ULMAN
PUBLIC POLICY

TO: **Clients**
FROM: **Ulman Public Policy**
DATE: **January 23, 2024**

RE: U.S. Department of Labor Independent Contractor Rule

On January 10, 2024, the U.S. Department of Labor ("Department" or "DOL") published a final rule ("the Biden rule")[1] setting forth the test the Department intends to use starting on March 11 to determine whether a worker is an employee or independent contractor under the Fair Labor Standards Act ("FLSA"). The FLSA requires employers to track employees' hours and pay a minimum wage for each hour employees work and premium pay for any hours employees work over forty in one week, unless the employee qualifies for one or more of the FLSA's exemptions, such as the exemption for white-collared salaried workers. The FLSA's provisions, however, do not apply to independent contractors.

Since the 1940s, the Department and courts have applied what is known as "an economic reality test" to determine whether a worker is an employee or independent contractor under the FLSA. The test focuses on whether "the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themselves (and is thus an independent contractor)." In theory, courts have applied a "totality-of-the-circumstances analysis, considering multiple factors to determine whether a worker is an employee or independent contractor, with no factor or factors having predetermined weight."

This framework where the analysis of the working relationship is viewed in totality rather than on any isolated factors, however, injected significant subjectivity and a lack of predictability into determinations. As a result, courts have struggled to apply the economic realities test consistently and predictably.

In 2021, the Trump administration attempted to address this confusion by issuing the first rule providing comprehensive guidance on independent status under the FLSA ("the Trump rule").[2] The Trump rule approached the analysis by identifying two "core" factors that primarily guided worker classification determinations: the nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss based on initiative, investment, or both. DOL argued in the proposal that this "two core factors" approach was consistent with the applicable case law. Specifically, the Department said:

> Focusing on control and opportunity for profit or loss is further supported by the results of federal courts of appeals cases weighing the economic reality factors since 1975. In these cases, whenever the court found (or affirmed a district court

[1] 89 FR 1638, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, January 10, 2024. ("Hereinafter: "Final rule").
[2] 86 FR 1168, Independent Contractor Status Under the Fair Labor Standards Act, January 7, 2021.

> finding) that the potential employer predominantly controlled the work, that court concluded that the worker is an employee. . . . Conversely, whenever the court of appeals found (or affirmed a district court finding) that the worker predominantly controlled the work, that court nearly always concluded that the worker is an independent contractor. . . . The few occasions where an appellate court's ruling on a worker's classification was contrary to what the control factor indicated were cases in which the other core factor—opportunity for profit or loss—pointed in the opposite direction. . . . Together, *i.e.*, in cases where they both indicate the same classification, they are substantially likely to point to the answer of the classification question—whether employee or independent contractor.[3]

The Trump rule also identified three other factors to also be considered, though they are less probative than the two core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production. The Trump rule also noted that the actual practice is more probative than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor.

The Biden rule, which replaces the Trump rule starting on March 11, applies a multifactor test, where six different factors could be determinative of a worker's classification – with no one factor being dispositive.[4] While the changes in the Biden rule are significant, the rule is "interpretive" rather than substantive rule, which means courts may, but do not have to, defer to legal interpretations in the rule.[5] In other words, courts may adopt the rule, adopt portions of the rule, or ignore the rule altogether.

This memorandum outlines the Biden rule's substance, including a discussion of the limited changes DOL incorporated relative to its original proposal as well as notable commentary from the Department included in the Biden rule's preamble.

---

[3] 85 FR 60600, 60619, Proposed Rule: Independent Contractor Status Under the Fair Labor Standards Act, October 26, 2020.

[4] The six factors are: opportunity for profit or loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and the worker's skill and initiative.

[5] *See Perez v. Mortgage Bankers Ass'n,* 575 U.S. 92 (2015); *See also Skidmore v. Swift & Co,* 323 U.S. 134 (1944) (starting at 140: "We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

ULMAN
PUBLIC POLICY

Table of Contents

Biden Independent Contractor Rule 4
I. Opportunity for Profit of Loss Depending on Managerial Skill 4
NPRM 4
Biden Rule 4
Other Commentary 5
II. Investments by the Worker and the Potential Employer 6
NPRM 6
Biden Rule 6
Other Commentary 7
III. Degree of Permanence of the Work Relationship 8
NPRM 8
Biden Rule 8
Other Commentary 9
IV. Nature and Degree of Control 10
NPRM 10
Biden Rule 10
Other Commentary 11
V. Extent to Which the Work Performed is an Integral Part of the Employer's Business 16
NPRM 16
Biden Rule 16
Other Commentary 16
VI. Skill and Initiative 17
NPRM 17
Biden Rule 17
Other Commentary 18
VII. Additional Factors 18
NPRM & Biden Rule 19
Other Commentary 19

Biden Independent Contractor Rule

DOL notes that the Biden rule adopts "the interpretive guidance set forth in the Notice of Proposed Rulemaking (NPRM)[6] largely as proposed." The Biden rule does adopt various changes throughout, which are outlined below. "As a global matter," DOL noted that a number of commenters took issue with the Department's use of "employer" throughout the regulatory text, arguing that it indicated a predetermined outcome to worker classification determinations. The agency thus incorporated the term "potential employer" throughout.

