The Epidemic of Employer Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act, and the Courts' Response

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Introduction

The Fair Labor Standards Act (FLSA)'s compensation requirements, such as minimum wages and overtime pay, apply only to "employees." *Chao v. Mid-Atl. Installation Servs., Inc.*, 16 F. App'x 104, 105 (4th Cir. 2001). Employers can get around these requirements and lower their tax bills at the same time by classifying workers as "independent contractors" instead of "employees." Employers classify as independent contractors many workers who do not meet the legal definition: the Department of Labor estimates that up to 30% of U.S. employers misclassify workers. Courts have found rampant violations across certain industries.[2]

FLSA's Definition of "Employee"

The FLSA defines an "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1); an "employer" as "any person acting . . . in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d); and the term to "employ" as "to suffer or permit to work," 29 U.S.C. § 203(g). These definitions are read broadly to effectuate the statute's

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[2] For example, no fewer than ten courts across the country have found that entertainers at adult entertainment clubs were misclassified under the FLSA and/or state laws. *See, e.g.*, *Reich v. Circle C. Invs.*, 998 F.2d 324 (5th Cir. 1993) (upholding trial court's determination that adult club dancers are employees within the meaning of the FLSA); *Clincy v. Galardi S. Enterps.*, No. 09 Civ. 2082, 2011 WL 3924860 (N.D. Ga. Sept. 7, 2011) (granting dancer/entertainers summary judgment on defendants' liability under the FLSA); *Thompson v. Linda & A., Inc.*, 779 F. Supp. 2d 139 (D.D.C. 2011) (granting partial summary judgment to exotic dancers on defendants' liability under the FLSA); *Morse v. Mer Corp.*, No. 08 Civ. 1389, 2010 WL 2346334, at *6 (S.D. Ind. June 4, 2010) (granting summary judgment to dancer plaintiffs and concluding that plaintiffs were employees); *Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343 (M.D. Fla. 1997) (dancer at adult night club was employee for purposes of the FLSA); *Reich v. Priba Corp.*, 890 F. Supp. 586 (N.D. Tex. 1995) (after bench trial, finding dancers at adult night club were employees for purposes of the FLSA); *Donovan v. Tavern Talent & Placements, Inc.*, No. 84-F-401, 1986 WL 32746 (D. Colo. Jan. 8, 1986) (night club operators employed dancers and violated their rights as tipped employees); *Matter of Wage Claims of Smith v. Tyad, Inc.*, 209 P.3d 228 (Mont. 2009), reh'g denied (June 16, 2009) (upholding state wage enforcement agency's finding that exotic dancers are employees and upholding agency's authority to deem deduction of "stage fees" unlawful requiring reimbursement); *State ex rel. Roberts v. Bomareto Enterps., Inc.*, 956 P.2d 254 (Or. Ct. App. 1998) (affirming trial court decision that dancers were employees); *Jeffcoat v. State, Dept. of Labor*, 732 P.2d 1073 (Alaska 1987) (same). *But see Matson v. 7455, Inc.*, No. 98 Civ. 788, 2000 WL 1132110, at *2 (D. Or. Jan. 14, 2000).

remedial purposes.[3] Therefore, the meaning of "employee" under the FLSA "cover[s] some workers who might not qualify as such under a strict application of traditional agency [or contract law] principles." *Schultz v. Capital Int'l Sec. Inc.,* 466 F.3d 298, 304 (4th Cir. 2006) (internal quotation marks omitted); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-29 (1947) (The common law definitions of "employee" and "independent contractor" do not apply in the FLSA context).

Under the FLSA's definition of "employee," "[t]he ultimate concern is 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." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (citing *Donovan v. Tehco, Inc.,* 642 F.2d 141, 143 (5th Cir. 1981)); *see also Baker v. Flint Eng'g & Const. Co.,* 137 F.3d 1436, 1443 (10th Cir. 1998) ("the question is whether plaintiffs are economically dependent upon [the defendant] during the time period they work for [it], however long or short that period may be. In other words, 'the dependence at issue is dependence on that job for that income to be continued and not necessarily for complete sustenance'") (quoting *Halferty v. Pulse Drug Co., Inc.,* 821 F.2d 261, 267 (5th Cir.1987)); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1538 (7th Cir. 1987) ("Economic dependence is more than just another factor. It is instead the focus of all the other considerations.") (citing *Usery v. Pilgrim Equip. Co.,* 527 F.2d 1308, 1311-12 (5th Cir. 1976)).

