appellate case law since 1975, and this review indicated that courts of appeals had effectively been affording the control and opportunity factors greater weight.[59]

The first core factor was the nature and degree of control over the work, which would have indicated independent contractor status to the extent that the worker exercised substantial control over key aspects of the performance of the work, such as by setting his or her own

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[54] *See* 86 FR 1246 (§ 795.105(a)).
[55] *See* 86 FR 1246 (§ 795.105(b)).
[56] *See* 86 FR 1246 (§ 795.105(c)).
[57] 86 FR 1246-47 (§§ 795.105(c) & (d)(2)(iv)).
[58] 86 FR 1246 (§ 795.105(c)).
[59] 86 FR 1198.

schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors.[60] Under the Rule's analysis, requiring the worker to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) would not have constituted control.[61]

The second core factor was the worker's opportunity for profit or loss.[62] This factor would have weighed towards the worker being an independent contractor to the extent the worker has an opportunity to earn profits or incur losses based on either his or her exercise of initiative (such as managerial skill or business acumen or judgment) or his or her management of investment in or capital expenditure on, for example, helpers or equipment or material to further the work.[63] While the effects of the worker's exercise of initiative and management of investment would both have been considered under this core factor, the worker did not need to have an opportunity for profit or loss based on both initiative and management of investment for this factor to have weighed towards the worker being an independent contractor.[64] This factor would have weighed towards the worker being an employee to the extent the worker is unable to affect his or her earnings or is only able to do so by working more hours or faster.[65]

The Rule would have also identified three other non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production (which is distinct from the concept of the importance or centrality of the worker's work to the employer's business).[66] The Rule would have provided that these other factors would be "less probative and,

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[60] *See* 86 FR 1246-47 (§ 795.105(d)(1)(i)).
[61] *See id.*
[62] *See* 86 FR 1247 (§ 795.105(d)(1)(ii)).
[63] *See id.*
[64] *See id.*
[65] *See id.*
[66] *See* 86 FR 1247 (§ 795.105(d)(2)).

in some cases, [would] not be probative at all" and would be "highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."[67]

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

After publication of the Rule, WHD issued Opinion Letters FLSA2021-8 and FLSA2021-9 on January 19, 2021 applying the Rule's analysis to specific factual scenarios, and then withdrew those opinion letters on January 26, 2021, explaining that the letters were issued prematurely because they were based on a Rule that had yet to take effect.[70]

D. Delay of Rule's Effective Date

On February 5, 2021, the Department published a proposal to delay the Independent Contractor Rule's effective date until May 7, 2021, 60 days after the original effective date of March 8, 2021.[71] On March 4, 2021, after considering the approximately 1,500 comments received in response to that proposal, the Department published a final rule delaying the effective date of the Independent Contractor Rule as proposed.[72] The Department explained that the delay was consistent with a January 20, 2021 memorandum from the Assistant to the President and Chief of Staff, titled "Regulatory Freeze Pending Review."[73] The Department further explained that a delay would allow it additional time to consider "significant and complex" issues associated with the Rule, including whether the Rule effectuates the FLSA's purpose to broadly

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[67] 86 FR 1246 (§ 795.105(c)).
[68] *See* 86 FR 1247 (§ 795.110).
[69] *See* 86 FR 1247-48 (§ 795.115).
[70] *See* https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA (last visited April 28, 2021), noting the withdrawal of Opinion Letters FLSA2021-8 and FLSA2021-9.
[71] *See* 86 FR 8326.
[72] 86 FR 12535.
[73] *Id.* (citing January 20, 2021 memo from the Assistant to the President and Chief of Staff, titled "Regulatory Freeze Pending Review," 86 FR 7424).

cover workers as employees as well as the costs and benefits attributed to the Rule, including its effect on workers.[74]

E. Proposal to Withdraw

On March 12, 2021, the Department published a notice of proposed rulemaking (NPRM) proposing to withdraw the Independent Contractor Rule.[75] The NPRM explained that the Department was considering withdrawing the Independent Contractor Rule for several reasons. First, the Rule's standard has never been used by any court or by WHD, and the Department questioned whether the Rule is fully aligned with the FLSA's text and purpose or case law describing and applying the economic realities test. In particular, the NPRM noted that no court has, as a general and fixed rule, elevated a subset of certain economic realities factors above others, and there is no clear statutory basis for such a predetermined weighting of the factors.[76] Moreover, the NPRM expressed concern that the Rule's emphasis on control and its recasting of other factors typically considered by courts would improperly narrow the facts to be considered in the application of the economic realities test, contrary to the FLSA's more expansive conception of the employment relationship contained in section 3(g) of the Act's definition of "employ" as including "to suffer or permit to work."[77] As a matter of policy, the NPRM expressed concern that the Rule's novel guidance would cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty,[78] and asserted that the Rule failed to fully consider the likely costs, transfers, and benefits that could result from the Rule, particularly for affected workers who might no longer receive the FLSA's wage and hour protections as an

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[74] *Id.* On March 26, 2021, a lawsuit was filed alleging that the Department's final rule delaying the Independent Contractor Rule's effective date did not comply with the Administrative Procedure Act. *See Coalition for Workforce Innovation v. Sec'y of Labor* (No. 1:21-cv-00130 E.D. Tex.).
[75] *See* 86 FR 14027.
[76] *See* 86 FR 14031-32.
[77] *See* 86 FR 14032-34.
[78] *See* 86 FR 14034.

independent contractor.[79] Finally, the NPRM stated that withdrawing the Independent Contractor Rule would not be disruptive because the Rule has not yet taken effect.[80]

The Department sought comment on its NPRM to withdraw the Independent Contractor Rule. The period for providing comment expired on April 12, 2021.

II. Comments and Decision

The Department received 1,010 comments in response to the NPRM.[81] Numerous state officials, members of Congress, labor unions, social justice organizations, worker advocacy groups, and individual commenters wrote in support of the Department's proposal to withdraw the Independent Contractor Rule, including several hundred commenters who submitted comments with similar template language. These commenters expressed opposition to the Independent Contractor Rule predominantly on the basis that, in their view, the Rule would have facilitated the exploitation of workers reclassified or misclassified as independent contractors as a consequence of the Rule. They also raised numerous other legal and policy criticisms of the Rule, discussed in greater detail below.

Numerous companies, trade associations, business advocacy organizations, law firms, and individual commenters submitted comments opposing the Department's proposal to withdraw the Independent Contractor Rule, including several commenters who identified themselves as current or former independent contractors. These commenters generally supported the Independent Contractor Rule for, in their view, providing a clearer and preferable analysis for determining employee or independent contractor status, and they raised numerous other legal and policy arguments in defense of the Rule (or in objection to the proposed withdrawal), discussed in greater detail below.

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[79] *See* 86 FR 14034-35.
[80] *See* 86 FR 14035.
[81] This figure includes a number of duplicate comments (i.e., identical comments submitted by the same requester) which appear to have been submitted by mistake. The Department received approximately 1,000 non-duplicative comments.

The Department received a number of comments addressing issues that are beyond the scope of this rulemaking to withdraw the Independent Contractor Rule. For example, several commenters expressed opinions related to the legal analysis for independent contractors under state laws or federal laws other than the FLSA, such as the "ABC" test generally used to evaluate independent contractor status under California state law,[82] or the "PRO Act" bill that would establish a similar standard under National Labor Relations Act.[83] As noted in the NPRM, the Department did not propose regulatory guidance to replace the guidance that the Independent Contractor Rule would have introduced as Part 795, so commenter feedback addressing or suggesting such a replacement or otherwise requesting that the Department adopt any specific guidance if the Rule was withdrawn was considered outside the scope of this rulemaking.[84] Similarly, the Department received dozens of comments addressing the merits of labor unions; however, this rulemaking addresses whether to withdraw a rule that would have provided a new analysis for determining whether a worker is an employee or independent contractor for purposes of the FLSA, a wage and hour statute that has no direct effect on collective bargaining rights.

Having considered the comments submitted in response to the NPRM, the Department has decided to finalize the withdrawal of the Independent Contractor Rule. The Department believes that the Rule is inconsistent with the FLSA's text and purpose, and would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent. The Department's response to commenter feedback on specific aspects of the proposed withdrawal is provided below.

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

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[82] *See* Assembly Bill ("A.B.") 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (codifying the ABC test for determining independent contractor status articulated in *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018)); A.B. 2257, Ch. 38, 2019–2020 Reg. Sess. (Cal. 2020) (exempting certain additional professions, occupations, and industries from the ABC test that A.B. 5 had codified).

[83] *See* Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021) (introduced by Rep. Bobby Scott) and S. 420, 117th Cong. (2021) (introduced by Sen. Patty Murray).

[84] 86 FR 14035.

Upon further review and consideration of the Rule and having considered the public comments, the Department does not believe that the Independent Contractor Rule is fully aligned with the FLSA's text or purpose, or with decades of case law describing and applying the multifactor economic realities test. The Department fully describes below the rationale for its departure from the views expressed in the prior Rule.[85]

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

For decades, WHD, consistent with case law, has applied a multifactor balancing test to assess whether the worker, as a matter of economic reality, is economically dependent on the employer or is in business for him or herself.[86] Courts universally apply this analysis as well and have explained that "economic reality" rather than "technical concepts" is the test of employment under the FLSA.[87] WHD and the U.S. Courts of Appeals generally consider and balance the following economic realities factors, derived from the Supreme Court's decisions in *Silk*, 331 U.S. at 716, and *Rutherford Food*, 331 U.S. at 729-30: the nature and degree of the employer's control over the work; the permanency of the worker's relationship with the employer; the degree of skill, initiative, and judgment required for the work; the worker's investment in equipment or materials necessary for the work; the worker's opportunity for profit or loss; whether the service rendered by the worker is an integral part of the employer's business; and the degree of independent business organization and operation.[88]

The Rule would have set forth a new articulation of the economic realities test, elevating two factors (control and opportunity for profit or loss) as "core" factors above the other factors,

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[85] *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).
[86] *See*, *e.g.*, Fact Sheet #13 (July 2008), *supra* note 37.
[87] *Goldberg*, 366 U.S. at 33; *see also Tony & Susan Alamo*, 471 U.S. at 301 ("The test of employment under the Act is one of 'economic reality.'") (quoting *Goldberg*, 366 U.S. at 33).
[88] *See*, *e.g*., *Razak*, 951 F.3d at 142-43; *Karlson*, 860 F.3d at 1092; *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Lauritzen*, 835 F.2d at 1534; *Real*, 603 F.2d at 754; Fact Sheet #13 (July 2008), available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf (last visited April 28, 2021).

and designating them as having greater probative value.[89] The Rule would have provided that only in "rare" cases would the other factors outweigh the core factors.[90] Notably, the Rule would have further provided that if both core factors point towards the same classification—that the worker is either an employee or an independent contractor—then there would be a "substantial likelihood" that this is the worker's correct classification.[91] In addition, the preamble to the Rule disagreed with court precedent that, as a general matter, the economic realities test "requires factors to be unweighted or equally weighted."[92] Although the Rule would have identified three other factors as additional guideposts, it made clear that these "other factors are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."[93] Similarly, the Rule would have provided that unlisted additional factors may be considered, but that they are "unlikely to outweigh either of the core factors."[94] The Rule noted that "[w]hile all circumstances must be considered, it does not follow that all circumstances or categories of circumstance, *i.e.*, factors, must also be given equal weight."[95] Rather, the Rule would have emphasized the control and opportunity for profit or loss factors as more probative than other factors in determining whether an individual is in business for him or herself, and would have provided that "other factors are less probative and may have little to no probative value in some circumstances."[96]

In the proposal to withdraw the Rule, the Department expressed concern that no court has taken the Rule's approach in analyzing whether a worker is an employee or an independent contractor under the FLSA, that the Rule would mark a departure from WHD's own

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[89] 86 FR 1246-47 (§ 795.105(c) & (d)).
[90] 86 FR 1201.
[91] *Id*. at 1246 (§ 795.105(c)).
[92] *Id*. at 1197.
[93] Id. at 1246 (§ 795.105(c)).
[94] Id. at 1197.
[95] Id. at 1201 (internal quotation marks omitted).
[96] Id. at 1202.

longstanding approach, and that the Rule was in tension with the Act's text and purpose.[97] Among other things, the Department noted that the Rule's elevation of only two factors may be inconsistent with the position, expressed by the Supreme Court and federal courts of appeals, that no single factor in the analysis is dispositive and that the totality-of–the-circumstances must be considered.[98]

Multiple commenters who supported withdrawal of the Rule criticized the Rule's focus on only two factors as departing from the Act's text and purpose, as well as relevant case law. The AFL-CIO, for example, noted that by focusing on control and opportunity for profit or loss, the Rule "would, in practice, adopt the common law standard contrary to congressional intent and Supreme Court precedent." The American Federation of State, County, and Municipal Employees (AFSCME) agreed that there is no reason to elevate the "control" factor above others, and a coalition of State Attorneys General and other officials ("State Officials") commented that this prioritization of only two factors "jettisoned the definition of employment that flexibly accounts for the full details of a working relationship, as decades of precedent require." The Northwest Workers Justice Project asserted that the Department's Rule would administratively amend the FLSA by placing "undue weight on two factors" and that the Rule also narrowed those two factors in a way that would undermine the Act's statutory intent and that is in tension with judicial precedent; Rep. Grace Napolitano added that the Rule's weighting of two factors conflicted with congressional intent. The Women's Law Project concurred that by according greater weight to only two factors instead of allowing the economic realities test to continue to be applied as a balancing test, the Rule was inconsistent with the intent of the Act

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[97] *See* 86 FR 14032-33.