I. Opportunity for Profit of Loss Depending on Managerial Skill

NPRM

DOL proposed that this factor focus on whether the worker exercises managerial skill that affects their economic success or failure. If the worker has an opportunity for profit or loss, this suggests they may be an independent contractor, while the absence of such opportunity suggests the worker is an employee. The NPRM lists the following facts and circumstances that may be relevant in evaluating managerial skills: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or choose the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. The NPRM notes this list is "nonexclusive" and other facts and circumstances may be relevant. The agency further noted that the decision to work more hours or take more jobs generally does not reflect managerial skill indicative of independent contractor status.

Biden Rule

DOL finalized this section with two main changes. First, the Department omitted the use of the word "exercises" in relation to a worker and managerial skill and instead emphasized whether the worker simply has the "opportunity" for profit or loss depending upon managerial skill. The Biden rule reads that "this factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work." The Department cited comments calling for the change[7] and noted that it "concurs that the term "opportunities," which

[6] 85 FR 60600

[7] Biden rule at 1674: "Although the U.S. Chamber agreed that the facts listed in the regulatory text are "relevant to whether workers are independent contractors or employees," it stated that the NPRM was "wrong to require a worker to 'exercise' these decisions to exemplify independent contractor status." Analogizing to the NPRM's discussion of how reserved rights can be relevant in addition to actual practice, the U.S. Chamber asserted that "the more important question is whether the worker has the opportunity to impact their profits and losses by engaging in various activities such as working for other companies, regardless of whether the worker actually acts on that opportunity." CWI criticized the NPRM for, in its view, "requir[ing] consideration of whether the worker actually exercises his skill to impact economic success." CWI asserted that the NPRM "consistently references 'opportunity,' not actual exercise of that opportunity, as the relevant touchstone" and added that: "Whether a worker chooses to exercise the opportunities for profit and loss available to him is fundamentally his own business decision. It is the

encompasses opportunity more broadly than "whether the worker exercises managerial skill," is more consistent conceptually with the case law analyzing this factor and with the remainder of the regulatory text … focusing on "opportunities" should capture the facts relevant to a worker's profit or loss and managerial skill."

Second, the Department made changes to the sentence of the NPRM's proposed text regarding the decision to work more hours or take more jobs not being reflective of the managerial skill indicative of independent contractor status. Specifically, DOL added in language to clarify that the decision to work more hours or take more jobs *when paid a fixed rate per hour or per job,* generally does not reflect the managerial skill indicating independent contractor status under this factor. Citing comments[8] that took issue with the proposed text, the Department conceded that that text "did not account for payment for the hours and jobs at a fixed rate or the employer's control over the flow of work. The NPRM recognized that courts have held that a worker's ability to freely choose among jobs based on the worker's assessment of the comparable profitability of those jobs can indicate independent contractor status when applying the opportunity for profit or loss factor." The Department further notes that "a worker may be able to accept and decline jobs where the jobs have varying degrees of potential profitability and the worker must determine which jobs to pursue and how much of the worker's time and resources should be devoted to the various jobs" – noting that such a situation points toward independent contractor status – but that a worker simply "working more to earn more" when paid a fixed rate per hour or per job is not reflective of managerial skill.

Other Commentary
On restricting power to exercise managerial skill: The preamble discusses comments from the United Food and Commercial Workers ("UFCW") that argued gig economy companies such as Instacart, Uber, and Lyft impose agreements that "prohibit workers from connecting with or soliciting their customers and stated that "actively prohibit[ing] workers from developing an independent business is evidence of a lack of opportunity to profit or loss based managerial

ability to follow that business judgment—even to his detriment—that is the hallmark of the independence he is afforded." See also N/MA; NRF & NCCR."

[8] Biden rule at 1675: "Flex described this sentence as "misleading" and "likely lead[ing] to the discounting of evidence that is, in fact, highly relevant to a worker's `opportunity for profit or loss depending on managerial skill.' " It stated that, "[i]f a cashier at a fast-food restaurant voluntarily chooses to work overtime or pick up an additional shift, that decision would not support independent contractor status[,]" but if a driver "who was planning to drive clients five days one week is solicited by a new client for a lucrative opportunity on Saturday, the decision to accept that new client and work an extra day is plainly an entrepreneurial decision that reflects managerial decision making." Flex explained that "technological advances . . . have facilitated independent contractors' ability to quickly determine what earnings opportunities and hours worked will yield *for them* the biggest return on the investment of *their* time." SHRM added that "[t]he economic reality is that a worker who can profit by taking other jobs is more independent—and therefore less economically dependent on the employer—than an employee who cannot," and that "[t]he ability to make that choice should point to an independent relationship." CWI stated that "[t]he Department's commentary even cites authority noting that choosing among `which jobs were most profitable' is evidence of independent contractor status, but the Proposed Rule contains no similar nuance."