Courts view "the totality of circumstances" in determining the degree of economic dependence, focusing on several non-exclusive factors. *See Superior Care*, 840 F.2d at 1059. Such factors include:

> (1) the degree of control exercised by the alleged employer;
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> (2) the extent of the relative investments of the worker and the alleged employer;
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> (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer;
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> (4) the skill and initiative required in performing the job;
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> (5) the permanency of the relationship; and
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> (6) the extent to which the work is an integral part of the alleged employer's business.

See, e.g., Thibault v. Bellsouth Telecomms., Inc., 612 F.3d 843, 845-46 (5th Cir. 2010); *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) (citing *Brock v. Mr. W.*

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[3] *Schultz v. Capital Int'l Sec., Inc.,* 466 F.3d 298, 304 (4th Cir. 2006) ("Because the Act is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals." (internal quotation marks omitted)); *Brock v. Superior Care*, 840 F.2d 1054, 1058 (2d Cir.1988) (the FLSA's definition of employee "is necessarily a broad one in accordance with the remedial purposes of the Act"); *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) ("Courts have adopted an expansive interpretation of the definitions of "employer" and "employee" under the FLSA, in order to effectuate the broad remedial purposes of the Act."); *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1976) ("Given the remedial purposes of the legislation, an expansive definition of 'employee' has been adopted by the courts").

Fireworks, Inc., 814 F.2d 1042, 1043-44) (5th Cir. 1987); *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App'x 782, 783 (11th Cir. 2006); *Schultz*, 466 F.3d at 304-05; *Chao*, 16 F. App'x at 106; *Baker*, 137 F.3d at 1440 (citing *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567, 570 (10th Cir.1994)); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991); *Superior Care*, 840 F.2d at 1058-59; *Donovan v. Brandel*, 736 F.2d 1114, 1120 (6th Cir. 1984); *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

Despite the focus on these factors, courts have emphasized that because "the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided." *Superior Care*, 840 F.2d at 1059; *see also Baker*, 137 F.3d at 1441; *Mr. W. Fireworks*, 814 F.2d at 1043; *Usery*, 527 F.2d at 1311 ("No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor-economic dependence.").

Non-Exclusive Factors Examined by Courts

1. Degree of control exercised by the alleged employer

The first factor, degree of control, is "crucial" to the economic reality test. *Gustafson v. Bell Atl. Corp.*, 171 F. Supp. 2d 311, 325 (S.D.N.Y. 2001). "[T]he issue is not the degree of control that an alleged employer has over the manner in which the work is performed in comparison to that of *another employer*. Rather, it is the degree of control that the alleged employer has in comparison to the control exerted by the *worker*." *Schultz*, 466 F.3d at 305 (emphasis in original). "An employer does not need to look over his workers' shoulders every day in order to exercise control," as long as the employer asserts the right to supervise and control the employees. *Superior Care*, 840 F.2d at 1060. Conversely, for a worker to be considered an independent contractor, the "individual [must] exert[] such a control over a meaningful part of the business that she stands as a separate economic entity." *Mr. W Fireworks*, 814 F.2d at 1049 (quoting *Usery*, 527 F.2d at 1312-13).

For example, where Sales Leaders sued an insurance company alleging misclassification, the court found that the company's tight control over the business indicated that the Sales Leaders were employees, not contractors. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343-44 (5th Cir. 2008). In *Hopkins*, the company "controlled the hiring, firing, assignment, and promotion of the Sales Leaders' subordinate agents," whose commissions were the Sales Leaders' "primary source of income." *Id*. The company also had a substantial degree of control over the plaintiffs' "advertising for new recruits;" "the type and price of insurance products" they could sell; "the number of sales leads" they received, and the geographic territories in which they could operate. *Id.* at 343-44. These facts added up to such substantial control over a meaningful part of the plaintiffs' business that the control factor of the economic dependence test tipped towards classifying the plaintiffs as employees.

