



South Carolina Bar

Continuing Legal Education Division

38th Annual North Carolina/South Carolina Labor & Employment Law Program

23-003

Tuesday, January 31-February 1, 2023

presented by
The South Carolina Bar
Continuing Legal Education Division

<http://www.scbar.org/CLE>

SC Supreme Court Commission on CLE Course No. 231050

AGENDA

Tuesday, January 31, 2023

- 8:30-9:00 **Registration and Continental Breakfast**
- 9:00-10:00 **2022 U.S. Supreme Court Commentary: Employment Law** | *Smith*
Hear updates on employment-related decisions rendered by the U.S. Supreme Court through the end of its most recent term in July of 2022. The materials summarize these cases followed by the comments about the decision's significance for workplace stakeholders. Also included are abbreviated summaries of all opinions and orders from the so-called "shadow docket" that are of consequence to employment relations. The session concludes with brief additional commentary on the Court's work as it affects the American workplace.
- 10:00-11:00 **Continuing to Pivot** | *Colclough*
Fiscal year 2021 has been a year of change and challenge in employment. While COVID has not retreated, we continue to navigate the new world of "how" we work. In this presentation, the speaker discusses how the EEOC and the employer community has pivoted during COVID-19 over the last 12 months. Finally, we discuss the results of our "pivot" — the good and the bad.
- 11:00-11:15 **Break**
- 11:15-12:15 **Fourth Circuit Update** | *Herrmann*
This presentation covers Fourth Circuit Court of Appeals basics and some of the most noteworthy decisions from November 2021 through October 2022.
- 12:15-1:30 **Lunch Break (on your own)**
- 1:30-2:30 **What's Precedent Got to Do With It? The Earthshaking Employment Law Implications of *Dobbs*** | Moderator: *Stallworth*, Panelists: *Birdsong, Helms and LeFever*

The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health* overturned decades of precedent regarding the right to access to abortion. With that dramatic upset in the law and the resulting rapidly changing state law landscape comes significant impacts on employment law. Do federal employment laws protect employees who obtain abortion services in states where doing so is now illegal? Do employers incur civil or criminal liability for maintaining benefit programs to assist employees to travel to other jurisdictions to obtain abortion services? Employees and employers will face many such questions in this new era.

2:30-3:30

Ethical Considerations in Employment Settlement Agreements* | *Abernethy, Edwards and Still*

Congratulations! You have settled your client's employment law case in principle with opposing counsel — now all that is left is navigating ethical and legal considerations regarding settlement agreements and ensuring that both parties' intent is reflected in the written settlement agreement. This presentation addresses these legal and ethical considerations, including issues regarding the tax treatment of settlement payments, the use of non-disclosure and non-disparagement provisions (and applicable state law affecting these issues), the scope of waivers and releases, and other critical issues.

3:30-3:45

Break

3:45-4:45

DEI* | *Wilson*

Across the country a firestorm over critical race theory (CRT) exploded seemingly overnight, casting the once-obscure academic theory into mainstream discourse. This session provides an overview of what CRT really is, dispelling the myths and distortions, and discusses how legal practitioners can use the insights offered by CRT to guide them in developing both their professional identities and lawyering choices.

4:45

Adjourn

Wednesday, February 1, 2023

8:30-9:00

Registration and Continental Breakfast

9:00-10:00

Choosing Wellness for Your Mind, Body and Best Life as an Attorney[†] | *Harris-Britt*

This presentation describes the unique challenges and factors that contribute to anxiety, depression and increased stress amongst attorneys. There is an emphasis on the importance of, and ways to, purposely choose a self-care plan that optimizes mental, physical and overall well-being.

10:00-11:00

The Evolving Legal Landscape in Employee Departures | *Sullivan*

This presentation addresses developments in the law pertaining to employee departures, including analysis of important or interesting state and federal opinions regarding restrictive covenant agreements, trade secret and computer trespass law, and related issues including the potential liability for new employers of departing employees. We address tips and guidance for HR professionals involved in these matters and discuss national legislative movements regarding noncompete agreements and the evolving concepts of fair competition. While the accompanying manuscript catalogues recent state and federal case law developments, the presentation is designed to assist attending attorneys and HR professionals with spotting issues and pragmatically identifying and addressing legal risks from both the former employer's and the departing employee's/new employer's perspectives.

11:00-11:15

Break

11:15-12:15

South Carolina State Update | *Reeves*

This presentation covers state and federal courts in South Carolina, highlighting recent developments and case law in labor and employment law in the state between November 2021 and October 2022.

12:15

Adjourn

38th Annual North Carolina/South Carolina Labor & Employment Law Program

November 4-5, 2022

NORTH CAROLINA
BAR ASSOCIATION
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38th Annual North Carolina/South Carolina Labor & Employment Law Program

PLANNERS AND SPEAKERS

Jennifer L. Bills (planner) is a partner with The Noble Law Firm PLLC in Chapel Hill. She has been litigating and advocating on behalf of employees and individuals for over 20 years. She is a frequent teacher and lecturer on Employment Law and primarily represents employees facing discrimination. Jennifer conducts workplace investigations and training for managers and employees regarding best employment practices and compliance issues. She is an Association of Workplace Investigators (AWI) certificate holder and teaches Disability Law as an Adjunct Professor at the University of North Carolina School of Law in Chapel Hill.

Graduating from Haverford College with a major in Sociology, Jennifer worked as an advocate with non-profit organizations in Washington, DC before attending Northeastern University School of Law. Upon graduation, she clerked for U.S. District Court Judge Gene Carter in Federal District Court in Portland, Maine. Jennifer then worked for two small Boston law firms practicing civil rights and employment law before coming to North Carolina in 2008. Jennifer was recognized as a Rising Star while practicing in Boston, MA.

[Click here](#) for more information about Jennifer.

Jack E. Cohoon (planner) is a partner with Burnette Shutt & McDaniel PA in Columbia, SC. He focuses his legal practice on employment law, civil rights, appeals, and administrative law.

He's an experienced litigator who has successfully challenged agencies and policies to move law forward. Jack has won in trial and appellate courts as well as before state and federal government agencies.

The common thread running through his cases: A drive to defend those whom the legal system has wronged.

Jack battles tirelessly to remove barriers for clients, working to eliminate roadblocks that prevent them from obtaining jobs and moving toward better futures. This includes seeking pardons, criminal record expungement, working to correct errors in criminal records, defending occupational licenses, and reinstating driver's licenses. He has successfully sued under the Fair Credit Reporting Act to correct errors on a background report that denied a client a job opportunity.

He developed legal clinic models now used throughout the state, including workshops on criminal records and driver's licenses. Jack also has taught numerous continuing legal education programs on topics such as representing clients in administrative law proceedings, unemployment benefits, and criminal records.

Jack is a member of the South Carolina Bar, Richland County and Lexington County Bar Associations. Jack received his B.A. degree with honors from the University of Georgia and his J.D. degree from the University of South Carolina School of Law.

[Click here](#) for more information about Jack.

L. Nicole Patino (planner) is owner of Law Offices of L. Nicole Patino PLLC in Greensboro. She is a labor and employment attorney who diligently and zealously advocates both public and private sector clients, whether they be employers, employees, or local governmental agencies.

Nicole graduated from Elon University School of Law where she was a staff member of the Elon Law Review in 2013-2014 and became Notes and Comments Editor during the 2014-2015 school year. Nicole was a law clerk with the Law Offices of Fred T. Hamlet during her second and third year in law school. She continued her legal career as an associate with Law Offices of Fred T. Hamlet for five years until Mr. Hamlet's death. Her goal is to honor his memory and work with the same dedication and devotion to the ethical practice of law.

Before attending law school, Attorney Patino worked as a substance abuse counselor where she gained knowledge of HIPAA, FMLA, federal privacy laws, and medical records. She also gained experience working with EAPs, human resources personnel, employers, and employees. Attorney Patino uses her knowledge of medical records and medical practices in her representation of medical practices, nurses, and in litigating cases which require medical knowledge.

[Click here](#) for more information about Nicole.

T. Cullen Stafford (planner) is a member of Wyrick Robbins Yates & Ponton LLP in Raleigh. He represents management in employment litigation matters involving wage and hour disputes, breach of contract, restrictive covenants, unfair competition, discrimination, harassment, and unfair labor practice charges. He also represents clients in commercial disputes, including such areas as trade secret misappropriation, intellectual property, construction litigation, and other complex business litigation.

Cullen has represented clients at all stages of litigation in state and federal court and routinely represents clients in proceedings before the N.C. Department of Labor, the Equal Employment Opportunity Commission, and other federal and state agencies. Cullen represents companies in a variety of industries, including healthcare, construction, transportation, manufacturing, retail,

education, and finance. In addition, Cullen counsels employers on a variety of issues, including reductions in force, terminations, regulatory compliance, and drafting effective employment agreements.

Cullen is a member of the North Carolina Bar Association and the Georgia State Bar. Cullen graduated cum laude from Emory University School of Law, where he received awards for outstanding achievement in Negotiations and Disability Discrimination. During law school, Cullen clerked for the Georgia Supreme Court.

[Click here](#) for more information about Cullen.

Chandra Austin Stallworth (planner/moderator) is an associate attorney with Richardson Plowden & Robinson P.A. in Columbia, SC. She focuses her practice in General Litigation and Employment Law.

Prior to joining Richardson Plowden, Chandra worked as a Judicial Law Clerk for The Honorable Jocelyn Newman. Prior to that, she was a law clerk for Richland County School District One. Before starting her legal career, Chandra taught for four years at Auburn University with the Honors College. Additionally, she held research fellowships at Utah State University and The University of Minnesota. She is a member of the South Carolina Bar, Richland County Bar Association, and the SC Defense Trial Attorneys' Association.

Chandra earned her Juris Doctor, *cum laude*, from the Charleston School of Law in December 2018. She earned her Doctor of Philosophy in Work and Human Resource Education in May 2009 and her Master of Education in Business and Industry Education in August 2007 from the University of Minnesota. She earned her Bachelor of Science in Graphic Communication Systems from North Carolina Agricultural & Technical State University.

In her free time, she enjoys traveling and spending time with her family.

[Click here](#) for more information about Chandra.