skill." UFCW also stated that, "when black-box algorithms solely dictate their available work, pay, and other economic conditions," "[w]orkers are powerless to negotiate or make any managerial decisions." In response, DOL noted its agreement that such facts would be probative of whether a worker has an opportunity for profit or loss depending on managerial skill but also reiterates that no one fact is dispositive under this factor."[9]

II. Investments by the Worker and the Potential Employer

NPRM

DOL proposed that this factor consider "whether any investments by a worker are capital or entrepreneurial in nature" and notes that "costs borne by a worker to perform their job, such as tools and equipment to perform specific jobs and the worker's labor" … "are not evidence of capital or entrepreneurial investment and indicate employee status." The Department noted that investments that are capital or entrepreneurial in nature and generally support an independent business/serve a business-like function are indicative of independent contractor status. The NPRM also stated that a worker's investments should be considered on a relative basis with the employer's investments in its overall business – and that while the worker's investments need not be equal to the employer's, the worker's investments should support an independent business or serve a business-like function to indicate independent contractor status.

Biden Rule

Costs to perform the job: The Biden rule added language to clarify that "costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status." The Department further explains in the preamble that "where the worker has no meaningful say either in the fact that the cost will be imposed or the amount, the cost cannot be an investment" indicating independent contractor status. However, if for example malpractice insurance is required by law or regulation and a worker can choose among policies based on their prices and coverage and independently procure a policy, then the cost of the insurance can indicate independent contractor status.[10] DOL additionally included minor changes – namely by adding some clarifying language and removing the reference to "costs borne by a worker to perform their job" to reflect the Department's view that "[a] worker may have expenses to perform a specific job and also make investments that generally support, expand, or extend the work performed which may be of a capital or entrepreneurial nature. Thus, the existence of expenses to perform a specific job will not prevent this factor from indicating independent contractor status so long as there are also investments that are capital or entrepreneurial in nature."[11]

[9] Biden rule at 1675.

[10] Biden rule at 1677.

[11] Biden rule at 1682.

Evaluating worker investments relative to potential employer's: The Department reaffirms its belief that "comparing the worker's investments to the employer's investment is well-grounded in the case law and the Department's prior guidance. The Department further believes that comparing types of investments is indicative of whether a worker is economically dependent on the employer for work or is in business for themself."[12] However, DOL responded to commenter concerns that "merely comparing the size of and dollar expenditures by the worker to those of the employer, especially for workers who are sole proprietors." The Biden rule text accordingly now reads:

> The worker's investments need not be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.[13]

Other Commentary

On use of a personal vehicle: DOL noted the number of commenters who expressed concern that the NPRM stated, "the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature." The Department countered that many of these commenters cited examples of vehicle types that the agency says do not fall into the NPRM's statement.[14] In other words, the Department considers the examples above to reflect investments that are capital or entrepreneurial in nature.[15] However, the Department continues on to say that "[w]hether a vehicle owned or leased by a worker and used to perform work is a capital or entrepreneurial investment does depend on the totality of the circumstances. In the scenario where a worker already owns a vehicle and happens to then use it to perform work, the acquisition of that vehicle was not for a business purpose and generally cannot be a capital or entrepreneurial investment." On the contrary, "If a worker already owns a vehicle for personal use and then modifies, upgrades, or customizes the vehicle to perform work, the worker's investment in modifying, upgrading, or customizing the vehicle could be a capital or entrepreneurial investment."[16]

On purchases used across multiple jobs: The Department cited comments from the Laborers' International Union of North America ("LIUNA") that suggested "[t]he mere utility of a worker's tools to perform similar work for other employers does not render the worker's

[12] Biden rule at 1684.

[13] Biden rule at 1684.

[14] "*See, e.g.,* NHDA (purchasing or leasing "personal vehicles for the primary purpose of starting a transportation business, whether full-time or part-time"); U.S. Chamber (purchasing "a car to use as a driver for a ride-sharing application"); WFCA (purchasing "a vehicle that is capable of carrying the weight of flooring materials and tools")"

[15] Biden rule at 1682.

[16] Biden rule at 1684.

purchase of those tools an entrepreneurial investment." DOL responded by saying such a statement "overlooks that the economic realities analysis considers the totality of the circumstances … A worker's use of tools alone does not determine whether the worker is an employee or independent contractor." DOL goes on to say that it "believes that a worker's purchase of tools and equipment for use performing multiple jobs for multiple employers can be a capital or entrepreneurial investment .. the nature of such purchases of tools and equipment needs to be determined."[17]

On treating "investments" as its own factor: The Trump rule did not treat this factor as one that stood alone; instead, it incorporated it as part of the opportunity for profit or loss factor, stating that its "opportunity for profit or loss factor indicates independent contractor status if the worker exercises initiative or if the worker manages their investment in the business" and 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." The Department acknowledges in the Biden rule that investments may be related to the consideration of the opportunity for profit or loss, but that separating investment as a separate factor is still necessary in order to capture instances where investments – or lack thereof – indicate that a worker is an employee.[18]

III. Degree of Permanence of the Work Relationship

NPRM

DOL proposed that the degree of permanence of the working relationship would "weigh in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships" and that this factor would point to an independent contractor finding "when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities." Further, the NPRM stated that independent contractors may have regularly occurring fixed periods of work, but that such work would not necessarily support an independent contractor classification – particularly in instances where a lack of permanence is attributable to the operational or business characteristics of the employer, rather than a worker's own independent business initiative.