[98] *See, e.g.*, *Silk*, 331 U.S. at 716 (explaining that "[n]o one [factor] is controlling" in the economic realities test, including "degrees of control"); *Parrish*, 917 F.3d at 380 (stating that it "is impossible to assign to each of these factors a specific and invariably applied weight" (citation omitted)); *Selker Bros*., 949 F.2d at 1293 ("It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive."); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) ("It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances.").

and judicial and administrative precedent. Finally, the International Brotherhood of Teamsters stated that by giving these two factors "preeminent status" over the other factors, the Rule "would make it more difficult for workers to prove they are employees."

Commenters opposed to withdrawal of the Rule generally supported giving two core factors greater weight in the analysis. For example, the American Bakers Association noted approvingly the Rule's determination that the control and opportunity for profit or loss factors should be afforded greater weight because this weighting of the factors would be consistent with the outcomes of prior court decisions applying an economic realities analysis. The Owner-Operator Independent Drivers Association also shared its support of the Rule's "decision to afford the 'control' and 'opportunity for profit or loss' factors greater weight in the classification determination." Relatedly, commenters such as the Coalition to Promote Independent Entrepreneurs stated that the additional weight accorded to these two factors was not intended to alter the economic realities analysis but rather reflected the Department's review of prior court decisions applying the test, and thus there is no inconsistency between this position and the longstanding Supreme Court tenet that no single factor be dispositive. Other commenters supported the elevation of two core factors because it would improve clarity. Cambridge Investment Research, for instance, stated that "the enhanced focus on the two core factors elucidates the test review process, reduces inaccurate classifications and decreases associated litigation," and the Center for Workplace Compliance agreed that the use of two core factors would simplify the analysis. The Texas Policy Foundation similarly commented that "[r]ather than analyzing a non-exhaustive list of six factors, the Independent Contractor Rule allows employers to focus on two core factors regarding how workers should be classified."

After careful consideration of the comments received, the Department believes that elevating two factors of the multifactor economic realities analysis above all others is in conflict with the Act, congressional intent, and longstanding judicial precedent. The Department and courts recognize, as they have since the Act's inception, that the cornerstone of the FLSA is the

Act's broad definition of "employ," which provides that an employee under the Act includes any individual whom an employer suffers, permits, or otherwise employs to work.[99] Rather than being derived from the common law of agency, the FLSA's definition of "employ" and its "suffer or permit" language originally came from state laws regulating child labor.[100] This standard was intended to expand coverage beyond employers who control the means and manner of performance to include entities who "suffer" or "permit" work.[101] The FLSA's breadth in defining the employment relationship, as well as its clear remedial purpose, comes from the statutory text itself as well as the legislative history.[102] This standard "stretches the meaning of 'employee' [under the FLSA] to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[103] The FLSA's overarching inquiry of economic dependence thus establishes a broader scope of employment than that which exists under the common law of agency and evinces Congress's intent to "protect all covered workers

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[99] *See* 29 U.S.C. 203(e)(1), (g).

[100] *See Rutherford Food*, 331 U.S. at 728 & n.7.

[101] *See generally People ex rel. Price v. Sheffield Farms-Slawson-Decker Co*., 225 N.Y. 25, 29-31 (N.Y. 1918).

[102] *See* 29 U.S.C. 202, 203(e)(1), (g); *Rosenwasser*, 323 U.S. at 362, 363 n.3 (quoting statement of Senator Black from 81 Cong. Rec. 7657 that "the term 'employee' had been given 'the broadest definition that has ever been included in any one act'"); *see also, e.g.*, *Parrish*, 917 F.3d at 378 ("Given the remedial purposes of the [FLSA], an expansive definition of 'employee' has been adopted by the courts." (citation omitted)); *Off Duty Police*, 915 F.3d at 1054-55 (noting, directly under the heading "Employment Relationship," that "[t]he FLSA is 'a broadly remedial and humanitarian statute ... designed to correct labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers'" (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (some internal quotation marks omitted)). The FLSA's broad scope of employment, broader than the common law, was not changed by the Supreme Court's decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), which explained that the Act's statutory exemptions should be interpreted fairly because there is no textual indication that the exemptions should be construed narrowly. *See* 138 S. Ct. at 1142. Here, the Act's definition of "employ" as including "to suffer or permit to work" gives a clear textual basis for the breadth of employment under the FLSA. 29 U.S.C. 203(g); *see Off Duty Police*, 915 F.3d at 1062 ("[T]hese [economic reality] factors must be balanced in light of the FLSA's strikingly broad definition of employee." (quotations and citation omitted)).

[103] *Darden*, 503 U.S. at 326; *see also Portland Terminal*, 330 U.S. at 150 (in determining employee status under the FLSA, "common law employee categories or employer-employee classifications under other statutes are not of controlling significance").

from substandard wages and oppressive working hours."[104] Altering the focus of this analysis to two "core" factors—particularly the control factor, as discussed below—risks excluding or misclassifying workers whose FLSA employment status is established under other facts that demonstrate that they are economically dependent on an employer and not in business for themselves.

Moreover, upon further review of the case law, the Department is not aware of any court that has, as a general and fixed rule, elevated a subset of the economic realities factors above the other factors in all cases, and there is no clear statutory basis for such a predetermined weighting of the factors. Rather, the Department is cognizant of the voluminous case law that emphasizes that it "'is impossible to assign to each of these factors a specific and invariably applied weight.'"[105] Undeniably, courts have refused to assign universal and predetermined weights to certain factors; rather, courts stress that the analysis must consider the totality of the circumstances and neither the presence nor absence of any particular factor is dispositive.[106]

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[104] *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).

[105] *Parrish*, 917 F.3d at 380 (quoting *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983)); *see also Scantland*, 721 F.3d at 1312 n.2 (observing that the relative weight of each factor "depends on the facts of the case"); *Silk*, 331 U.S. at 716 (rejecting "a rule of thumb to define the limits of the employer-employee relationship" immediately before providing an incomplete list of factors considered "important for decision").

[106] *See Razak*, 951 F.3d at 143 (citing *DialAmerica Mktg.*, 757 F.2d at 1382); *see also McFeeley*, 825 F.3d at 241 ("While a six-factor test may lack the virtue of providing definitive guidance to those affected, it allows for flexible application to the myriad different working relationships that exist in the national economy. In other words, the court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case."); *Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012) ("This 'economic reality' standard, however, is not a precise test susceptible to formulaic application. . . . It prescribes a case-by-case approach, whereby the court considers the 'circumstances of the whole business activity.'") (quoting *Brandel*, 736 F.2d at 1116); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001) ("No one factor standing alone is dispositive and courts are directed to look at the totality of the circumstances and consider any relevant evidence."); *Superior Care*, 840 F.2d at 1059 ("No one of these factors is dispositive; rather, the test is based on a totality of the circumstances. . . . Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided."); *Lauritzen*, 835 F.2d at 1534 ("Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling."); *Hickey*, 699 F.2d at 752 ("It is impossible to assign to each of these factors a specific and invariably applied weight."); *Usery*, 527 F.2d at 1311-12 ("No one of these

Regarding the Department's review of certain appellate case law in the Rule discussed by some commenters, the Department believes that upon further consideration, this summary of appellate case law is incomplete, oversimplifies the analysis provided by the courts, and makes assumptions about the reasoning behind the courts' decisions that are not necessarily clear from the decisions themselves.[107] The Rule's discussion of the review was incomplete because the Department did not provide full documentation or citations for its case law review. In addition, it was not made clear in the Rule what the scope of the review entailed (e.g., whether it included only published circuit court decisions or all cases, whether it included cases that were simply remanded to the district court for any reason, etc.).[108] The review oversimplified the analysis provided by the courts because court decisions regarding classification under the FLSA often emphasize the fact-specific nature of the totality of circumstances analysis and do not parse out each factor like a checklist.[109] As the Third Circuit, for example, recently reiterated, neither the presence nor absence of any particular factor is dispositive, and courts should examine the circumstances of the whole activity, which is how courts commonly approach this analysis.[110] Mechanically deconstructing court decisions and considering what courts have said about only two factors, even when courts did present their analyses in this manner, ignores the holistic approach that most courts have taken in determining worker classification.

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considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor—economic dependence.").

[107] *See* 86 FR 1196-98.

[108] *See* 86 FR 1198 (stating "[a]mong the appellate decisions since 1975 that the Department reviewed…" and thus indicating that the universe may have been limited in some capacity that is not noted in the Rule).

[109] The economic realities factors ultimately assess whether the worker is economically dependent on the employer or in business for him/herself. *See*, *e.g.*, *Parrish*, 917 F.3d at 380 ("[T]he focus is on an assessment of the economic dependence of the putative employees, the touchstone for this totality of the circumstances test.") (internal quotation marks and citation omitted); *Keller*, 781 F.3d at 807 ("[W]e address each factor with an eye toward the ultimate question—[the worker's] economic dependence on or independence from [the employer]."); *Scantland*, 721 F.3d at 1312 (the economic realities factors "serve as guides, [and] the overarching focus of the inquiry is economic dependence").

[110] *See Razak*, 951 F.3d at 143 (citing *DialAmerica Mktg.*, 757 F.2d at 1382).

Most significantly, the Rule's assertion about the case law makes assumptions about the courts' decisions that are not part of the courts' reasoning—the Rule did not identify any court opinion that states that control and opportunity for profit or loss should be invariably prioritized over other factors as the Rule would have done, and there is therefore no basis to suggest that the case law endorses this "core factor" analysis. The Rule stated that "[t]he Department's review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so."[111] The Department should not have replaced the courts' analyses based on the theory that they were actually setting forth an unstated, different analysis, especially when courts expressly stated that they were applying a multifactor, holistic analysis. Ultimately, these cases were decided based on the application of the economic realities test to their facts, and different facts produce different results. As *Saleem*—a case relied upon heavily in the Rule—made clear, courts identify the most probative facts for that particular case and rely on them in reaching an outcome, and the factual differences do not need to be great to produce a different result.[112] The case law reflects that, rather than prioritizing certain factors as the Rule contended, courts have explicitly explained that the determination of the relationship depends on "the circumstances of the whole activity."[113]

While there are certainly many cases in which the classification decision made by the court aligns with the classification indicated by the control and opportunity for profit and loss factors, the Rule concedes that there are cases in which the classification suggested by the

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[111] 86 FR 1198. The Rule further hypothesized that "[i]n those cases where the control factor and opportunity factor aligned, had the courts hypothetically limited their analysis to just those two factors, it appears to the Department that the overall results would have been the same." *Id*.
[112] *Saleem*, 854 F.3d at 149 ("We conclude only that assessing the totality of the circumstances here in light of each *Silk* factor, undisputed evidence makes clear as a matter of law that *these* Plaintiffs were not employees of *these* Defendants. In a different case, and with a different record, an entity that exercised similar control over clients, fees, and rules enforcement in ways analogous to the Defendants here might well constitute an employer within the meaning of the FLSA.") (emphasis in original).
[113] *Rutherford Food*, 331 U.S. at 730.

control factor did not align with the worker's classification as determined by the courts.[114] The Rule also stated in a footnote, regarding the opportunity factor, that "[t]his is not to imply that the opportunity factor necessarily aligns with the ultimate classification, but rather that the Department is not aware of an appellate case in which misalignment occurred."[115] The Rule did not, however, identify any cases stating that the opportunity for profit or loss factor should be determinative or more probative of a worker's classification than other factors. Additionally, it is necessarily the case that if any two factors of a multifactor balancing test point toward the same outcome, then that outcome becomes increasingly likely to be the ultimate outcome; however, there was no analysis provided in the Rule regarding whether a different combination of factors would yield similar results.

While the Department is always seeking to improve clarity for workers and employers, the Rule's formulaic and mechanical weighting of factors is precisely what courts have cautioned against for decades in applying an economic reality analysis.[116] This is because a true balancing test that properly considers the totality of circumstances by definition does not mechanically elevate certain factors, and doing so would impermissibly narrow the Act's broad definition of "employ." For example, if facts relevant to the control and opportunity for profit or loss factors both point to independent contractor status for a particular worker but weakly so, those factors should not be presumed to carry more weight than stronger factual findings under other factors (e.g., the existence of a lengthy and exclusive working relationship under the "permanence" factor, the performance of work at the very heart of the potential employer's business under the

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[114] 86 FR 1197.
[115] *Id*. at 1197, n.44.
[116] The Supreme Court has been clear that there is no single factor that is determinative, *see Rutherford Food*, 331 U.S. at 730, nor is there any "mathematical formula" to be applied, *Antenor v. D & S Farms*, 88 F.3d 925, 933 (11th Cir. 1996). Furthermore, "courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees." *Antenor*, 88 F.3d at 933 (citations omitted). Courts of appeals have cautioned against any "mechanical application" of the economic reality factors. *See, e.g., Saleem*, 854 F.3d at 139. "Rather, each factor is a tool used to gauge the economic dependence of the alleged employee, and each must be applied with this ultimate concept in mind." *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008).

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

Further, the Rule's reliance on how courts assessed the control and opportunity for profit or loss factors in the past is inapposite here, because, as discussed below, the Rule would have significantly altered both of these factors, changing what may be considered for each. For example, the Rule would have downplayed the employer's right to control the work and recast the opportunity for profit or loss factor as indicating independent contractor status based on the worker's initiative or investment.[117] In other words, even if courts had generally relied upon control and opportunity for profit or loss in prior cases, the new framing of these factors, as redefined in the Rule, nevertheless sets forth a new analysis without precedent.

Accordingly, the Department agrees with the view expressed by numerous commenters that the Rule's elevation of the control and opportunity for profit or loss factors is in tension with the language and purpose of the Act as well as the position, expressed by the Supreme Court and in appellate cases from across the circuits, that no single factor is determinative in the analysis of whether a worker is an employee or independent contractor.

