

THE PRISM OF ENTREPRENEURSHIP: CREATING A NEW LENS FOR  
WORKER CLASSIFICATION

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## INTRODUCTION

### *Overview*

Courts use the economic realities test to determine whether a worker is an employee and thus protected by the Fair Labor Standards Act (“FLSA” or “the Act”).<sup>1</sup> Unfortunately, the economic realities test fails to accomplish the purposes of the statute. Use of the test creates inconsistent results, fails to provide accurate guidance to employers, and is unsuitable for changing employment arrangements.

In this article, I examine the history and purpose of the FLSA. I then turn to three subject areas that create difficulties: the problem of inconsistent results, the challenges of the sharing economy, and the throttling of innovative work arrangements. I then turn to the academic literature of entrepreneurship to understand the elements of entrepreneurship.

I propose a revised interpretation of the economic realities test. I focus on the second element of the test: whether evidence exists of entrepreneurial opportunity. I propose that this element become primary. In essence, courts should view the question of independent contractor status through the prism of entrepreneurship. Defining entrepreneurship is

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<sup>1</sup>Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 301 (1985).

difficult but not impossible. By examining the common elements of entrepreneurship, I create a revised interpretation of the economic realities classification test that accurately reflects the difference between employee and independent contractor.

*The distinction between employee and independent contractor*

The distinction between employee and independent contractor is fundamental to U.S. employment law. Most state and federal employment statutes reach employees but not independent contractors. In this article, I examine the worker classification controversy arising out of one such statute, the Fair Labor Standards Act.<sup>2</sup> Seventy years after passage of the FLSA, employers and workers remain embroiled in lawsuits across the country.<sup>3</sup> Worker classification claims have exploded in the last few years as workers filed numerous lawsuits alleging that their employer misclassified its workers.<sup>4</sup> Misclassification occurs when workers are wrongly classified as independent contractors instead of employees. Often, misclassification claims arise out of an allegation that the employer failed to pay proper minimum wage or overtime payments.<sup>5</sup> A close relationship exists between the FLSA and employee classification disputes: alleged FLSA violations often provide the catalyst for lawsuits and government actions.<sup>6</sup> Plaintiff-side lawyers have seized on the FLSA.<sup>7</sup>

The FLSA sets wage standards for employers, creating a minimum wage for all employees and requiring overtime wages to non-exempt

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<sup>2</sup>Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012 & Supp. IV 2017).

<sup>3</sup>Kevin McGowan, *Wage and Hour Class Action Boom Called Likely to Last*, BLOOMBERG L. (Jan. 20, 2017), <https://www.bna.com/wage-hour-class-n73014450078> (indicating that 8,304 Fair Labor Standards Act collective actions were filed in 2016).

<sup>4</sup>Lydia DePillis, *Why Wage and Hour Litigation is Skyrocketing*, WASH. POST (Nov. 25, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours/?utm\\_term=.d93a466a621a](https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours/?utm_term=.d93a466a621a) (“The number of wage and hour cases filed in federal court rose to 8,871 for the year ending Sept. 30, [2015] up from 1,935 in 2000. That’s an increase of 358 percent, compared to the federal judiciary’s overall intake volume, which rose only a total of about 7 percent over the same period.”).

<sup>5</sup>Anna P. Prakash & Brittany B. Skemp, *Beyond the Minimum Wage: How the Fair Labor Standards Act’s Broad Social and Economic Protections Support its Application to Workers Who Earn a Substantial Income*, 30 A.B.A. J. LAB. & EMP. L. 367, 367 (2015).

<sup>6</sup>See Annie Hunt, *FLSA Lawsuits Break Records in 2015 and Set to Rise in 2016*, LEGAL NEWSLINE (Jan. 29, 2016, 9:33 AM), <http://legalnewsline.com/stories/510660586-flsa-lawsuits-break-records-in-2015-and-set-to-rise-in-2016>.

<sup>7</sup>DePillis, *supra* note 4.

employees.<sup>8</sup> The FLSA also mandates that employers maintain payroll records for employees.<sup>9</sup> These requirements do not apply to an employer who retains independent contractors.<sup>10</sup> Thus, classification of a worker as an employee or independent contractor creates important consequences. A host of laws will protect the worker only if the worker is an employee. Independent contractors are self-employed workers, who retain personal responsibility for the payment of Social Security taxes, Medicare taxes, and any worker's compensation protection.<sup>11</sup> Accordingly, the employer may be able to avoid much of the costs associated with employees by using independent contractors. An employer has a strong monetary incentive to classify workers as independent contractors rather than as employees.<sup>12</sup> At a minimum, an employer who uses independent contractors in lieu of employees is no longer responsible for wages prescribed by the law.<sup>13</sup> Furthermore, an employer who classifies his workers not as employees but as self-employed entrepreneurs may avoid costly regulations, the payment of fees and expenses, the costs of withholding—including the necessary administrative staff to oversee the withholding, the payment of benefits, and the funding of retirement plans.<sup>14</sup>

Misclassification has a societal effect as well. The confusion in worker classifications harms competitiveness. If one employer misclassifies its workers as independent contractors, it may achieve an unfair competitive

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<sup>8</sup> 29 U.S.C. §§ 201–219 (2012 & Supp. IV 2017); *see also* U.S. DEP'T OF LABOR, OFFICE OF THE ASSISTANT SEC'Y FOR POLICY, WAGES AND HOURS WORKED: MINIMUM WAGE AND OVERTIME PAY (2016) (describing the employers subject to FLSA requirements).

<sup>9</sup> 29 U.S.C. § 211(c) (2012) (“Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions . . .”).

<sup>10</sup> *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (2009).

<sup>11</sup> LALITH DE SILVA ET AL., PLANTIMATICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS 91–92 (2000), <https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

<sup>12</sup> Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMP. L.J. 75, 76 (1997).

<sup>13</sup> *See* Micah Prieb Stolfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 313 (2011).

<sup>14</sup> *See id.*

advantage over those employers classifying workers as employees. An employer can substantially reduce its labor cost through the use of independent contractors.<sup>15</sup> On the other hand, the employer who voluntarily classifies its workers as employees rather than independent contractors risks saddling itself with unnecessary burdens.<sup>16</sup>

*The law provides employers with little guidance*

Defining the status of a worker has troubled courts and administrative agencies for years. The ongoing struggle to distinguish between employees and independent contractors has been “lengthy and confused.”<sup>17</sup> As the Supreme Court acknowledged, “[t]here are innumerable situations . . . where it is difficult to say whether a particular individual is an employee or an independent contractor.”<sup>18</sup>

Unfortunately, the law provides employers with little guidance in making worker classification decisions. Employers face a system that distinguishes between employee and independent contractor, but that provides little guidance to making the proper classification. Employers wishing to strike contractual agreements to clarify independent contractor status will likely be frustrated, as those agreements are routinely disregarded.<sup>19</sup> Ordinarily when construing the validity of a contractual agreement, a court will start with the actual language of the agreement.<sup>20</sup> But this approach does not work in the classification arena. Instead, the agreement between the employer and the worker receives little weight in the determination of employment status.<sup>21</sup>

For instance, in *Vizcaino v. Microsoft Corp.*, the employer signed a number of agreements with workers.<sup>22</sup> Each of the agreements stated that

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<sup>15</sup> See MICHAEL P. KELSAY ET AL., UNIV. OF MO.-KANSAS CITY, THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF ILLINOIS 2–3 (2006), [http://www.faircontracting.org/PDFs/prevaling\\_wages/Illinois\\_Misclassification\\_Study.pdf](http://www.faircontracting.org/PDFs/prevaling_wages/Illinois_Misclassification_Study.pdf). (“Firms that misclassify can bid for work without having to account for many normal payroll-related costs. This illegal practice can decrease payroll costs by as much as 15 to 30%. This places employers who correctly classify their employees at a distinct competitive disadvantage.”).

<sup>16</sup> See *id.* at 2 (“[T]he conditions for a fair and competitive marketplace are sabotaged.”).

<sup>17</sup> Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 353 (2011).

<sup>18</sup> NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968).

<sup>19</sup> Jost, *supra* note 13, at 345–46.

<sup>20</sup> CSC Credit Servs., Inc. v. Equifax Inc., 119 F. App’x 610, 613 (5th Cir. 2004).

<sup>21</sup> Jost, *supra* note 13, at 346.

<sup>22</sup> 120 F.3d 1006, 1010 (9th Cir. 1997).

“the worker was ‘an Independent Contractor for [Microsoft],’ and nothing in the agreement should be construed as creating an ‘employer-employee relationship.’”<sup>23</sup> The agreement with the workers included additional language, cautioning that the workers would be responsible for payment of their own insurance and benefits.<sup>24</sup> In each agreement, the worker acknowledged, “You are not either an employee of Microsoft, or a temporary employee of Microsoft.”<sup>25</sup> Nevertheless, despite the clarity of the contracts, the appellate court deemed the workers to be employees.<sup>26</sup>

An employer faced with contractual hurdles to establishing independent contractor status may instead turn to statutes for guidance. Unfortunately, statutory definitions of employee status offer little to guide employers. Statutory definitions are often vague or circular and provide no bright line rules. Instead, an employer attempting to rely on statutory guidance to make a classification decision will once again be frustrated. Even a good-faith decision as to independent contractor status may result in investigations and lawsuits. Particularly troubling are the employment-related definitions found in the FLSA. As discussed further below, these definitions fail to provide employees, employers, or the court system with a foundational basis for making a worker status determination.

The United States Department of Labor (DOL) oversees and enforces the FLSA.<sup>27</sup> Unfortunately, it has been sending mixed signals regarding the scope of the FLSA coverage. Recently, after previously directing courts and employers to utilize a broad interpretation of who is an employee, the DOL reversed its position.<sup>28</sup> In June 2017, the DOL withdrew an Administrator Interpretation (“AI”) of the statute that addressed employer misclassification of employees as independent contractors.<sup>29</sup> The withdrawn AI, issued only two years earlier in July 2015, emphasized that the principal inquiry to make in the determination of employee or independent contractor status was whether the individual is “economically dependent” on the

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 29 U.S.C. § 204 (2012).

<sup>28</sup> Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance*, LITTLER (June 7, 2017), <https://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance>.