Biden Rule

The Department modified language in the Biden rule to capture that "the proper analysis" under this factor "is not categorically based on operational characteristics of particular industries . . . it is important to consider whether the worker is exercising independent business initiative" after receiving comments from organizations who expressed concern that independent work occurs at times over a discrete amount of time and that the proper question is whether to determine if the

[17] Biden rule at 1678.

[18] Biden rule at 1680.

worker is choosing how, when, and the volume of services to provide.[19] Therefore, the modified text reads, "Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status *unless the worker is exercising their own independent business initiative."*[20] The Department notes that it agreed with the aforementioned commenters that "the critical question is whether the worker is in business for themselves, which is why the proposed regulatory language would require consideration of whether a lack of permanence is due to the workers' own business initiative.

Other Commentary
On exclusivity: The Department reaffirmed its statement from the NPRM that exclusivity is not required in order to find a degree of permanence and that working multiple jobs does not necessarily favor independent contractor status. DOL cited comments from organizations describing a "current client who "often has to work for a variety of gig economy jobs simultaneously, such as Uber Eats, GoPuff, Instacart, and Caviar, to keep her finances afloat." And the National Employment Law Project ("NELP") observed that in "low-wage industries, particularly in services such as transportation, delivery, or home care, many workers juggle multiple jobs with multiple entities not as an exercise of their own business judgment but as a necessity to cobble together a living wage in an underpaying economy."[21]

On long-lasting business relationships: The Biden rule discusses comments from stakeholders who expressed concern that a degree of permanence in a work relationship would translate to an employment relationship.[22] The Department counters in the preamble that "the economic reality test is a totality-of-the-circumstances test where no one factor is dispositive. Even if the degree of permanence in a work relationship indicates employee status, this is just one factor" to be considered along with others. The preamble continues,"The Department does not believe there is a scenario in which, for example, a worker who controls conditions of employment, sets their

[19] Biden rule at 1687 see "One commenter, CWI, objected to the Department's inclusion of "[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own business initiative, this factor is not indicative of independent contractor status" because it felt this language fails to account for the fact that "many types of independent contractor work are often limited or sporadic in duration precisely because such work is only needed for a discrete period of time" and that "the critical question is whether the worker acted like a business." The U.S. Chamber also contended that it "makes no difference whether . . . project-to-project work occurs as a result of `operational characteristics,' " urging the Department to more clearly identify that whether a worker is acting independently is better viewed through the lens of whether the worker chooses "how, when, and the volume of services to provide."

[20] Biden rule at 1688.

[21] Biden rule at 1690.

[22] Biden rule at 1687, see "Several commenters expressed a mistaken belief that having a degree of permanence in a work relationship would automatically make workers employees, s *ee, e.g.,* N/MA; SBA Office of Advocacy, or that the Department was creating a "per se" rule that work of continuous or indefinite duration equates to employee status, *see, e.g.,* CWI; NRF & NCCR."

own fees, hires helpers, and markets their business is converted from an independent contractor to an employee solely because they have long-lasting relationships with some clients."[23]

IV. Nature and Degree of Control

NPRM

The Department's proposed control factor considers the employer's potential control – including reserved control – over performance of the work and the economic aspects of the working relationship. The NPRM identifies the following facts as relevant to assessing the employer's control over the worker: whether the employer sets the worker's schedule; supervises the performance of the work; or explicitly limits the worker's ability to work for others. The NPRM and Biden rule differ from the Trump rule in that it considers the control factor to be one of six non-exhaustive factors within the overall economic reality analysis – whereas the Trump rule included control as one of the two "core" factors. Additionally, the Biden rule identifies additional aspects of control in the workplace that should be considered under this factor, including control mediated by technology as well as control over economic aspects of the working relationship (such as control over prices or rates for services). These aspects were not identified in the Trump rule. Moreover, and contrary to the Trump rule, the NPRM stated that an employer's compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, may indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer.

Biden Rule

One of the most notable changes in the Biden rule versus the NPRM lies in the control factor and is related to the Department's language in the NPRM around legal compliance for purposes of establishing control. As DOL notes in the Biden rule, "A very large proportion of the comments received regarding the control factor addressed the proposal that an employer's compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations may indicate control, suggesting that the worker is economically dependent on the employer. Many commenters objected to this proposal."[24]

---

[23]Biden rule at 1687

[24] Biden rule at 1691, see: "For example, Flex commented: "Legally required control is generally disregarded since that is control imposed by the government, not by the client or hiring party. The client or hiring party is not choosing to exercise legally required control; it is required to do so." *See also* Richard Reibstein, publisher of legal blog. The WFCA and others commented that "[r]equiring an independent contractor to comply with legal obligations, safety standards, contractual obligations, or industry standards should not be indicative of control" because "[t]hese requirements are standard in contracts and subcontracts." *See also* Genesis Timber; National Association of Home Builders ("NAHB"); NRF & NCCR. Other commenters stated that the Department's proposal would disincentivize employers to prioritize safety and other beneficial policies, because employers would not want to risk workers being classified as employees."