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

As explained above, the Independent Contractor Rule would have identified the nature and degree of control over the work as one of the two "core factors" meant to carry "greater weight in the analysis."[118] According to the Rule, "review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even

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[117] *See* 86 FR 1246-47 (§§ 795.105(d)(1)(i)-(ii), 795.110).
[118] *See* 86 FR 1246-47 (§ 795.105(d)(1)). The worker's opportunity for profit or loss would have been the other core factor.

if they did not always explicitly acknowledge doing so."[119] The Rule addressed and rejected comments which opined that focusing the analysis on two core factors—one of which would be control—would narrow the analysis to a common law control test.[120]

In the proposal to withdraw the Independent Contractor Rule, the Department expressed concern that "significant legal and policy implications could result from making control one of only two factors that would be ascribed greater weight" and cited several Supreme Court decisions stating that the FLSA's definition of "employ" means that the scope of employment under the Act is broader than under a common law control (*i.e.*, agency) analysis.[121] The Department questioned whether, in light of this Supreme Court "directive," "the outsized—even if not exclusive—role that control would have if the Rule's analysis were to apply may be contrary to the Act's text and case law."[122]

Several commenters who supported the proposed withdrawal of the Rule compared, and even equated, the Rule's elevation of control as a "core" factor with the adoption of a common law control test, a test which is inconsistent with the FLSA's "suffer or permit" standard. For example, AFSCME stated that, "by elevating consideration of day-to-day control as near-determinative, rather than one coequal factor among six, the Department has formulated a standard aligned with, and possibly more restrictive than, the common law employment test." The State Officials asserted that the Independent Contractor Rule "was wrong not only to elevate any one relevant factor over another in an assessment of a worker's economic reality, but also to elevate control in particular" because "the FLSA uses an intentionally broad definition of employment, which expands the statute's protections to a class of workers greater than just those who would satisfy a common law understanding of employment based largely on the degree of control." They added that the Rule's "emphasis on control reverts back to the common law

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[119] *Id.* at 1198 (citing 85 FR 60619).
[120] *See id.* at 1200-01.
[121] 86 FR 14033 (citing 29 U.S.C. 203(g); *Darden*, 503 U.S. at 326; *Portland Terminal*, 330 U.S. at 150-51; *Rutherford Food*, 331 U.S. at 728; *Rosenwasser*, 323 U.S. at 362-63).
[122] *Id*.

standard" and that "this, too, requires withdrawal of the [Rule]." *See also* AFL-CIO ("Despite . . . clear Supreme Court instructions to construe the definition of employee in the FLSA more broadly than under the common law . . . , the [Rule] effectively collapses the FLSA's definition into the common law definition by giving primacy and controlling weight to the two factors of control and opportunity for profit and loss."); Representative Scott, *et al.* ("Giving the control factor outsized weight under the Rule's test is in direct conflict with congressional intent.").

Many commenters who opposed the proposed withdrawal of the Rule expressed general support for elevating control as a "core" factor along with opportunity for profit or loss. For example, Capital Investment Companies stated that the Rule "properly focuses on the control over the working relationship and the financial aspects of the relationship." The Intermodal Association of North America commended the Rule's adoption of a "revised economic reality test, with a focus on the nature and degree of the worker's control over their work and the worker's opportunity for profit or loss." Commenters who opposed the Rule's proposed withdrawal generally did not express concerns with elevating control as one of two core factors for determining employee or independent contractor status.

As an initial matter and as explained above, it is not legally supportable to elevate in a predetermined and universal manner two factors above the others. Moreover, having considered the issue and the comments received, it is the Department's position that, in particular, elevating control is contrary to the FLSA's text and its particular scope of employment. As noted, the FLSA defines "employ" to include "to suffer or permit to work."[123] The Supreme Court has explained that this FLSA definition was a rejection of the common law control standard for determining who is an employee under the Act in favor of a broader scope of coverage.[124]

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[123] 29 U.S.C. 203(g).

[124] *See Darden*, 503 U.S. at 326 ("[T]he FLSA … defines the verb 'employ' expansively" and with "striking breadth" that "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.") (citations omitted); *Portland Terminal*, 330 U.S. at 150-51 ("But in determining who are 'employees' under the Act, common law employee categories or employer-employee

Although the Rule's test was not the same as the common law control test, the Rule's mandate that control have such an elevated role in every FLSA employee or independent contractor analysis brought the Rule too close to the common law test that the Act squarely rejects. Accordingly, the outsized role that control would have played in the analysis supports withdrawing the Rule.

3. The Rule's Narrowing of Several Factors

In its proposal to withdraw the Independent Contractor Rule, the Department expressed concern that the ways in which the Rule would have redefined certain factors would improperly narrow the application of the economic realities test.[125] The Department identified four examples of such narrowing: (1) making the "opportunity for profit or loss" factor indicate independent contractor status based on the worker's initiative *or* investment; (2) disregarding the employer's investments; (3) disregarding the importance or centrality of a worker's work to the employer's business; and (4) downplaying the employer's right or authority to control the worker.[126] In each of these ways, the Rule would have narrowed the scope of facts and considerations comprising the analysis of whether the worker is an employee or independent contractor, eliminating several facts and concepts that have deep roots in both the courts' and WHD's application of the analysis.[127] Moreover, the Department expressed concern that, as a policy matter, the Rule's narrowing of the analysis would result in more workers being classified as independent contractors not entitled to the FLSA's protections, contrary to the Act's purpose of broadly covering workers as employees.[128]

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classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.") (citations omitted); *see also Rutherford Food*, 331 U.S. at 728 ("The definition of 'employ' is broad."); *Rosenwasser*, 323 U.S. at 362-63 ("A broader or more comprehensive coverage of employees … would be difficult to frame.").

[125] *See* 86 FR 14033-34.

[126] *See id*.

[127] *See id.* at 14034.

[128] *See id*.

A number of commenters who supported withdrawal agreed that the Rule would have impermissibly narrowed how the factors are applied. For example, the National Employment Lawyers Association (NELA) and the Women's Law Project stated that the "words of the FLSA are unrecognizable in [the Rule's] cramped reading of the law and its adoption of entirely irrelevant factors, twisting of the meaning of other factors, and narrowing of the measure of what it means to be an employee." According to AFSCME, the Rule would have "redefine[d]" the factors, "narrowing and confining the depth of each factor's inquiry." The State Officials added that the Rule would have "unreasonably exclude[d] relevant criteria from the determination of whether a worker is covered by the FLSA" and would not have considered "the full details of a working relationship, as decades of precedent require." The National Employment Law Project commented that the Rule "describe[d] a set of narrow 'core' factors taken from a cramped version of the narrowly-scoped common law, which is not the test for employment coverage under the FLSA, assert[ed] new factors never before considered relevant by the courts, and prevent[ed] consideration of factors that the Supreme Court has always deemed critical to determining whether an employment relationship exists."

Of the commenters who opposed the proposed withdrawal of the Rule, the National Association of Home Builders supported the Rule's "adopting a narrower 'economic reality' test to determine a worker's status as an FLSA employee or an independent contractor" and "reject[ed] the contention and justification offered as support for withdrawing the [Rule]." Other commenters disputed the Department's concern that the Rule would narrow the application or the factors and/or that any narrowing is a basis for withdrawing the Rule. For example, the Competitive Enterprise Institute disputed the concern, arguing among other things that "the underlying determining factors would remain the same" and that the Rule did "not prevent courts from weighing all factors," but instead "merely offer[ed] guidance, as a rulemaking should." The U.S. Chamber of Commerce characterized the proposal's concern that the Rule's narrowing of the analysis would result in more workers being classified as independent contractors as

"misguided and presum[ing] conclusions that the [Rule] does not guarantee." Other comments asserted that the Rule's explanation of the factors eliminated confusion and overlap among the factors. *See*, *e.g.*, Seyfarth Shaw on behalf of Coalition for Workforce Innovation (asserting that the Rule provided "clear guidance regarding . . . which facts fall within the various and sometimes blurred factors," "increas[ing] legal certainty in application of the economic realities test").

Having considered the comments and the issues further, the Department believes that, by removing from the analysis several facts and concepts that have a strong foundation in both the courts' and WHD's application of the analysis, the Rule would have improperly narrowed the scope of facts and considerations comprising the analysis of whether a worker is an employee for purposes of the FLSA or an independent contractor. Narrowing the facts and considerations that comprise the analysis would have been inconsistent with the court-mandated totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor.[129] The Department elaborates on this below in its discussion of several examples of how the Rule would have narrowed application of the factors. In addition, upon further consideration, the Rule's narrowing of factors would, in the Department's view, have likely resulted in more workers being reclassified or misclassified as independent contractors not entitled to the FLSA's protections. Not only would such a result have been contrary to the Act's purpose of broadly covering workers as employees,[130] but to the extent that women and people of

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[129] *See*, *e.g.*, *Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012) ("This 'economic reality' standard, however, is not a precise test susceptible to formulaic application . . . . It prescribes a case-by-case approach, whereby the court considers the 'circumstances of the whole business activity.'") (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984)); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001) ("No one factor standing alone is dispositive and courts are directed to look at the totality of the circumstances and consider any relevant evidence."); *Snell*, 875 F.2d at 805 ("It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances."); *Superior Care*, 840 F.2d at 1059 (2d Cir. 1988) ("No one of these factors is dispositive; rather, the test is based on a totality of the circumstances . . . . Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.").

[130] *See*, *e.g.*, *supra* notes 8-10, and accompanying text.

color are overrepresented in low-wage independent contractor positions where misclassification is more likely (as a number of commenters asserted), this result would have had a disproportionate impact on these workers. Citing a study finding that seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color, the National Women's Law Center, Kentucky Equal Justice Center, Center for Law and Social Policy, Shriver Center on Poverty Law, and other commenters asserted that "it is no coincidence that corporate misclassification is rampant in low-wage, labor-intensive industries where women and people of color, including Black, Latinx, and AAPI workers, are overrepresented." These commenters, as well as numerous individual commenters, added that the Rule would have "inflict[ed] the most damage on workers of color who predominate in the low-paying jobs where independent contractor misclassification is common." The Department agrees that if the Rule had resulted in an increase in the use of independent contractors in low-wage industries where independent contracting is common, it could have had a disproportionate effect on women and workers of color.

In sum, the Rule's narrowing of the application of the economic realities factors, as further described below, warrants withdrawal of the Rule.

a. Making the Opportunity for Profit or Loss Factor Indicate Independent Contractor Status Based on the Worker's Initiative or Investment

The Independent Contractor Rule would have provided that the opportunity for profit or loss factor indicates independent contractor status if the worker has that opportunity based on either his or her exercise of initiative (such as managerial skill or business judgment) *or* management of his or her investment in or capital expenditure on helpers or equipment or material to further his or her work.[131] The worker "does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor."[132] In other words, the factor would have indicated independent contractor status if

[131] *See* 86 FR 1247 (§ 795.105(d)(1)(ii)).
[132] *Id.*

the worker either: (1) made no capital investment but exercised initiative or (2) had a capital investment but exercised no initiative. Most courts currently consider investment as its own factor in the analysis, but the Rule's change would have resulted in investment no longer being its own factor. In addition, courts may currently consider initiative as part of the skill factor, but the Rule's change would have resulted in initiative being considered only as part of the opportunity for profit or loss factor. The proposal to withdraw the Rule expressed the concern that, by articulating the factor in this manner, the Rule would completely remove investment or initiative from consideration in certain cases.[133] The proposal suggested that, for example, if the worker exercised initiative, the opportunity for profit or loss factor would indicate independent contractor status even if the worker made no capital investment.[134]

Few commenters addressed the Rule's exact articulation of the opportunity for profit or loss factor. AFSCME commented that although this factor was "initially formulated to determine whether an independent contractor can grow and expand their business through investment," the Rule would have "look[ed] only to whether a worker's success (or failure) in earnings can be attributable to individual initiative or management but need not involve both." The International Brotherhood of Teamsters objected to the Rule's "reframing" of the opportunity for profit or loss factor, arguing that it would "overemphasiz[e] workers' theoretical ability to increase their earnings through minimal investment or personal initiative." Other commenters who supported the proposed withdrawal generally questioned whether the opportunity for profit or loss should be determinative. *See*, *e.g.*, AFL-CIO; Women's Law Project. On the other hand, commenters who opposed withdrawal of the Rule generally supported the Rule's articulation of the opportunity for profit or loss factor as being based on initiative or investment. *See*, *e.g.*, SHRM; Seyfarth Shaw on behalf of Coalition for Workforce Innovation; Associated General Contractors of America; *see also* American Society of Travel Advisors.

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[133] *See* 86 FR 14033.
[134] *See id*.

Having considered the comments and the issue further, the Department believes that the Rule's articulation of the opportunity for profit or loss factor as indicating independent contractor status if the worker either exercises initiative or manages capital investment is not supported. No court articulates the opportunity for profit or loss factor as having these two prongs, only one of which need indicate independent contractor status for the factor as a whole to indicate independent contractor status. Moreover, this articulation would have erased from the analysis in certain situations the worker's lack of initiative or lack of capital investment—both of which are longstanding and well-settled indicators of employee status. Because the worker's initiative and investment would have been considered under the Rule only as the two prongs comprising the opportunity for profit or loss factor, if either one indicated an opportunity for profit or loss then the factor would have invariably indicated independent contractor status. The other prong need not be considered at all as it could not have reversed or weighed against that finding even if it indicated employee status as a matter of economic reality. In effect, the Rule's subordination of "initiative" and "investment" as alternative considerations within the "opportunity for profit or loss" factor would have favored independent contractor status even when evidence of employee status was present.

b. Disregarding the Employer's Investments

The Independent Contractor Rule articulated investment as the worker's "management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work."[135] The Rule's preamble provided that "comparing the individual worker's investment to the potential employer's investment should not be part of the analysis of investment."[136] Thus, the Rule precluded consideration of the employer's investment. The proposal to withdraw the Rule questioned the basis for the Rule's limited consideration of investment.[137]

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[135] 86 FR 1247 (§ 795.105(d)(1)(ii)).
[136] *Id.* at 1188.
[137] *See* 86 FR 14033.