<sup>29</sup> U.S. DEP’T OF LABOR, 17-0807-NAT, U.S. SECRETARY OF LABOR WITHDRAWS JOINT EMPLOYMENT, INDEPENDENT CONTRACTOR INFORMAL GUIDANCE (2017).

employer.<sup>30</sup> The July 2015 AI set out a six-factor test, known as the economic realities test, to guide employers in determining whether an individual is economically dependent on the employer.<sup>31</sup> The Department emphasized that the six-factor test should be applied “broadly.”<sup>32</sup> In the original AI, the DOL stated that “most workers are employees under the FLSA”<sup>33</sup> and noted that courts must remain focused on the “economic realities” of the worker/employer relationship.<sup>34</sup> Furthermore, the AI indicated that the DOL would increase its enforcement efforts aimed at misclassified independent contractors.<sup>35</sup> The guidance also signaled that the DOL would closely scrutinize any worker a company classified as an independent contractor.<sup>36</sup>

Although it appears that the DOL abruptly shifted course, the meaning of the AI withdrawal remains questionable. For instance, in the same news release announcing the withdrawal, the DOL qualified the effect and meaning of its decision.<sup>37</sup> The DOL noted that “removal of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act . . . as reflected in the Department’s long-standing regulations and case law. The Department will continue to fully and fairly enforce all laws within its jurisdiction including the Fair Labor Standards Act . . . .”<sup>38</sup> At the time of the announcement, the

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<sup>30</sup>U.S. DEP’T OF LABOR, ADMINISTRATOR’S INTERPRETATION NO. 2015-1, THE APPLICATION OF THE FAIR LABOR STANDARDS ACT’S “SUFFER OR PERMIT” STANDARD IN THE IDENTIFICATION OF EMPLOYEES WHO ARE MISCLASSIFIED AS INDEPENDENT CONTRACTORS 2 (2015),

<http://assets.law360news.com/0679000/679249/Administrator’s%20Interpretation%20on%20Misclassification.pdf>.

<sup>31</sup>*Id.* at 4.

<sup>32</sup>*Id.* at 2.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*See id.* at 1.

<sup>36</sup>*See* Michael J. Lotito et al., *How Broad is Broad? New DOL Guidance Determines Most Workers Are Employees*, LITTLER (July 22, 2015), <https://www.littler.com/publication-press/publication/how-broad-broad-new-dol-guidance-determines-most-workers-are-employees> (“The bottom line is that businesses are facing a time of unprecedented uncertainty as the government continues to change the definition of both who is an employer and who is an employee.”).

<sup>37</sup>U.S. DEP’T OF LABOR, *supra* note 29.

<sup>38</sup>*Id.*

DOL failed to indicate what would take the place of the AI.<sup>39</sup> Later, however, the agency announced that it would return to its practice of issuing opinion letters.<sup>40</sup> These opinion letters, together with DOL regulations, pertinent provisions of the Field Operations Handbook, and DOL briefs, are meant to guide employers in their classification decisions.<sup>41</sup>

Ideally, the confusion created by the economic realities test would be resolved within the political context and not the judicial system. For instance, Congress itself could make a legislative change to the FLSA. If Congressional action remains impossible, employers could presumably rely on an administrative effort by the DOL. For instance, the DOL could provide employers with a new set of guidelines. But in today's polarized political environment, such changes seem unlikely. Instead, courts must rely on the FLSA classification test.<sup>42</sup>

In this article, I offer a modification of the test used to make FLSA classification determinations. I do not discard the economic realities test, but instead choose to focus on one of the six factors examined in the test. I propose that the role of independent contractor be defined primarily by the presence or absence of entrepreneurial opportunity. To determine what constitutes entrepreneurship, I look to the academic discipline of entrepreneurship. Scholars in that field have studied, debated, and defined what exactly constitutes entrepreneurship. To determine the presence of entrepreneurial opportunity, I use the scholarly definitions of entrepreneurship to create a legal test aimed at improving the classification process.

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<sup>39</sup> *Id.*

<sup>40</sup> U.S. DEP'T OF LABOR, 17-0914-NAT, U.S. DEPARTMENT OF LABOR REINSTATES WAGE AND HOUR OPINION LETTERS (2017).

<sup>41</sup> *See id.*

<sup>42</sup> Of course, nothing suggested herein would affect misclassification and joint employment allegations brought under state wage and hour laws, federal or state tax laws, unemployment laws, workers' compensation laws, or employee benefit laws.



COURTS USE THE ECONOMIC REALITIES TEST TO CLASSIFY WORKERS  
UNDER THE FLSA

*Examining the roots of the statute*

The first goal of a classification test should be to ensure that the test accomplishes the purposes of the FLSA. To understand those purposes, one must examine the roots of the statute.

The drafters of the FLSA addressed the harsh working conditions found in the first decades of the twentieth century.<sup>43</sup> The FLSA bars substandard working conditions in the production of goods and services for interstate commerce.<sup>44</sup> Specifically, the statute prohibits paying less than minimum wage,<sup>45</sup> employing child labor,<sup>46</sup> and failing to pay premium overtime pay for non-exempt employees.<sup>47</sup> Congress intended the prohibitions to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” which “cause commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States . . . .”<sup>48</sup> Congress hoped to “eliminate low wages and long hours,” as well as to “free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers.”<sup>49</sup>

The FLSA reflects the government’s willingness to regulate at-will employment. Addressing the enactment of the FLSA, the Supreme Court stated that “the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power.”<sup>50</sup>

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<sup>43</sup> 29 U.S.C. § 202 (2012).

<sup>44</sup> Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1003 (1999).

<sup>45</sup> See 29 U.S.C. § 206 (2012 & Supp. IV 2017).

<sup>46</sup> *Id.* § 212.

<sup>47</sup> *Id.* § 207.

<sup>48</sup> *Id.* § 202(a).

<sup>49</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

<sup>50</sup> *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509–10 (1950).

The drafters of the FLSA also hoped that the statute would prevent unfair competition.<sup>51</sup> Backers of the FLSA hoped to level the playing field between reputable employers and those exploiting workers through the use of substandard wages.<sup>52</sup> Section 202(a)(3) of the FLSA declares that substandard labor conditions constitute “an unfair method of competition in commerce.”<sup>53</sup> As a House of Representatives report issued after the statute’s passage stated:

No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wages . . . higher than those applicable to his competitors. No employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes.<sup>54</sup>

The FLSA has traditionally been read to extend coverage to most workers.<sup>55</sup> Broad coverage of the statute is needed to accomplish the statute’s purpose:

This Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and

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<sup>51</sup>U.S. DEP’T OF LABOR, *Domestic Service Final Rule Frequently Asked Questions (FAQs)*, <https://www.dol.gov/whd/homecare/faq.htm> (last visited March 18, 2018) (“The Fair Labor Standards Act (FLSA) was enacted in 1938 to provide minimum wage and overtime protections for workers, to prevent unfair competition among businesses based on subminimum wages, and to spread employment by requiring employers whose employees work excessive hours to compensate employees at one-and-one-half times the regular rate of pay for all hours worked over 40.”).

<sup>52</sup>*Id.*

<sup>53</sup>29 U.S.C. § 202 (2012).

<sup>54</sup>H.R. REP. NO. 75-2182, at 6–7 (1938); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1332 (9th Cir. 1991).

<sup>55</sup>*Roland Elec. Co. v. Walling*, 326 U.S. 657, 669–70 (1946), *superseded by statute*, Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, 63 Stat. 910 (1949), *as recognized in Idaho Sheet Metal Works, Inc., v. Wirtz*, 383 U.S. 190, 197–98 (1966).

will penalize those who practice fair labor standards as against those who do not.<sup>56</sup>

Similarly, the Department of Labor was originally created to “foster, promote, and develop the welfare of the wage earners of the United States.”<sup>57</sup> Congress also intended that the DOL improve conditions for workers and “advance their opportunities for profitable employment.”<sup>58</sup> The Secretary of Labor had the power to: (1) bring an action by or on behalf of any employee;<sup>59</sup> (2) impose civil penalties;<sup>60</sup> and (3) seek injunctive relief against unpaid wages due to the employee.<sup>61</sup> Congress likewise created the DOL’s Wage and Hour Division to “promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation’s workforce.”<sup>62</sup>

*The drafters of the FLSA wanted to protect workers*

The FLSA contains rules designed to limit the harsh working conditions faced by many workers. The Act was meant to:

[R]aise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation ‘from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.’<sup>63</sup>

Some have argued that Congress intended a broad application of the ACT—to extend the act’s protections “to as many workers as possible.”<sup>64</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> 29 U.S.C. § 551 (2012).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* § 216(c).

<sup>60</sup> *Id.* § 216(e).

<sup>61</sup> *Id.* § 217.

<sup>62</sup> U.S. DEP’T OF LABOR, WAGE AND HOUR DIVISION MISSION STATEMENT, <https://www.dol.gov/whd/about/mission/whdmiss.htm>.

<sup>63</sup> *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945) (quoting S. REP. NO. 75-884, at 4 (1937)).

<sup>64</sup> Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1691 (2016).

The passage of the FLSA marked a changed attitude in the United States toward working conditions and standards.<sup>65</sup> Although it seems uncontroversial today, the FLSA faced a minefield of opposition, in both Congress and the Supreme Court, before enactment.<sup>66</sup> In fact, the statute was rescued only by the famous “switch in time that saved nine,” the course reversal by the Supreme Court that salvaged much New Deal legislation.<sup>67</sup>

Actually though, the roots of the statute lie not in the New Deal but date back to the Industrial Revolution,<sup>68</sup> that time period when the United States “entered a period of rapid industrial growth that proved beneficial to the United States, as well as the world economy.”<sup>69</sup> While the growth of the industrial economy provided benefits to consumers, working conditions degraded substantially.<sup>70</sup> Decades of poor working environments spurred Congress’ passage of the FLSA.<sup>71</sup> In creating the FLSA, Congress expressed its concern for “four major areas: minimum wages, overtime pay, equal pay, and child labor.”<sup>72</sup> The Act provided:

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in

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<sup>65</sup>JONATHAN GROSSMAN, U.S. DEP’T OF LABOR, FAIR LABOR STANDARDS ACT OF 1938: MAXIMUM STRUGGLE FOR A MINIMUM WAGE (1978), <https://www.dol.gov/oasam/programs/history/flsa1938.htm>.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*; see also BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 360–61 (1998).