With this in mind, the Department revised the Biden regulation to read "actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control." However, the agency provided an additional revision that states "actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control." Under this change, DOL is putting the regulated community on notice that any control over compliance methods that goes beyond what is required by an outside legal framework may in some – but not all – cases be relevant to the control analysis if it proves a worker's economic dependence. The Department gives an example of a potential situation in the home healthcare industry: if an agency requires a criminal background check for all individuals with patient contacts in compliance with a specific Medicaid regulation, such an action does not indicate control. However, under the Biden rule, DOL explains that if that same agency were to require fulfillment of a comprehensive training beyond that required of relevant licenses, doing so may indicate control and point toward an employment relationship. Moreover, DOL explains that instances of potential control are only relevant when probative of the worker's economic dependence and when they indicate that the worker is not in fact in business for themselves (i.e., when an employer (not a worker) imposes safety or customer service obligations beyond what is required by law or regulation).

DOL also included a change with respect to how the Biden rule frames technological supervision. The Biden rule includes clarifying language that replaces "technological means of supervision" with "technological means to supervise performance of the work." This is discussed in further detail below.

Other Commentary

On shifting focus to control by potential employer versus control by the worker: DOL notes that various stakeholders registered complaints with the proposal's text that represented a shift back to the control exerted by the employer rather than by the worker.[25] The Trump rule, for reference, considered both the worker's and the potential employer's control. In discussion of these concerns, the Department re-affirmed its stance in the NPRM and declined to make any changes to the Biden rule, noting that "the control factor has its roots in the common law, where the inquiry was whether the "employer" had the "right to control the manner and means by

[25] Biden rule at 1691, see: "N/MA, for example, commented that "a worker's right to control the manner and means by which a worker provides services is, and should remain, a primary consideration in the Department's discussion of the right to control factor." CWI described this aspect of the proposal as "misguided" because "[f]ocusing on the individual's control ensures that the totality of the worker's business are evaluated, including control the worker may have over whether to subcontract, how to manage his workforce, whether and how to advertise his services, and whether to prioritize, stagger, or overlap projects." It added that such "considerations are largely lost when the analysis is unduly narrowed to an evaluation of an individual putative employer's alleged control." *See also* NAM ("Instead of focusing on the control a worker exercises over their work (which would evidence that they are in business for themselves), the Department would rather determine `employee' status on the employer's generally considered control over the work.")."

which [work] is accomplished"" and referred to a number of courts that have "[f]or decades, considered this factor with the focus on the potential employer, not the worker." Additionally, DOL asserts that "consistent with the economic reality analysis, this factor should necessarily focus on whether the employer controls meaningful aspects of the work relationship because that focus is probative of whether the worker stands apart as their own business. Simply assessing whether the employer lacks control over discrete working conditions (e.g, scheduling) or whether the employer exercises physical control over the workplace does not fully address whether the employer controls meaningful aspects of the work relationship."[26]

On reserved control: DOL notes that it received a number of comments expressing concerns with the concept of "reserved control," citing a general argument that the concept broadened the control factor by incorporating additional uncertainty given the "undefined, vague terminology."[27] The Department declined to make any changes, reaffirming its belief that the "absence of more apparent forms of control does not invariably lead to the conclusion that the control factor weighs in favor of independent contractor status … because such reserved rights may, in some situations, be probative of the economic reality of the total situation."

On scheduling: The Department states its view that "scheduling flexibility may be a relatively minor freedom, especially in those cases where a worker is prevented from exercising true flexibility because of the pace or timing of work or because the employer maintains other forms of control, such as the ability to punish workers who may seek to exercise flexibility on the job… the proper lens for the test is the totality-of-the-circumstances analysis, which considers scheduling flexibility along with other forms of control the employer might exert, as well as with other factors in the economic reality test."[28] This view is a major departure from the Trump rule, which found scheduling flexibility to be potentially dispositive under the control factor.

Moreover, the Department was unpersuaded with commenters' assertion that the NPRM ignored industry-specific realities that may appear to limit scheduling flexibility but do not necessarily mean that a worker lacks flexibility in scheduling.[29] The Department countered, "To the extent a

[26] Biden rule at 1693.

[27] Biden rule at 1691.

[28] In framing this discussion, the Department cited comments from a number of organizations citing specific industry practices, asserting that flexibility was not truly probative of economic independence. See Biden rule at 1696: "For example, ROC United noted that their members, who are restaurant workers, "frequently decide when and how long to work," yet, "once working, they have very little control over how they actually do the work," suggesting their economic dependence. UFCW similarly commented that, in their experience working with drivers, app-based companies "threaten to expel workers from the platform or reduce the availability of work shifts, unless the worker continuously accepts jobs;" a situation that limits the benefit of flexibility" [continued in FN #385] … The comment noted specific practices that erode the benefit of scheduling flexibility, such as app-based platforms offering first access to premium deliveries or allowing workers first access to select shifts on the condition that they have accepted enough jobs in the prior month."