Few commenters addressed the issue in response to the proposal. For example, Farmworker Justice commented that the Department was "correct" to identify the Rule's preclusion of consideration of "the worker's investment relative to the putative employer's investment" as "inconsistent with the law." The International Brotherhood of Teamsters opposed both the Rule's rejection of "prior precedent which held that in determining whether or not a worker's investment was significant, courts must compare it to the employer's investment" and the Rule's suggestion that "a minimal investment by a worker might be sufficient to find that a worker is an independent contractor even if the employer made much more significant investments." Representative Scott, *et al.*, when describing the factors "almost uniformly used in federal courts of appeal as indicators of economic dependence," articulated the investment factor as "the extent of the relative investments of the employer and the worker" and cited AI 2015-1.

Commenters who opposed withdrawal of the Rule generally did not share any concerns with the Rule's limiting of the investment factor to consideration of the worker's investment. The Center for Workplace Compliance, for example, commented that there is "significant overlap between the relative investment factor and the factor examining the opportunity for profit or loss" and that "not separately list[ing] the relative investment factor removes any confusion caused by the overlap yet does not prevent an analysis of relative investment where appropriate." These commenters generally approved of the Rule's articulation of the factors, including investment. *See*, *e.g.*, Seyfarth Shaw on behalf of Coalition for Workforce Innovation; U.S. Chamber of Commerce.

Having considered the comments and the issue further, the Department believes that the Rule's interpretation against considering the worker's investment as compared to the employer's investment was legally unsound. As support for the interpretation, the Rule cited decisions from the Fifth and Eighth Circuits in which courts gave little weight to the comparison of the employer's investment in its business to the worker's investment in the work in light of the facts

presented in those cases.[138] However, the decisions cited did make the comparison of the investments a part of the analysis, but found that the comparison had little relevance or accorded it little weight under those particular facts.[139] Numerous other courts of appeals have considered the worker's investment in the work in comparison to the employer's investment in its business,[140] as does WHD in enforcement actions. As the Fifth and Eighth Circuit decisions demonstrate, courts may give the relative comparison of investments little weight in certain factual circumstances or make nuanced decisions regarding how much evidence of the employer's investment to allow. Accordingly, precluding consideration of the worker's and the employer's relative investments would have very little legal support, would have been contrary

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[138] *See* 86 FR 14033. The Fifth Circuit decisions cited were *Parrish*, 917 F.3d at 383, and *Hopkins*, 545 F.3d at 344-46. The Eighth Circuit decision cited was *Karlson*, 860 F.3d at 1096.

[139] *See Parrish*, 917 F.3d at 383; *Hopkins*, 545 F.3d at 344-46. The Fifth Circuit recently again articulated the investment factor as "'the extent of the relative investments of the worker and the alleged employer.'" *Hobbs*, 946 F.3d at 829 (quoting *Hopkins*, 545 F.3d at 343). In *Hobbs*, the Fifth Circuit affirmed the district court's finding that the relative investments – the potential employer's "overall investment in the pipe construction projects" as compared to the workers' individual investments – favored employee status. *Id.* at 831-32. The Fifth Circuit agreed with the district court's conclusion to give the factor "little weight in its analysis" in that case given the nature of the industry and work involved. *Id.* at 832 (citing *Parrish*, 917 F.3d at 383). In sum and contrary to what the Rule would have provided, the Fifth Circuit routinely considers the relative investments of the worker and the potential employer even if the factor may ultimately be accorded little weight depending on the circumstances. And in the Eighth Circuit's decision in *Karlson*, the court affirmed the district court's decision to allow some evidence of the worker's and the employer's relative investments but not allow the worker to introduce evidence of the employer's overall investment (i.e., large dollar figures) that "would create the danger of unfair prejudice." 860 F.3d at 1096.

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

to numerous courts of appeals decisions as well as the totality-of-the-circumstances approach applied by courts,[141] and would have been an unfounded limit on factfinders' ability to pursue inquires that best differentiate between a worker's economic dependence and independence based on the particular facts of the case.

c. Disregarding the Importance or Centrality of a Worker's Work to the Employer's Business

The Independent Contractor Rule would have recast the factor examining whether the worker's work "is an integral part" of the employer's business as whether the work "is part of an integrated unit of production."[142] The Rule rejected as irrelevant to this factor whether the work is important or central (*i.e.*, integral) to the employer's business.[143] Instead, the Rule would have provided that "the relevant facts are the integration of the worker into the potential employer's production processes" because "[w]hat matters is the extent of such integration rather than the importance or centrality of the functions performed" by the worker.[144] The Rule asserted that this recast articulation was supported by *Rutherford Food* (which considered whether the work was "part of the integrated unit of production" of the employer),[145] but acknowledged that WHD and courts typically consider whether the work is important or central.[146] The proposal to withdraw the Rule identified this factor's redefinition to "integrated unit of production" as another example of how the Rule would eliminate from the economic realities analysis facts and concepts that have a strong foundation in the courts' and WHD's application of the analysis and would narrow the scope of the analysis.[147]

A number of commenters who supported the proposed withdrawal objected to the Rule's narrowing of the "integral" factor. For example, Farmworker Justice commented that the

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[141] *See supra* note 106.
[142] *See* 86 FR at 1193-96, 1247 (§ 795.105(d)(2)(iii)).
[143] *See id.* at 1193-95.
[144] *Id.* at 1195.
[145] *See id.* at 1193-94 (citing *Rutherford Food*, 331 U.S. at 729).
[146] *See id.* at 1193.
[147] *See* 86 FR 14033-34.

Department was "correct" to identify the Rule's "remov[al of] consideration of the work's importance to the business purpose" as "inconsistent with the law." The State Officials stated that, "under well-established circuit court precedent, the relevant inquiry is whether the worker's work is 'an integral part of the business,' which could be satisfied by being part of an integrated unit, or by being integral to the business." Texas RioGrande Legal Aid asserted that, by "removing" consideration of whether "farmworkers perform tasks integral to the businesses of the growers to whom they provide services," the Rule would have "stacked the decks in favor of a narrower definition of farm-based employee." The AFL-CIO added that the Rule would have "narrow[ed] the meaning" of the integral factor and was "contrary to Congress' intent and otherwise unjustified for several reasons," including because it would have been inconsistent with Supreme Court and Circuit Court precedent and because it "appears to be intended to provide transportation network companies like Uber and Lyft with a regulatory basis for their argument that their drivers are not their employees." The International Brotherhood of Teamsters objected for similar reasons, arguing that the Rule's "bar[ring] any consideration of whether the work performed is important or otherwise integral to the employer's business [is] in direct contradiction of established precedent" and was undertaken to "facilitat[e] the recognition of gig workers as independent contractors."

Commenters who opposed the proposal to withdraw did not share concerns regarding this factor. The Center for Workplace Compliance stated that "many courts have found the former 'integral part' framing of the factor as overlapping with the ability to control work" and that "the 'integral part' factor can inappropriately be interpreted to focus on the importance of the work instead of integration." It agreed with the Rule that "reframing this factor to look at whether the work is part of an integrated unit of production . . . is much closer to how the factor has been historically interpreted by the Supreme Court." Other commenters who opposed the proposal generally objected to the proposal's assertion that the Rule would have narrowed the factors, *see*,

e.g., U.S. Chamber of Commerce, or generally supported the Rule's articulation of the factors, including the "integrated unit" factor, *see*, *e.g.*, TechServe Alliance.

Having considered the comments and the issue further, the Department believes that the Rule's narrowing of the "integral part" factor to exclude consideration of whether the work is central or important was not supported. As the Rule acknowledged, WHD and courts have been applying the "integral part" factor for decades,[148] and it is a longstanding factor within the economic realities analysis. This is because a worker who performs work that is integral to the employer's business is more likely to be economically dependent on the employer;[149] whereas a worker who performs work that is more peripheral to the employer's business is more likely to be independent from the employer. Moreover, as with the other ways in which the Rule would have limited the analysis, the Rule's exclusion of whether the work is important or central to the employer's business is inconsistent with the court-mandated totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor.[150] In addition, the Rule's reliance on *Rutherford Food*'s "integrated unit of production" language was overly rigid and incomplete. The Rule did not consider a passage from the Supreme Court's contemporaneous decision in *Silk* finding that "unloaders" were employees of a retail coal company as a matter of economic reality in part because they were "*an integral part* of the businesses of retailing coal or transporting freight." 331 U.S. at 716 (emphasis added). The Rule did not sufficiently credit courts' or WHD's longstanding treatment of *Rutherford Food*'s "integrated unit" language as tantamount to analyzing whether the work is an "integral part" of the employer's business.[151] Finally, the Rule stated that the "integral part" factor tended to indicate employee status and had a "higher rate of misalignment" with the ultimate result in

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[148] *See* 86 FR at 1194 (citing WHD opinion letters and cases).
[149] See *DialAmerica Mktg.*, 757 F.2d at 1382-83.
[150] *See* footnote 106, *supra*.
[151] *See*, *e.g.*, AI 2015-1, 2015 WL 4449086, at *5 (relying on *Rutherford Food*'s "integrated unit of production" language in its discussion of the "integral" factor).

certain cases;[152] however, it did not identify any cases where the "integral part" factor led to a result that was contrary to the totality of the evidence. Accordingly, the Rule's narrowing of the "integral" factor is another reason in support of withdrawal.

d. Downplaying the Employer's Right or Authority to Control the Worker

The Rule would also have stressed the primacy of the parties' actual practice by providing that "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible," and that "a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority."[153] In support, the Rule's preamble asserted that "the common law control test does not establish an irreducible baseline of worker coverage for the broader economic reality test applied under the FLSA," and that the FLSA "does not necessarily include every worker considered an employee under the common law."[154] The proposal to withdraw the Rule questioned whether this approach was consistent with Supreme Court precedent.[155]

Commenters who supported withdrawal objected to how the Rule would treat the employer's right or authority to control the worker. For example, the AFL-CIO commented that "discounting contractual or reserved control is inconsistent with congressional intent to expand the coverage of the FLSA beyond the narrow confines of common law employment and the Department provides a faulty basis for discounting reserved control." The State Officials stated that the Rule "unduly narrowed the existing factors when it emphasized that evaluating whether an employment relationship exists should rely heavily on actual practice." They added that how the Rule would have treated the employer's right or authority to control the worker "is contrary to law" and would have impermissibly "narrowed employment even further than it was

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[152] *See* 86 FR at 1194.
[153] 86 FR at 1247 (§ 795.110).
[154] *Id.* at 1205.
[155] *See* 86 FR 14033-34.

understood at common law" (citing *New York v. Scalia*, 490 F. Supp.3d 748, 787-88 (S.D.N.Y. 2020)).

Commenters who opposed withdrawal generally agreed with how the Rule would have treated the employer's right or authority to control the worker. For example, the National Retail Federation commented that the Rule would have "appropriately focuse[d] the test on actual practice rather than contractual or theoretical possibilities." The Center for Workplace Compliance described this provision of the Rule as "consistent with historical interpretation of the economic reality test by federal courts and DOL."

Having considered the comments and the issue further, the Department believes that the actual practice of the employer is not invariably more relevant than the authority that the employer may have reserved for exercise in the future. As several commenters noted, the right to control is part of control at the common law, and the Rule's blanket diminishment of the relevance of the right to control seems inconsistent with the Supreme Court's observations that the FLSA's scope of employee coverage is exceedingly broad and broader than what exists under the common law.[156] Thus, an employer's right or authority to control a worker, for example, can be strong evidence suggesting the existence of an FLSA employment relationship, just as it is under the common law.[157] In sum, the Rule's simplistic declaration that the parties' actual practices are invariably more relevant is another reason to withdraw the Rule.

B. Whether the Rule Would Provide the Intended Clarity

One of the Independent Contractor Rule's primary stated purposes was to "significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act."[158] Although the stated intent of the Rule was to provide clarity, it would also (as

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[156] *See Rosenwasser*, 323 U.S. at 362 ("A broader or more comprehensive coverage of employees" than that contemplated under the FLSA "would be difficult to frame."); *Darden*, 503 U.S. at 326 (the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").
[157] *See*, *e.g.*, *Razak*, 951 F.3d at 145 ("[A]ctual control of the manner of work is not essential; rather, it is the right to control which is determinative.").
[158] 86 FR 1168.

discussed above) have introduced several concepts to the analysis that neither courts nor WHD have previously applied. As explained in the NPRM, the Department's proposal to withdraw the Rule arose in part from a concern that these changes would cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty, as intended.