<sup>68</sup>Cunningham-Parmeter, *supra* note 64, at 1691.

<sup>69</sup>Pamela N. Williams, *Historical Overview of the Fair Labor Standards Act*, 10 FLA. COASTAL L. REV. 657, 658 (2009).

<sup>70</sup>*Id.* (noting the increased availability of “transportation, food processing, pasteurization, etc.”).

<sup>71</sup>See *id.* at 660.

<sup>72</sup>*Id.* at 676–77.

commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.<sup>73</sup>

In construing the FLSA, the Supreme Court noted “that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency.”<sup>74</sup> The Court has “consistently construed the Act ‘liberally to apply to the furthest reaches consistent with congressional direction.’”<sup>75</sup> Courts have construed the FLSA with the intent of maintaining “minimum standards of decency.”<sup>76</sup> Some have argued that the broad definition of employee found in the Act was intended to extend the Act’s protections “to as many workers as possible.”<sup>77</sup> To this end, the Supreme Court held that “the purposes of the Act require that it be applied even to those who would decline its protections.”<sup>78</sup> Thus, the FLSA even applies to those workers that would refuse its application.

#### COURTS USE A VARIETY OF WORKER CLASSIFICATION TESTS TO DETERMINE WORKER STATUS

##### *The FLSA’s employment-related definitions fail to satisfy the statute’s purposes*

In an ideal world, the statute would provide an adequate definition of those workers who fall within its ambit. Thus, before addressing classification tests, we first look to the language of the statute. A sufficiently detailed statutory definition would obviate the need for a judicially created test. Unfortunately, the employment-related definitions found within the FLSA are vague, circular, and interlocking. The definitions are certain to frustrate any party seeking to use the statute to distinguish between an employer and an independent contractor. Like many employment-related statutes, the FLSA’s definition of employee provides

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<sup>73</sup> 29 U.S.C. § 202 (Supp. V 1939).

<sup>74</sup> *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985).

<sup>75</sup> *Id.* (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)).

<sup>76</sup> *See id.*

<sup>77</sup> *Cunningham-Parmeter*, *supra* note 64, at 1691.

<sup>78</sup> *Tony & Susan Alamo Found.*, 471 U.S. at 302.

little guidance as to what an “employee” is. The relevant definitions are as follows:

1. “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .
2. “Employee” includes any individual employed by an employer.
3. “Employ” includes to suffer or permit to work.<sup>79</sup>

Because of the lack of contractual or statutory certainty, courts have had to fill in the gaps. To make determinations of worker status, courts use different legal tests. “These tests derive from a variety of sources including the common law, governmental agency regulations, and federal and state statutes.”<sup>80</sup> This confusing assortment of tests differs across law and across context. For example, the National Labor Relations Act requires courts to use the common-law test to determine classification.<sup>81</sup> The Internal Revenue Service test examines twenty factors when making classification decisions relating to tax payments.<sup>82</sup> On the state level, every state making employment classifications for purposes of unemployment insurance coverage must use a test mandated by the state statute.<sup>83</sup>

The two most prevalent classification tests are the common law control test and the economic realities test.

### *The right to control test*

In most cases of misclassification not tied to the FLSA, courts look to the question of control, specifically the extent of control retained by the employer over the worker’s efforts.<sup>84</sup> Many states, as well as several federal agencies, have adopted their own versions of the control test.<sup>85</sup> The

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<sup>79</sup>29 U.S.C. § 203 (2012 & Supp. IV 2017) (defining “Employer,” “Employee,” and “Employ”).

<sup>80</sup>John DeRoss Jr., Note, *Misclassification of Employees as Independent Contractors in Indiana: A State Legislative Solution*, 50 IND. L. REV. 673, 675 (2017).

<sup>81</sup>*Id.* at 677.

<sup>82</sup>*Id.* at 675.

<sup>83</sup>*Id.*

<sup>84</sup>Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461, 469 (2017).

<sup>85</sup>*Id.*

common law control test is aimed at determining which party exercises control over the worker's performance.<sup>86</sup> Courts consider the following factors when applying the common law standard:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>87</sup>

Since the middle of the nineteenth century, courts have used this common law test, often referred to as the control test, to determine worker status.<sup>88</sup> To apply the standard, a court must examine the amount of control retained by the employer over the work of the putative employee.<sup>89</sup> The more control exerted by the employer over the work of the worker, the more

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<sup>86</sup> *Id.*

<sup>87</sup> RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)–(j) (AM. LAW INST. 1958).

<sup>88</sup> Bales & Woo, *supra* note 84, at 469.

<sup>89</sup> Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U.L. REV. 67, 76 (2013); *see also* Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257 (2006).

likely it is that the worker will be considered an employee.<sup>90</sup> Measured from the opposing viewpoint, if the employer exerts or retains less control, courts are more likely to determine that the employer has hired an independent contractor.<sup>91</sup>

Predating the FLSA, the need to define worker status arose out of the need to define when an employer had vicarious liability for the tortious acts of its agents.<sup>92</sup> In fact, the determinative factors of the common law test derive from the Restatement (Second) of Agency, found beneath the subheading “Torts of Servants.”<sup>93</sup>

Each factor is considered, although no authority exists to guide courts as to their relative importance. Ultimately, however, the common law test focuses on the issue of control—does the employer retain control over the right to control the work that is done and how the work is performed?<sup>94</sup> If the employer retains the right to control the work, regardless of the actual exercise of the right, then the worker will likely be classified as an employee.<sup>95</sup>

Unfortunately, little guidance exists as to how the factors are to be weighed and balanced. Some factors may be present, while others are absent. Instead, the focus remains on the question of control. If the employer retains the right to control the work and its performance, the worker is likely to be classified as an employee.<sup>96</sup> The control test, although created for purposes of determining the scope of vicarious liability, has become the dominant worker classification test.<sup>97</sup> The control test factors have found their way into numerous federal and state statutes.<sup>98</sup> The factors are used to test employee status for coverage of the Employee Retirement

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<sup>90</sup>Pivateau, *supra* note 89, at 68.

<sup>91</sup>*Id.* at 68–69.

<sup>92</sup>Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 610 (2012).

<sup>93</sup>RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)–(j) (AM. LAW INST. 1958).

<sup>94</sup>Jenna Amato Moran, Comment, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 109 (2009–2010).

<sup>95</sup>*Id.*

<sup>96</sup>Bales & Woo, *supra* note 84, at 469 (citing Pivateau, *supra* note 89, at 68).

<sup>97</sup>JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 8 (2d ed. 2013) (“[The] ‘control test’ . . . became the leading test for distinguishing employees from independent contractors.”).

<sup>98</sup>Bales & Woo, *supra* note 84, at 470–71.



Income Security Act (ERISA),<sup>99</sup> the Federal Insurance Contribution Act (FICA),<sup>100</sup> the Federal Unemployment Tax Act (FUTA),<sup>101</sup> the Immigration and Naturalization Act,<sup>102</sup> the Occupational Safety and Health Act,<sup>103</sup> and Title VII of the Civil Rights Act of 1964.<sup>104</sup>

*The elements of the economic realities test*

Instead of the control test, courts deciding cases brought pursuant to the FLSA utilize the economic realities test.<sup>105</sup> This test attempts to determine “whether as a matter of economic reality, the individuals are dependent upon the business to which they render service.”<sup>106</sup> Financial considerations are paramount in the use of the economic realities test. Worker status is determined not by the nature of the work, but on the financial realities that accompany the work.<sup>107</sup> The test should measure economic independence.<sup>108</sup> Some variation of the economic realities test is used to classify workers under the FLSA, the Equal Pay Act of 1963, the Family and Medical Leave Act of 1993, and the Employee Polygraph Protection Act of 1988.<sup>109</sup>

The economic realities test is a creature of federal courts.<sup>110</sup> In *Goldberg v. Whitaker House Cooperative*, the Supreme Court opined that courts

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<sup>99</sup>Bales & Woo, *supra* note 84, at 470; *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992).

<sup>100</sup>Bales & Woo, *supra* note 84, at 470; *see also* I.R.C. § 3121(d) (2012 & Supp. IV 2016).

<sup>101</sup>Bales & Woo, *supra* note 84, at 470; *see also* I.R.C. § 3306(i) (2012 & Supp. IV 2016).

<sup>102</sup>Bales & Woo, *supra* note 84, at 470; *see also* 8 U.S.C. §§ 1101–1537 (2012); 8 C.F.R. § 274a.1(f), (j) (2017).

<sup>103</sup>Bales & Woo, *supra* note 84, at 470–71; *see also* 29 U.S.C. § 652 (2012).

<sup>104</sup>Bales & Woo, *supra* note 84, at 471; *see also* 42 U.S.C. § 2000e(f) (2012).

<sup>105</sup>Grant E. Brown, Comment, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 MD. L. REV. ENDNOTES 15, 26 (2016).

<sup>106</sup>*Martin v. Selker Bros.*, 949 F.2d 1286, 1293 (3d Cir. 1991); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981).

<sup>107</sup>*Martin*, 949 F.2d at 1293; *see also Donovan*, 656 F.2d at 1370.

<sup>108</sup>*See Mednick v. Albert Enters.*, 508 F.2d 297, 303 (5th Cir. 1975) (“An employer cannot saddle a worker with the status of independent contractor, thereby relieving itself of its duties under the F.L.S.A., by granting him some legal powers where the economic reality is that the worker is not and never has been independently in the business which the employer would have him operate.”).

<sup>109</sup>*See* MICHAEL S. HORNE ET AL., *THE CONTINGENT WORKFORCE: BUSINESS AND LEGAL STRATEGIES* § 2.07 (2017).