[29]Biden rule at 1697, see "For example, NRF & NCCR commented that the Department's proposed approach "ignores key realities of business relationships common to retailers and restaurants." Examples include individuals who rent retail space but are constrained by limited operating hours of the building in which they rent, food delivery

potential employer is exerting control over when and for how long an individual can work, that fact is indicative of the employer's control. And even in those scenarios where the worker's schedule is constrained by contract or employer requirements, such scheduling control is only one fact among many that could be considered under the control factor."[30]

On supervision: DOL notes that while a lack of close supervision may point to a worker being free from control and in business for themselves, a lack of supervision is not alone indicative of independent contractor status – such as when the employer's business or business nature make direct supervision unnecessary.[31] Further, DOL is clear in reiterating stating its position that supervision can come in many forms – employers may rely on training and hiring systems that preclude the need for direct supervision and/or may supervise workers via monitoring systems that can track a worker's location and productivity. Remote methods using electronic systems to verify attendance and manage tasks may also constitute supervision. Therefore, DOL states that "a totality-of-the-circumstances analysis properly includes not only exploring ways in which supervision is expressly exercised, but also those instances where supervision is not apparent but still used by the employer—either through the job's structure, training, or the use of technological tools.[32]

On technologically mediated supervision: The Department emphasizes its position "that control over the performance of work that is exercised by means of data, surveillance, or algorithmic supervision is relevant to the control inquiry under the economic reality test" and agrees with commenters who stated in their comments that businesses are increasingly using such tools.[33] The Department further acknowledges that even technology used to collect information on business operations for purposes unrelated to supervision may be probative of an employer's control if such information is then used for purposes of supervision and goes beyond simple information collection.

---

workers who may only be able to deliver food when a restaurant is open, or cleaning crews who can only do their work at night. They asserted that these types of limitations do not necessarily indicate that the worker lacks control over their schedule … In addition, DoorDash suggested that the type of flexibility its workers possess is fundamentally different from the flexibility an employee may obtain from an employer. For instance, "[h]aving some room to voice a preference about shifts or work remotely isn't true scheduling flexibility, because the ultimate control still belongs to their employers, who dictate things like deadlines and meeting schedules that can't be shirked." In contrast, DoorDash noted that its platform allows workers to work on their own time and walk away, potentially for weeks or months at a time."

[30] Biden rule at 1697.

[31] Biden rule at 1698.

[32] Biden rule at 1699.

[33] Biden rule at 1700, see "However, as discussed in the section on examples used in the preamble, UFCW, several of its locals, and the AFL–CIO would also have the Department go further by providing additional examples of ways in which employers use technology, including surveillance, data collection, and algorithmic management tools, to supervise workers. According to UFCW, since "employers in all industries are rapidly exploiting electronic surveillance to supervise workers," the Biden rule "should additionally explain that a company's use of nontransparent computer algorithms (programming codes) to manage workers is evidence indicative of employer control."

DOL concedes, however, that an employer may at times use technology to track information critical to their business or the status of the work performed by the worker and that such a practice may still be consistent with an independent contractor relationship even when the data itself is generated from the worker's action. According to the Department, that line between an independent contractor relationship and an employment relationship may be crossed "where such tracking is then paired with supervisory action on behalf of the employer such that the performance of the work is being monitored so it might then be directed or corrected."[34] In response to commenters that took issue with the NPRM ignoring this reality, the Department added clarifying language that replaces simply "technological means of supervision" with "technological means to supervise performance of the work."

On setting a price or rate for goods or services: The Biden rule considers whether the employer controls economic aspects of the working relationship, including control over prices or rates for services. DOL notes that workers in business for themselves are generally able to set – or at least negotiate – their own prices for services rendered; however, the NPRM also acknowledges that, at times, a contract between a business and independent contractor may include pricing information. That said, DOL is firm in its position that the existence of such a contract does not preclude an employment finding.

DOL notes stakeholder comments that agree with the agency's approach, referencing their position that "price-setting is a form of control, since an independent contractor "controls, and has the right to control, all important business decisions," including "what good or service to sell and at what price." As NELP further noted, "without the power to set prices for goods or services, a worker will likely be economically dependent on an employer for work, and if she wants to increase earnings, her only option is to work longer, harder, or more jobs."[35]

DOL rejected calls from commenters to deemphasize the discussion of prices or rates of services, noting comments from the International Franchise Association ("IFA") as the issues related to franchising relationships. IFA explained, "[f]ranchisors commonly suggest resale prices for offerings across the franchise system and, subject to applicable law, may set minimum or maximum prices for products or services, or have uniform advertising requirements for systemwide promotions." IFA requested that the Department, "expressly state that, in the franchise context, the fact that a franchisor sets prices for goods or services is not probative of an employment relationship."