Kathryn F. “Katie” Abernethy is a partner with the Noble Law Firm in Chapel Hill. She joined the employment law firm in January 2018 following more than 15 years in the defense bar at large international law firms. Katie has represented clients in matters arising under Title VII, the North Carolina Retaliatory Employment Discrimination Act (“REDA”), the North Carolina Whistleblower Statute, the North Carolina False Claims Act, the North Carolina Wage & Hour Act, the Fair Labor Standards Act, and other state and federal employment statutes. Katie has extensive background and experience as a litigator in class and collective action cases. She has also developed significant experience with navigating the regulatory frameworks surrounding medical practice and related industries. Among other things, Ms. Abernethy has represented physicians and medical providers in Administrative Law Judge proceedings and appeals before the U.S. Department of Health and Human Services and with respect to licensure proceedings.

Katie is admitted to practice before the State Bars of both North Carolina and Illinois, and in the United States Courts of Appeals for the Third, Fourth, Fifth and Seventh Circuits. She has written and presented on topics relating to e-discovery, civil procedure, insurance coverage and the Medicare payment process.

Katie received her J.D. degree from Washington University School of Law in 2001. She graduated Order of the Coif (top 10% of law school graduating class) and was an Articles Editor for the Washington University Law Quarterly. She has a Bachelor of Arts in History from Westminster College in Fulton, Missouri. While practicing as an employment attorney in Chicago, Katie was named a North Carolina “Super Lawyer” in 2022.

[Click here](#) for more information about Katie.

Susanna S. Birdsong is the General Counsel and Vice President of Compliance at Planned Parenthood South Atlantic in Raleigh, a reproductive healthcare provider with clinics in four states, including North Carolina, South Carolina, West Virginia, and Virginia. Before joining Planned Parenthood in 2020, Susanna worked at the ACLU of North Carolina and the National Women's Law Center. She has a law degree from American University's Washington College of Law, and a Master of Social Work and undergraduate degree from the University of North Carolina at Chapel Hill.

[Click here](#) for more information about Susanna.

Thomas M. Colclough currently serves as the Director of Field Management Programs located at EEOC's Headquarters Office in Washington, DC. Thomas has over 30 years of experience with EEOC investigating charges and complaints of discrimination and leading high performing teams. He has served in various leadership positions at EEOC, e.g., Enforcement Supervisor, Local Director, Area Director, Systemic Coordinator, Deputy District Director and District Director.

Only June 19, 2022, Thomas was promoted to the position of Director of Field Management Programs. In this position, he plays a key role in fulfilling the agency's mission through strategic enforcement management and planning.

A native of North Carolina, Thomas attended Saint Augustine's College in Raleigh, North Carolina, where he received his Bachelor of Science in Business Administration. He earned his Master's degree from the University of North Carolina at Greensboro. Thomas is also a graduate of the military's Command and General Staff College and the Office of Personnel Management's Federal Executive Institute.

In 2005, Thomas retired from the North Carolina National Guard after 23 years of service (active, reserve and guard) at the rank of Lieutenant Colonel.

[Click here](#) for more information about Thomas.

Bartina L. Edwards is an employment and business lawyer who is MD-110 Certified, mediation and collaborative law trained. She celebrates her 17th year of practicing in her own firm, The Law Office of Bartina Edwards, PLLC in Charlotte, NC where her special focus is on navigating the workplace, workplace issues and business disputes.

Bartina has utilized Collaborative Law as part of her corporate and entrepreneurial background giving her a unique ability to advise companies while being an employee advocate. Helping businesses understand the strategic benefits of helping their employees navigate the workplace by replacing symptomatic responses with equity, inclusion and collaborative principles also led her to implement her vision of a workplace culture firm, CP3 Paradigm, LLC, where she is a co-founder.

Bartina is also one of the founding board members of the N.C. Civil Collaborative Law Association, an NCAJ PAC Trustee, immediate past Board of Governor, serves as an officer on the NC Bar Association Employment Law Council, is the Chair of the Employment Law Section of the Mecklenburg County Bar and a Director on the College of Charleston Foundation Board.

Bartina is a graduate of The College of Charleston and received her J.D. cum laude from NCCU School of Law.

[Click here](#) for more information about Bartina.

April Harris-Britt, Ph.D. is a licensed psychologist who maintains an active practice in NC and VA while also engaging in research and teaching at the University of North Carolina at Chapel Hill and Fielding Graduate University. In addition to providing child, adolescent, adult, and family therapy, Dr. Harris-Britt conducts comprehensive psychological evaluations and forensic evaluations. Specific areas of expertise include trauma and violence, adoption and attachment, medically fragile children, divorce transitions, ADHD and learning disabilities, autism spectrum disorders, and multicultural issues.

Dr. Harris-Britt's primary orientation is to utilize a systems-based, holistic approach to wellness. She is actively involved in several committees and task forces for the American Psychological Association, North Carolina Psychological Association, and the Association for Family and Conciliatory Courts.

Dr. Harris-Britt is currently a member of the Board for the Center for Cooperative Parenting, APA Advocacy Coordinating Committee, APA Working Group to Review Scientific Literature for High Conflict Family Relationships and AFCC Task Force on Model Standards of Practice for Child Custody Evaluations.

[Click here](#) for me information about Dr. Harris-Britt.

Katherine Dudley “Kathy” Helms is a shareholder and former managing shareholder of the Ogletree Deakins Nash Smoak & Stewart PC office in Columbia, SC. She has practiced in the area of labor and employment for all but one of her 38 years of practice.

Kathy has represented companies and individuals in both the private and public sectors ranging from production line supervisors to company executives. Having represented clients in forums from mediation to the United State Supreme Court allows her the perspective and knowledge to work closely with her clients to offer creative solutions to age-old problems.

Although Ms. Helms represents a wide spectrum of employers, she has a particular emphasis in the health care industry including employment matters involving medical residents, physicians, and the range of health care and particularly hospital employees.

Kathy is a member of the South Carolina Bar, American, Arkansas and Georgia Bar Associations. She is also a member of the National Association of Women Lawyers, South Carolina Association of Women Lawyers, Women Lawyers Alliance and the Litigation Counsel of America.

Kathy is a graduate of the University of Arkansas and Georgia State University College of Law. She has received many forms of recognition of excellence in the law including being honored as the Distinguished Lawyer of the Year 2021 by the Labor & Employment Law Section of the SC Bar.

[Click here](#) for more information about Kathy.

Sean F. Herrmann is a partner at Herrmann & Murphy PLLC in Charlotte, North Carolina. He represents workers in employment law disputes and False Claims Act whistleblower matters. Sean is licensed in both North and South Carolina, and he represents employees throughout both states.

Sean graduated from the University of Illinois College of Law, where he graduated *magna cum laude* in 2012. Sean has been named to the Super Lawyers 'Rising Stars list since 2019. He has received Best Lawyers in America recognition each year since 2018 and was recognized by them as the 2023 "Lawyer of the Year" for employee-side Employment Law in Charlotte, North Carolina. Sean is Chair of the North Carolina Bar Association's Labor and Employment Section.

[Click here](#) for more information about Sean.

Grant Burnette LeFever is an attorney with Burnette Shutt & McDaniel, PA, in Columbia, SC, where she focuses her legal practice on employment law, including a range of civil rights and discrimination issues. She also practices family law and education law, including issues involving Title IX, special education, school discipline and teacher employment issues. In addition, Grant is on the litigation team representing Planned Parenthood South Atlantic in its lawsuit challenging the six-week abortion ban in South Carolina.

Grant has been selected by her peers for inclusion in: Ones to Watch, The Best Lawyers in America 2021 to present, in the fields of labor and employment law, civil rights law, education law, family law, and litigation. She also has been recognized in Super Lawyers Rising Stars and Legal Elite of the Midlands.

Grant is a 2018 graduate of the University of South Carolina School of Law. Prior to law school, Grant earned a master's degree in Southern Studies from the University of Mississippi, where she concentrated on the long Civil Rights Movement. It is this work that ultimately led to her decision to pursue a career in law. She graduated *cum laude* from Presbyterian College with a bachelor's degree in English and History.

[Click here](#) for more information about Grant.

George A. Reeves III is a partner with Fisher Phillips LLP in Columbia, South Carolina. His practice primarily involves representation of management in employment and labor litigation involving trade secrets and restrictive covenant; discrimination, harassment, and retaliation under federal and state law; wage and hour litigation and arbitration; and employment litigation under state law for workplace torts such as defamation, wrongful termination, invasion of privacy, and negligent hiring or supervision. George also represents employers in audits and investigations by federal and state agencies related to whistleblower complaints and wage and hour practices and worker misclassification issues.”

George is a frequent presenter on employment and labor issues for local and state Society for Human Resource Management (SHRM) chapters, chambers of commerce and other professional organizations. Prior to attending law school, George served in the United States Navy.

George is a member of the South Carolina Defense Trial Attorneys' Association. He received his B.A. degree from Augusta State University and his J.D. degree from the University of South Carolina School of Law.

[Click here](#) for more information about George.

Paul E. Smith is a partner at Patterson Harkavy LLP in Chapel Hill. An integral member of the firm's civil rights and appellate practice, Paul primarily represents employees, labor unions, and the victims of police misconduct. He is active in the North Carolina Bar Association Labor and Employment Section and the North Carolina Advocates for Justice.

Paul has successfully represented individuals and labor unions in private arbitration, the North Carolina Industrial Commission, State and Federal trial courts, and before the North Carolina Court of Appeals and North Carolina Supreme Court. In 2019, Governor Roy Cooper appointed him to the North Carolina Occupational Safety and Health Review Commission, where he currently serves as Chair.

Paul graduated from UNC-Chapel Hill in 2007 and from Columbia Law School in 2012, where he was a Senator Daniel Patrick Moynihan Fellow and a James Kent Scholar.

[Click here](#) for more information about Paul.

Kyle R. Still is a member of Wyrick Robbins Yates & Ponton LLP in Raleigh. He is the Practice Group Leader for the firm’s Labor and Employment Practice Group. He regularly represents, counsels, and trains clients regarding all state and federal employment laws, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (“ADEA”), the Americans with Disabilities Act (“ADA”), the Fair Labor Standards Act (“FLSA”), the Family and Medical Leave Act (“FMLA”), the Retaliatory Employment Discrimination Act (“REDA”), and state wage and hour laws. He also advises clients and litigates cases related to these issues, as well as regarding covenants not to compete, trade secrets, drug testing, employment terminations and severance, employment policies, and other employment-related issues.