Numerous commenters asserted that the Independent Contractor Rule would clarify the distinction between independent contractors and FLSA-covered employees, and that withdrawing the Rule would forfeit the benefits of this added clarity. For example, the U.S. Chamber of Commerce stated that "[under] the status quo ante … employers are uncertain how to classify a worker under the economic realities test because they can not [sic] know how WHD will evaluate the different factors … [which] puts employers at risk of WHD enforcement and private litigation, and can impede businesses from engaging many smaller businesses or sole proprietors." Several commenters specifically identified the Rule's elevation of two "core factors" as a clarifying feature that would reduce uncertainty and inconsistency in application of the economic realities test. *See, e.g.*, American Society of Travel Advisors ("[A]ssigning greater weight to any factor will necessarily reduce, to some degree, the element of subjectivity inherent in the test."); Competitive Enterprise Institute ("Increasing the number of factors that must be given equal weight would lead to more inconsistent outcomes in the courts and elsewhere."). Some commenters, such as Brownstein Hyatt Farber Schreck and the Washington Legal Foundation, praised the Independent Contractor Rule's inclusion of illustrative factual examples, while other commenters expressed appreciation for the Rule's guidance on common business practices that would not militate against independent contractor status, such as requiring individuals 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. *See* American Trucking Association ("Without [such guidance], motor carriers and other companies in other industries will be more reluctant to engage with and require improved safety as a condition of working with them for their independent contractors."); New Jersey

Warehousemen & Movers Association (same). Numerous commenters asserted that these features of the Rule would reduce litigation over the FLSA employment status of alleged independent contractors. *See, e.g.*, Chauvel & Glatt, LLP; Society for Human Resource Management.

Some commenters supportive of the Independent Contractor Rule addressed the concern expressed in the NPRM that the novelty of the Rule's guidance would cause confusion or lead to inconsistent outcomes. The Competitive Enterprise Institute asserted that "[a]ll rule changes are initially unfamiliar and require courts and others to adjust," and that unfamiliarity "is not a rationale for leaving the rules unchanged when they become outdated." *See also* Melinda Spencer ("So what if this is a new definition? The country clearly needs a new, clearer definition."). Associated Builders and Contractors (ABC) and Littler Mendelson, P.C. disputed that the Rule's guidance was new or novel at all, asserting that its features were consistent with the way that most courts have been applying the economic realities test. Asserting differences in the ways that circuit courts describe the economic realities test, the Coalition to Promote Independent Entrepreneurs opined that "the Independent Contractor Rule provides an opportunity to conform all federal circuits to one unified explication of the test."

By contrast, many other commenters shared the concern expressed in the Department's NPRM that implementation of the Independent Contractor Rule would add confusion rather than clarity due to the Rule's deviation from established guidance and precedent. For example, AFSCME asserted that the Rule would "upset … settled understandings and relied-upon judicial precedent upon which millions of American workers and employers have ordered their relationships." A number of commenters, including the Center for Law and Social Policy (CLASP), the North Carolina Justice Center, and the Shriver Center on Poverty Law, characterized the Independent Contractor Rule as a "a radical departure from established agency and court interpretations of the FLSA." Farmworker Justice asserted that the Rule would "still require complex, fact-specific considerations of the unique circumstances of each employer-

worker relationship," but introduce "a whole set of new ambiguities and legal questions," such as "whether it matters at all that an activity is 'integral'—or important—to the business … how to weigh worker investment without comparing it to the investment made by the employer; what type of control is relevant when deciding the 'control' factor; when to weigh the secondary factors and so forth." The Signatory Wall and Ceiling Contractors Alliance (SWACCA) asserted that, if the Independent Contractor Rule were adopted, subsequent court decisions interpreting the Rule would "necessitate additional, ongoing familiarization costs." NELA, Pleval Law, and the International Brotherhood of Teamsters opined that implementation of the Rule would be discordant with state laws featuring more expansive worker coverage, increasing the likelihood that some workers might have different employment statuses under state and federal law.

Several commenters asserted that the lack of clarity regarding whether and to what extent courts would defer to the Independent Contractor Rule's guidance would result in uncertainty. *See* AFL-CIO; International Brotherhood of Teamsters; Northwest Workers Justice Project; SWACCA; Texas RioGrande Legal Aid. The United Brotherhood of Carpenters and Joiners of America stated that the Rule would itself be vulnerable to a successful legal challenge, invoking the "fate of the [Department's] equally flawed joint employer rule."[159] *See also* State Officials ("[F]rom its initial proposal to the present, the States and other commenters have consistently questioned [the Rule's] legality due to its departure from the FLSA and violation of [Administrative Procedure Act]-required procedures.").

Upon further reflection, including consideration of relevant comments, the Department does not believe that the Independent Contractor Rule would have achieved the added clarity it intended to provide to the regulated community. To the contrary, given how the Rule failed to account for the FLSA's broad "suffer or permit" language and the numerous ways in which it

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[159] On September 8, 2020, the U.S. District Court for the Southern District of New York vacated most of the FLSA Joint Employer Final Rule issued by the Department and effective in March 2020, on the grounds that it is contrary to law and arbitrary and capricious. *See Scalia*, 490 F. Supp.3d 748. An appeal is currently pending before the Second Circuit Court of Appeals. *See New York v. Walsh*, No. 20–3806 (2d Cir. appeal docketed Nov. 6, 2020).

departed from courts' longstanding precedent, it is not clear whether courts would have deferred to the Rule's guidance. To the extent that some courts would have declined to apply the test set forth in the Independent Contractor Rule, this would have created conflicts among courts and between courts and the Department, resulting in more uncertainty as to the applicable economic realities test. Businesses operating nationwide would have had to familiarize themselves with multiple standards for determining who is an employee under the FLSA across different jurisdictions, continuing "to comply with the most demanding standard if they wish[ed] to make consistent classification determinations."[160]

In addition to uncertainty resulting from whether courts would defer to the Independent Contractor Rule given its departures from courts' own precedent, the Rule would have introduced several ambiguous terms and concepts into the analysis for determining the FLSA employment status of an alleged independent contractor. For example, courts and regulated parties would have had to grapple with what it would mean in practice for two factors to be "core" factors and entitled to greater weight. In addition, they would have had to determine, in cases where the two "core" factors pointed to the same classification, how "substantial" the likelihood is that they point toward the correct classification if the additional factors point toward the other classification. Perhaps most difficult of all, the Rule cautioned that its list of factors was "not exhaustive,"[161] but did not specify whether the "additional factors" referenced in § 795.105(d)(2)(iv) would have had less probative value (or weight) than the three "other factors" listed in § 795.105(d)(2)(i)-(iii) of the Rule.[162] Assuming that they did, the Rule would have essentially transformed the multifactor balancing test that courts and the Department currently apply into a three-tiered multifactor balancing test, with "core" factors given more weight than enumerated "other" factors, and enumerated "other" factors given more weight than unspecified "additional" factors. Rather than weighing all factors against each other in a holistic

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[160] 86 FR 1241 n. 255.
[161] 86 FR 1246 (§ 795.105(c)).
[162] 86 FR 1247.

fashion depending on the facts of a particular work arrangement, courts and the regulated community would have had to evaluate factors within and across groups in a new hierarchical structure, which would have likely caused confusion and inconsistency. Adding to the confusion, the Rule collapses some factors into each other, so that investment and initiative are only considered as a part of the opportunity for profit or loss factor, requiring courts and the regulated community to reconsider how they have evaluated those factors.

In other words, the Independent Contractor Rule's guidance would complicate rather than simplify the analysis for determining whether a worker is an employee or independent contractor under the FLSA. Given the likelihood that many courts would ignore, reject, or not defer to the Rule's guidance for the reasons explained above, the Department believes that the Rule would have introduced substantial confusion and uncertainty on the topic of independent contractor status, to the detriment of workers and businesses alike.

C. Whether the Rule Would Have Benefitted Workers as a Whole

As part of its analysis of possible costs, transfers, and benefits, the Independent Contractor Rule quantified some possible costs (regulatory familiarization) and some possible cost savings (increased clarity and reduced litigation).[163] The Rule identified and discussed—but did not quantify—numerous other costs, transfers, and benefits possibly resulting from the Rule, including "possible transfers among workers and between workers and businesses."[164] The Rule "acknowledge[d] that there may be transfers between employers and employees, and some of those transfers may come about as a result of changes in earnings," but determined that these transfers cannot "be quantified with a reasonable degree of certainty for purposes of [the Rule]."[165] The Economic Policy Institute (EPI) had submitted a comment during the rulemaking estimating that the annual transfers from workers to employers as a result of the Rule would be

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[163] *See id.* at 1211.
[164] *Id.* at 1214-16.
[165] *Id.* at 1223.

$3.3 billion in pay, benefits, and tax payments.[166] The Rule discussed its disagreements with various assumptions underlying EPI's estimate and explained its reasons for not adopting the estimate.[167] The Rule concluded that "workers as a whole will benefit from [the Rule], both from increased labor force participation as a result of the enhanced certainty provided by [the Rule], and from the substantial other benefits detailed [in the Rule]."[168]

The Department's view, upon further consideration, of the value of EPI's analysis is addressed below in section IV, in the analysis of costs and benefits of this withdrawal. As a general matter, the Department notes here that it does not believe the Rule fully considered the likely costs, transfers, and benefits that could result from the Rule. This concern is premised in part on WHD's role as the agency responsible for enforcing the FLSA and its experience with cases involving the misclassification of employees as independent contractors. The consequence for a worker of being classified as an independent contractor is that the worker is excluded from the protections of the FLSA. Without the protections of the FLSA, workers need not be paid at least the federal minimum wage for all hours worked, and are not entitled to overtime compensation for hours worked over 40 in a workweek. Workers would also lose the FLSA's protection against retaliation for complaining about a violation of the FLSA. The Department concludes that, to the extent the Rule would result in the reclassification or misclassification of employees as independent contractors, the resulting denial of FLSA protections would harm the affected workers. The Department's decision to withdraw the Rule is the result in part of its belief that doing so will benefit workers as a whole.

The Washington Legal Foundation commented that the Department should not consider only the distributional effects of withdrawal. It argued that the Rule would still benefit workers even if it benefitted businesses more. As an initial matter, the Department believes that the distributional consequences of withdrawal are appropriate to consider. Moreover, it finds that the

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[166] *See id.* at 1222.
[167] *See id.* at 1222-23.
[168] *Id.* at 1223.

Rule would not merely benefit workers less than business owners, but—for the reasons noted above and those explained below—would actually harm workers.

Many commenters expressed concerns that the Rule's effects would have harmed workers. For example, a number of individual commenters, including independent contractors, employees, and employers who supported withdrawing the Independent Contractor Rule believed that the Rule would give businesses more power to force workers to accept independent contractor status. As several commenters said in comments that used template language, "[i]n times of high unemployment like today, individual workers have even less market power than usual to demand fair conditions, especially in jobs that historically have been undervalued; they are forced to accept take-it-or-leave-it job conditions." Other of these commenters worried the Rule would "stack the deck against workers and enable employers to misclassify more and more employees as independent contractors." The Rule would, according to some, "fuel a race to the bottom." One commenter who self-identified as "an actual independent contractor" believed that the only effect of the Rule would be "to allow massive companies to deny workers the benefits of employment status and squeeze extra profits for shareholders," with the result that misclassified workers would "end up on public assistance for basic needs like healthcare, meaning corporations are passing the true cost of business on to taxpayers." Some commenters were also worried about the effect of the Rule on businesses. The Construction Employers of America commented that the Rule "will make it harder for employers providing middle class careers in our industry to compete and provide good wages, benefits, and the protections that have been part of the employer/employee relationship since the 1930s." Other commenters also said that the Rule "harms companies that play by the rules and treat workers fairly. Companies that take shortcuts are allowed under the rule to misclassify their employees, undercut responsible employers and drag down the wages and labor standards across essential industries."

Commenters opposed to the withdrawal saw independent contractor status in a more positive light. In particular, a number of individual commenters expressed a desire to maintain

their status as independent contractors, articulating general support for the concept of independent contractor status, especially the concept of flexible work schedules. The Department appreciates these commenters' perspective, however, these comments do not demonstrate the Rule's benefit to workers. A worker already properly classified as an independent contractor will retain that status because, with this withdrawal, the economic realities test the Department uses to determine who is an employee under the FLSA is not changing. Moreover, flexible work schedules can be made available to employees as well as independent contractors, so any determination of or shift in worker classification need not affect flexibility in scheduling.

Some other commenters stated that the Department "seems to take the position that independent contractors only exist to the extent that they are simply misclassified employees." They further stated that the proposal "fails to recognize that independent contractors exist separate and apart from employees who are misclassified as independent contractors by some employers." Similarly, a self-described "freelance writer and editor" commented that the proposal "appears to be part of a larger effort to significantly restrict or even eliminate the ability for employers to classify individuals as independent contractors." Some of these commenters worried that withdrawal would mean adopting a test similar to the "ABC Test" that generally applies under California state wage laws. These comments do not accurately characterize the proposal or the withdrawal of the Independent Contractor Rule. The Department recognizes, and has always recognized, that there are bona fide independent contractors that do not fall under the FLSA. In fact, soon after the FLSA was enacted, the Supreme Court stated that the Act was "not intended to stamp all persons as employees"[169] and recognized that independent contractors are not employees within the Act's broad scope of coverage.[170] The Department is withdrawing the Rule for the reasons described throughout this final rule, and is not creating a new test, but is

[169] *Portland Terminal*, 330 U.S. at 152.
[170] *See Rutherford Food*, 331 U.S. at 729.

instead leaving in place the current economic realities test which allows for determinations that some workers are independent contractors.

Commenters also assert that many independent contractors would prefer independent contracting arrangements. Fundamentally, however, "the purposes of the [FLSA] require that it be applied even to those who would decline its protections," as allowing workers who otherwise qualify as FLSA-covered employees to waive their rights "would affect many more people than those workers directly at issue … and would be likely to exert a general downward pressure on wages in competing businesses."[171] The Department also believes that this preference does not hold for a significant proportion of independent contractors. A survey cited by CWI found that in May 2020, 45 percent of workers preferred being an independent contractor to being fully employed. This is by no means a majority – the same survey finds that 53 percent of workers prefer being a full-time employee with benefits.[172] This survey—which was limited to users and potential users of one jobs platform—found a significant increase in workers who preferred being an independent contractor compared to the prior year, and also found that a lack of childcare was workers' largest obstacle to full-time employment.[173] These findings suggest that even this minority of workers who prefer being an independent contractor to full-time employment are motivated in part by temporary pressures created by the COVID-19 pandemic. The survey did not ask whether workers would prefer a flexible schedule combined with employee status. As this rule notes elsewhere, flexibility and FLSA employment are not mutually exclusive.