<sup>110</sup>*See Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 141 (2d Cir. 2008).

should not focus on “technical concepts” but instead should examine “economic reality.”<sup>111</sup> The Court suggested that workers are likely employees for FLSA purposes where they “are regimented under one organization, [doing] what the organization desires and receiving the compensation the organization dictates.”<sup>112</sup>

The economic realities test examines the financial dependence of the worker.<sup>113</sup> Review of employer control remains, but the more important measuring test is whether the worker is “economically dependent” on the employer or in business for him or herself.<sup>114</sup> The economic reality test goes beyond technical, common law concepts of the master and servant relationship to determine whether, as a matter of economic reality, a worker is dependent on an employer.<sup>115</sup> This standard focuses on “whether the individual is economically dependent on the business to which he renders service, or is, as a matter of economic fact, in business for himself.”<sup>116</sup>

While the question of “control” remains, it is not meant to be determinative for purposes of the economic realities test. As noted by the Supreme Court in *Walling v. Portland Terminal Co.*:

[I]n 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.<sup>117</sup>

The economic realities test grew out of a concern for employee protection and not vicarious liability. In the past, courts have often given weight to the non-control factors of the common law test “when the effect was to extend protection to needy workers, rather than to impose tort

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<sup>111</sup> 366 U.S. 28, 33 (1961).

<sup>112</sup> *Id.* at 32.

<sup>113</sup> Brown, *supra* note 105, at 26.

<sup>114</sup> U.S. DEP’T OF LABOR, *supra* note 30, at 2.

<sup>115</sup> Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998).

<sup>116</sup> Doty v. Elias, 733 F.2d 720, 722–23 (10th Cir. 1984) (citation omitted).

<sup>117</sup> 330 U.S. 148, 150–51 (1947) (citation omitted).

liability on employers.”<sup>118</sup> The concept of “employee” for protection purposes was broad.<sup>119</sup> This approach focused on “control” but a different kind of control.<sup>120</sup> Instead of personal control, the economic realities test focused on the employer’s control over two things: capital and the specific project.<sup>121</sup>

The factors examined in conjunction with the economic realities test derive from *United States v. Silk*, a case construing the Social Security Act.<sup>122</sup> As with the control test, none of the factors used in the economic realities test is dispositive.<sup>123</sup> Instead, a court should apply the test with an eye toward the “totality of the circumstances.”<sup>124</sup> In fact, courts are free to use factors other than those prescribed by the test.<sup>125</sup> “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.”<sup>126</sup> The court applying the test should ultimately concern itself with “whether, as a matter of economic reality, the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.”<sup>127</sup>

The economic realities test arose out of a labor case, as courts sought to bring more workers within the scope of the statute’s coverage.<sup>128</sup> In *NLRB v. Hearst Publications*, the Court looked to the legislative purposes of the National Labor Relations Act to create a classification standard.<sup>129</sup> The Court noted that in determining the status of a worker, the goal of the statute at issue should be considered.<sup>130</sup> In changing the status test, the

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<sup>118</sup>Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes that Target the Construction Industry*, 39 J. LEGIS. 295, 297 (2012–2013).

<sup>119</sup>*United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (The FLSA contains “the broadest definition [of employee] that has ever been included in any one act.”) (citation omitted).

<sup>120</sup>*See Kwak, supra* note 118, at 297.

<sup>121</sup>*Id.*

<sup>122</sup>331 U.S. 704, 713–14, 716 (1947).

<sup>123</sup>*Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>*Id.*

<sup>128</sup>*See United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (stating that “a broader or more comprehensive coverage of employees . . . would be difficult to frame”).

<sup>129</sup>322 U.S. 111, 128–29 (1944).

<sup>130</sup>*See id.* at 129.

Supreme Court expanded the coverage of the NLRA, as more workers fell within its ambit.<sup>131</sup> In *Hearst Publications*, the Supreme Court found that the men who distributed Los Angeles newspapers (called “newsboys” despite their age) were employees within the coverage of the NLRA.<sup>132</sup> The Supreme Court expressed its displeasure with the agency test, in large part because its common law roots allowed for different interpretations depending on state law.<sup>133</sup> Because the Court considered labor issues to be national, “the Court rejected the possibility that the states’ common law principles could be productively distilled into a workable national standard.”<sup>134</sup> It believed that the control test might produce results that did not meet the comprehensive labor reform that Congress was attempting to achieve.<sup>135</sup>

Two decades later, the Wage-Hour Administrator of the Department of Labor utilized the “economic realities test” to measure status for purposes of coverage under the FLSA.<sup>136</sup> The court in *Brock v. Superior Care, Inc.* stated that the dominant issue was not control but “whether, as a matter of economic reality, the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.”<sup>137</sup> The economic realities test was incorporated into the Family and Medical Leave Act (FMLA).<sup>138</sup>

In 2015, the DOL produced its AI noting that an employer’s lack of control over a worker should not be given undue weight in determining classification.<sup>139</sup> Although the AI has been withdrawn, it provides a worthwhile primer on the economic realities test. For purposes of the FLSA, the DOL noted that courts should focus on whether the worker is

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<sup>131</sup> *See id.* at 125.

<sup>132</sup> *See id.* at 113–19 (discussing the newsboys’ work arrangement); *id.* at 131–32 (upholding the NLRB’s determination that they were employees).

<sup>133</sup> *Id.* at 123 (“Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees’ organization and of collective bargaining.”).

<sup>134</sup> *Id.* at 125–26 (“Congress no more intended to import this mass of technicality as a controlling ‘standard’ for uniform national application than to refer decision of the question outright to the local law.”); Pivateau, *supra* note 89, at 81.

<sup>135</sup> *Hearst*, 322 U.S. at 122–23.

<sup>136</sup> 29 U.S.C. §§ 201–219 (2012 & Supp. IV 2016); U.S. Dep’t of Labor, Wage & Hour & Pub. Cont. Divs., Opinion Letter (June 25, 1968).

<sup>137</sup> 840 F.2d 1054, 1059 (2d Cir. 1988).

<sup>138</sup> 29 C.F.R. § 825.105 (2017).

<sup>139</sup> U.S. DEP’T OF LABOR, *supra* note 30, at 4.

economically dependent upon the putative employer or is in business for him or herself.<sup>140</sup> According to the DOL, a worker is an employee of the employer even if the employer does not exercise control, as long as the worker is economically dependent on the employer.<sup>141</sup>

In deciding the economic dependence question, the DOL synthesized a number of judicial opinions to provide six factors that courts should examine when measuring economic realities.<sup>142</sup> The DOL gave further insight into how a court should weigh the various factors.<sup>143</sup>

1. **The extent to which the work performed is an integral part of the putative employer's business.**<sup>144</sup>

The DOL found this factor to be "compelling."<sup>145</sup> A worker who performs work that is integral to a putative employer's business is likely more economically dependent. In contrast, a bona fide independent contractor is less likely to be integral to the putative employer's business.

2. **The worker's opportunity for profit or loss, depending on his or her managerial skill.**<sup>146</sup>

The DOL states that this factor should focus on the worker's managerial skill with respect to matters such as purchasing materials and equipment, hiring workers, advertising, renting space, and managing timetables, which can affect profit and loss.<sup>147</sup> The inquiry should specifically not focus on the worker's ability to work more hours.

3. **The extent of the relative investments of the employer and the worker.**<sup>148</sup>

The DOL cautions that even those investments that seem significant may not

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<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 14.

<sup>142</sup> *Id.* at 4.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 6.

<sup>146</sup> *Id.* at 4.

<sup>147</sup> *Id.* at 7.

<sup>148</sup> *Id.* at 4.

be telling.<sup>149</sup> Instead, focus should lie on the relative investments.<sup>150</sup> According to the DOL, the worker's investment should be proportional with the employer's investment in its "overall business."<sup>151</sup> This standard is broader than the employer's investment in the particular job performed by the worker.

4. **Whether the work performed requires special skill and initiative.**<sup>152</sup> The DOL stated that analysis of this factor should focus on the worker's business skills, judgment, and initiative.<sup>153</sup> The mere fact that a worker possesses technical or specialized skills does not indicate independent contractor or employee status.
5. **The permanency of the relationship.**<sup>154</sup> The DOL stated that a working relationship that lasts weeks or months instead of years could be sufficiently permanent to signal the presence of an employment relationship.<sup>155</sup> Also, a lack of permanence or indefiniteness does not automatically suggest an independent contractor relationship.<sup>156</sup> Moreover, working for other employers and not relying on the employer as the primary source of income does not necessarily make a worker an independent contractor.<sup>157</sup> The DOL took the position that the key is whether the lack of permanence or indefiniteness relates to "operational characteristics intrinsic to the industry."<sup>158</sup>

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<sup>149</sup> *Id.* at 9.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 4.

<sup>153</sup> *Id.* at 10.

<sup>154</sup> *Id.* at 4.

<sup>155</sup> *Id.* at 12.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

6. **The degree of control exercised or retained by the employer.**<sup>159</sup> Control continues to play a role. The AI stated that to be an independent contractor, a worker must control “meaningful aspects of the work performed.”<sup>160</sup> The worker must actually exercise control.<sup>161</sup> The presence of control over work hours or the lack of direct supervision does not necessarily indicate independent contractor status. The AI further confirmed that control over workers, no matter how control is exercised, still indicates that the worker is an employee.<sup>162</sup> The economic reality inquiry is not concerned with why a putative employer exercises control. According to one case cited favorably in the Interpretation, “[i]f the nature of a business requires a company to exert control over the workers . . . then the company must hire employees, not independent contractors.”<sup>163</sup>

Apart from the primary six factors, the AI notes that other relevant factors should be considered. The suggested test examines “whether the alleged employer (1) has the power to hire and fire the employees, (2) supervise[s] and control[s] employee work schedules or conditions of employment, (3) determine[s] the rate and method of payment, and (4) maintain[s] employment records.”<sup>164</sup> As with other worker classification tests, no single element is determinative. Courts are required to examine all the circumstances.<sup>165</sup>

As noted above, no definitive economic realities test exists. For instance, the Fifth Circuit’s test differs slightly.<sup>166</sup> Once again, the court must focus on whether “as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business

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<sup>159</sup> *Id.* at 4.

<sup>160</sup> *Id.* at 13.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 14.

<sup>163</sup> *Id.* (quoting *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1316 (11th Cir. 2013)).

<sup>164</sup> *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990).

<sup>165</sup> *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 570 (10th Cir. 1994).