The Seventh Circuit has held that the proper inquiry is the degree of control the purported employer exercised over its entire operation, not just over the portion of the business in which the plaintiffs worked. *See Lauritzen*, 835 F.2d at 1536 (noting disagreement with the Sixth Circuit case, *Brandel*, 736 F.2d at 1119). The *Lauritzen* court combined the defendants'

"exercise [of] pervasive control over [their] operation as a whole" with evidence proving some degree of control over the harvesting work of the migrant worker plaintiffs to hold that the company exercised enough control to suggest economic dependence by the workers. *Id.*

The Fourth Circuit did not find sufficient control to indicate an employee relationship where the company assigned "daily routes" to the plaintiff cable installers and required "them to report their progress to a dispatcher periodically," because the installers were free "to complete the jobs within their routes in whatever order they wish…; to attend to personal affairs or conduct other business during the day; to choose and manage their own employees to help them complete their work orders; and to work either independently or together with other Installers." *Chao,* 16 F. App'x at 106.

The Fourth Circuit ruled differently in *Schultz,* 466 F.3d at 307, identifying many indicia of company control. The joint employers of a Saudi prince's personal security guards "exercised nearly complete control over how the agents did their jobs." *Id.* They issued an eight-page document that "strictly dictated the manner in which the agents were to carry out their duties," including requiring "hourly walks" of the prince's property, "regular checks at all locations where contractors are working," and the use of specific sets of doors for specific individuals. *Id.* The court assumed that the guards sometimes exercised independent judgment, "such as determining whether a particular visitor appeared suspicious," but "as a general rule they did not control the manner in which they provided security." *Id.*

The Fifth Circuit found a clear case of company control where laundry operators classified as independent contractors were in fact "totally dependent" on the company "to provide direction or control in every major aspect of their work." *Usery*, 527 F.2d at 1312. The defendant handled "substantially all advertising," "set[] the prices," "require[d] that [plaintiff] operators deal exclusively with" the company, "require[d] that each operator remit a certain amount of money every day for the cleaning work" the company performed, and even prevented "operators from posting any signs on the premises [without] prior permission." *Id.* The court rejected the defendant's argument that the plaintiffs could have exercised more independence than they did, holding that "[i]t is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts." *Id.*

The Fifth Circuit also affirmed the district court finding that a night club exercises a great deal of control over the dancers where the dancers were required to comply with weekly work schedules, were instructed on the prices that they could charge for their services, and had to meet the standards of the club for dances. *See Reich v. Circle C. Inv.*, 998 F.2d 324 (5th Cir. 1993).

Some factors which courts routinely consider as evidence of control include:

a. Uniforms

Requiring workers to wear uniforms bearing the purported employers' name, logo, or similar markings is a sign that the workers may be employees. *See, e.g., Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998) (finding that drivers were independent contractors, as suggested by lack of requirement to wear uniforms; company did require employee drivers to wear uniforms); *Velu v. Velocity Exp., Inc.*, 666 F. Supp. 2d 300,

303, 307 (E.D.N.Y. 2009) (absence of "requirement that he wear special apparel" is one "relevant factor[]" proving that plaintiff is an independent contractor); *Scruggs v. Skylink, Ltd.*, No. 10 Civ. 0789, 2011 WL 6026152, at *3 (S.D.W. Va. Dec. 2, 2011) ("Courts, in evaluating [the control] factor, have considered such details as whether workers . . . must wear uniforms") (internal quotation marks omitted). *But see Herman v. Mid-Atl. Installation Serv., Inc.*, 164 F. Supp. 2d 667, 673 (D. Md. 2000) ("Requiring Installers to wear uniforms and ID badges identifying themselves with MAT and Comcast does not make them employees" because it is required by law and it does not change economic reality of the parties' relationship), *aff'd sub nom. Chao v. Mid-Atl. Installation Services, Inc.*, 16 F. App'x 104 (4th Cir. 2001).

b. Marked Vehicles

Courts view requirements that workers mark their vehicles with the company's signage akin to wearing uniforms. *Nichols v. All Points Transp. Corp. of Michigan, Inc.*, 364 F. Supp. 2d 621, 634 (E.D. Mich. 2005) ("the use of [company] placards [on vehicles] cuts slightly in favor of an employee-employer relationship").

