

For the reasons set out in the preamble, the Wage and Hour Division, Department of Labor ~~proposes to amend~~ amends Title 29 CFR chapter V<sub>1</sub> as follows:

**PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT**

1. The authority citation for part 780 continues to read as follows:

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201-219. Pub. L. 105-78, 111 Stat. 1467.

2. Amend § 780.330 by revising paragraph (b) to read as follows:

**§ 780.330 Sharecroppers and tenant farmers.**

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(b) In determining whether such individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used.

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**PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED**

~~3~~ 2.—The authority citation for part 788 continues to read as follows:

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

~~4~~ 3.—Amend § 788.16 by revising paragraph (a) to read as follows:

**§ 788.16 Employment relationship.**

(a) In determining whether individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used.

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~~4~~ ~~5~~ Add part 795 to read as follows:

**PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT<sub>1</sub>**

Sec.

795.100 Introductory statement.

795.105 Determining employee or independent contractor classification under the FLSA.

795.110 Economic reality test to determine economic dependence.

795.115 Severability.

Authority: 29 U.S.C. 201-219.

**§ 795.100 Introductory statement.**

This part contains the Department of Labor’s (the Department) general interpretations for determining whether workers are employees or independent contractors under the Fair Labor Standards Act (FLSA or Act). See 29 U.S.C. 201-19. These interpretations are intended to serve as a “practical guide to employers and employees” as to how the Department will seek to apply the Act. *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944). The Administrator of the Department’s Wage and Hour Division will use these interpretations to guide the performance of their duties under the Act, unless and until the Administrator is otherwise directed by authoritative decisions of the courts or the Administrator concludes upon reexamination of an interpretation that it is incorrect. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to determining who is an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. The interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251-262, notwithstanding that after any act or omission in the course of such reliance, the interpretation is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. 29 U.S.C. 259.

**§ 795.105 Determining employee or independent contractor classification under the FLSA.**

(a) *Relevance of independent contractor or employee status under the Act.* The Act’s minimum wage, overtime pay, and recordkeeping obligations apply only to workers who are covered employees. Workers who are independent contractors are not covered by these protections. Labeling employees as “independent contractors” does not make these protections inapplicable. A determination of whether ~~workers are employees~~ a worker is an employee or

independent contractors contractor under the Act focuses on the economic realities of the workers' worker's relationship with the worker's potential employer and whether the workers are worker is either economically dependent on the potential employer for work or in business for themselves themselves.

(b) *Economic dependence as the ultimate inquiry.* An “employee” under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. 29 U.S.C. 203(e)(1), (g). “Employer” is defined to “include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. 203(d). The Act’s definitions are meant to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work. A worker is an independent contractor, as distinguished from an “employee” under the Act, if the worker is, as a matter of economic reality, in business for themselves. Economic dependence does not focus on the amount of income earned the worker earns, or whether the worker has other sources of income streams.

#### **§ 795.110 Economic reality test to determine economic dependence.**

(a) *Economic reality test.* (1) In order to determine economic dependence, multiple factors assessing the economic realities of the working relationship are used. These factors are tools or guides to conduct a totality-of-the-circumstances analysis. This means that the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the potential employer for work or is in business for themselves.

(2) The six factors described in paragraphs (b)(1) through (6) of this section should guide an assessment of the economic realities of the working relationship and the question of economic dependence. Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and

circumstances of the particular case relationship. Moreover, these six factors are not exhaustive.

As explained in paragraph (b)(7) of this section, additional factors may be considered.

(b) Economic reality factors—(1) *Opportunity for profit or loss depending on managerial skill*. This factor considers whether the worker exercises has opportunities for profit or loss based on managerial skill ~~that affects the worker's~~ (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

(2) *Investments by the worker and the potential employer*. This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs ~~borne by~~ to a worker ~~to perform their job (e.g., of~~ tools and equipment to perform a specific jobs ~~and the~~ job, costs of workers' labor), and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the ~~worker's~~ worker's ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the ~~worker's~~ worker's investments should be considered on a relative basis with the ~~employer's~~ potential employer's investments in its

overall business. The worker's investments need not be equal to the potential employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

(3) *Degree of permanence of the work relationship.* This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in or exclusive working relationships of work for other employers. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, ~~non-exclusive~~ non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own independent business initiative, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative.

(4) *Nature and degree of control.* This factor considers the employer's potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the employer's potential employer's control over the worker include whether the potential employer sets the worker's worker's schedule, supervises the performance of the work, or explicitly limits the

~~worker's~~**worker's** ability to work for others. Additionally, facts relevant to the employer's**potential employer's** control over the worker include whether the **potential** employer uses technological means of supervision **to supervise the performance of the work** (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands **or restrictions** on workers' ~~time~~ that do not allow them to work for others or work when they choose. Whether the **potential** employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. ~~Control implemented~~**Actions taken** by the **potential** employer for purposes**the sole purpose** of complying with legal obligations, safety standards**a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control. Actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control,** or contractual or customer service standards may be indicative of control. More indicia of control by the **potential** employer favors employee status; more indicia of control by the worker favors independent contractor status.

(5) *Extent to which the work performed is an integral part of the ~~employer's~~**potential employer's** business.* This factor considers whether the work performed is an integral part of the employer's**potential employer's** business. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part **of the business**. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the employer's**potential employer's** principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the employer's**potential employer's** principal business.

(6) *Skill and initiative.* This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work. Where the worker brings specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors ~~Where the worker brings specialized skills to the work relationship, it~~ may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

(7) *Additional factors.* Additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the potential employer for work.

#### **§ 795.115 Severability.**

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

**Signed this 2nd day of January, 2024.**

**Jessica Looman,**  
**Administrator, Wage and Hour Division.**