Other commenters suggested that the Independent Contractor Rule would harm workers in ways beyond the effects of a worker's classification on their individual compensation. The

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[171] *Tony & Susan Alamo Found.*, 471 U.S. at 302.
[172] Wonolo, "COVID-19 economic fallout weighs heavily on blue collar gig workers," 2020. https://go.wonolo.com/rs/052-CZJ-953/images/Data-report-The-rise-of-blue-collar-gig-workers.pdf
[173] *Id.* (finding that workers preferred full-time employment to independent contractor status by a ratio of 71-to-29 percent in 2019, and that workers concerned about a lack of childcare increased from 12 percent to 23 percent).

AFL-CIO commented that all workers benefit from the FLSA's minimum wage requirements, even if those requirements do not apply to them directly, because the FLSA establishes a wage floor that prevents wages in general from being dragged downward. The NWLC commented that the FLSA's definition of "employ" governs other worker protections, including the provision of lactation breaks and spaces for breastfeeding mothers as well as anti-discrimination protections. The Department agrees that the Independent Contractor Rule failed to consider these issues.

D. Whether Withdrawing the Independent Contractor Rule Is Disruptive

The Department explained in the NPRM that, because the Independent Contractor Rule had yet to take effect, withdrawing it would not be disruptive. The NPRM pointed out that, as remains the case, courts have not applied the Rule in deciding cases, and WHD has not implemented the Rule. For example, WHD's Fact Sheet #13, titled "Employment Relationship Under the Fair Labor Standards Act (FLSA)" and dated July 2008, does not contain the Rule's analysis for determining whether a worker is an employee or independent contractor.[174] WHD's Field Operations Handbook addresses independent contractor status by simply cross-referencing Fact Sheet #13 and likewise does not contain the Rule's new economic realities test.[175] WHD's elaws Advisor compliance-assistance information regarding independent contractors likewise does not contain the Rule's analysis.[176] On January 26, 2021, WHD withdrew two opinion letters issued on January 19, 2021 applying the Rule's analysis to several factual scenarios.[177] WHD explained that the letters were "issued prematurely because they are based on [a Rule] that ha[s] not gone into effect."[178] Accordingly, the NPRM asserted that the regulated community has been

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[174] Fact Sheet #13 (July 2008), *supra* note 37.
[175] Chapter 10 of Wage and Hour's Field Operations Handbook, "FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits," is available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf (last visited April 28, 2021). The relevant provision, section 10b05 ("Test of the employment relationship"), is on page 6.
[176] *See* https://webapps.dol.gov/elaws/whd/flsa/scope/ee14.asp (last visited April 28, 2021).
[177] *See* https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA (last visited April 28, 2021), noting the withdrawal of Opinion Letters FLSA2021-8 and FLSA2021-9.
[178] *Id*.

functioning under the current state of the law and the Department does not believe that it would be negatively affected by continuing to do so were the Rule to be withdrawn.

Several commenters agreed that withdrawing the Rule would not be disruptive. The State Officials agreed that, because the Rule has not taken effect, it "has not required the substantial expenditure of compliance resources from the regulated community" and "has not engendered substantial reliance interests." The State Officials explained that, to the contrary, failing to withdraw the Rule would be disruptive, as they believed the Rule "would have led employers to reclassify many employees as independent contractors overnight." The State Officials argued that such reclassification and misclassification would have disruptive consequences for workers and states who are already dealing with disruptions caused by the ongoing COVID-19 pandemic and resulting unemployment. The Department agrees that it is inappropriate to issue a rule during the pandemic that could increase the classification of workers as independent contractors, and therefore reduce the number of workers protected by the FLSA. Farmworker Justice likewise agreed that any disruption caused by withdrawal would be "minimal," because "no adjustments would need to be made by workers, employers, or courts. Instead, the regulated community would be free to continue applying the decades of case law built up around the FLSA." Texas RioGrande Legal Aid suggested that withdrawing the Rule before it went into effect would be far less disruptive than withdrawing it after it went into effect, because employers could simply refrain from reclassifying employees, whereas workers who were reclassified as a result of the Rule going into effect would be less likely to know if the Rule were later withdrawn and therefore less likely to insist on being reclassified again.

Some commenters disagreed with the Department, asserting that withdrawal of the Rule would be disruptive. Multiple commenters argued that "DOL did not consider the costs of compliance preparation many individuals and businesses have already undertaken in anticipation of the Final Rule becoming effective as scheduled." However, none of these commenters presented evidence of such costs or even described what kind of costs they incurred, so the

Department cannot assess the validity or significance of these claims, or quantify these possible costs. Moreover, the Department would expect any such costs to be minimal given that to the extent businesses had reason to incur costs in preparation for the Rule's becoming effective—even though the Rule imposed no new requirements on businesses—the Department announced on February 5, 2021 that it was proposing to delay the effective date of the Rule in order to reconsider the Rule,[179] putting businesses on notice that it was far from certain when the Rule would go into effect, or in what form. In addition, any costs of complying with the Independent Contractor Rule were created by the Rule and would not be increased by its withdrawal. The Rule's withdrawal does not impose new compliance costs on the regulated community, because it imposes no new requirements. Employers must continue to comply with the currently governing interpretations of the FLSA.

Some commenters confused the one-time costs of coming into compliance with the withdrawal of the Rule with the ongoing costs of complying with the FLSA, which may be higher under the current interpretation of the FLSA than under the interpretation contained in the Independent Contractor Rule. For example, Capital Investment Companies stated that the Department "should not be able to simply withdraw a rule that was developed after public notice and comment" because the regulated community "cannot be expected to be able to shift gears every two months." It argued that "DOL did not consider the costs to the current properly-classified independent contractors who may face a loss of business opportunities in the face of the uncertainties resulting from the DOL's actions." The Mercatus Center likewise argued that the Department's belief that withdrawal would not be disruptive was inaccurate, because "[a]ny valid analysis of the final rule's withdrawal must be measured in reference to the anticipated cost and benefits of the previous rule."

These comments incorrectly assert that the Department is ignoring the costs and benefits of not implementing the Independent Contractor Rule. The Department has considered

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[179] *See* 86 FR 8326.

comments from the public, following the same procedures used to promulgate the Rule in the first instance. In doing so, the Department has measured the costs and benefits of retaining the current interpretation of the FLSA by withdrawing the Rule against the costs and benefits of enacting the Rule. The Department's determination that the Rule's withdrawal will not be disruptive does not mean that there will not be costs imposed on some employers. By its nature, the FLSA imposes costs on employers in the form of minimum wage and overtime pay requirements. However, the costs to come into compliance with the Department's decision to withdraw the Rule are minimal, because employers and businesses who engage independent contractors will only need to comply with the statutory interpretations that already apply. They will not need to "shift gears" or change anything about their business practices, so long as they are currently complying with the FLSA.

The Coalition to Promote Independent Entrepreneurs (CPIE) argued that the Rule's withdrawal will cause confusion in future enforcement actions brought by the Department, because a company accused of misclassifying workers as independent contractors "could respond by relying on DOL's own research findings that are published in the *Federal Register*." In other words, though the Independent Contractor Rule would not be in effect, the company could rely on the Department's reasoning behind the Rule. CPIE asked rhetorically, "If this were to occur, would DOL dispute its own published research findings?" Contrary to the implications of this comment, there should be no confusion about the Department's position. The Department is withdrawing the Rule because, as explained throughout this final rule, it believes that the Rule's justifications were insufficient to support such a departure from courts' well-established analysis and the Department's previous guidance. Accordingly, the Independent Contractor Rule does not reflect the Department's interpretation.

Finally, a few commenters argued that withdrawal would be disruptive if it occurred before the resolution of the pending lawsuit challenging the Department's delay of the

Independent Contractor Rule's original March 8, 2021 effective date.[180] The Coalition for Workforce Innovation (CWI), which brought that lawsuit, argued that the Department should avoid confusion by allowing that litigation to determine whether the delay of the Rule's effective date was lawful. CWI argued that the Department's "assumption" that the Independent Contractor Rule is not currently in effect is "faulty." Littler Mendelson argued that "insofar as the Department's arguments in support of withdrawal of the Rule rests [sic] on its status as not yet in effect, they are at best premature, and at worst, incorrect as a matter of fact and law."

The Department does not agree with these comments. The Independent Contractor Rule is not currently in effect and is not currently applied by the Department, courts, or others. The Department maintains that its delay of the Rule's original effective date was proper for the reasons explained in the final rule effectuating that delay,[181] but declines to comment on the ongoing litigation. Regardless of the outcome of the lawsuit, the result of this withdrawal of the Rule is that longstanding prior guidance, such as Fact Sheet #13, remains in effect. Even if the Department's delay of the Rule's effective date were vacated such that the Rule is deemed to have been in effect since March 8, 2021, any disruption caused by the short period in which the Rule was in effect would be outweighed by the reasons described in this final rule to withdraw the Independent Contractor Rule. In other words, the Department would withdraw the Independent Contractor Rule even if it were currently in effect. Therefore, businesses can, as of publication of this withdrawal of the Rule, continue to rely upon the prior, familiar guidance even if the delay is later vacated and the Rule is retroactively deemed to have been in effect from March 8 until the issuance of this final rule. The disruption caused by the withdrawal would accordingly remain limited.

After carefully considering commenter feedback, the Department maintains its belief that withdrawing the Independent Contractor Rule will not result in significant disruption to the

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[180] *See Coalition for Workforce Innovation v. Sec'y of Labor* (No. 1:21-cv-00130 E.D. Tex.).
[181] *See* 86 FR 12535.

regulated community. In particular, any businesses currently engaging workers properly classified as independent contractors or individuals who now correctly consider themselves to be independent contractors will be able to continue to operate without any effect brought about by the absence of new regulations. Businesses that had taken steps in preparation for the Rule taking effect will not be precluded from adjusting their relationships with workers or paying for new services from workers, and can rely on past court decisions and WHD guidance to determine whether those workers are employees under the FLSA or independent contractors.

E. Timing and Effect of Withdrawal

1. Effective Date of Final Rule

Section 553(d) of the Administrative Procedure Act provides that substantive rules should take effect not less than 30 days after the date they are published in the Federal Register unless "otherwise provided by the agency for good cause found." 5 U.S.C. 553(d)(3). The Department finds that it has good cause to make this rule effective immediately upon publication. Allowing for a 30-day delay between publication and the effective date of this rulemaking would result in the Independent Contractor Rule taking effect for a short period before its withdrawal, which would cause confusion for regulated entities. The "Regulatory Freeze Pending Review" Memorandum described in section I(D) above, which directed the review that led the Department to propose withdrawing the Independent Contractor Rule, was issued on January 20, 2021. Even after delaying the Rule's original effective date of March 8, 2021 to May 7, 2021, the Department had less than 4 months to consider the significant and complex issues raised by the Independent Contractor Rule as directed by the Memorandum and subsequent guidance from the Office of Management and Budget[182] and to conduct notice-and-comment rulemaking based on that consideration as well as input from commenters.

[182] Memorandum M–21–14, Implementation of Memorandum Concerning Regulatory Freeze Pending Review, https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf (last visited April 28, 2021).

Withdrawing the Rule immediately ends employers' and workers' uncertainty about whether the Rule would go into effect at all following the Memorandum and the delay of the Rule's effective date. At least since the Memorandum, businesses have been unsure whether to expect to apply the Rule's analysis to their employment practices. Ending this uncertainty immediately benefits employers and workers alike. To delay the withdrawal by 30 days would mean that the Rule would be in effect from May 7, 2021, until the effective date approximately one month later. To require businesses to apply the Rule's analysis only to have them reassess the analysis when the Rule is withdrawn would impose unnecessary costs with no benefits. And, as pointed out by Texas RioGrande Legal Aid, it could have negative effects on workers—in particular, low-wage workers—whose employment status could be changed upon the Rule's taking effect, and would be unlikely to know that they were again entitled to FLSA protections. Because withdrawing the Rule will merely retain the status quo rather than impose any new requirements, immediate withdrawal will not require any reassessments of employment status. The regulated community does not require time to adjust to new requirements, because there are none imposed by withdrawal of the Rule. Because a delay of this rule's effective date would be impracticable and unnecessary, the Department finds it has good cause to make this withdrawal effective immediately upon publication.

2. Effect of Withdrawal

For the reasons described above, the Department has decided to withdraw the Independent Contractor Rule, effective immediately. Accordingly, the guidance that the Rule would have introduced as part 795 of Title 29 of the Code of Federal Regulations will not be introduced and the revisions that the Rule would have made to 29 CFR 780.330(b) and 29 CFR 788.16(a) will not occur and their text will remain unchanged. The Department did not propose and is not now issuing regulatory guidance to replace the guidance that the Independent Contractor Rule would have introduced as part 795.

III. Paperwork Reduction Act

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

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

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[183] Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. This final rule is economically significant under section 3(f) of Executive Order 12866 because it is withdrawing an economically significant rule.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored

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[183] *See* 58 FR 51735 (Sept. 30, 1993).

to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.[184] Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from the Rule's withdrawal and was prepared pursuant to the above-mentioned executive orders.