<sup>166</sup> *See Watson*, 909 F.2d at 1553–54.

for himself.”<sup>167</sup> But the Fifth Circuit considers only five factors: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.<sup>168</sup> The court cautions that the factors are non-exhaustive and that no factor is determinative.<sup>169</sup> The determination as to whether an individual worker is an FLSA-covered employee is legal and not factual.<sup>170</sup>

THE ECONOMIC REALITIES TEST HAS FAILED TO COPE WITH THE  
MODERN INSTITUTION OF EMPLOYMENT

*The economic realities test is designed to measure the worker’s  
economic dependence on the employer*

Courts created the economic realities test to improve the control test. Nevertheless, the economic realities test remains problematic. Most prominently is the concept that lies at the heart of the economic realities test: the concept of economic dependency. This term “is a vague concept that without further explanation and refinement is often difficult, if not impossible, to apply.”<sup>171</sup> Economic dependence alone does not signify employee status, for there are many independent contractors who are also economically dependent on their customers.<sup>172</sup> Similarly, one could argue that employers may also be economically dependent on employees.<sup>173</sup>

Even if one were to argue that economic dependence accurately measures worker status, the economic realities test fails as a measure of calculating economic dependence. The factors that courts have developed may or may not signal economic dependence. Moreover, “[c]ourts do not

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<sup>167</sup>Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008).

<sup>168</sup>*Id.*

<sup>169</sup>*Id.*

<sup>170</sup>*Id.*; Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1045 (5th Cir. 1987); *see also* Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1327, 1327 n.24 (5th Cir. 1985) (citing and reconciling cases).

<sup>171</sup>Goldstein et al., *supra* note 44, at 1009.

<sup>172</sup>Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 482 (2016).

<sup>173</sup>*Id.*



discuss the meaning of economic dependence or why it has been chosen as the test for employment under the FLSA.”<sup>174</sup> Determining worker status then becomes a matter of methodical sorting and weighing, producing an answer “without ever revealing the meaning of the economic dependency that they are seeking.”<sup>175</sup>

*The economic realities test is unrelated to the definitions found in the statute*

Furthermore, no tie exists between the judicially created economic dependence/economic realities test and the language of the statute. Critics have noted that courts do not discuss, and sometimes do not even mention, the statutory definition—“employ” includes to suffer or permit to work—the canonical starting point in statutory construction.<sup>176</sup> The statutory definition of “employ” shares nothing with the economic realities test.<sup>177</sup>

The economic realities test fails because the factors that it tests for do not reach the core of what it means to be employed. As Professor Goldstein noted, “the factors become an end in themselves.”<sup>178</sup> The economic realities test is not only unrelated to the language of the statute, it is also divorced from the purpose of the statute: to guarantee minimum working conditions for wage earners. In the end, the test fails “because it offers little guidance for future cases and because any balancing test begs questions about which aspects of ‘economic reality’ matter, and why.”<sup>179</sup> The cumbersome and complex economic realities test fails to provide an employer with the tools necessary to properly classify their workers.<sup>180</sup>

*The economic realities test produces inconsistent results*

The economic realities test will often produce inconsistent results. There are two reasons that explain the inability of the economic realities test to produce consistent results. First, the test differs depending on court and context. Second, even where the venue and facts are the same, courts can

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<sup>174</sup>Goldstein et al., *supra* note 44, at 1010.

<sup>175</sup>*Id.*

<sup>176</sup>*Id.* at 1009–10.

<sup>177</sup>*See id.* at 1009.

<sup>178</sup>*Id.* at 1010.

<sup>179</sup>*Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

<sup>180</sup>*See LALITH ET AL.*, *supra* note 11, at 23.

disagree on the application of the test. Because the factors are not consistently weighed, and because no factor is dominant, the test will yield different results depending on the court applying the test. Judges use their discretion to choose some factors over others, based in part on the “eagerness or reluctance to extend coverage to workers in any given circumstance.”<sup>181</sup>

Two cases out of the Fifth Circuit illustrate this problem. Despite the presence of essentially the same fact pattern, two different panels issued two different decisions: finding in one instance that the putative employee was an employee, while in the other instance finding independent contractor status.

Both cases involved FLSA claims. In *Cromwell v. Driftwood Electrical Contractors, Inc.*,<sup>182</sup> and *Thibault v. BellSouth Telecommunications, Inc.*,<sup>183</sup> the Fifth Circuit was faced with the question of whether workers were employees or independent contractors. The cases originated in New Orleans and the recovery efforts in the aftermath of Hurricane Katrina.<sup>184</sup> The plaintiffs in each case were cable splicers, and each provided services to BellSouth Communications in its work along the hurricane-ravaged Gulf Coast.<sup>185</sup> BellSouth and a contractor for BellSouth hired the cable splicers in conjunction with its post-Katrina repair efforts.<sup>186</sup> In both cases, the employer classified the cable splicers as independent contractors.<sup>187</sup>

The facts of each case were remarkably similar. The plaintiffs had been hired as independent contractors, with the understanding that the individual splicers would maintain insurance and pay their appropriate taxes.<sup>188</sup> Each plaintiff splicer provided his own tools and truck.<sup>189</sup> The splicers did not receive training for their assignments and typically were not supervised in the performance of their work.<sup>190</sup> Their schedules were similar.<sup>191</sup> The

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<sup>181</sup> Kwak, *supra* note 118, at 298; Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 327–28 (2001).

<sup>182</sup> 348 F. App'x 57 (5th Cir. 2009).

<sup>183</sup> 612 F.3d 843 (5th Cir. 2010).

<sup>184</sup> Compare *Cromwell*, 348 F. App'x at 58, with *Thibault*, 612 F.3d at 844.

<sup>185</sup> Compare *Cromwell*, 348 F. App'x at 58, with *Thibault*, 612 F.3d at 844.

<sup>186</sup> Compare *Cromwell*, 348 F. App'x at 58, with *Thibault*, 612 F.3d at 844.

<sup>187</sup> Compare *Cromwell*, 348 F. App'x at 59, with *Thibault*, 612 F.3d at 845.

<sup>188</sup> Compare *Cromwell*, 348 F. App'x at 59, with *Thibault*, 612 F.3d at 848.

<sup>189</sup> Compare *Cromwell*, 348 F. App'x at 59, with *Thibault*, 612 F.3d at 845.

<sup>190</sup> Compare *Cromwell*, 348 F. App'x at 58–59, with *Thibault*, 612 F.3d at 845.

splicers worked a shift consisting of thirteen days on and one day off.<sup>192</sup> Each workday lasted at least twelve hours.<sup>193</sup> Their work duties were also similar.<sup>194</sup> Every morning, the workers would receive their assignments from a BellSouth representative.<sup>195</sup>

Unfortunately, the economic realities test failed to produce similar answers. One panel decided that the *Cromwell* plaintiffs were employees; a separate panel deemed the *Thibault* plaintiff an independent contractor.<sup>196</sup>

In *Cromwell*, the court noted that the relationship seemed permanent, finding that the plaintiffs worked exclusively for the defendants, full-time, for approximately eleven months.<sup>197</sup> Permanency seemed a weak factor on which to make the determination, because post-Katrina recovery was, by its nature, a temporary position.<sup>198</sup> Nevertheless, the court noted that the long hours imposed by BellSouth, as well as the long-term nature of the assignment, prevented the plaintiffs from working for anyone else during the eleven-month tenure of the work.<sup>199</sup> Moreover, the court believed that, by furnishing work assignments, the workers were unable to demonstrate initiative in the performance of the work.<sup>200</sup>

Decided less than a year later, another Fifth Circuit panel reached a different conclusion in *Thibault*.<sup>201</sup> In that case, the court found that a cable splicer, working a similar schedule and providing the same services as the *Cromwell* plaintiffs, was an independent contractor and not an employee.<sup>202</sup> The court recognized that the plaintiff controlled the method and manner of his work, which required a high level of skill.<sup>203</sup> It further noted that the plaintiff in *Thibault* provided his own tools and equipment and traveled from his home to provide services.<sup>204</sup>

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<sup>191</sup> Compare *Cromwell*, 348 F. App'x at 58, with *Thibault*, 612 F.3d at 845.

<sup>192</sup> Compare *Cromwell*, 348 F. App'x at 58, with *Thibault*, 612 F.3d at 845.

<sup>193</sup> Compare *Cromwell*, 348 F. App'x at 58, with *Thibault*, 612 F.3d at 845.

<sup>194</sup> Compare *Cromwell*, 348 F. App'x at 58, with *Thibault*, 612 F.3d at 845.

<sup>195</sup> Compare *Cromwell*, 348 F. App'x at 58, with *Thibault*, 612 F.3d at 845.

<sup>196</sup> See *Cromwell*, 348 F. App'x at 60; see also *Thibault*, 612 F.3d at 849.

<sup>197</sup> *Cromwell*, 348 F. App'x. at 60.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 61.

<sup>200</sup> *Id.*

<sup>201</sup> *Thibault*, 612 F.3d at 849.

<sup>202</sup> See *id.*

<sup>203</sup> *Id.* at 847.

<sup>204</sup> *Id.*

Nevertheless, unlike the result in *Cromwell*, the court determined that Thibault's relationship with BellSouth was temporary and non-exclusive.<sup>205</sup> Thibault's tenure was shorter—he worked for only three months.<sup>206</sup> Moreover, Thibault had a degree of economic independence. He was involved in business ventures other than cable-splicing.<sup>207</sup> Those ventures included operating a Delaware-based sales company, owning eight drag-race cars, and owning and managing commercial rental property.<sup>208</sup> Although Thibault had the same duties as the splicers in *Cromwell*, the court found that, unlike the *Cromwell* plaintiffs, Thibault controlled his opportunity for profit and loss to a greater degree since he demonstrated an “economic independence” from the splicing job.<sup>209</sup> As the court noted, the evidence indicated that Thibault was “a sophisticated, intelligent business man who entered into a contractual relationship to perform a specific job for the defendants.”<sup>210</sup>

*The economic realities test cannot cope with the sharing economy*

The economic realities test is now out of date. The test shows little chance of adapting to new types of employment. In recent years, the sharing economy has exploded into the American consciousness.<sup>211</sup> The creation of the sharing economy, and the struggle to classify those workers participating in it, has provided a hurdle that the economic realities test cannot overcome.

Technology has enabled millions of Americans to access products and services only when needed, creating a new business model. The sharing economy is a broad term, generally employed to refer to economic and social activity utilizing online transactions. There has been a rapid increase in companies like Uber, Lyft, and TaskRabbit, each of which provides a technological matching service connecting consumers with workers. In the sharing economy, “an online intermediary [or platform] . . . acts as a market

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<sup>205</sup> *See id.* at 846.

<sup>206</sup> *Id.* at 849.