In response, DOL acknowledges that many industries, occupations, or sectors set prices and rates for good or services; however, the agency is firm in its position that "workers who are truly in business for themselves will generally control the fundamental economic components of their business, including the prices to charge customers or clients for the goods or services offered…

[34] Biden rule at 1701.

[35] Biden rule at 1702.

where the potential employer exerts control to set rates or prices for services, the worker is more likely to be "receiving the compensation the organization dictates," and thus less likely to be in business for themselves."[36]

On the ability to work for others: The Biden rule considers whether the employer explicitly limits the workers' ability to work for others or places demands on workers' times that do not allow them to work for others. However, the Department notes that while some courts find that less control is evidenced where a worker is permitted to work for others (i.e. competitors) such that it may indicate an independent contractor relationship, DOL reaffirms its position to exclude from the NPRM and Biden rule such a statement that says the ability to work for others is a form of control exercised by the *worker* that points to an independent contractor status. According to the Department, this "fails to distinguish between work relationships where a worker has multiple jobs in which they are economically dependent on each potential employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business. (…) [T]he question is "whether a [worker's] freedom to work when she wants and for whomever she wants reflects economic independence, or whether those freedoms merely mask the economic reality of dependence.""[37]

On using applications or platforms: In response to commenters who pointed at the increased fluidity in terms of working for others when associated with applications or platforms, DOL discusses two points of view stemming from comments submitted in response to the NPRM. The first, from DoorDash, stated that workers "are free to work with anyone they want, including our competitors. Most importantly . . . they can do it in real time—even while they're logged into our app. If [they] find a better work opportunity (or work that's simply more appealing to them), they can switch back and forth." On the contrary, DOL notes comments from UFCW who "did not view "multi-apping" as a unique concept that could not be addressed within the economic reality test, arguing that a "worker who attempts to leverage earnings between two app-based platforms ('multi-apping') [is] now simply dependent on two platform companies for which the employee is waiting around for work to perform. This is not indicative of the worker exercising initiative to develop a business for themselves independent of these platform companies.""

The Department ultimately articulated its position that the ability to use applications or platforms to access work does not change how the ability to work for others is weighed when determining worker classification. Instead, DOL reiterates that the overall test is economic dependence and "even if a worker has the ability to more fluidly move among potential employers while performing work by using multiple applications, this does not necessarily mean that the entire control factor weighs in favor of independent contractor status. Nor is it dispositive of whether the worker is in business for themself rather than being subject to the control of the entity for whom they are performing work at any given time." Additionally, the Department agrees with

[36] Biden rule at 1702-1703.

[37] Biden rule at 1704.

UFCW and states its belief that "having multiple jobs can too often be necessary for financial survival in the modern economy, as many commenters and courts have noted. For example, an employee may have two jobs, several part-time jobs, or a regularly-recurring seasonal job in addition to a full-time employment situation, and an independent contractor may also have multiple customers based on their exercise of business initiative. Thus, the mere ability to work for others is not necessarily an indicator of employee or independent contractor status."[38]

On additional considerations: The Department noted comments from the UFCW that contend that "platform companies essentially coerce workers to continuously accept work (which would preclude them from working for others) by threatening to terminate workers from the platform or reduce the availability of work shifts unless the worker continuously accepts jobs. Additionally, it noted that an employer may prohibit workers from developing their own business or customer base, for example, by prohibiting a platform worker from doing any independent work for customers they connect with through the app." DOL expressed agreement that these facts could be relevant to whether a business has "either explicitly limited the worker's ability to work for others or has placed demands or other restrictions on workers that do not allow them to work for others."[39]

V. Extent to Which the Work Performed is an Integral Part of the Employer's Business

NPRM
The Department proposed to enumerate this as a standalone factor and specifically as "whether the work performed is an integral part of the employer's business," returning it from the Trump rule's articulation as "whether the worker is part of an integrated unit of production" that was not itself considered a standalone factor to the overall worker classification determination.

Biden Rule
The Biden rule retains this factor as written in the NPRM, noting that "if the potential employer could not function without the service performed by the workers, then the service they provide is integral … "[s]uch workers are more likely to be economically dependent on the potential employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer."[40]

Other Commentary
On relation to the ABC test: The Department strongly rejects concerns from commenters that the rule's articulation of the integral factor is an attempt to adopt one of the prongs of the ABC

[38] Biden rule at 1705-1706.
[39] Biden rule at 1706.
[40] Biden rule at 1707.

test.[41] DOL states that the integral factor in the rule's multifactor analysis where no one factor is dispositive, and thus stands in "stark contrast" to an ABC test where each test element is dispositive.

On the factor leaving no room for IC status: The Department rejected arguments from commenters that the integral factor would lead to most workers being classified as an employee.[42] DOL responded that the integral factor is just one in a multi-factor test, and that it is "not always true that workers whose work is integral are employees." The Department also suggests that the key word in the Biden rule is "principal" – such that while in some cases it may be critical for a business to hire, for example, an accountant – accounting work is not central to the employer's principal business.[43]

VI. Skill and Initiative

NPRM
The Department proposed that this factor consider "whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative." Where the worker is dependent upon training from the employer to perform the work, or where no specialized skills are used, this factor points toward employment status. Importantly, the Department proposes that where specialized skills are used, they must be used in connection with business-like initiative to indicate an independent contractor relationship.