B. Background

On January 7, 2021, WHD published a final rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (Independent Contractor Rule or Rule).[185] In this final rule, the Department is withdrawing the Independent Contractor Rule, which has not taken effect. Aside from minimal rule familiarization costs, the Department also provides below a qualitative discussion of the transfers that may be avoided by withdrawing the Rule.

C. Costs

1. Rule Familiarization Costs

Withdrawing the Independent Contractor Rule will impose direct costs on businesses that will need to review the withdrawal. To estimate these regulatory familiarization costs, the Department determined: (1) the number of potentially affected entities, (2) the average hourly wage rate of the employees reviewing the withdrawal, and (3) the amount of time required to review the withdrawal. It is uncertain whether these entities would incur regulatory familiarization costs at the firm or the establishment level.[186] For example, in smaller businesses

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[184] *See* 76 FR 3821 (Jan. 21, 2011).
[185] *See* 86 FR 1168. WHD had published a notice of proposed rulemaking requesting comments on a proposal. *See* 85 FR 60600 (Sept. 25, 2020). The final rule adopted "the interpretive guidance set forth in [that proposal] largely as proposed." 86 FR 1168.
[186] An establishment is a single physical location where one predominant activity occurs. A firm is an establishment or a combination of establishments.

there might be just one specialist reviewing the withdrawal, while larger businesses might review it at corporate headquarters and determine policy for all establishments owned by the business. To avoid underestimating the costs of the withdrawal, the Department uses both the number of establishments and the number of firms to estimate a potential range for regulatory familiarization costs. The lower bound of the range is calculated assuming that one specialist per firm will review the withdrawal, and the upper bound of the range assumes one specialist per establishment.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.[187] Because the Department is unable to determine how many of these businesses are interested in using independent contractors, this analysis assumes all businesses will undertake review.

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

The Department's analysis assumes that the withdrawal would be reviewed by Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) or employees of similar status and comparable pay. The median hourly wage for these workers was $31.04 per hour in 2019, the most recent year of data available.[188] The Department also assumes that benefits are

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[187] Statistics of U.S. Businesses 2017, https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html, 2016 SUSB Annual Data Tables by Establishment Industry.
[188] Occupational Employment and Wages, May 2019, https://www.bls.gov/oes/current/oes131141.htm.

paid at a rate of 46 percent[189] and overhead costs are paid at a rate of 17 percent of the base wage, resulting in a fully loaded hourly rate of $50.60.

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

Additionally, the Department estimated average annualized costs of this proposed withdrawal over 10 years. Over 10 years, it would have an average annual cost of $6.7 million to $8.8 million, calculated at a 7 percent discount rate ($5.8 million to $7.6 million calculated at a 3 percent discount rate). All costs are in 2019 dollars.

In their comment, the Financial Services Institute (FSI) asserted that the rule familiarization costs are understated because "they fail to consider the costs that will be imposed on stakeholders by repeating their activities of the very recent notice/comment period." However, they also acknowledged that there has been no change in law since the Independent Contractor Rule was announced. The Department notes that estimates of rule familiarization costs do not usually include the time it takes stakeholders to comment on the rule, and instead only include the time it takes to read and become familiar with the final rule.

2. Other Impacts

In the Independent Contractor Rule, the Department estimated cost savings associated with increased clarity, as well as cost savings associated with reduced litigation. The Department does not anticipate that this withdrawal will increase costs in these areas, or result in greater costs as compared to the Rule. Although the intent of the Independent Contractor Rule was to provide clarity, it would also have introduced several concepts to the FLSA economic realities analysis that neither courts nor WHD have previously applied. Because the Rule would have

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[189] The benefits-earnings ratio is derived from the Bureau of Labor Statistics' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

been unfamiliar and could have led to inconsistent approaches and/or outcomes, and because withdrawal maintains the status quo, the Department does not believe that withdrawal of the Independent Contractor Rule will result in decreased clarity for stakeholders. As discussed above in section II(B), numerous commenters agreed that the Rule would not have increased clarity, and that there would have instead been increased litigation following the Rule due to uncertainty over whether and to what extent courts would adopt the Rule's complicated guidance.

Some commenters asserted that there would be significant costs associated with withdrawing the Independent Contractor Rule. For example, the National Retail Federation (NRF) and Littler Mendelson's Workplace Policy Institute (WPI) claimed that employers had already begun to implement the Rule, even though it had not yet gone into effect. WPI claimed that, in the withdrawal NPRM, the Department ignored the costs of compliance preparation that many businesses have already undertaken in anticipation of the rule becoming effective. The commenters did not provide information on the types of activities that businesses have taken to implement the Rule, or how much time they spent. The Department also did not receive any data on the number of businesses that have incurred implementation costs, or the magnitude of these costs, so the Department has not quantified them here. Any costs that were incurred by businesses in response to the publication of the Independent Contractor Rule are sunk costs, and would not be affected by the withdrawal. Commenters did not provide any information on what changes businesses would have to undo following the withdrawal.

In discussing the effects of the Independent Contractor Rule, many commenters referenced the analysis that the Economic Policy Institute (EPI) provided in their comment to the 2020 Independent Contractor NPRM. EPI itself commented to again explain the results of its study, which estimated that the Independent Contractor Rule would have cost workers more than $3.7 billion annually. This figure represents $400 million in new annual paperwork costs and a transfer to employers of at least $3.3 billion in the form of reduced compensation for employees

who are converted to independent contractors. EPI also estimated a loss of $750 million in employer contributions to social insurance funds such as Social Security, Medicare, Unemployment Insurance, and Workers' Compensation. The Department believes that although the magnitude of this estimate may be overstated, for reasons discussed in response to the comment on the Independent Contractor Rule, the discussion of impacts to workers is valid. EPI did not directly address the Department's criticisms of its estimates in the Independent Contractor Rule, but it agreed with the Department's statement in the NPRM that EPI's analysis may be useful in understanding the types of impacts the Rule would have had on workers.

Michael D. Farren and Liya Palagashvili of the Mercatus Center provided a detailed comment evaluating the Department's economic analysis. In their comment, they estimated the costs associated with withdrawing the Independent Contractor Rule, stating that the annual cost of withdrawing the Rule is approximately $1.85 billion. After thoroughly reviewing this analysis, the Department concludes that this cost estimate is not accurate, for the reasons described below.

Farren and Palagashvili note that their analysis is based on the framework provided by EPI, in order to allow their estimate to be comparable. They begin by estimating the own-wage elasticity of employment costs from a meta-analysis of literature, finding that "the average own-wage elasticity with respect to changes in employment costs is -0.66." They conclude that this suggests that workers capture 66 percent of the decrease in employer costs associated with reclassifying employees as independent contractors. The Department believes that this is not an accurate application of the findings of the meta-analysis. The studies indicate that on average, the impact of a 1.0% increase in taxes is a 0.66% decrease in wages for employees. It may be inappropriate to assume that this estimate for employees also applies to independent contractors. Additionally, it is unclear whether non-tax labor costs would have the same elasticity as taxes. The Department also notes that the studies referenced in their meta-analysis come from many different countries, some of which may reflect a different economic situation than that of the United States, and may not be applicable to an analysis of worker classification in the United

States. Although the Department recognizes that regulatory impacts are often experienced across both workers and employers (and, more generally, labor market outcomes are the result of tradeoffs made by both workers and employers), the Department's analysis on earnings does not find that independent contractors capture a large portion of the decrease in employer costs. As discussed in section IV(D)(4), when controlling for observable characteristics related to earnings, the data fail to show that independent contractors have an earnings premium over employees sufficient to cover the increased tax liability.

The Mercatus Center commenters also estimate the average willingness to pay for flexible work, by stating that a National Bureau of Economic Research (NBER) working paper finds that the average worker is willing to accept a salary that is 10.4 percent lower for a flexible job. Although the Department could not find this figure in the three papers that were cited in the comment, two of the three papers have a range of results that include approximately 10 percent.[190] The Department does not believe that the first paper cited is appropriate for applying to the analysis, because that study was a field experiment using a Chinese job board, and only looked at college-educated workers with 5-10 years of experience, all applying for professional/executive positions. The tradeoff between wages and flexibility for this population might not be comparable to that of the total population of workers in the United States. The authors of the paper also note that they "look at a narrow set of jobs (and at one employer), so the results may not generalize to different types of jobs and the workers searching for them."

The Mercatus Center assumed that workers would receive increased flexibility if they are reclassified as independent contractors, but this is not necessarily true. Many employees already

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[190] The three papers cited were Haoran He, David Neumark, and Qian Weng, "Do Workers Value Flexible Jobs? A Field Experiment" (NBER Working Paper No. 25423, National Bureau of Economic Research, Cambridge, MA, July 2020), 26; Nicole Maestas et al., "The Value of Working Conditions in the United States and Implications for the Structure of Wages" (NBER Working Paper No. 25204, National Bureau of Economic Research, Cambridge, MA, October 2018). M. Keith Chen et al., "The Value of Flexible Work: Evidence from Uber Drivers," Journal of Political Economy 127, no. 6 (December 2019): 2735–94.

enjoy flexible work schedules[191]—and the share of employees with such flexible work arrangements is likely to increase as a result of the COVID-19 pandemic.[192] If an employee with a flexible work arrangement is converted to an independent contractor, that worker might or might not experience an increase in flexibility. Though the Mercatus Center stated that it would be illegal for an employer to convert an employee to an independent contractor without increasing their flexibility, this does not accurately reflect the Independent Contractor Rule or WHD's prior interpretations, because control over one's schedule is only one part of one factor in the analysis. The assumption that all workers converted to independent contractors would benefit from increased flexibility may be inaccurate.

These commenters then use these estimates to calculate the benefits to workers when employees are reclassified as independent contractors. The commenters first calculate the value of each worker's lost supplemental income, lost employment fringe benefits (paid leave, health insurance, and retirement benefits), and net change in FICA (Federal Insurance Contributions Act) tax liability.[193] They then calculate the amount that workers would capture of these employer cost savings using the average own-wage elasticity of 0.66.[194] From that amount, they subtract the amount that they claim workers are willing to forgo for greater flexibility. Comparing the net gains to the net losses, Farren and Palagashvili say that workers will receive a

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[191] Flexible work schedules do not prevent courts from finding workers to be employees. *See, e.g.*, *Silk*, 331 U.S. at 706 (finding that coal unloaders were employees despite their ability to show up to work "when they wish and work for others at will"); *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 230 (3d Cir. 2019) (finding that dancers were employees and not independent contractors despite fact that they could select their own shifts and work for competitors); *DialAmerica Mktg.*, 757 F.2d at 1380 (finding that home researchers were employees even though they were "free to choose the weeks and hours they wanted to work").

[192] *See* Society for Human Resources Management, "Managing Flexible Work Arrangements," https://www.shrm.org/ResourcesAndTools/tools-and-samples/toolkits/Pages/managingflexibleworkarrangements.aspx (last visited April 28, 2021) ("Now that many employers have experienced how successful telecommuting can be for their organization or how work hours that differ from the normal 9-to-5 can be adopted without injury to productivity, offering flexible work arrangements may become even more commonplace.").

[193] The commenters calculate a sum of $6,185 using data in EPI's comment: Heidi Shierholz, EPI Comments on Independent Contractor Status, 5–6.

[194] $6,186 x 0.66 = $4,082.

net benefit of $414. The Department believes that the commenters misapplied the estimate of elasticity when calculating this benefit, because they multiplied 0.66 by total reduced costs. The Department believes it is more appropriate to find the percent reduction in cost, and apply that percentage to total wages. When adjusting for this change in the analysis, it would result in a net loss to workers. [195] Moreover, the short-hand term "total reduced costs" lumps together several types of impacts, some of which should not be used as inputs into the type of comparative statics analysis suggested by the commenters; for example, although legal tax liability shifts depending on whether workers are employees or independent contractors, the size of the tax wedge is unchanged.

Additionally, the Mercatus Center noted that its estimates excluded one cost from EPI's analysis: the cost of additional paperwork that independent contractors must do. EPI estimated this cost would average $777, which included an IRS estimate of an additional 13 hours of tax preparation, an average of half an hour a week of other, non-tax paperwork, and the cost of accounting and tax preparation software that independent contractors use. The Mercatus Center explained that it excluded these costs because "[t]hese costs are required only for business expense deductibility purposes, and workers would not engage in such paperwork if their expected return were not positive." However, workers would not know if their return would be positive until after they spent this time calculating their deductible expenses. The IRS estimate of additional time independent contractors spend on tax preparation is an average, so any independent contractors who do not spend extra time on taxes are already accounted for in that average. Moreover, only 13 of the 39 hours of additional paperwork estimated by EPI were tax-related, and the Mercatus Center analysis did not account for the time spent on non-tax paperwork. The $777 in paperwork expenses that the Mercatus Center excluded from its analysis

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[195] Assuming the bare minimum employer costs of wages plus cost savings listed ($30,387), the Department calculates that of the cost savings, $3,251 would be passed along to employees. Even with the assumption that this amount would be paid to the independent contractor, and incorporating the flexibility benefits that the commenters claim independent contractors experience, it results in a net loss of $417 per worker.

would outweigh its conclusion of $414 in average net benefits to employees converted to independent contractors. Even a somewhat smaller paperwork burden would result in a net loss to workers.

In sum, the Department believes that the Mercatus Center's criticisms of EPI's study overestimate the benefits to employees converted to independent contractors in the form of higher wages and greater flexibility, while underestimating the costs imposed on such workers. Though it remains difficult to quantify the costs and benefits of the Rule precisely, and the Department believes that the magnitude of the costs in EPI's analysis may be overstated, the Department nonetheless believes that the EPI estimate correctly concluded that workers affected by the Independent Contractor Rule would suffer a net loss.