<sup>207</sup> *Id.* at 845.

<sup>208</sup> *Id.* at 849.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Editorial Board, *The 'Gig Economy,'* CHRISTIAN SCIENCE MONITOR (Jan. 8, 2016), <https://www.csmonitor.com/Commentary/the-monitors-view/2016/0108/The-gig-economy> (reporting that 44 percent of all U.S. adults, some 90 million Americans, “have either offered their services through online brokers or been a customer of someone who has”).

for [peer-to-peer] services and . . . facilitates exchanges by lowering transaction costs.”<sup>212</sup> The sharing economy provides an alternative to the traditional notion of exchange of value for goods or services. Items like cars and houses, which are too expensive for many, can be utilized by many more people than would have access otherwise.

The sharing economy has changed the meaning of economic activity.<sup>213</sup> The sharing economy has as its core the efficient allocation of resources.<sup>214</sup> The use of digital platforms permits transactions between entrepreneurs and those seeking to take advantage of their services. Users benefit from the interaction, as the value of goods are increased: for businesses, for individuals, and for society.<sup>215</sup> But to enable this more efficient allocation, the sharing economy requires the reduction of transaction costs.

Perhaps the most famous (or infamous, depending on your perspective) player in the sharing economy is Uber. Valued at over \$65 billion,<sup>216</sup> Uber is a transportation company that does not own vehicles and does not employ drivers.<sup>217</sup> “In New York City, for example, the number of rides provided by Uber jumped in two years from 300,000 to 3.5 million, while traditional cabs lost 2.1 million rides during the same period.”<sup>218</sup> Moreover, Uber has expanded beyond its traditional market, delivering food (UberEats), retail items (UberRush), and flu shots (UberHealth).<sup>219</sup>

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<sup>212</sup>Vanessa Katz, Note, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1070 (2015).

<sup>213</sup>Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023, 1023 (2016); see also Katz, *supra* note 212, at 1070.

<sup>214</sup>Redfearn III, *supra* note 213, at 1023.

<sup>215</sup>See Tomio Geron, *Airbnb Had \$56 Million Impact On San Francisco: Study*, FORBES (Nov. 9, 2012, 3:00 AM), <https://www.forbes.com/sites/tomiogeron/2012/11/09/study-airbnb-had-56-million-impact-on-san-francisco/#691933d43962>.

<sup>216</sup>Rani Molla & Johana Bhuiyan, *How Uber's Funding and Valuation Stack Up Against Competitors like Didi and Lyft*, RECODE (May 25, 2017, 10:23 AM), <https://www.recode.net/2017/5/25/15686886/ride-hail-valuation-investment-uber-didi-lyft>.

<sup>217</sup>See O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015) (explaining Uber's justifications for classifying itself as a technology company rather than as a transportation company); Goldberg v. Uber Techs., Inc., No. 14-14264-RGS, 2015 WL 1530875, at \*1 (D. Mass. Apr. 6, 2015) (noting Uber's assertion that the company “does not employ drivers or own any vehicles”).

<sup>218</sup>Cunningham-Parmeter, *supra* note 64, at 1685.

<sup>219</sup>See Leslie Picker & Mike Isaac, *Uber Said to Organize New Round of Funding*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/24/business/dealbook/uber-said-to-plan-another-1-billion-in-fund-raising.html>; see also Stephanie M. Lee, *The Uber Will See You*

At its core, Uber represents a bundle of technological services, in which it pairs those needing rides with those car owners offering rides. To use the service, a prospective user downloads the Uber application and creates a user profile. The profile includes the user's name and credit card information. When ready, the user inputs her destination and location and requests a ride. The application will then notify the user when a driver has been located, providing the user with the driver's name, vehicle, and license plate number. When the ride is complete, Uber charges the user's credit card.

Uber does not employ drivers. Instead it contracts with drivers as independent contractors. By doing so, Uber avoids having to pay the driver a minimum wage or overtime pay. Uber also avoids the costs of withholding taxes.

The current classification test is ill-suited to the challenges of the shifting employment landscape. The sharing economy that has sprung to vigorous life in the last half-decade has presented courts and government agencies with steep hurdles and challenges. A California court articulated the dilemma clearly.<sup>220</sup> In a case involving Lyft drivers seeking to be classified as employees, the court judge described the problem with a graphic analogy:

As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. . . . But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide.<sup>221</sup>

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Now, BUZZFEED (Nov. 20, 2015, 5:34 PM), <http://www.buzzfeed.com/stephaniemlee/heres-how-uber-wants-to-shake-up-health-care#.eiMvxX35R2>.

<sup>220</sup>Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015).

<sup>221</sup>*Id.*

*The economic realities test is not compatible with innovative working arrangements*

The economic realities test fails to cope with innovative working arrangements. The country is currently experiencing a tidal shift in the process of employment. Employment is changing, pushed by automation and other forms of technological change. Globalization and lack of regulation has fed the phenomenon of indirect employment.<sup>222</sup> Workers fill shifts around the clock, often time on a part-time basis. The forty-hour work week employment norm is eroding. In the twentieth century, employment typically involved “a long-term, full-time, direct relationship between a large firm and a worker with set wages and pre-defined duties.”<sup>223</sup> Today, this notion of industrial employment has been superseded by a new reality. The growth of the service sector, technological advancements, and developments in the finance market create the need for a new employment model.<sup>224</sup>

Because so much of the United States’ economic and social systems rely on the concept of employment, it becomes vital to adapt to new circumstances. In the midst of this sea of change, some firms have adopted new working arrangements. Probably the best example of this attempt to create a new employment model was the FedEx Ground system. After acquiring Roadway Transportation Systems, FedEx opted to not integrate the Roadway drivers into the FedEx system.<sup>225</sup>

Over the last decade, FedEx Ground has been at the center of the question of independent contractor classification. The company was under pressure from state and federal regulators, as well as a host of plaintiffs’ class action lawyers. In 2007, a California appellate court determined that FedEx Ground delivery drivers had been misclassified as independent contractors rather than as employees.<sup>226</sup>

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<sup>222</sup>V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 82 (2017).

<sup>223</sup>Julia Tomassetti, *From Hierarchies to Markets: Fedex Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083, 1093 (2015).

<sup>224</sup>*See id.*

<sup>225</sup>*See* Lydia DePillis, *How FedEx is Trying to Save the Business Model that Saved it Millions*, WASH. POST (Oct. 23, 2014), [https://www.washingtonpost.com/news/storyline/wp/2014/10/23/how-fedex-is-trying-to-save-the-business-model-that-saved-it-millions/?utm\\_term=.773307baa175](https://www.washingtonpost.com/news/storyline/wp/2014/10/23/how-fedex-is-trying-to-save-the-business-model-that-saved-it-millions/?utm_term=.773307baa175).

<sup>226</sup>*Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 330–31 (Cal. Ct. App. 2007).

In 2009 and 2010, FedEx Ground pushed back. In those years, FedEx Ground achieved success in several court decisions. FedEx successfully convinced state and federal district courts that the workers were properly classified as independent contractors.<sup>227</sup> Perhaps most significantly, the company's victories included a December 2010 decision by a federal district court judge exercising jurisdiction over multiple independent contractor misclassification cases.<sup>228</sup> In that case, the court granted summary judgment in favor of FedEx Ground in 42 independent contractor misclassification lawsuits. The plaintiffs included drivers from a number of different states.<sup>229</sup>

But in 2014, the company suffered a setback. The United States Court of Appeals for the Ninth Circuit issued two decisions reversing the decisions in the multi-district litigation.<sup>230</sup> The two Ninth Circuit cases involved claims from FedEx Ground drivers in California and Oregon.<sup>231</sup> The California case, *Alexander v. FedEx Ground Package System, Inc.*, was a class action suit on behalf of 2,300 FedEx Ground delivery drivers on a full-time basis in California.<sup>232</sup> The Oregon case, *Slayman v. FedEx Ground Package System, Inc.*, was a smaller class action involving approximately 400 full-time delivery drivers for FedEx Ground.<sup>233</sup>

The *Alexander* court reviewed the FedEx Ground Operating Agreement executed by the company and each of its drivers.<sup>234</sup> The court also examined the FedEx Ground written policies and procedures.<sup>235</sup> The court found that the drivers were not independent contractors but instead employees.<sup>236</sup> The focus of the court was on the Operating Agreement and the amount of control that FedEx Ground retained.<sup>237</sup> Although the court acknowledged the FedEx Ground argument that it lacked control over

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<sup>227</sup> See, e.g., *Council v. FedEx Custom Critical, Inc.*, 73 So. 3d 461, 465 (La. App. 2011).

<sup>228</sup> *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 559 (N.D. Ind. 2010).

<sup>229</sup> *Id.* at 560; *In re FedEx Ground Package Sys., Inc.*, No. 3:05-MD-527 RM, 2010 WL 3239330, at \*1 (N.D. Ind. Aug. 12, 2010).

<sup>230</sup> *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 997 (9th Cir. 2014); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1049 (9th Cir. 2014).

<sup>231</sup> *Alexander*, 765 F.3d at 984; *Slayman*, 765 F.3d at 1037.

<sup>232</sup> 765 F.3d at 984.

<sup>233</sup> 765 F.3d at 1037.

<sup>234</sup> 765 F.3d at 984.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 997.

<sup>237</sup> *Id.* at 989.



certain parts of the roles of the driver, the court concluded that this lack of control was not enough to “counteract the extensive control it does exercise.”<sup>238</sup>

The court noted the entrepreneurial effects of the Operating Agreement, such as the ability to delegate to other drivers, acquire additional routes, or even sell a route to another driver.<sup>239</sup> Nevertheless, the court further noted that FedEx Ground retained the right to veto some of those actions.<sup>240</sup> As a result of the adverse decision, FedEx Ground was potentially liable for millions of dollars in restitution for these drivers, for items such as uniforms, fuel, insurance, tires, oil changes, maintenance and even the FedEx Ground trucks they drove.<sup>241</sup>

FedEx Ground lost another battle in 2015.<sup>242</sup> Before the Court of Appeals for the Seventh Circuit, the company faced another adverse decision in an independent contractor misclassification suit.<sup>243</sup> In that case, the appellate court adopted a decision by the Kansas Supreme Court that also determined that FedEx Ground had misclassified its workers.<sup>244</sup> The court derided the Operating Agreement as a “brilliantly drafted contract creating the constraints of an employment relationship with [the drivers] in the guise of an independent contractor model—because FedEx not only has the right to control, but has close to absolute actual control over [the drivers] based upon interpretation and obfuscation.”<sup>245</sup>

Because of the setbacks, the company gave up on its new business model.<sup>246</sup> The company opted to settle the remaining independent contractor misclassification cases. The company agreed to pay over 240 million

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<sup>238</sup> *Id.* at 990.