c. Schedule and Hours

Whether workers or the company set the workers' schedule or hours is often considered in deciding the degree of control that the alleged employer exercises over the worker.[4] *See, e.g., LeMaster v. Alt. Healthcare Solutions, Inc.*, 726 F. Supp. 2d 854, 863 (M.D. Tenn. 2010) (company controlled workers' schedules, weighing control factor towards employee status); *Mathis v. Hous. Auth. of Umatilla Cty.*, 242 F. Supp. 2d 777, 783-84 (D. Or. 2002) (worker's freedom to set her own schedule tilted control factor toward an independent contractor status, but other facts outweighed it and court concluded that she was an employee); *Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343, 1348-49 (M.D. Fla. 1997) (workers' control over their schedules suggested that they were independent contractors, but other facts weighed the control factor towards employee status); *Carrell v. Sunland Const., Inc.*, 998 F.2d 330, 333-34 (5th Cir. 1993) (company's control of number of hours worked helped tip the control factor towards employee status (though other facts led to finding of independent contractor status)).

d. Power to Hire and Fire

"The economic reality test includes inquiries into whether the alleged employer has the power to hire and fire employees . . . ." *Baker*, 137 F.3d at 1440 (citing *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990)); *Mathis*, 242 F. Supp. 2d at 782 n.6 ("the power to hire and fire employees" is "a relevant factor" to the independent contractor analysis). Conversely, the workers' ability to hire their own employees could suggest independent contractor status. *See Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301 (5th Cir. 1975) (concluding that worker was employee, although worker's hiring and firing of "his own employees" "arguably . . . suggest[ed] that [he] was an independent contractor").

[4] Some courts analyze scheduling and hours under the profit/loss factor *See, e.g., Baker*, 137 F.3d at 1441 (company that sets the hours of hourly-paid workers determines their opportunity for profit); *Schultz*, 466 F.3d at 308 (company's complete control over workers' hours and schedules "weighs in favor of employee status" because it denied them opportunity to earn more).

2. Relative investments

Courts also examine the parties' relative investments. This factor compares "each worker's *individual* investment to that of the alleged employer." *Hopkins*, 545 F.3d at 344 (emphasis in original) (even where the plaintiffs "made 'substantial investments' in their individual offices," those investments paled in comparison to the purported employer's "greater overall investment in the business scheme"). Note that the relevant comparison involves "the employer's investment in the overall operation," not just its investment in the plaintiff or the plaintiff's work. *Baker*, 137 F.3d at 1442. *But see Thibault*, 612 F.3d at 847 (focusing on comparison of the amount the alleged employer and employee each contribute to the specific job the employee undertakes, not to the operation as a whole); *Martin*, 949 F.2d at 1294-95 (same). An indication that a company's investment predominates is that workers "could not operate" without the company-provided resources – illustrating how this factor contributes to answering the ultimate question: whether workers are as a practical matter economically dependent on the company. *Usery*, 527 F.2d at 1314; *see also, e.g., Berrocal v. Moody Petroleum, Inc.*, No. 07 Civ. 22549, 2009 WL 455448, *7 (S.D. Fla. Feb. 22, 2009) (plaintiff "did not invest in equipment or materials," which weighed in favor of her "being an employee"); *Solis v. Int'l Detective & Protective Serv., Ltd.*, No. 09 Civ. 4998, 2011 WL 2038734, *9-11 (N.D. Ill. May 24, 2011) (company "provided the majority of equipment that the [workers] needed to carry out their tasks," weighing the relative investment factor towards employee status).

A worker's investment in his own equipment does not necessarily preclude a finding of employee status. *Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989) ("fact that a worker supplies his or her own tools or equipment does not preclude a finding of employee status"); *see also Lauritzen*, 835 F.2d at 1537 (a worker's "[g]loves do not constitute a capital investment"). Neither does workers' investments in individual professional licenses. *Schultz*, 466 F.3d at 308.

On the other hand, workers who have invested significantly in equipment are more likely to be independent contractors. *See, e.g.*, *Chao*, 16 F. App'x at 107 (finding that workers were independent contractors where they "suppl[ied] their own trucks (equipped with 28-foot ladders), specialized tools, uniforms, and pagers" and were "responsible for their own liability and automobile insurance"); *Baker v. Barnard Const. Co. Inc.*, 860 F. Supp. 766, 775 (D.N.M. 1994) (relative investment factor consistent with independent contractor status even though company invested much more than workers because workers' investment in their welding rigs was significant and without it they would receive no compensation), *aff'd sub nom. Baker v. Flint Eng'g & Const. Co.*, 137 F.3d 1436 (10th Cir. 1998).