Kyle is admitted to practice before all federal and state courts in North Carolina. He regularly represents clients in proceedings in state and federal court and before the U.S. Department of Labor (“US DOL”), the North Carolina Department of Labor (“NCDOL”), the Equal Employment Opportunity Commission (“EEOC”), the National Labor Relations Board (“NLRB”), and other federal and state agencies.

Kyle received his B.A. degree, with honors, from the University of North Carolina at Chapel Hill and his J.D. degree, with honors, from the University of North Carolina at Chapel Hill School of Law. While in law school, Kyle was a published member of the *North Carolina Law Review*, where he also served as a Comments Editor and received the Thornton Brooks Award. Prior to joining the firm, Kyle was a shareholder at a large North Carolina-based firm.

[Click here](#) for more information about Kyle.

M. Todd Sullivan is a founding member of Fitzgerald Hanna & Sullivan PLLC in Raleigh. He is a 1994 graduate of Cornell Law School and has practiced in North Carolina for almost thirty years, the majority of which with the firm now known as Womble Bond Dickinson. Todd represents former employers, new employers, and key employees in departure matters and has been litigation counsel in some of North Carolina’s most noteworthy employee departure litigations and arbitrations.

Todd has co-taught the Pre-Trial Litigation course at Duke Law School and routinely speaks and writes about employee departure issues. Todd also developed a unique reputation for his *pro bono* representation of less-well-off defendants in noncompete litigation that includes representation of hair stylists, lawn maintenance workers, and chefs. He has presented at this conference in both North Carolina and South Carolina on numerous occasions in past years.”

Todd received his B.A. degree, magna cum laude, from Lake Forest College and his J.D. degree from Cornell Law School.

[Click here](#) for more information about Todd.

Jonathan “Jon” Wall is a partner with Higgins Benjamin PLLC in Greensboro, NC. He specializes in employment law litigation, including class actions.

Jon has chaired the Labor & Employment Law sections of both the North Carolina Bar Association and the North Carolina Advocates for Justice, as well being recognized in multiple years by Legal Elite and Super Lawyers. He has served on Elon University School of Law's Board of Advisors since the school opened in 2006, and he also currently serves on the Board of the North Carolina Wildlife Federation.

Jon received his B.A. degree from Duke University and his J.D. degree from Washington & Lee University School of Law.

[Click here](#) for more information about Jon.

Laura J. Wetsch was born in Fargo, ND, raised in Minot and Bismarck, ND, married a guy from Killdeer, ND, and graduated from the University of North Dakota School of Law in 1985 – in that order. After law school she was a federal law clerk and then practiced law in North Dakota until 1991 when she and her family moved to North Carolina (the other Great North State). She is a partner in the Raleigh firm of Winslow Wetsch, PLLC, and is the author of “A Practitioner’s Guide to North Carolina Employment Law,” and co-author of the North Carolina chapter in the ABA’s “Employment at Will: A State-By-State Survey.” She has previously served as the Chair of the NCBA Labor & Employment Law Section, and the Chair of the NCAJ Employment Law Section, and has been named to Best Lawyers in America, N.C. Super Lawyers, N.C. Super Lawyers’ Top 50 Women Lawyers, and N.C. Legal Elite.

[Click here](#) for more information about Laura.

Erika K. Wilson is a Professor of Law, the Wade Edwards Distinguished Scholar and Thomas Willis Lambeth Distinguished Chair in Public Policy at the UNC School of Law in Chapel Hill. Her areas of expertise include civil litigation, civil rights, clinical legal education, critical race theory, education law and public policy.

Professor Wilson's scholarship on issues related to education law and policy, and the intersection between race and the law, has appeared in the Harvard Law Review, Yale Law Journal Forum, Cornell Law Review, and UCLA Law review, among others. In 2016, Professor Wilson's work was selected for presentation at the Harvard Yale Stanford Junior Faculty Forum. In 2017 and 2022, she was awarded the James H. Chadbourn Award for Excellence in Scholarship from the UNC School of Law. In 2020 she also founded the Critical Race Lawyering Clinic, a clinic that teaches law students how to bridge the gap between CRT theory and praxis.

Professor Wilson received her B.A. degree, *cum laude*, from the University of Southern California and her J.D. degree from the UCLA School of Law.

[Click here](#) for more information about Professor Wilson.

Jordan N. Wolfe has been a Field Attorney at the National Labor Relations Board in the Winston-Salem Subregion 11 office since 2015. Jordan received her B.A. degree, *magna cum laude*, with honors, from the University of North Carolina at Asheville and received her J.D. degree from the University of North Carolina at Chapel Hill School of Law.

[Click here](#) for more information about Jordan.

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CHAPTER II

Continuing to Pivot

Thomas M. Colclough – Washington, DC

**There are no written materials for this chapter.
Please refer to the Appendix for a copy of the PowerPoint presentation slides.**

CHAPTER III

Fourth Circuit Update

Sean F. Herrmann – Charlotte, NC

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Moderator: *Chandra A. Stallworth – Columbia, SC*

Panelists: *Susanna S. Birdson – Raleigh, NC*

Katherine Dudley Helms – Columbia, SC

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Kathryn F. Abernethy – Chapel Hill, NC

Bartina L. Edwards – Charlotte, NC

Kyle R. Still – Raleigh, NC

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CHAPTER VI

DEI

Erika K. Wilson – Chapel Hill, NC

**There are no written materials for this chapter.
Please refer to the Appendix for a copy of the PowerPoint presentation slides.**

CHAPTER VII

Choosing Wellness for Your Mind, Body and Best Life as an Attorney

April Harris-Britt, Ph.D. – Durham

**There are no written materials for this chapter.
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CHAPTER VIII-A

National Labor Relations Board Update

Jordan N. Wolfe – Winston-Salem NC

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M. Todd Sullivan – Raleigh, NC

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North Carolina Update

Laura J. Wetsch – Raleigh, NC

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North Carolina Update

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Jonathan “Jon” Wall – Greensboro, NC

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South Carolina State Update

George A. Reeves III – Columbia, SC

**There are no written materials for this chapter.
Please refer to the Appendix for a copy of the PowerPoint presentation slides.**

APPENDIX
PowerPoint Presentations

CHAPTER I

2022 U.S. Supreme Court Commentary: Employment Law

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CHAPTER I
2022 U.S. Supreme Court Commentary: Employment Law

Paul E. Smith – Chapel Hill

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CHAPTER I
2022 Supreme Court Commentary: Employment Law

Jonathan R. Harkavy

This article is dedicated to all who labor in their own ways to bend the arc of the moral universe toward justice, including especially those who have cared for and comforted victims of the COVID-19 pandemic and those who are defending women's liberty, reproductive autonomy and personal safety and dignity.

* * *

Thank you to Nahomi Harkavy - inspiring muse, tireless copyreader and devoted partner in life, learning, parenting, grandparenting and lawyering - for her insights, editing and enduring patience with her husband, the author of this article. I am, of course, solely responsible for the article's content and tone.

The October 2021 Term of the Supreme Court of the United States was both monumental and breathtaking, as a freshly invigorated and willful majority - anointed by the Federalist Society and appointed by four Republican Presidents - erased women's Constitutional right to abortion, expanded a right to carry guns outside the home, approved Christian praying at public school events in derogation of the Establishment Clause, restricted federal agency administration of the Clean Air Act to combat climate change, and excluded American citizens in Puerto Rico from the Social Security disability program - among a host of other decisions advancing an ideologically inspired "to do" list. And, lest one believe that this majority was ruling as a group of principled originalists, the truth is, as put by the keenest of Supreme Court journalists, "They did it because they could." Linda Greenhouse, "Requiem for the Supreme Court" in *The New York Times* on June 24, 2022 (<https://www.nytimes.com/2022/06/24/opinion/roe-v-wade-dobbs-decision.html>). To no one's surprise, the 2021 Term's dizzying array of high profile rulings captured the public's attention in unprecedented fashion, thanks in part to unrelenting and sometimes frenzied media coverage. For purposes of this article, however, the blur of the majority's many milestone decisions also had the effect of obscuring what was a busy and eclectic, yet somewhat odd, term for our workplace jurisprudence. And so, this article seeks to shine a light on an employment law agenda now in full flower - and most notably, a product of the same unrestrained majority that provokes concern about its broader effect on our increasingly fragile American republic.

Specifically as to employment law, in clear view is the majority's continuing program to enhance the business community's prerogatives while limiting employees' voice and agency at the inevitable expense of American workers, their families, and possibly the broader economy. As a consequence, the imperatives of equal opportunity and workplace fairness that Congress

has mandated through a web of federal statutes seems in more jeopardy than ever, as employees' rights are imperiled while their voices are muffled. And, dare I mention (yet again!) a worry I have expressed for the past several terms -- that a disturbing thread of religious nationalism dressed up in Free Exercise garb continues to run through the opinions of several members of the dominant majority. To say it plainly, this creeping infusion of Christian creed puts in harm's way a foundational principle of the American republic that ours is a secular - not sectarian - nation. *See*, U.S. Const., Art. I, Establishment Clause. But, readers, fear not this subjective introduction. Please read on and judge for yourselves the measure of the 2021 Term's employment-related opinions.

Section I of this article summarizes each employment-related decision of the 2021 Term, as well as a number of non-employment decisions likely to affect the shape and scope of workplace regulation and worker-management relations. Included are cases not only from the Court's merits (or argument) docket, but also dissents from denials of certiorari and opinions appearing in the Court's orders lists covering filings from the emergency or so-called "shadow docket." The cases are arranged by broad substantive topics with brief personal commentary at the beginning of each topical subsection. Additionally, my own take on each principal decision is offered in the italicized paragraphs immediately following its case summary. That personal commentary ranges from the political to the predictive and from the philosophical to the practical. The aim is to assess the likely impact of these decisions on all stakeholders in the employment relationship, including working people, business owners, labor organizations and benefit providers.

Section II is a descriptive listing, current as of the date of this article, of grants of certiorari presenting employment-related issues to be decided in the upcoming October 2022 Term scheduled to begin on Monday, October 3, 2022. Included is the question presented by each granted petition for certiorari, along with a sentence or two describing the pertinence of the case to our employment jurisprudence.

Section III brings this article to a close with a few additional observations about the 2021 Term's opinions rendered as the pandemic persists and political fallout continues from the 2020 election and its disturbing - and some say seditious - aftermath. This section is also sprinkled with a few suggestions about how best to assess the Court's employment decisions, just as labor organizing is becoming more energetic with the advent of a post-Millennial generation of workers and the nature of work itself is continuing to evolve in challenging ways.