Biden Rule
The Biden rule adopts this provision largely as proposed, but includes language to "sharpen the point that use of skills in connection with business-like initiative is what distinguishes between independent contractors and employees under this factor." Namely, the revised text reads, "Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors

[41] At 1709, See For example, the U.S. Chamber commented that "it appears that the Proposed Rule's shift away from the Supreme Court's focus on an `integrated unit' to whether the work is `critical, necessary, or central' is a thinly veiled attempt to inject Prong B of the ABC test—whether the work takes place outside the usual course of the putative employer's business—into the analysis." The Club for Growth, NRF & NCCR, and the U.S. Chamber contended that the Department's proposal for the integral factor was at odds with the Department's explanation elsewhere in the NPRM that the Department believes the ABC test to be inconsistent with Supreme Court precedent interpreting the FLSA, and as such, cannot be adopted without Supreme Court or congressional alteration of the applicable analysis under the FLSA.

[42] At 1710, see The U.S. Chamber of Commerce similarly commented that "[t]he Department has mistakenly equated 'integral' with 'critical, necessary, or central to the employer's business'. . . . Taken literally, this could include every independent contractor, because a business would not hire an independent contractor unless it was 'necessary' to do so."

[43] Biden rule at 1710.

may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor."[44]

Other Commentary
On including initiative along with skill: Commenters noted that using initiative in tandem with skill was inappropriate – e.g., some workers may strongly prefer to work as independent contractors, not for the flexibility to grow their businesses, but for the flexibility to control their workloads and to work when they want to – and so the absence of initiative does not indicate that a worker is not in business for themself.[45] The Department disagreed; DOL affirms their position that "whether workers with specialized skills use those skills in connection with business-like initiative is probative of their status as employees or independent contractors. Using such skills to "grow" or "expand" their work is a prime example of business-like initiative as the commenters recognize, but there may be other ways in which workers can use such skills in connection with businesslike initiative. Of course, the determination of a worker's status ultimately requires consideration of the totality of the circumstances—not just the skill and initiative factor."[46]

On skill generally: DOL acknowledges that a worker may lack specialized skill but still exercise the initiative of an independent business and still be an independent contractor after considering all factors.[47] Additionally, the Department states its position that skills developed separate and apart from a hiring entity are relevant and may indicate independent contractor status.[48]

VII. Additional Factors

[44] The change follows comments from stakeholders, such as Real Women in Trucking, requesting clarification. At 1712, See Real Women in Trucking stated that it would appreciate clarification that, "although truck driving typically is not classified as 'skilled' labor in other contexts, it requires sufficient skill that, when combined with business-like initiative, drivers are appropriately considered independent contractors." The Department agrees that, consistent with the analysis for this factor and its discussion of commercial drivers' licenses (CDLs) below, this factor would indicate independent contractor status for a worker who uses truck-driving skills in connection with business-like initiative.

[45] See at 1713, FSI, Coalition of Business Stakeholders, and NRF & NCCR similarly objected to the inclusion of initiative in this factor. FSI stated that including initiative in the skill factor contravenes *Silk* and that "this alteration represents yet another way in which the Proposed Rule repeatedly and improperly emphasizes 'entrepreneurial drive' as an overarching consideration across many factors." FSI further stated that emphasizing "entrepreneurial drive" may "lead to erroneous classification decisions because, among other considerations, some workers may strongly prefer to work as independent contractors, not for the flexibility to grow their businesses, but for the flexibility to control their workloads and to work when they want to. It added that, "while initiative is an appropriate consideration in favor of independent contractor status, its absence does not indicate that a worker is not pursuing independence."

[46] Biden rule at 1713.

[47] Biden rule at 1713.

[48] Biden rule at 1715.

NPRM & Biden Rule
The NPRM and Biden rule provide that "additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the potential employer for work." The Department reaffirms its position that the regulatory language is consistent with decades of Supreme Court and federal appellate court precedent, in addition to language from the 2021 Biden rule that emphasizes the enumerated economic reality test factors aren't exhaustive.

Other Commentary
Commenters took issue with the Department's approach relative to that of the Trump rule, noting that the Trump rule "constrained or narrowed the additional factors application by, first, explicitly assigning more weight to core factors than any potentially relevant additional factors, and second, by identifying relevant additional factors." These concerns notwithstanding, the Department declined to identify any additional factors that are indicative or whether the worker is in business for themselves or an employee, noting that the text as written is sufficiently precise in focusing on whether the additional factors point to whether the worker is economically dependent on the hiring entity. However, DOL does note that "such facts as the place where work is performed, the absence of a formal employment agreement, . . . whether an alleged independent contractor is licensed by State/local government," and "the time or mode of pay" do not generally indicate whether a worker is economically dependent or in business for themselves."[49]

[49] Biden rule at 1717-1718.