3. Opportunity for profit or loss

Another factor is "the degree to which the worker's opportunity for profit or loss is determined by the alleged employer." *Hopkins*, 545 F.3d at 343. In *Hopkins*, the Fifth Circuit's analysis of this factor relied on the same facts as its examination of the first factor and led to the same conclusion: because the company controlled the Sales Leaders' subordinates, who were their primary source of income, it controlled their opportunity for profit or loss. *Id.* at 344. Also significant was the fact that the company prevented the plaintiffs "from owning and operating other businesses." *Id.*

The fact that the company plays a significant role in drawing customers – such as being responsible for advertisement, location, business hours, maintenance of facilities – shows that the employer exercises a high degree of control over the workers' opportunity for profit. *See Reich*, 998 F.2d at 328; *Usery*, 527 F.2d at 1313.

In the case of the private security guards, the Fourth Circuit found "no evidence" that the plaintiffs, who were paid "a set rate for each shift worked," could do anything to increase their pay. *Schultz*, 466 F.3d at 308. The company determined how many shifts each guard worked, and therefore determined their opportunity for profit or loss. *Id.* In another case five years earlier, however, the Fourth Circuit did weigh the workers' ability "to work more or fewer hours" as an indicator of independent contractor status, along with the workers' investments and employment of subordinates. *See Chao*, 16 F. App'x at 106-07.

Rather than assessing the workers' ability to increase their earnings, courts may also focus on the impossibility that they would suffer a loss. *Lauritzen*, 835 F.2d at 1536. Migrant farm workers who picked cucumbers for the purported employer would earn more or less money based on the quality and quantity of the crop, but a reduction in earnings "is a loss of wages, and not of an investment," and therefore irrelevant for this analysis. *Id. But see Brandel*, 736 F.2d at 1119 (treating wages as profit where "it is clear that their remuneration increases by their successful managing of the harvest process"). The Fifth Circuit reached the same conclusion regarding laundry operators who had "[n]o opportunity for loss of the capital investment in the station's operation." *Usery*, 527 F.2d at 1313.

Opportunity for profit or loss is also interrelated with the relative investments factor. *Baker*, 137 F.3d at 1442.[5] The Fifth Circuit found, for example, that there was an opportunity for profit or loss where workers could control their cost of their investments, thus increasing their profits. *Thibault*, 612 F.3d at 848.

4. Skill and initiative

The skill and initiative factor presumes that independent contractors are more likely to perform jobs requiring skill and initiative, and that unskilled workers are more likely to be employees than to be in business for themselves. For instance, the Fifth Circuit held that the skills required of laundry operators, such as "courtesy to customers, tagging clothes, taking money from customers, paying [the defendant] a set amount each day for cleaning, settling accounts (getting paid) once a week, occasionally hiring helpers, and correctly reporting tax and Social Security information," while valuable, are the same skills required of "many successful employees" and therefore not indicative of an independent contractor relationship. *Usery*, 527 F.2d at 1314-15.

The Seventh Circuit emphasized the importance of a skill's complexity or specialization in *Lauritzen*, observing that general "[s]kills are not the monopoly of independent contractors." 835 F.2d at 1537. "[A]ny good employee in any line of work must" develop "occupational

[5] In fact, the Second Circuit considers the factor together with the relative investments factor. *See Superior Care*, 840 F.2d at 1058-59.

skills" like the ones migrant workers developed "in order to recognize which [produce] to pick when." *Id.* This level of skill, the court decided, did not set a cucumber harvester "apart from the harvester of other crops." *Id.* Because the plaintiffs' skills were not of a "high degree," the court ruled that this factor suggested the plaintiffs were properly classified as independent contractors. But the Sixth Circuit made the opposite ruling on similar facts in *Donovan*, 736 F.2d at 1118.