I. Decisions of the 2021 Term

Set forth in this section are all the Court's decisions from the merits docket that arise under our labor and employment laws. Additionally, a number of non-employment cases that either bear on worker-management relations or deal with adjective issues, such as standing and remedies, are also covered, sometimes in abbreviated fashion. As you will see, even though this term did not offer much in the way of path-marking employment law decisions and completely lacked any opinion concerning labor relations, there are a wealth of developments worthy of close attention by all who are interested in our employment jurisprudence.

A. Labor Relations.

The notable absence of any case arising under the National Labor Relations Act ("NLRA") should not be seen as a signal that the Court's longstanding interest in labor relations is flagging. To the contrary, since the inauguration of President Biden, both union and management labor lawyers have focused considerable attention on a reconstituted National Labor Relations Board ("Board") with a majority of Biden appointments and most especially on the Board's new General Counsel, Jennifer A. Abruzzo, and her vigorous stance on enforcement of the NLRA. *See, e.g.*, Office of the General Counsel Memorandum GC 21-06 (September 8, 2021) ("Seeking Full Remedies"). It is not, therefore, daring to predict that these developments will prompt the appearance of one or two labor law cases on the Court's merits docket in the coming terms. *See, e.g.*, Motion dated February 6, 2022 for Summary Judgment in *Pathway Vet Alliance, LLC, d/b/a Thrive Pet Healthcare*, (accessed on July 5, 2022 at <https://www.nlr.gov/case/03-CA-291267>).

B. Employment Discrimination.

Traditional race, sex, age and disability claims took a back seat to more esoteric employment discrimination disputes during the term just ended. The principal case split the Court 5 to 4 on an arcane sovereign immunity and war powers point on its way to a rare victory for an employee seeking damages against a state employer that refused to accommodate his return from military duty. Additionally, the Court dealt with employment discrimination claims stemming from COVID-19 vaccination requirements in both the federal and private sectors. Those decisions, hopefully (but not assuredly) of diminishing importance when the pandemic abates, are treated in abbreviated fashion below.

On the horizon for next term and beyond, however, are both affirmative action and reproductive healthcare issues that could alter how both race and sex discrimination disputes in the workplace are viewed. Indeed, given the current majority's willingness to confront and reconfigure doctrines they do not like, it seems all but certain that the Court will revisit the equal opportunity mandate that Congress has fashioned in a variety of employment discrimination laws.

Torres v. Texas Dep't of Public Safety, 597 U.S. ---, 142 S. Ct. ---, 212 L. Ed. 2d --- (2022)

The Court held that Congress lawfully exercised its war powers in authorizing employee suits under the Uniformed Services Employment and Reemployment Rights Act of 1994 for damages against non-consenting States that waived their sovereign immunity when they ratified the Constitution.

Le Roy Torres, a state trooper employed by the Texas Department of Public Safety ("Texas"), enlisted in the Army Reserves in 1989. Torres was called to active duty and deployed to Iraq in November of 2007. Like many soldiers serving in Iraq, he suffered lung damage from exposure to toxic fumes emanating from open air "burn pits" that smoldered 24 hours per day on military bases. These pits emitted thick smoke from burning trash, ammunition, medicine and human waste. One year after his deployment Torres was honorably discharged. Upon his return to Texas, he was diagnosed with constrictive bronchitis, a respiratory condition that narrowed his airways and made breathing difficult. Because he was unable to work in his former position as a trooper, he asked his employer to accommodate his condition by re-employing him in a different job. Texas refused to do so and told him that he would be fired if he refused to report for duty as a trooper in a temporary position. Torres resigned instead of assuming duties he could not perform.

Torres sued Texas in state court, arguing that it had failed to use "reasonable efforts" to accommodate his service-related disability under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). 38 U.S.C. 4313(a)(3). Texas moved to dismiss the suit based on sovereign immunity. The trial court denied the motion, but the Texas Court of Appeals reversed, stating that Congress could not authorize private suits against non-consenting States (except in bankruptcy cases.) Following the Supreme Court of Texas' denial of discretionary review, the Supreme Court of the United States ruled in a non-bankruptcy eminent domain case that upon entering the Union, the States implicitly agreed to yield their sovereignty to federal maintenance of a national military and thus "gave up their immunity from Congressionally authorized suits pursuant to the 'plan of the Convention,' as part of the structure of the original Constitution itself." *PennEast Pipeline Co. v. New Jersey*, 594 U.S. --- (2021) (Slip Opin., p. 14). After its *PennEast* decision, the Court granted Torres' petition for certiorari to decide whether, in light of that decision, USERRA's damages remedy against state employers is constitutional.

The Court, in a 5 to 4 decision, reversed the Texas appellate courts, ruling in an opinion by Justice Breyer that Congress enacted USERRA under its Article 1 power to "raise and support armies" and that by joining the Union, Texas surrendered its immunity from suits for damages by military veterans seeking to reclaim their jobs. Justice Breyer first explains that USERRA embodies job protection for returning veterans and that Congress extended that protection to state employment after the Vietnam War by authorizing private suits for damages.

The Court then addressed whether the Constitution allows this re-employment protection against state employers that do not wish to consent to such suits.

The Court explains that Congress may abrogate state immunity from suit if the State agreed at the founding that their sovereignty would yield as part of the "plan of the [Constitutional] Convention." Reviewing prior instances of so-called structural waivers for suits between states, suits under federal bankruptcy laws, and (in *PennEast, supra*) suits to enforce federal condemnations necessary to build interstate pipelines, Justice Breyer concluded that where a federal power is "complete in itself" and the State consented to the exercise of that power in its entirety by ratifying the Constitution and joining the Union, the State implicitly agreed to yield its sovereignty when Congress chooses to exercise its authority.

Applying the foregoing test, the Court concludes that Congress' power to build and maintain Armed Forces fits what it calls the *PennEast* test. Examining the Constitution's text and history and the Court's precedents, Justice Breyer reasons that the structure of the Constitution prevents states from frustrating the national objective of maintaining an Armed Force in order to provide for the common defense. From Revolutionary War bonuses at state expense through cases involving the national draft and the escheat of veterans' property, Congress may, in Justice Breyer's words, "legislate at the expense of traditional state sovereignty to raise and support the Armed Forces." Slip Opin., p. 9. The Court also rejects arguments by both Texas and the dissent, finding that USERRA clearly supersedes state authority and that various suggestions of state limits are simply attempts to thwart the authority and ability of Congress to maintain a military force for the common defense.

Accordingly, the Court reversed the judgment of the Texas Court of Appeals and remanded the case for further proceedings not inconsistent with the Court's opinion.

Justice Kagan, while joining Justice Breyer's majority opinion, filed a concurring opinion noting that she had joined Justice Barrett's dissent in *PennEast* and explaining that the war powers in this case lie closer to the heart of the Convention's plan than did the power of eminent domain in *PennEast*. Indeed, Justice Kagan emphasizes that the war powers, "more than any other power, and surely more than eminent domain," were complete in themselves and that the ratifying states waived their sovereign immunity to any remedy or suit Congress authorized to provide for the common defense.

Justice Thomas, joined by Justices Alito, Gorsuch and Barrett, dissented in an opinion expressing the view that when the states ratified the Constitution, they did not implicitly consent to private damages suits, whether authorized by Congress' war powers or any other Article I power. In a nearly 30-page opinion, Justice Thomas disagrees with the majority's interpretation of Congress' intent in USERRA to waive immunity and chastises the majority's failure to apply prior decisions. The dissent also concludes that, applying the majority's "plan of the Convention" rationale, the Court wrongly concluded that the states surrendered their immunity against exercise of the war powers. And, finally, Justice Thomas claims that the

Court "overreads" *PennEast* when it fabricates the "complete in itself" test based on a misunderstood snippet from that case. Claiming that "[o]ur sovereign States deserved better," the dissenters decry what they regard as the Court's denial of dignity owed to them in our system of dual federalism.

* * * *

Forget for a moment the deep philosophical chasm between the majority and the dissent on the question of state sovereign immunity. Consider instead that the Court's decision here is a modern rarity - an unequivocal victory for employees seeking to sue an employer for damages. And, speaking of rarities, the lineup of Justices granting workers this access to monetary relief against their employer includes both the Chief Justice and Justice Kavanaugh voting with Justices Breyer, Kagan and Sotomayor. On closer examination, however, this somewhat odd pro-employee majority seems a fragile one. Although no other Justice joined Justice Kagan's concurrence, it is easily conceivable that the Chief Justice and Justice Kavanaugh, as well as Justice Kagan herself, would not find a waiver of immunity in other cases unless the exercise of Congressional power, like the war powers here and the eminent domain power in PennEast, is "complete" in itself.

Turning back to the pitched Constitutional battle between the opinions of Justices Breyer for the Court and Justice Thomas for the dissenters, both sides reviewed the same text, history and structure of Article I's war powers and Congress' enactment of USERRA and reached diametrically opposed conclusions. While Justice Breyer relies on a judicially concocted test of "completeness" in assessing the Constitution's conferral of war powers on Congress, his regard for how sovereign immunity and waivers have played out in the Court and in our history seems more compelling than the dissenters' plea for according more "dignity" to the states. In the end, of course, the decision was ultimately a matter of power - that is, which side could command at least five votes. That does not answer who wins the states' rights debate, but it does answer which party wins. And in this case, it was the employee seeking re-employment who won.

The COVID-19 Vaccine Cases

As noted in this section's opening paragraph, the Court dealt with both private and public sector claims in the wake of varying requirements that employees be vaccinated against COVID-19 in order to keep their jobs. Most claims arose in urgent fashion, ordinarily without full briefing and argument, on the Court's emergency or so-called "shadow" docket. Set forth below in abbreviated fashion, mainly for reference and without analysis, are the Court's decisions stemming from what is, one hopes, a transient (albeit now in its third year) public health emergency that will soon end.

Perhaps most notable about this group of decisions is a contrast between the Court's readiness for authorizing both public and private health-related employers to require their

employees to receive COVID-19 vaccine as a condition of keeping their jobs and its more cautious approach to regulations targeting the vast bulk of private sector employees for mandatory vaccination. Also significant in reviewing these employee vaccine opinions is a Free Exercise defense to mandatory vaccination based on sincerely held religious beliefs.