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

Commenters such as the Mercatus Center and the Coalition for Workforce Innovation (CWI) also claim that DOL's analysis does not include the value of workplace flexibility, and that evidence does not show that employees also have flexibility. The Department believes that employment and flexibility are not mutually exclusive, and many employees do have flexibility. For example, a 2016 study found that 81 percent of U.S. employers allow employees some flexibility in schedule.[196] A 2019 USAToday article cites results from surveys indicating that a large percentage of companies offer flexibility and a large percentage of employees say that they have flexibility in their jobs.[197]

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[196] Kenneth Matos, Ellen Galinsky and James T. Bond. 2016 National Study of Employers, 2017, https://www.familiesandwork.org/research/workplace-research-national-study-of-employers.
[197] Paul Davidson, "More employers offer flexible hours, but many grapple with how to make it succeed.","" October 20, 2019. https://www.usatoday.com/story/money/2019/10/20/flexible-hours-jobs-more-firms-offer-variable-schedules/4020990002/.

Some commenters assert that the Department's analysis ignores the component of the workforce that like being independent contractors. For example, the Financial Services Institute (FSI) says that DOL "utterly ignores the possibility that true independent contractors exist" and that independent financial advisors are proud to be their "own boss."

Throughout their comment, CWI cites many surveys, some with questionable survey sampling procedures, showing that independent contractors like the flexibility of their work. For example, in opposition to the Department's withdrawal, CWI references a study on freelancing, which concludes that the freelance workforce contributes over a trillion dollars to the U.S. economy, freelance workers are highly skilled, and that freelancing increases earnings potential.[198] The Department appreciates the importance of freelance work, but believes that comments such as these lack evidence to show that these opportunities were restricted before the Independent Contractor Rule. Therefore, the withdrawal will not create further restrictions on independent contractor work beyond those imposed by existing guidance. Existing freelancers who are properly classified as independent contractors will not be affected by this withdrawal. Additionally, the data cited by CWI showing that freelancing increases earning potential is limited to freelancers who voluntarily left their employer to become freelancers. This population could be different from workers who would have been reclassified as independent contractors because of the Independent Contractor Rule.

D. Transfers

The Department believes that it is important to provide a qualitative discussion of the transfers that would have occurred under the Independent Contractor Rule. In the economic analysis originally accompanying the Rule, the Department assumed that the Rule would lead to an increase in the number of independent contractor arrangements, and acknowledged that some of this increase could be due to businesses reclassifying employees as independent contractors.[199]

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[198] https://www.upwork.com/i/freelance-forward

[199] *See* 86 FR 1225-27.

As discussed in the Rule and again below, an increase in independent contracting could have resulted in transfers associated with employer-provided fringe benefits, tax liabilities, and minimum wage and overtime pay.[200] By withdrawing the Rule, these transfers from employees (and, in some cases, from state or local governments and the recipients of government-operated unemployment insurance of worker's compensation programs) to employers are avoided.

1. Employer Provided Fringe Benefits

The reclassification of employees as independent contractors, or the use of independent contracting relationships as opposed to employment, decreases access to employer-provided fringe benefits such as health care or retirement benefits. According to the BLS Current Population Survey (CPS) Contingent Worker Supplement (CWS), 75.4 percent of independent contractors have health insurance, compared to 84 percent of employees.[201] This gap between independent contractors and employees is also true for low-income workers. Using CWS data, the Department compared health insurance rates for workers earning less than $15 per hour and found that 71.0 percent of independent contractors have health insurance compared with 78.5 percent of employees. Lastly, the Department considered whether this gap could be larger for traditionally underserved groups or minorities. Considering the subsets of independent contractors who are female, Hispanic, or Black, only the Hispanic independent contractors have a statistically significant difference in the percentage of workers with health insurance (estimated to be about 18 percentage points lower).[202]

Additionally, a major source of retirement savings is employer-sponsored retirement accounts. According to the CWS, 55.5 percent of employees have a retirement account with their current employer; in addition, the BLS Employer Costs for Employee Compensation (ECEC)

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[200] *See* 86 FR 1216-18, 1223-24.

[201] Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements – May 2017," USDL-18-0942 (June 7, 2018), https://www.bls.gov/news.release/pdf/conemp.pdf.

[202] To measure if the difference between these proportions is statistically significant, the Department used the replicate weights for the CWS. At a 0.05 significance level, the proportion of Hispanic independent contractors with any health insurance is lower than the proportion for all independent contractors.

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

2. Tax Liabilities

As self-employed workers, independent contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes. Thus, as discussed in the Rule, if workers' classifications change from employees to independent contractors, there may be a transfer in federal tax liabilities from employers to workers.[203] Although the Rule only addressed whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax purposes.[204] These payroll taxes include the 6.2 percent employer component of the Social Security tax and the 1.45 percent employer component of the Medicare tax.[205] In sum, independent contractors are legally responsible for an additional 7.65 percent of their earnings in FICA taxes (less the applicable tax deduction for this additional payment). Some or all of this increased tax liability may ultimately be paid for by a business if it increases pay to compensate independent contractors for this tax liability, and changes in compensation are discussed separately below. Changes in benefits, tax liability, and earnings must be considered in tandem to identify how the standard of living may change.

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[203] *See* 86 FR 1218.

[204] Courts have noted that the FLSA has the broadest conception of employment under federal law. *See, e.g.*, *Darden*, 503 U.S. at 326. To the extent that businesses making employment status determinations base their decisions on the most demanding federal standard, a rulemaking addressing the standard for determining whether a worker is an FLSA employee or an independent contractor may affect the businesses' classification decisions for purposes of benefits and legal requirements under other federal laws.

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

In addition to affecting tax liabilities for workers, some commenters claimed that the Rule would have an impact on state tax revenue and budgets. SWACCA noted that taxpayer costs would have increased following the Rule. They state that an increase in independent contractor arrangements leads to reduced tax revenues and increased costs to Federal, State, and local governments for programs like unemployment insurance and workers compensation. A comment from the State Officials also claimed that reclassification following the Independent Contractor Rule would disrupt States' efforts to administer their unemployment insurance programs, especially at a time when they have been processing record numbers of unemployment claims.

Because independent contractors do not receive benefits like health insurance, workers compensation, and retirement plans from an employer, the State Officials suggested that a rule that increases the prevalence of independent contracting could shift this burden to State and Federal governments.

3. FLSA Protections

When workers are classified as independent contractors, the minimum wage, overtime pay, and other requirements of the FLSA no longer apply. The 2017 CWS data indicate that independent contractors are more likely than employees to report earning less than the FLSA minimum wage of $7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors, and 2 percent for employees).[206] Research on drivers who are classified as independent contractors and work for online transportation companies in California and New York also finds that many drivers receive significantly less than the applicable state minimum wages.[207] Commenters asserted that because of the COVID-19

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[206] In their comment, CWI noted that the CWS data that was cited by the Department does not include this data. These calculations cannot be found in the tables published by BLS, but are from the Department's own calculations of the CWS microdata.

[207] M. Reich, "Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers." University of California, Berkeley (October 5, 2020), https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf; L. Moe, et al. "The

pandemic and the resulting economic fallout, there is an even greater need to ensure workers have access to FLSA protections. The Center for Law and Social Policy (CLASP) cited a study showing that minimum wage violations increased dramatically as unemployment rose during the Great Recession, disproportionately impacting Latinx, Black, and female workers.[208] They anticipate that the recent period of high unemployment could lead to similar violations.

Concerning overtime pay, not only do independent contractors not receive the overtime pay premium, but the number of overtime hours worked is also higher. Analysis of the CWS data indicated that, before conditioning on covariates, primary self-employed independent contractors are more likely to work overtime (more than 40 hours in a workweek) at their main job (29 percent for self-employed independent contractors and 17 percent for employees).[209]

Commenters referenced other FLSA protections that employees would lose if they were reclassified as independent contractors following the Rule. The National Women's Law Center points out that the FLSA also contains provisions that are centered on ensuring that women are treated fairly at work, including employer-provided accommodations for breastfeeding workers and protections against pay discrimination.

4. Hourly Wages, Bonuses, and Related Compensation

Some commenters asserted that independent contractors are compensated better than employees, citing discussions of earnings from the Independent Contractor Rule. The

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Magnitude of Low-Paid Gig and Independent Contract Work in New York State," The New School Center for New York City Affairs (February 2020), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/Feb112020_GigReport.pdf.

[208] Fine et al., Maintaining effective U.S. labor standards enforcement through the coronavirus recession, Washington Center for Equitable Growth, Sept. 3, 2020, available at https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/.

[209] The Department based this calculation on the percentage of workers in the CWS data who respond to the PEHRUSL1 variable ("How many hours per week do you usually work at your main job?") with hours greater than 40. Workers who answer that hours vary were excluded from the calculation. The Department also applied the exclusion criteria used by Katz and Krueger (exclude workers reporting weekly earnings less than $50 and workers whose calculated hourly rate (weekly earnings divided by usual hours worked per week) is either less than $1 or more than $1,000).

Department is concerned that its discussion of data on the differences in earnings between employees and independent contractors in the Independent Contractor Rule was confusing and potentially inaccurate, so the findings and methodology are discussed again here. Independent contractors are often expected to earn a wage premium to compensate for reduced fringe benefits, increased tax liability and associated paperwork costs. However, due to asymmetric information, differences in bargaining power, or a willingness to trade earnings for increased flexibility, this may not hold. The Department compared the average hourly wages of current employees and independent contractors to provide some indication of the impact on wages of a worker who is reclassified from an employee to an independent contractor.

The Department used an approach similar to Katz and Krueger (2018).[210] Both regressed hourly wages on independent contractor status[211] and observable differences between independent contractors and employees (e.g., occupation, sex, potential experience, education, race, and ethnicity) to help isolate the impact of independent contractor status on hourly wages. Katz and Krueger used the 2005 CWS and the 2015 RAND American Life Panel (ALP) (the 2017 CWS was not available at the time of their analysis). The Department used the 2017 CWS.[212]

Both analyses found similar results. A simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees do (e.g., $27.29 per hour for all independent contractors versus $24.07 per hour for employees using the 2017 CWS). However, when controlling for observable differences between workers, Katz and Krueger found no statistically significant difference between independent contractors' and employees' hourly

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[210] L. Katz and A. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015," (2018).

[211] On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of "traditional" employees.

[212] In both Katz and Krueger's regression results and the Department's calculations, the following outlying values were removed: workers reporting earning less than $50 per week, less than $1 per hour, or more than $1,000 per hour. Choice of exclusionary criteria from Katz and Krueger (2018), *supra* note 210.

wages in the 2005 CWS data. Although their analysis of the 2015 ALP data found that primary independent contractors earned more per hour than traditional employees do, they recommended caution in interpreting these results due to the imprecision of the estimates.[213] The Department found no statistically significant difference between independent contractors' and employees' hourly wages in the 2017 CWS data.

Based on these inconclusive results, the Department believes it is inappropriate to conclude independent contractors generally earn a higher hourly wage than employees do. Therefore, the Department does not assert that wages would be impacted due to the Rule or its withdrawal. The Department ran another hourly wage rate regression including additional variables to determine if independent contractors in underserved groups are impacted differently by including interaction terms for female independent contractors, Hispanic independent contractors, and Black independent contractors. The results did not find a statistically significant difference in earnings for these groups.[214]

The Mercatus Center commenters also claim that independent contractors earn supplemental compensation, which the Department believes is unsupported by widespread evidence for most independent contractors. They say that "[t]he analysis assumes that independent contractors do not receive supplemental compensation, despite widespread evidence to the contrary in the platform economy, such as signing and performance bonuses." The commenters cite one Wall Street Journal article to support their assertion, and this article also discusses the difficulty finding and retaining workers, including statements like, "turnover is driven by gig workers' unhappiness with their take-home pay," "a 2015 analysis found 45% of Uber's workforce left in their first year," and, "in any given month, an estimated 1 in six

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[213] See top of page 20, "Given the imprecision of the estimates, we recommend caution in interpreting the estimates from the [ALP]."

[214] The coefficient for Black independent contractors was negative and statistically significant at a 0.10 level (with a p-value of 0.067). However, a significance level of 0.05 is more commonly used.

participants in the gig economy is new, and more than half of such workers exit within a year."[215]

V. Regulatory Flexibility Act (RFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq*., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 (1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined this withdrawal to determine whether it will have a significant economic impact on a substantial number of small entities.

The most recent data on private sector entities at the time this NPRM was drafted are from the 2017 Statistics of U.S. Businesses (SUSB), which reports 5,996,900 private firms and 7,860,674 private establishments with paid employees.[216] Of these, 5,976,761 firms and 6,512,802 establishments have fewer than 500 employees. The per-entity cost for small business employers is the regulatory familiarization cost of $8.43, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist ($50.60) multiplied by 1/6 hour (ten minutes). Because this cost is minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses, the Department certifies that this withdrawal will not have a significant economic impact on a substantial number of small entities.

VI. Unfunded Mandates Reform Act of 1995

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[215] Kelsey Gee, "In a Job Market This Good, Who Needs to Work in the Gig Economy?," *Wall Street Journal*, August 8, 2017.

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

The Unfunded Mandates Reform Act of 1995 (UMRA)[217] requires agencies to prepare a written statement for rules with a federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $165 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year.[218] This statement must: (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative. This withdrawal is not expected to result in increased expenditures by the private sector or by state, local, and tribal governments of $165 million or more in any one year.

VII. Executive Order 13132, Federalism

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

VIII. Executive Order 13175, Indian Tribal Governments

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

Signed this 30th day of April, 2021.

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

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

Jessica Looman,

Principal Deputy Administrator, Wage and Hour Division.

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