Even workers who do need special skills to perform their jobs may not qualify as independent contractors if they have enough unskilled duties. While personal security guards required professional licenses, for example, the Fourth Circuit noted that "many of their tasks required little skill, for example, sorting the mail, making wake up calls, moving furniture, providing newspapers," and therefore held that this factor did not tip towards or against misclassification. *Schultz*, 466 F.3d at 308. Workers with special skills may also qualify as employees if they "do not use those skills in any independent way." *Martin*, 949 F.2d at 1295 (citing *Superior Care*, 840 F.2d at 1060 (a "variety of skilled workers who do not exercise significant initiative in locating work opportunities have been held to be employees under the FLSA") (collecting cases)).

The fact that employers do not evaluate the workers based on a certain skill undermines the defendants' employers' claim that the job requires that skill. *See Thompson v. Linda & A., Inc.*, 779 F. Supp. 2d 139, 150 (D.D.C. 2011) (dancing does not require skill where auditions were judged on looks, not artistic ability); *Morse v. Mer Corp.*, No. 08 Civ. 1389, 2010 WL 2346334, at *54 (S.D. Ind. June 4, 2010) (rejecting argument that entertainers must possess communication and counseling skills where defendants' hiring process did not include assessment of such skills).

However, the fact that the necessary skills may be learned on the job does not necessarily weigh this factor towards an employee status: the Fifth Circuit found that the plaintiff's skills were complex or specialized even though he largely learned them on the job. *See Thibault*, 612 F.3d at 847.

5. Permanency

The permanency of the relationship factor distinguishes employees from independent contractors who, upon completing a project for a company, may move to a different project for a different company.

However, a lack of permanence does not necessarily signal an independent contractor relationship. "[E]ven where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative." *Superior Care*, 840 F.2d at 1060-61 (citing *Mr. W. Fireworks*, 814 F.2d at 1053-54 (firework stand operators were employees notwithstanding 80% turnover because of seasonal nature of work)). The Seventh Circuit found sufficient permanency to tip this factor towards employee status where migrant farmworkers' relationship with the farm owners was "permanent and exclusive for the duration of that harvest season," and it was "not uncommon for the migrant families to return year after year." *Lauritzen*, 835 F.2d at 1537. *But see Brandel*, 736 F.2d at 1117 ("the annual return of migrant families to Brandel's fields was a

product of a mutually satisfactory arrangement rather than the permanent relationship between them"). In contrast, where workers did not stay with one company for a season, the Fifth Circuit found no permanency. *See Thibault*, 612 F.3d at 846 ("Splicers travel from job-to-job and from state-to-state looking for work.").

A worker's ability to take "as many or as few jobs as he desired" from other businesses weighs against permanency and toward independent contractor status, whereas exclusive working relationships indicate employee status. *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App'x 782, 784 (11th Cir. 2006); *see also, e.g.*, *Thibault*, 612 F.3d at 849 (finding that a separate business the worker ran while also working for the purported employer was evidence that he was an independent contractor); *Parrilla v. Allcom Const. & Installation Servs., LLC*, No. 08 Civ. 1967, 2009 WL 2868432, at *5 (M.D. Fla. Aug. 31, 2009) (worker who was not free to work for other companies was not an independent contractor); *Muller v. AM Broadband, LLC*, No. 07 Civ. 60089, 2008 WL 708321, at *3 (S.D. Fla. Mar. 14, 2008) (discussing freedom to work for other business as a relevant factor, though not determinative on the record before the court). Some courts have noted, however, that "employees may work for more than one employer without losing their benefits under the FLSA" if that is the nature of the profession. *See Brock*, 840 F. 2d at 1060; *McLaughlin v. Seafood, Inc.*, 861 F.2d 450, 452 (5th Cir. 1988) ("Laborers who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer."), *amended*, 867 F. 2d 875 (5th Cir. 1989).

The Fifth Circuit considered it a sign of permanence when workers had "nothing to transfer [to another employer] but their own labor." *Usery*, 527 F.2d at 1314. The court implied that this was a reason the working relationship was highly permanent; it also illustrates why more permanent relationships are considered indicia of economic dependence – workers with nothing to offer but their labor are more likely to be economically dependent on their alleged employer. *Id.*

6. Integral part of the business

Some circuits (although not the Fifth) also examine the extent to which the work "is an integral part of the alleged employer's business." *Martin*, 949 F.2d at 1293. The Seventh Circuit interprets "integral" as "necessary" to the business. *Lauritzen*, 835 F.2d at 1537-38 (finding the harvesting work of migrant farm workers who picked vegetables to be necessary to the company's business because if the vegetables were not picked, the company's other activities would only "serve the purpose of raising ornamental pickle vines"). The Third Circuit's formulation is that integral work is an "essential part" of the company's business. *Martin*, 949 F.2d at 1295-96. The Ninth Circuit has defined integral work as work that is not "an independently viable enterprise." *Real*, 603 F.2d at 755.