**Biden v. Missouri, No. 21A240 and
Becerra v. Louisiana, No. 21A241
595 U.S. ---, 142 S. Ct. 647, 211 L. Ed. 2d 433 (2022)**

The Court, *per curiam*, stayed injunctions against enforcement of a federal requirement that staff in facilities receiving Medicare and Medicaid funding be vaccinated against COVID-19 (unless exempt for medical or religious reasons.)

Here, the Court, in a 5 to 4 *per curiam* decision with the Chief Justice and Justice Kavanaugh joining Justices Breyer, Sotomayor and Kagan, permitted enforcement of a federal vaccination requirement for workers in facilities (mostly healthcare-related) receiving federal funding under the Medicare and Medicaid laws. This program did provide an important exemption: Employees with medical or sincerely held religious reasons for declining the COVID-19 vaccine were exempt from the mandatory vaccination program.

Justice Thomas, joined by Justices Alito, Gorsuch and Barrett, filed an opinion dissenting from the Court's granting of the stays because the Government failed to make a strong showing that Congress had authorized the Centers for Medicare and Medicaid Services ("CMS") to force healthcare workers to choose between vaccinations and their jobs. Justice Alito, joined by Justices Thomas, Gorsuch and Barrett, also filed a separate opinion dissenting from the Court's action. While endorsing Justice Thomas' reasoning, Justice Alito also opined that CMS failed to show good cause for skipping notice-and-comment rulemaking under 5 U.S.C. 553.

**Does v. Mills, No. 21A90
595 U.S. ---, 142 S. Ct. 17, 211 L. Ed. 2d --- (2021)**

The Court denied an application for injunctive relief against a state regulation requiring that healthcare workers receive COVID-19 vaccines in order to keep their jobs.

Here the Court, by a 6 to 3 vote, denied an application presented to Justice Breyer (and by him referred to the Court) to enjoin a Maine regulation requiring healthcare workers to receive COVID-19 vaccine in order to keep their jobs. The Court denied the applications for injunctive relief on a *per curiam* basis without an opinion. Justice Barrett, joined by Justice Kavanaugh, concurring in the denial, expressed the view that using the Court's emergency or shadow docket to "force" a merits preview of a case it would be unlikely to take -- and to do so

on a "short fuse" without full briefing and oral argument -- is a discretionary consideration that counsels against granting extraordinary relief in this case of first impression.

Justice Gorsuch, joined by Justices Thomas and Alito, filed an opinion dissenting from the Court's denial of injunctive relief against this state program. Noting first that Maine's program, unlike comparable programs in most other states, has no exemption for those whose sincerely held religious beliefs preclude them from consenting to vaccination. One applicant seeking relief was a physician operating a medical practice, and eight others were healthcare workers (one of whom had already lost her job because of her refusal to be vaccinated.) Expressing optimism about the likelihood that applicants will succeed on the merits of their religion-based claims, Justice Gorsuch concludes that Maine's program permitting some non-religious exemptions cannot survive strict scrutiny because vaccination rates are high and new treatments are effective, thus making the lack of a religious exemption nearly irrational.

**National Federation of Independent Business v. Dep't of Labor, No. 21A244
Ohio v. Dep't of Labor, No. 21A247
595 U.S. ---, 142 S. Ct. 661, 211 L. Ed. 2d 448 (2022)**

The Court stayed a federal government COVID-19 employee vaccination mandate applying to employers with 100 or more employees and pre-empting contrary state laws.

On November 5, 2021, the Secretary of Labor, acting through the Occupational Safety and Health Administration ("OSHA"), published a vaccine mandate for much of the nation's workforce. The mandate covered virtually all employers with 100 or more employees. It required that covered workers (estimated to be about 84.2 million) be vaccinated against COVID-19 at the risk of losing their employment (with an exception for workers who test weekly on their own time and at their own expense and wear a mask each workday.) Immediately upon OSHA's publication of the mandate, employers, trade groups, States and non-profits sought review in every circuit. The cases were consolidated in the Sixth Circuit, which denied *en banc* treatment and dissolved a stay of the mandate that had been issued by the Fifth Circuit. Upon applications by various parties to the Supreme Court seeking a stay of OSHA's mandate, the Court consolidated two applications (one from the National Federation of Independent Business, and one from a coalition of States) and heard expedited argument on January 7, 2022.

In a *per curiam* decision the Court granted the applications for stays of the vaccination mandate. Disagreeing with the Sixth Circuit, the Court concluded that a stay of OSHA's rule is justified because the applicants are likely to succeed on their claim that the Secretary of Labor lacked authority to impose the mandate. Noting that the rule is a "significant encroachment" into the lives and health of a vast number of employees, the Court finds no Congressional authorization for such public health action that falls outside of OSHA's sphere of expertise.

Disputing the Solicitor General's argument that OSHA is simply regulating "work-related dangers," the Court denies that COVID-19 is a universal risk and not an occupational hazard in the workplace. And, the Court notes that there is no historical precedent for OSHA's rule. Turning to the equities of withholding the relief sought by the applicants, the Court declines to weigh the costs and benefits of the mandate. Instead, it declares that Congress is the place for doing so, repeating that Congress did not confer such power on OSHA.

Justice Gorsuch, joined by Justices Alito and Thomas, filed a concurring opinion expressing the view that the "major questions" doctrine requires that Congress "speak clearly" if it wishes to assign to an executive agency decisions of "vast economic and political significance." Concluding that Congress did not do so here, Justice Gorsuch reminds that sweeping health standards affecting employees' lives outside the workplace have historically been regulated at the state and federal levels by authorities with more explicit authorization and broader powers.

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented in an opinion that accused the majority of seriously misapplying applicable legal standards and impairing the federal government's ability to deal with the "unparalleled threat that COVID-19 poses to our Nation's workers." Summarizing his main point, Justice Breyer lamented that the Court was displacing the judgments of Government officials who were given responsibility for responding to workplace health emergencies.

C. Employee Wages and Benefits.

The 2021 Term's employee wage and benefits decisions can best be described as an eclectic collection. Ranging from workers' compensation to retirement plans to dual-service military pensions to disability benefits for citizens in Puerto Rico, there was a remarkable degree of unanimity amongst the Justices about how to decide the following cases. Aside from this corner of employment law, however, unanimous or near-unanimous decisions were few and far between.

One other benefits decision worth a passing mention is *Marietta Mem. Hosp. Employee Health Benefit Plan v. DaVita Inc.*, 596 U.S. ---, 142 S. Ct. ---, 212 L. Ed. 2d --- (2022). While not dealing with an employment issue, the effect of the Court's ruling on the thousands of present or former workers or family members undergoing dialysis for end-stage renal disease is significant. The Court decided in a suit by a dialysis provider that a health plan offering all participants - including those with end-stage renal disease - the same limited coverage for outpatient dialysis does not violate federal Medicare law. Justice Kagan, joined by Justice Sotomayor, dissented.

**United States v. Washington, 596 U.S. ---, 142 S. Ct. ---,
212 L. Ed. 2d --- (2022)**

The Court held that Washington's special workers' compensation program for federal contract workers at the Federal Government's Hanford clean-up site is unconstitutional.

The United States Government purchased the "Hanford site" in the State of Washington during World War II to produce nuclear weapons there. Work at the site generated a massive amount of radioactive and chemical waste that the Federal Government has been trying to remediate for decades at a cost of billions of dollars. Most of the clean-up workers are federal contract workers employed by private companies that contract with the Federal Government. In 2018 Washington enacted a workers' compensation program that all parties agree applies only to these federal contract workers. (Other workers at the site are either federal employees who work directly for the Federal Government, state employees who work for the State of Washington or employees of private companies that do not contract with the Federal Government.) Washington's program makes it easier for the target group of federal contract workers to obtain workers' compensation by means of a lifetime rebuttable presumption (the "causal presumption") that certain diseases and illnesses are caused by work at the Hanford site. Because the Federal Government pays workers' compensation claims for these workers, the Washington program increases the Federal Government's costs.

Claiming that the Washington law discriminated against the Federal Government and thus violated the Supremacy Clause, the United States sued the State of Washington. The United States argued that its waiver of immunity for state workers' compensation laws applicable to Federal Government projects was inapplicable here because the Washington law imposed higher costs on the Federal Government than on other employers subject to the state's workers' compensation regime. The district court ruled that the state law was constitutional, concluding that it fell within the scope of Congressionally authorized immunity for state workers' compensation programs. The Ninth Circuit affirmed, and the Supreme Court granted certiorari to determine the constitutionality of Washington's law.

The Court unanimously held, in an opinion by Justice Breyer, that Washington's law discriminates against the Federal Government and is unconstitutional under the Supremacy Clause because when Congress waived immunity for state workers' compensation laws applicable to federal projects, it did not unambiguously include discriminatory laws.

Justice Breyer's opinion first rejected Washington's argument that the case is moot because its law was amended to apply the causal presumption to "any worker at a radiological hazardous waste facility," not just federal contract workers at the Hanford site. Concluding that it is not "impossible" that the United States could recoup or avoid paying millions of dollars of workers' compensation claims (depending, of course, on how the amended law is applied), the

Court declined to find the Federal Government's dispute with the State moot.

On the merits, Justice Breyer explains that Washington's law singles out the Federal Government for unfavorable treatment and thus violates the principle that states may not increase costs for the Federal Government in a discriminatory or non-neutral way. The Court notes that on its face Washington's law treated certain federal workers differently and imposed costs on the Federal Government that state or private entities did not have to bear. But, Washington argued that Congress' workers' compensation waiver in 40 U.S.C. 3172(a) is a "complete" one for federal projects - even where the state singles out a class of workers whose workers' compensation coverage will cost the Federal Government more. Rejecting that argument, the Court notes that statutory waiver can reasonably be read more narrowly, especially because it requires that states apply the law to federal premises "in the same way and to the same extent as if the premises were under [state jurisdiction.]" Accordingly, the Court concludes that the waiver does not "clearly and unambiguously" authorize Washington's scheme.

The Court also rejected Washington's argument that the waiver here does not contain any explicit language referring to discrimination (as is the case for state taxation of federal officers and the application of state environmental laws to federal facilities.) The lack of an explicit reference is not the equivalent of an unambiguous authorization of discrimination, according to Justice Breyer. Finally, the Court distinguished its prior decision construing an earlier version of the Congressional waiver as it applied to a case that did not involve a state law that discriminated against the Federal Government. Accordingly, the Court reversed the Ninth Circuit and remanded the case for further proceedings consistent with the Court's opinion.