<sup>239</sup> *Id.* at 994.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 997; Robert W. Wood, *FedEx Settles Independent Contractor Mislabeling Case for \$288 Million*, FORBES (June 16, 2015, 8:39 AM), <https://www.forbes.com/sites/robertwood/2015/06/16/fedex-settles-driver-mislabeling-case-for-228-million/#4304c05c22ed>.

<sup>242</sup> *Craig v. FedEx Ground Package Sys., Inc. (In re FedEx Ground Package Sys., Inc.)*, 792 F.3d 818, 821 (7th Cir. 2015).

<sup>243</sup> *Id.* at 819, 821.

<sup>244</sup> *Id.*; *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 92 (Kan. 2014).

<sup>245</sup> *Craig*, 335 P.3d at 80.

<sup>246</sup> Mark B. Solomon, *FedEx Ground Agrees to Settle All Claims in Independent-Contractor Case*, DC VELOCITY (Mar. 17, 2016), <http://www.dcvelocity.com/articles/20160317-fedex-ground-agrees-to-settle-all-claims-in-independent-contractor-case/>.

dollars to resolve the disputes.<sup>247</sup> When these settlement agreements are totaled, FedEx Ground has spent over a half-billion dollars to resolve the issues arising out of their attempt to create a new business model.

The continued demand for innovative work solutions requires a new classification test. Without clarification, parties will be unwilling to engage in new or innovative work arrangements. Uncertainty will fuel further litigation and expense, while continuing to provide no controlling bright line rule. In a post-industrial world, the economic realities test remains tied to twentieth century notions of industrial employment.

INDEPENDENT CONTRACTOR STATUS IS BEST MEASURED BY THE  
ENTREPRENEURIAL NATURE OF THE WORK

The economic realities test includes as one of its factors the presence of entrepreneurial opportunity, a carry-over from the common law agency test.<sup>248</sup> I believe that the ultimate issue in any classification dispute should be whether the “putative independent contractors have ‘significant entrepreneurial opportunity for gain or loss.’”<sup>249</sup> Therefore, I propose focusing the economic realities test on the presence of genuine entrepreneurial opportunity.

The dictates of the FLSA require the protection of workers.<sup>250</sup> To protect against legal manipulation, my proposed test requires the presence of genuine entrepreneurial opportunity. This proposed test empowers employees and offers them a choice in their classification. At the same time, the proposed test means that an employer will need to make hard choices about the scope of the freedom it provides to its workers. Designating workers as independent contractors will require the company not only to cede control, but also to cede the possibility that workers will achieve larger rewards, monetary and otherwise, than they would otherwise have achieved as employees.

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<sup>247</sup>Solomon, *supra* note 246 (noting that FedEx offered to settle for 227 million dollars); Daniel Wiessner, *FedEx to Settle Driver Lawsuits in 20 States for \$240 Million*, REUTERS (June 16, 2016, 12:50 PM), <https://www.reuters.com/article/us-fedex-settlement/fedex-to-settle-driver-lawsuits-in-20-states-for-240-million-idUSKCN0Z229Q> (noting that FedEx settled for 240 million dollars); Wood, *supra* note 241.

<sup>248</sup>FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009).

<sup>249</sup>*Id.*

<sup>250</sup>See Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 535 (2001) (discussing the FLSA as “a major development in the evolution of worker protection in America”).

As further explained below, my proposed entrepreneurial test measures genuine entrepreneurial opportunity. Courts and government agencies should not rely on bare-boned allegations of opportunity, but instead must use a narrow definition of entrepreneurship to define those who are independent contractors and those who are not. In other words, workers must actually do entrepreneurship. To analyze the presence of entrepreneurial opportunity, I look to the academic field of entrepreneurship, examine the various definitions of entrepreneurship, and create a workable legal test.

Scholars have called entrepreneurship a “broad and complex concept.”<sup>251</sup> Those seeking to grasp the concept will find it difficult to find a “precise, inherently consistent, and agreed-upon definition.”<sup>252</sup> Nevertheless, there are means to identify entrepreneurship when it occurs. Once we target entrepreneurship, we can focus on the means to identify an entrepreneurial opportunity.

In the context of employment, I maintain that a court must distinguish between opportunity in the marketplace, which would indicate an entrepreneurial independent contractor, and opportunity within the firm, which would be a sign of employment.

#### *Entrepreneurship shares common aspects*

Despite decades of study and widespread use,<sup>253</sup> identifying the elements that make up entrepreneurship remains controversial.<sup>254</sup> The difficulty of defining the field has even drawn the legitimacy of the academic study of entrepreneurship into question.<sup>255</sup> No consensus exists as to exactly who is an entrepreneur.<sup>256</sup>

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<sup>251</sup>Domingo Ribeiro Soriano & Ma Angeles Montoro-Sanchez, *Introduction: The Challenges of Defining and Studying Contemporary Entrepreneurship*, 28 CAN. J. ADM. SCI. 297, 297 (2011).

<sup>252</sup>PER DAVIDSSON, *RESEARCHING ENTREPRENEURSHIP* (2005).

<sup>253</sup>The first author to give entrepreneurship an economic meaning was Richard Cantillon in *Essai sur la Nature du Commerce en Général* (1755/1999). Cantillon “outlined the principles of the early market economy based on individual property rights and economic interdependency.” Hans Landström et al., *Entrepreneurship: Exploring the Knowledge Base*, RES. POL’Y 41, at 1154–55 (Sept. 2012).

<sup>254</sup>Candida G. Brush et al., *Doctoral Education in the Field of Entrepreneurship*, 29 J. OF MGMT. 309, 311 (2003).

<sup>255</sup>See Margaret Kobia & Damary Sikalieh, *Towards a Search for the Meaning of Entrepreneurship*, 34 J. EUR. INDUS. TRAINING 110, 111–12 (2010) (“In the past decade or so, researchers and educators in this field have had and still have to confront the question ‘what are

Fortunately, however, many understand the idea of entrepreneurship.<sup>257</sup> Academic study of entrepreneurship has provided different definitions of the concept.<sup>258</sup> Entrepreneurship consists of those practices relating to the creation or discovery of opportunities and their enactment.<sup>259</sup> Entrepreneurship “is the process whereby an individual or a group of individuals use organized efforts and means to pursue opportunities to create value and grow by fulfilling wants and needs through innovation and uniqueness, no matter what resources are currently controlled.”<sup>260</sup> Entrepreneurship can focus on activities, generally new and innovative, taken in response to perceived business opportunities.<sup>261</sup> Entrepreneurship often relates to the creation of new firms.<sup>262</sup>

The varying definitions of entrepreneurship share some common elements. When scholars define entrepreneurship, certain elements often appear:

1. The environment within which entrepreneurship occurs.
2. The people engaged in entrepreneurship.
3. Entrepreneurial behaviors displayed by entrepreneurs.
4. The creation of organizations by entrepreneurs.

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we talking about when we talk about entrepreneurship?’ The answer to this question however, has been and still is unclear, delayed and overlaps with other sub fields.”)

<sup>256</sup>Anat Alon-Beck, *The Law of Social Entrepreneurship-Creating Shared Value through the Lens of Sandra Day O’Connor’s iCivics*, 20 U. PA. J. BUS. L. (forthcoming) (manuscript at 8) (on file with author).

<sup>257</sup>Nadim Ahmad & Richard G. Seymour, *Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data Collection*, Org. for Econ. Co-Operation and Dev., Working Paper No. STD/DOC(2008)1 (2008), [http://search.oecd.org/officialdocuments/display-documentpdf/?doclanguage=en&cote=std/doc\(2008\)1](http://search.oecd.org/officialdocuments/display-documentpdf/?doclanguage=en&cote=std/doc(2008)1).

<sup>258</sup>For an overview of the academic study of entrepreneurship, including a list of 135 core entrepreneurship works, see Hans Landström et al., *supra* note 253, at 1155–81.

<sup>259</sup>Sana El Harbi & Alistair R. Anderson, *Institutions and the Shaping of Different Forms of Entrepreneurship*, 39 J. SOCIO-ECONOMICS 436, 436 (2010).

<sup>260</sup>MARY COULTER, *ENTREPRENEURSHIP IN ACTION* (2001).

<sup>261</sup>Patricia P. McDougall & Benjamin M. Oviatt, *International Entrepreneurship Literature in the 1990s and Directions for Future Research*, in *ENTREPRENEURSHIP 2000*, at 293 (Donald L. Sexton & Raymond W. Smilor, eds.).

<sup>262</sup>See Sang M. Lee & Suzanne J. Peterson, *Culture, Entrepreneurial Orientation, and Global Competitiveness*, 35 J. WORLD BUS. 401, 402 (2000).

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5. Opportunities identified and exploited.
6. Innovation, whether incremental, radical or transformative.
7. Assuming risk, at personal, organizational, and even societal levels.
8. Adding value for the entrepreneur and society.<sup>263</sup>

*There are three dimensions of entrepreneurship*

There are three main dimensions to entrepreneurship.<sup>264</sup> These dimensions are (1) the processes and events that make up entrepreneurship; (2) the skills and traits that characterize an entrepreneur; and (3) the results that entrepreneurship generates.<sup>265</sup> Thus, entrepreneurship is made up of processes, behaviors, and outcomes.<sup>266</sup>

Process

The development of a new business or innovative strategy is central to the process dimension of entrepreneurship. One can view entrepreneurship as “the process of creating something new of value by devoting the necessary time and effort, assuming the accompanying financial, psychic and social risks, and receiving the resulting rewards of monetary and personal satisfaction and independence.”<sup>267</sup> In other words, “entrepreneurship is a process by which individuals—either on their own or inside organizations—pursue opportunities without regard to the resources they currently control.”<sup>268</sup>

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<sup>263</sup> See Timothy M. Stearns & Gerald E. Hills, *Entrepreneurship and New First Development: A Definitional Introduction*, 36 J. BUS. RES. 1, 1 (1996).