In the Fourth Circuit, the work of private security guards for a Saudi prince was found integral to a company that "was formed specifically for the purpose of supplying" those guards to the prince. *Schultz*, 466 F.3d at 309.

Exotic dancers have been found to be "obviously" integral to the success of adult night clubs. *See, e.g.*, *Harrell*, 992 F. Supp. at 1352 (concluding, without relying on evidence, that it is

"obvious that the continued success of [the club] depends to an appreciable degree upon its provision of stage and table dances"); *Thompson*, 779 F. Supp. 2d at 150-51 (finding it "self-evident" that nude dancers form an integral part of the defendants' business).

Contractual Relationship and Subjective Beliefs Are Irrelevant

The multi-factor tests of economic dependence are intended to uncover the economic reality of workers' situations, regardless of how the purported employers and even the workers describe their relationship. "Neither contractual recitations nor subjective intent can mandate the outcome in these cases. Broader economic realities are determinative." *Usery*, 527 F.2d at 1315. Thus employers cannot validate misclassification by writing it into contracts. *Hopkins*, 545 F.3d at 346; *Thibault*, 612 F.3d at 845-46; *Real*, 603 F.2d at 755 ("Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA."); *Superior Care*, 840 F.2d at 1059 ("an employer's self-serving label of workers as independent contractors is not controlling").

Similarly, workers' beliefs that they are independent contractors do not trump the economic realities revealed by the courts' tests for misclassification.[6] *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (workers' "protestations" that they were not employees, "however sincere, cannot be dispositive"). "[S]ubjective beliefs cannot transmogrify objective economic realities. A person's subjective opinion that he is a businessman rather than an employee does not change his status. . . . '[F]acile labels . . . are only relevant to the extent that they mirror economic reality.'" *Hopkins*, 545 F.3d at 346 (quoting *Mr. W Fireworks*, 814 F.2d at 1049, 1044); *see also Usery*, 527 F.2d at 1315 ("We reject both the declaration in the lease agreement that the operators are 'independent contractors' and the uncontradicted testimony that the operators believed they were, in fact, in business for themselves as controlling FLSA employee status.")

Investigations and Proposed Legislation to Combat Misclassification

The New York State Department of Labor created an interagency strike force in 2007 to investigate worker misclassification. (*See* http://www.labor.ny.gov/agencyinfo/MisclassificationofWorkers.shtm.) The Joint Enforcement Task Force on Employee Misclassification's 2009 report concluded that it had "raise[d] the costs and penalties of misclassification and [led] to compliance and deterrence" by facilitating interagency cooperation. Among other findings, unemployment insurance audits of "163 businesses show[ed] 7,789 misclassified workers and over $86 million in unreported remuneration." Completed wage audits showed over $2.2 million in unpaid wages and violation of recordkeeping and child labor laws.

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6 "If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act," which "would be likely to exert a general downward pressure on wages in competing businesses." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985).

More recently, the United States Department of Labor launched a Misclassification Initiative that coordinates the Department of Labor (DOL) and the Internal Revenue Service (IRS)'s efforts to investigate and prosecute violations of federal anti-misclassification laws. (*See* http://www.dol.gov/whd/workers/misclassification/.) So far eleven states have signed on to work cooperatively with the Initiative.

A bill pending before the U.S. House of Representatives, The Employee Misclassification Prevention Act ("EMPA") (H.R. 3178), would create new penalties for employers who misclassify employees as independent contractors and introduce several measures to prevent misclassification, including development of an "employee rights" website to educate workers about their rights under the FLSA; reaffirmation that misclassification violates federal law; a requirement that employers keep accurate records reflecting workers' status and inform workers of their status; a mandate that states audit employers for misclassification; and coordination between the DOL and the IRS to identify and prosecute misclassification (though as stated above, the agencies are already working together towards these ends). EMPA is currently before the Subcommittee on Workplace Protections.