* * * *

As a practical matter, the federal contract workers at the Hanford site now enjoy the same treatment they formerly received under the law held unconstitutional here. Indeed, given Washington's amendment of its law to avoid the discriminatory waiver argument that gave rise to this case, it seems a bit odd that the Court granted certiorari in the first place. Now, disputes about recouping paid claims and fighting over who pays unpaid claims are bound to occur and may prompt a small cottage industry for local lawyers. Perhaps the important takeaway from this decision is that Congressional waivers of immunity are to be read narrowly and that the scope of those waivers must be clear and unambiguous to be enforced.

Hughes v. Northwestern University, 595 U.S. ---, 142 S. Ct. 737, 211 L. Ed. 2d 558 (2021)

The Court held that ERISA's duty of prudence requires plan fiduciaries to independently and continually evaluate a plan's investment options and expenses,

even where plan participants ultimately choose their own investments.

Northwestern University offers its employees two defined contribution retirement plans in which employees maintain individual investment accounts funded by pretax employee contributions from employee salaries and matching employer contributions. Each employee may choose from a menu of investment options selected by the plan administrator - in this case the University. The investment options are typically mutual funds and index funds that charge fees for managing the funds. The more actively managed funds, such as mutual funds, charge higher fees than index funds that simply track the S&P 500 or a similarly indexed group. Retirement plans also pay fees for record-keeping services that are calculated as a percentage of assets or a flat rate per participant account.

April Hughes and two other University employees who participated in the University's two plans sued the University, its Retirement Investment Committee and the individuals who managed the two plans, alleging that these defendants violated ERISA's duty of prudence by (i) failing to monitor and control record-keeping fees; (ii) offering higher-fee "retail class" mutual fund and annuities instead of a lower cost "institutional class" ones; and (iii) offering too many investment options (in this case more than 400) that caused participant confusion and poor investment decisions. The district court granted defendants' motion to dismiss and denied leave to amend the complaint, and the Seventh Circuit affirmed. The Supreme Court granted plaintiffs' petition for certiorari on the motion to dismiss.

The Court unanimously reversed the Seventh Circuit's judgment in a concise six page opinion by Justice Sotomayor. (Justice Barrett did not participate in this case.) Likening this case to *Tibble v. Edison Int'l*, 575 U.S. 523 (2015), the Court reminded that fiduciaries are required to monitor each investment option in the plan and remove any imprudent ones. The Seventh Circuit's conclusion that plaintiffs failed to state a plausible claim because of their own ultimate choice over investments did not, as Justice Sotomayor points out, excuse compliance with ERISA. In short, the Seventh Circuit's "exclusive focus" on investor choice elided the monitoring and removal aspects of the duty of prudence. Accordingly, the Court vacated the Seventh Circuit's judgment so that plaintiffs' allegations may be reevaluated. In doing so, the Court directed the Court of Appeals to apply the "*Twiqbal*" pleading standard in a "context specific" manner as required by *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), and observed that circumstances facing ERISA fiduciaries will at times "implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." Slip Opin., p. 6.

* * * *

This decision, anxiously anticipated by all stakeholders because of the spate of similar suits and the uncertainty surrounding application of ERISA's duty of prudence standard, disappointed the defense bar and presumably many of their clients. And, to be sure, the Court effectively allows plaintiffs a second bite at the apple, thus effectively allowing a tardy motion to

amend a defective complaint. At the end of her opinion, however, Justice Sotomayor lays down explicit guideposts for what the Seventh Circuit "should" do when it reevaluates plaintiffs' allegations on remand. Just as importantly, the Court reminds that ERISA fiduciaries face circumstances that implicate "difficult tradeoffs" and that courts "must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." Slip Opin., p. 6. And, the Court especially criticizes the Seventh Circuit's reliance on participants' ultimate choice over their investments as an excuse for imprudent decisions about the number of investment options, management expenses, investment performance and inadequate oversight of record-keeping fees. Given the Court's broad hints that it expects some deference to fiduciary judgments, any disappointment expressed by fiduciaries about the Court's decision rings a little hollow.

Babcock v. Kijakazi, 595 U.S. ---, 142 S. Ct. 641, 211 L. Ed. 2d 424 (2022)

The Court held that civil service pension payments based on employment as a "dual status military technician" are not payments based on "service as a member of a uniformed service" and thus do not qualify for an exception to a reduction of benefits under the Social Security Act.

David Babcock worked from 1975 to 2009 as a "military technician (dual status)," a unique position in which he was a civilian employee supporting the Michigan National Guard as a test pilot and pilot instructor. Like all dual-status technicians, Babcock also served in the National Guard, which in his case included part-time training, weekend drills and an active duty deployment to Iraq. He was also required to wear his military uniform while performing his civilian duties. For his civilian work, Babcock received civil service compensation and pension benefits from the Office of Personnel Management. For his National Guard military service, Babcock received separate military pay and pension benefits from the Defense Finance and Accounting Service.

Upon retirement, Babcock applied to the Social Security Administration ("Agency") for benefits. The Social Security Act ("Act") generally reduces benefits for retirees who receive payments from separate pensions based on employment not subject to Social Security taxes. This reduction is not triggered, however, by pension payments "based wholly on service as a member of a uniformed service." The Agency granted Babcock's application, but reduced his benefits by about \$100 per month because his "military technician (dual service)" service did not entitle him to the "uniformed service" exception. Babcock sought reconsideration, arguing that his pension payments fell within the uniformed service exception and thus should not trigger a reduction of his benefits. The Agency denied reconsideration, and an Administrative Law Judge and the Agency's Appeals Council upheld that decision.

Babcock then sued the Agency in federal court. The district court upheld the Agency's position, and the Sixth Circuit affirmed, concluding that Babcock's civil service pension

payments were based on service in a civilian capacity and thus did not fall within the uniformed service exception. The Court granted certiorari to resolve a circuit split.

The Court, in an opinion by Justice Barrett for eight Justices, affirmed the Sixth Circuit's judgment and held that Babcock's civil service pension payments were not based on service "as a member of a uniformed service." Accordingly, Babcock's retirement benefits were subject to reduction. Looking first to the plain meaning of the words of the Act, Justice Barrett concluded that Babcock's technician work was not service "as" a member of the National Guard. The Act defines the technician position repeatedly as a civilian one. Furthermore, Babcock's National Guard membership and military dress do not dictate whether one is serving "as" a Guard member, according to Justice Barrett, and the Court thus declined adopting a meaning of "as" broader than its natural one. In short, Justice Barrett concluded that Congress consistently distinguished technician employment from National Guard service, a distinction that the Agency and the courts below applied. Finally, while Congress classified the dual-status technicians as civilian for what the dissent labeled "bookkeeping" purposes, Justice Barrett stresses that "bookkeeping matters when it comes to pay and benefits." Accordingly, Babcock's civil service pension payments were based on service in his civilian capacity and not "as" a National Guard member.

Justice Gorsuch dissented alone in an opinion that found Babcock's statutory interpretation arguments "compelling." Because dual-status military technicians have to maintain their National Guard membership, are subject to discharge and discipline by the Adjutant General, and must spend all their duty time working in uniform for the Guard, Justice Gorsuch would hold that these technicians "serve as" members of the National Guard "in all the work they perform for this country day in and day out" and thus should not be subject to curtailed Social Security benefits.

* * * *

The Court's ruling against Babcock is not designed to affect more than what must be a tiny group of "dual status military technicians" whose classification is clearly a unique position in federal employment. Accordingly, the consequence of this decision is limited to a small group of workers. Of course, that does not lessen the burden of this ruling on those workers and their families. Nor does it lessen what may seem to many as an unfair encumbrance on federal workers who dress in uniform every day, maintain their National Guard membership and perform their civilian work subject to discipline and discharge by the National Guard. Given the narrow question before the Court and the likelihood that so few federal workers fall into this unique dual-status category, Justice Gorsuch's dissent has much to commend it as a matter of workplace fairness. In the end, however, Justice Barrett's close adherence to the words and intentions of Congress rightly carried the day against David Babcock's position.

**United States v. Vaello Madero, 596 U. S. ---, 142 S. Ct. 1539,
211 L. Ed. 2d --- (2022)**

**The Court held that the Constitution does not require Congress to extend
Supplemental Security Income benefits to citizens residing in Puerto Rico.**

Jose Luis Vaello Madero [*sic*] received Supplemental Security Income ("SSI") benefits when he lived in New York. Eligibility for this benefit requires that one be a "resident of the United States," which is defined today as the 50 States and the District of Columbia, 42 U.S.C. 1382c(e) and the Northern Mariana Islands, 90 Stat. 268, Note following 48 U.S.C. 1801. In 2013 Vaello Madero moved from New York to Puerto Rico. Unaware of this move, the U.S. Government continued to pay him benefits totaling more than \$28,000. In response to the Government's suit for restitution, Vaello Madero argued that exclusion of residents of Puerto Rico from the SSI program violated the equal protection component of the Fifth Amendment's Due Process Clause. That argument prevailed in the district court and the First Circuit.

The Supreme Court, in an 8 to 1 decision, reversed the First Circuit's judgment and ruled that Congress may distinguish Territories from States in tax and benefits programs, so long as it has a rational basis for doing so. Justice Kavanaugh's majority opinion, relying on two prior decisions applying a deferential rational basis test for reviewing Congress' judgment, reasons that because residents of Puerto Rico are typically exempt from most federal income, gift, estate and excise taxes, Congress had a rational basis for excluding them from the SSI program.

Justice Thomas filed a concurring opinion expressing his doubt about the premise that the Fifth Amendment's Due Process Clause contains an equal protection component. His opinion suggests that the Citizenship Clause of the Fourteenth Amendment would yield a similar result to the Court's decision on a more supportable basis. Nonetheless, Justice Thomas joined Justice Kavanaugh's majority opinion.

Justice Gorsuch filed a concurring opinion expressing his view that the time has come to recognize that Congressional authority over Puerto Rico (and other Territories) rests on the "rotten" foundation of the so-called *Insular Cases* decided a century ago in the wake of the Spanish-American War. Explaining that the flaws of the *Insular Cases* are "as fundamental as they are shameful," for they rest on "ugly" racial stereotypes, Justice Gorsuch invites an opportunity to overrule them, something the Court could not do here because no party asked. Slip Opin., p. 5.