<sup>264</sup> See DAVID STOKES ET AL., *ENTREPRENEURSHIP* 4 (2010).

<sup>265</sup> See generally Kobia & Sikalieh, *supra* note 255.

<sup>266</sup> *Id.*

<sup>267</sup> ROBERT D. HISRICH & MICHAEL P. PETERS, *ENTREPRENEURSHIP* (5th ed. 2002).

<sup>268</sup> Howard H. Stevenson & J. Carlos Jarillo, *A Paradigm of Entrepreneurship: Entrepreneurial Management*, 11 STRATEGIC MGMT. J. 17, 23 (1990).

### Behavior

The next dimension of entrepreneurship focuses on behavior: the skills, traits, and actions of the putative entrepreneur. One study suggests the following definition:

Entrepreneurship is the manifest ability and willingness of individuals, on their own, in teams, within and outside existing organizations, to: perceive and create new economic opportunities (new products, new production methods, new organizational schemes, and new product-market combinations) and to introduce their ideas in the market, in the face of uncertainty and other obstacles, by making decisions on location, form and the use of resources and institutions.<sup>269</sup>

### Outcome

Outcome also defines entrepreneurship. Genuine entrepreneurship “results in the creation, enhancement, realization and renewal of value not just for the owners but all participants and stakeholders.”<sup>270</sup> The entrepreneurial process—the set of behaviors that characterize entrepreneurship—must produce a concrete result. If process and behavior do not create value, entrepreneurship does not exist.

### *Creating a legal entrepreneurial test requires consideration of each dimension of entrepreneurship*

Entrepreneurship thus consists of three areas: process, behavior, and outcome.<sup>271</sup> Creating a legal definition requires consideration of each dimension of entrepreneurship. Any proposed legal test should incorporate elements of each of the three dimensions to ensure the presence of genuine entrepreneurial opportunity. My proposed definition of entrepreneurship will incorporate a synthesis of all three dimensions:

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<sup>269</sup>Sander Wennekers & Roy Thurik, *Linking Entrepreneurship and Economic Growth*, SMALL BUS. ECON. 13:27-55, 46-47 (Aug. 13, 1999).

<sup>270</sup>JEFFRY A. TIMMONS & STEPHEN SPINELLI, *NEW VENTURE CREATION ENTREPRENEURSHIP FOR THE 21ST CENTURY* (2004).

<sup>271</sup>Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U.L. REV. 67, 102 (2013).

1. Process: [t]he identification, evaluation and exploitation of an opportunity.
2. Behavior: [t]he management of a new or transformed organi[z]ation so as to facilitate [t]he production and consumption of new goods and services.
3. Outcome: [t]he creation of value through the successful exploitation of a new idea.<sup>272</sup>

These three dimensions should guide the creation of a workable legal test. We begin by distilling each dimension to the idea at its core. Entrepreneurial processes involve innovation. Entrepreneurial behavior is characterized by risk. Finally, entrepreneurial outcomes can be identified by results. Together, these elements—innovation, risk, and results—guide the development of a legal test designed to determine the presence of genuine entrepreneurial opportunity.

#### Entrepreneurship requires innovation

The concept of entrepreneurship has long been dependent on the presence of innovation. Joseph Schumpeter famously defined entrepreneurs as “innovators who implement entrepreneurial change within markets.”<sup>273</sup> Innovation is a necessary component of entrepreneurship.<sup>274</sup> Schumpeter’s definition equates entrepreneurship with business innovation by “identifying market opportunities and using innovative approaches to exploit them.”<sup>275</sup> In Schumpeter’s view, the entrepreneur is “the pivot on which everything turns.”<sup>276</sup>

Innovation stimulates demand, and that new demand leads to the creation of wealth. Entrepreneurship incorporates “an attitude of helping innovative ideas become reality by establishing new business models and at the same time replacing conventional business systems by making them obsolete.”<sup>277</sup>

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<sup>272</sup>STOKES ET AL., *supra* note 264, at 8 n.200.

<sup>273</sup>Pivateau, *supra* note 271, at 103.

<sup>274</sup>Ahmad & Seymour, *supra* note 257.

<sup>275</sup>*Id.*

<sup>276</sup>Thomas C. Leonard, *Redeemed by History*, in XVII/2009/1 HISTORY OF ECONOMIC IDEAS 189, 191 (2009), available at <https://www.princeton.edu/~tleonard/papers/redeemed.pdf>.

<sup>277</sup>George M. Korres, et al., *Measuring Entrepreneurship and Innovation Activities in E.U.*, 3 INTERDISC. J. CONTEMP. RES. BUS. 1155, 1155 (2011).

The entrepreneur as innovator establishes change within markets by creating new combinations. These new combinations may appear as:

1. the introduction of a new good or quality thereof,
2. the introduction of a new method of production,
3. the opening of a new market,
4. the conquest of a new source of supply of new materials or parts, and
5. the carrying out of the new organi[z]ation of any industry.<sup>278</sup>

Thus, the first thing a court should look for to determine the presence of entrepreneurial opportunity is whether or not the position provides an opportunity for innovation. I propose that courts construe this element broadly. The entrepreneurial worker classification analysis will examine factors that indicate that the job requires or rewards innovation and creativity. How might the innovation analysis take place in real life? In evaluating this factor, courts might well look to many of the factors commonly designated as “control” factors.<sup>279</sup> Instead of control by the employer, however, we invert the analysis. Instead of focusing on employer control, we frame the question as one of employee opportunity. Are workers given the freedom to create productivity solutions? The more freedom retained by the worker, the less likely that the worker is actually an employee.

Thus, employers seeking to classify workers as independent contractors must provide those workers with the ability to create or modify work processes. Employers must focus on the ends sought by the work, and not the means by which the work is accomplished.

### Entrepreneurship requires risk

The concept of risk is integral to the presence of entrepreneurship. Thus, the entrepreneurial classification analysis necessarily requires an evaluation of risk. The concept of risk impliedly involves an element of uncertainty.<sup>280</sup>

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<sup>278</sup>Ahmad & Seymour, *supra* note 257, at 7.

<sup>279</sup>Pivateau, *supra* note 271, at 104–05.

<sup>280</sup>See Jeffrey G. York & S. Venkataraman, *The Entrepreneur–Environment Nexus: Uncertainty, Innovation, and Allocation*, 25 J. BUS. VENTURING 449, 452 (2010), available at



Risk taking is a key feature defining entrepreneurship.<sup>281</sup> Richard Cantillon, the economist who first described entrepreneurship, believed that entrepreneurs were those who took on risk: purchasing products (or labor) before consumers have indicated whether, or how much, they will pay for those products. Employees receive a guaranteed income, while the entrepreneur bears the risk of the marketplace.

Entrepreneurship cannot exist without an element of uncertainty. Frank Knight believed that entrepreneurship required assuming a special type of risk he called uncertainty.<sup>282</sup> In Knight's view, uncertainty arises out of partial knowledge.<sup>283</sup> For Knight, uncertainty referred to those outcomes that cannot be calculated, but may only be subjectively estimated.<sup>284</sup> An entrepreneur assumes responsibility for economic uncertainty.<sup>285</sup> The entrepreneur does this because presumably profit will compensate him for bearing that risk.

The entrepreneurship test will require an examination of uncertainty. For an employer to classify a worker as an independent contractor, the worker must face uncertainty. The duration of the work must be uncertain, success must not be guaranteed, and there must exist the possibility of profit as well as the possibility of loss. Theoretically, the opportunities for profit and loss should be roughly equal. The potential for large rewards must be counterbalanced by the potential for a large loss.

The element of risk will be an important part of the entrepreneurial worker analysis. An employer who provides too great a risk may find workers unwilling to take the position. Moreover, employers may be unwilling to provide opportunities for great rewards, if those rewards come at a cost to the employer.

### Entrepreneurship requires results

Finally, the third element of the proposed entrepreneurial classification analysis is the presence of genuine market opportunity. In determining the presence of entrepreneurship, Peter Drucker focused on the quest for

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[http://effectuation.org/sites/default/files/research\\_papers/jbv-2010-nexus-york-venkat.pdf](http://effectuation.org/sites/default/files/research_papers/jbv-2010-nexus-york-venkat.pdf) (explaining that there are risks which can't be accurately predicted or assigned a probability).

<sup>281</sup> See Ahmad & Seymour, *supra* note 257.

<sup>282</sup> FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT, at lix (1921, photo. reprint 1964).

<sup>283</sup> *Id.* at 199.

<sup>284</sup> *Id.* at 236–37.

<sup>285</sup> *Id.* at 237.

opportunity.<sup>286</sup> In a market economy, profit opportunities motivate entrepreneurs. Entrepreneurship involves more than mere effort.

Entrepreneurship is more than simply creating new ideas or reintroducing discarded ideas. Instead, entrepreneurship, if it is to be considered entrepreneurship, must make a difference.<sup>287</sup> Entrepreneurship consists of “the competitive behaviors that drive the market process.”<sup>288</sup> The concept of the market process is integral to understanding entrepreneurship. Under the entrepreneurial analysis, the proposed work must involve a certain level of success to constitute entrepreneurship.

This element of the analysis could potentially prove troublesome to courts. It may be difficult for a firm to prove the potential for profit. The best evidence of opportunity would consist of evidence of market success by other similarly situated individuals, either at the firm or at similarly situated firms. If the position is so new or different that there is no evidence of success, a firm may have difficulty in proving the existence of market outcomes. Nevertheless, even in the absence of evidence of other entrepreneurs engaged in the same or similar activity, a court should be able to make a determination of whether opportunity exists or not.

#### CONCLUSION

The economic realities test, as currently utilized, has failed to accomplish the purposes of the FLSA and should be amended or revised. I propose that the test be retained, but that the motivating factor, the prism through which worker status is viewed, should be the presence of genuine entrepreneurial opportunity. To determine whether entrepreneurial opportunity exists, courts should apply a three-part test that focuses on the factors indicated above: innovation, risk, and results.

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<sup>286</sup> See PETER DRUCKER, INNOVATION AND ENTREPRENEURSHIP (1985).

<sup>287</sup> DAVIDSSON, *supra* note 252, at 6.

<sup>288</sup> *Id.* (emphasis in original omitted).