Justice Sotomayor's lone dissent, while agreeing in a footnote with Justice Gorsuch's view that the *Insular Cases* should be overruled, argues that it is "utterly irrational" and "especially cruel" to deny SSI benefits to impoverished residents of Puerto Rico because they do not pay enough taxes. In her view, the Constitution does not permit the kind of unequal

treatment of citizens countenanced by the Court's decision.

* * * *

The decision to exclude Puerto Rico from the protection of a crucial part of a safety net intended for all citizens is, quite likely, the last gasp of our colonialist notion that Congress can treat citizens of the Territories without due regard for the Constitution's equality imperative. Indeed, Justice Gorsuch's hope for a chance to overrule the Insular Cases may well turn into a real opportunity this coming term, as certiorari is being sought expressly for that purpose in a birthright citizenship dispute in Fitisemanu v. United States, Docket No. 21-1394 (April 27, 2022).

D. Public Employment.

The Court's attention turned to public employment in a momentous First Amendment case permitting demonstrative Christian prayer by a coach on the school's football field, in the midst of his work time and often with players and fans surrounding him. In another public employment decision, the Court addressed a community college board's public censure of one of its own members and limited the operational scope of 42 U.S.C. 1983 in doing so.

The Court also addressed civil claims against federal agents in a non-employment context that might ultimately impact governmental employment. Explained in a much abbreviated reference below, the Court declined to allow an expansion of *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and again raised the prospect of overruling that seminal case.

Kennedy v. Bremerton School District, 597 U.S. ---, 142 S. Ct. 2407, 212 L. Ed. 2d --- (2022)

The Court held that the First Amendment protects a public school coach's right to pray on the school's football field during his working time.

Joseph Kennedy, after serving in the Marines for nearly two decades, was first employed by the Bremerton School District ("District") in 2008 on a renewable annual contract to be a part-time assistant coach for the varsity football team and head coach for the junior varsity team at Bremerton High School ("BHS"). His duties included supervising student activities following each football game until the students are released to leave. The District required coaches to adhere to its policies, including one on "Religious-Related Activities and Practices" that prohibited encouraging or discouraging students from non-disruptive oral or silent prayer or other devotional activity and also prohibited religious services, programs or assemblies in school facilities in connection with any school-sponsored or school-related activity.

After seven years of Coach Kennedy's praying on the football field at the conclusion of every game, sometimes with large groups of his own and opposing players to whom he addressed motivational remarks, the District superintendent learned of this conduct from a visiting team's coach and immediately notified Kennedy of his "problematic" prayer and other religion-infused practices. This notification made plain that any religious expression by Kennedy should be "nondemonstrative" to avoid the appearance of school endorsement of religion under the Establishment Clause. Kennedy responded through counsel that he felt "compelled" to offer post-game prayers and asked the District to allow him to continue his private religious expression alone. The District replied shortly on a game day, October 16, 2015, (which was the BHS homecoming game) with an ultimatum that forbade Kennedy from any overt actions that would appear to endorse prayer while on duty as a public employee, though it had no objection to his returning to the stadium when off-duty to pray at the 50-yard line. Kennedy nonetheless knelt to pray at midfield after the end of the homecoming game and was quickly joined by both BHS and opposing players and community members before finishing his prayer. There followed considerable media coverage, some instigated on-line and in person by Kennedy himself. On next week's game day (October 23, 2015) the District advised Kennedy by letter that his conduct the prior week raised Establishment Clause concerns, but invited him to pray in a non-endorsing way and to discuss ways to accomplish that. The letter added that further violations of its directives would be grounds for discipline or termination. Kennedy did not directly respond or suggest any accommodation. Instead, his attorneys told the media that he would accept only demonstrative prayer at mid-field immediately after games. So, again on that day and at another game three days hence on October 26, 2015, Kennedy prayed at mid-field during post-game activities. At the October 26th game he was surrounded by members of the public, including state representatives supporting him. The BHS players joined Kennedy at midfield when he stood up and they had finished singing their fight song. Two days later the District notified Kennedy that he was being placed on paid administrative leave for kneeling and praying on the field while on duty. That notification also recounted the District's offer to accommodate Kennedy's religious exercise and his failure to respond to that offer. The letter repeated that the District remained willing to discuss a way forward if Kennedy was also willing.

At the end of the 2015 season the District's annual evaluation of Kennedy advised against rehiring him because he had failed to follow District policy regarding religious expression and failed to supervise his student-athletes immediately after games. The BHS varsity head football coach also resigned, expressing fear of being "shot from the crowd" or otherwise attacked because of the turmoil created by these events and their media coverage. And, three of the five other assistant coaches also resigned. Kennedy's contract was not renewed for the 2016 season.

Two years later Kennedy filed suit in the Western District of Washington alleging that the District had violated his rights to Free Exercise and Free Speech under the First Amendment. The district court denied Kennedy's preliminary injunction motion seeking reinstatement. The Ninth Circuit, emphasizing the context of Kennedy's praying, affirmed, and the Supreme Court

denied certiorari. Following discovery, the district court granted the District's motion for summary judgment, concluding that Kennedy's speech was not made as a private citizen and that his prayer practices violated the Establishment Clause. The Ninth Circuit again affirmed, and this time the Supreme Court granted certiorari.

The Court ruled 6 to 3 in an opinion by Justice Gorsuch that Kennedy is entitled to summary judgment on his Free Exercise and Free Speech claims because the Establishment Clause did not require the District to single out his praying for special disfavor. After a lengthy statement of its version of the factual evidence, the majority concluded that Kennedy demonstrated that his praying was protected by the First Amendment's religious exercise and speech clauses. Next, Justice Gorsuch found that the District failed to show, by any level of scrutiny, that its restrictions on Kennedy served a compelling interest and were narrowly tailored to that end. In doing so, the Court found the "endorsement" rubric of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), inapplicable. In its place the majority instructed that Establishment claims must be examined by reference to "original meaning and history," as to which the District failed to carry its burden. Finding no coercion of students and no actual conflict between Establishment and Free Exercise and Speech requirements, the majority concludes by characterizing the employer's treatment of Kennedy's practices as a kind of "discrimination" against his First Amendment right to engage in religious exercise during his work time and on school property.

Justice Thomas filed a concurring opinion agreeing with Justice Gorsuch's opinion and emphasizing that the Court is not resolving two free exercise issues: first, how might free exercise rights of public employees differ or not differ from those enjoyed by the general public and second, what burden must a government employer carry to justify restricting an employee's religious expression.

Justice Alito filed a concurring statement asserting that Kennedy's religious expression "occurred while at work but during a time when a brief lull in his duties apparently gave him a few free moments to engage in private activities" and that Kennedy was thus acting in a "purely private capacity" when he prayed on the field. Accordingly, Justice Alito declares that the Court does not decide how to determine whether retaliation for the coach's expression can be justified on any of the standards the majority discussed. On this understanding, Justice Alito joined the majority opinion in full.

Justice Sotomayor, joined by Justices Breyer and Kagan dissented in an opinion that first narrates in detail - with photographs of Kennedy openly engaged in group praying on the field - a more pertinent and thorough account of the facts than the majority's recitation. The dissent then stresses that compliance with the Establishment Clause in public schools is particularly important because of the role of public education in our democracy and because schools face a higher risk of coercing religious exercise by children who are uniquely susceptible to pressure from both teachers and peers. Accordingly, the employer's time and place restrictions on Kennedy's praying were justified and its Establishment concerns satisfied strict scrutiny.

Criticizing the majority's departure from the "endorsement" test that *Lemon* suggests, Justice Sotomayor says that overruling *Lemon* is just plain "wrong." Moreover, the dissent then finds the majority's embrace of a "history and tradition" test as devoid of useful guidance for school administrators. Finally, the dissent reminds that the question here is not whether Kennedy's praying would violate the Establishment Clause "in any and all circumstances." Rather, the question is whether allowing Kennedy to continue demonstrative praying after years of leading prayers with students at the same spot violates the Establishment Clause. The dissent concludes that it does. According to Justice Sotomayor, by answering the wrong question in the wrong way, the majority pushes us "further down a perilous path in forcing States to entangle themselves with religion, with all our rights hanging in the balance." Dissenting Slip Opin., p. 35.

* * * *

*Using a pure scorecard approach, the decision here might, I suppose, be put in the win column for public employees and the loss column for government employers. On sober reflection, however, the losers here are not really employers. No, the real loser is the public itself, as the Court effectively reads the Establishment Clause out of consideration in order to promote the freedom of a combative and disobedient football coach to engage in prayer when and where he wants to do so and in a way that pressures vulnerable teenagers to join with him or show support for this religious practice. After more than 60 years of keeping overt sectarian religious exercise separate from public education, the majority wittingly ignores the Establishment Clause and rewrites how the First Amendment should apply in a public school setting. And, in doing so, the Court effectively overrules *Lemon v. Kurtzman* in favor of its own newly crafted "history and tradition" test for reviewing questions about government endorsement of religion. Further, as Justice Sotomayor puts it, the majority applies a "nearly toothless version" of coercion analysis in paying lip service to the First Amendment's concern about coercing religious exercise by students faced with the social pressures of their youth.*

At times the opposing opinions did not seem to be focusing on the same case. In fact, the majority's framing of Kennedy's praying as an unobtrusive individual act of personal devotion was so misleading that Justice Sotomayor included photographs in her dissenting opinion to demonstrate how Kennedy gathered scores of players around him in the kind of team prayer that is undeniably coercive to those who wish neither to participate in public religious exercise nor to incur disapproval of peers, parents and coaches for refusing to participate. Reading the competing versions of Kennedy's religious exercise, one cannot help being reminded of Kellyanne Conway's "alternative facts" answer to reporter Chuck Todd about audience size at the 2016 inauguration: "Think about what you just said to your viewers. That's why we feel compelled to go out and clear the air and put alternative facts out there." <https://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html>.

*On a doctrinal level, this decision reduces *Lemon v. Kurtzman* to a remnant of a bygone era that honestly recognized and sought to minimize coercion of children who are particularly*

susceptible to the unspoken pressure of conformity or approval that stems from teachers, coaches and peers. By crafting its own originalist (and frankly opaque) test for evaluating Establishment concerns, the majority effectively blurs the separation of church and state in public schools and elevates religious exercise by public employees to a perilous platform. This decision, therefore, should not be put in anyone's win column. It is, instead, a loss for all of us as citizens of what was and is - from the founding until now - supposed to be a secular nation.

Houston Community College System v. Wilson, 595 U.S. ---, 142 S. Ct. 1253, 211 l. Ed. --- (2022)

The Court held that verbal censure of a public board member did not give the censured member standing to sue the board under Section 1983 for violation of his First Amendment rights.

David Wilson was elected to the Houston Community College System ("HCC") Board of Trustees ("Board") in 2013. HCC operates various community colleges in Texas, and its Board consists of nine members elected from single-member districts for 6-year terms. Wilson's tenure was "a stormy one," as characterized by the Supreme Court. He often disagreed in strong fashion with his colleagues about HCC's direction and its best interests, and he brought various lawsuits challenging the Board's actions. By 2016 the Board had reprimanded Wilson publicly, to which Wilson responded that the Board would "never stop me." Indeed, Wilson filed two more lawsuits, robo-called constituents, hired a private investigator to surveil a fellow trustee and charged the Board in various media outlets with ethics and by-law violations.

In 2018, after spending more than \$270,000 in legal fees to defend against Wilson's suits, the Board adopted a public resolution "censuring" Wilson for "inappropriate" and "reprehensible" conduct." The Board also imposed penalties on Wilson and recommended that he complete additional training about governance and ethics. Wilson then amended one of his pending state court suits by adding a claim against HCC and the Board's trustees under 42 U.S.C. 1983, alleging that the Board's censure violated the First Amendment. Wilson sought injunctive and declaratory relief, as well as damages for mental anguish, punitive damages and attorneys' fees. Following removal of that action to federal court, Wilson again amended the complaint to drop the trustees as parties. HCC, the only remaining defendant, moved to dismiss the complaint.

The district court granted HCC's motion, concluding that Wilson lacked Article III standing. The Fifth Circuit reversed, concluding that Wilson had standing, that his complaint stated a viable First Amendment claim only as to the Board's censure resolution, and that the Board's imposition of other nonverbal punishments (e.g., access to funds and eligibility for officer positions) did not violate his rights because he had no entitlement to those privileges. HCC's request for rehearing *en banc* was denied by an equally divided vote.

HCC's petition for certiorari asked the Court to review the Fifth Circuit's judgment that Wilson may pursue a First Amendment claim based on a purely verbal censure. Wilson's brief on the merits, however, sought not only to defend the Fifth Circuit's judgment about the censure, but also sought to challenge the lower courts' upholding of the Board's other nonverbal punishments. Because Wilson failed to file a cross-petition, however, the Court confined its decision here to the narrow question presented by HCC's petition: Does Wilson possess an actionable First Amendment claim arising from the Board's purely verbal censure?

The Supreme Court, in a unanimous opinion by Justice Gorsuch, reversed the Fifth Circuit's judgment and held that Wilson does not possess an actionable First Amendment claim arising out of the Board's purely verbal censure.

Justice Gorsuch's opinion first examines the history of public bodies' censuring their members and finds little reason to think that the First Amendment was understood to upend that practice. Citing examples of censuring in both houses of Congress from the early 1800's through the Senate's condemnation of Senator Joseph McCarthy, the Court found censuring by public bodies to leave a "considerable impression" that a censured member's speech is not abridged countervailing speech by the body itself and its other members. Justice Gorsuch then turns to contemporary doctrine and concludes that it confirms what history suggests. His opinion stresses that Wilson did not allege a material adverse action against him that could sustain a First Amendment claim. Noting that elected officials must expect some criticism of their own speech from other officials who exercise their own speech rights, Justice Gorsuch explains that the Board's censure here is simply a form of free speech that neither defamed Wilson, denied him any privilege or otherwise constituted a material adverse action. Finally, the Court rejected Wilson's reliance on cases where public bodies have refused to seat duly elected officials. Emphasizing that excluding is different from verbal censuring, Justice Gorsuch repeats that the Board's verbal censure of Wilson in the course of its official business did not offend Wilson's First Amendment rights. Accordingly, the Court's opinion closes with the observation that argument and counterargument - and not litigation - are the "weapons available" for resolving Wilson's dispute with the Board and its members.

* * * * *

How refreshing it is, for a change, to hear the Court speaking with one clear voice! That this decision is a narrow one (as Justice Gorsuch allows) does not detract from its importance as a lesson for litigators, clients and citizens alike. Instead of even more roiling litigation, Wilson simply needs a thicker skin.

Egbert v. Boule, 596 U.S. ---, 142 S. Ct. 1793, 212 L. Ed. 2d --- (2022)

The Court held that *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), could not be extended to cover excessive force and retaliation claims against

a U.S. Border Patrol Agent.

Robert Boule, a resident of Blaine, Washington, markets his home as a bed-and-breakfast aptly named "Smuggler's Inn." The property lies on the border with Canada, and persons engaged in unlawful border-crossing activities often use his property to cross the border illegally. Boule at times has helped federal agents apprehend these people, but has also provided transportation and lodging to some of the border-crossers. In 2014 Boule informed Erik Egbert, a Border Patrol agent, that a Turkish national was traveling to the Inn. When Egbert showed up at the Inn, Boule asked him to leave the premises, Egbert refused, became violent and threw Boule to the ground. Egbert then checked the immigration paperwork for Boule's Turkish guest, found everything in order, and left the Inn. The Turkish guest unlawfully entered Canada later that evening. Boule filed a grievance about Egbert's conduct, and Egbert retaliated by reporting Boule's "SMUGLER" license plate for illegal activities and by prompting a federal tax audit of Boule. Boule sued Egbert, alleging a Fourth Amendment claim for excessive use of force and a First Amendment claim for retaliation. The district court declined to extend *Bivens* to recognize a damages action for those alleged violations. The Ninth Circuit reversed, and the Supreme Court granted certiorari.

The Court, in a 6 to 3 decision, reversed the Ninth Circuit and ruled in an opinion by Justice Thomas that *Bivens* does not extend to either of Boule's claims. The majority reasoned that a Fourth Amendment claim presents national security concerns beyond judicial competence and that there are alternative remedies for persons in Boule's position. As for the First Amendment claim, there is no basis for extending *Bivens* to a new context when Congress is better suited to authorize a damages remedy.

Justice Gorsuch concurred in the judgment and filed an opinion criticizing *Bivens* as an improper judicial assumption of legislative power. He would overrule it and "return the power to create new causes of action" to Congress.

Justice Sotomayor, joined by Justices Breyer and Kagan concurred in the denial of Boule's First Amendment claim (though on grounds differing from the majority) and dissented from the disposition of his Fourth Amendment claim. In a lengthy opinion, the dissent concludes that the Court's refusal to recognize the importance of *Bivens* actions will inappropriately close the door to those who suffer serious Constitutional violations by federal agents.

* * * *

As noted previously, the significance of this non-employment decision for employment law purposes is the majority's disapproval of any Bivens-type claims, despite its reluctance to say so directly. Only Justice Gorsuch forthrightly punctuated the majority opinion with his unequivocal suggestion that the Court abandon Bivens entirely. So, unless there is a wholesale change in the Court's composition, Bivens' days may be numbered, as the Court

had no trouble abolishing both abortion and Establishment Clause precedents of approximately the same age and status as Bivens itself. What that means for federal workers is that they may soon not be able to rely on an implied cause of action seeking damages for violations of their Constitutional rights.

E. Arbitration.

The Court's decades-long romance with compelled arbitration, a centerpiece of the business community's ability to tether worker agency, continued in the 2021 Term, but with a couple of unexpected twists and turns in cases applying the Federal Arbitration Act, 9 U.S.C. 1, *et seq.* ("FAA"). First, in a small departure from its persistent nurturing of forced arbitration, the Court slightly relaxed the FAA's grip on coverage of disputes involving some airport employees. Providing a second modest victory for workers, the Court held that to establish an employer's waiver of its right to compel arbitration, proof of prejudice to the employee is not required. A third employment arbitration case addressed a somewhat arcane jurisdictional issue to decide where motions to vacate or confirm FAA awards can be reviewed. The fourth case dealt with the high-profile tension between California's hostility to arbitration expressed in its Private Attorneys General Act ("PAGA") and the FAA's pro-arbitration imperative.

Finally, in two commercial settings not involving employment, the Court limited the utility of an arbitration discovery statute for international disputes by narrowly interpreting the definition of certain arbitration tribunals. An abbreviated review of that decision is offered after the four principal cases.

Southwest Airlines Co. v. Saxon, 596 U.S. ---, 142 L. Ed. 2d 1783, 212 L. Ed. 2d --- (2022)

The Court held that cargo ramp supervisors are exempt from FAA coverage because they are within a "class of workers engaged in foreign or interstate commerce" and may thus avoid arbitration of their claims for overtime pay.

Latrice Saxon was employed by Southwest Airlines Co. as a cargo "ramp supervisor" at Midway Airport in Chicago, IL. Ramp supervisors train and supervise "ramp agents" who physically load and unload baggage, airmail and commercial cargo on and off aircraft that travel cross-country. Ramp supervisors also frequently step in to load and unload cargo alongside the ramp agents. Southwest's ramp agents are covered by a collective bargaining agreement governing the terms of their employment. Ramp supervisors, however, are excluded from the collective bargaining unit and instead sign individual annual employment contracts governing their employment. As part of those contracts, Saxon and the other ramp supervisors agreed to arbitrate wage disputes individually. Nonetheless, when Saxon concluded that Southwest was

failing to pay proper overtime wages to ramp supervisors, she brought a putative class [sic] action against Southwest under the Fair Labor Standards Act of 1938 ("FLSA").

Southwest moved to dismiss Saxon's suit and sought to compel arbitration under the FAA and its contract with Saxon. Relying on Section 1 of the FAA, Saxon countered that ramp supervisors are exempt from FAA coverage because they are in a "class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. The district court ruled for Southwest, holding that the FAA exemption applies only to employees involved in "actual transportation" and not the mere handling of goods. The Seventh Circuit reversed, holding that loading cargo onto a vehicle to be transported in interstate commerce is itself "commerce," as that term was understood when the FAA was enacted in 1925. The Supreme Court granted Southwest's petition for certiorari to resolve a circuit conflict.

The Supreme Court unanimously affirmed the Seventh Circuit's judgment in an opinion by Justice Thomas (with Justice Barrett recused.) Justice Thomas first reminds that the FAA is to be interpreted according to its words' "ordinary" or "common" meaning. That requires reading the words in their context and not in isolation. Accordingly, the Court rejects the employer's position that ramp supervisors generally do not load cargo, for the evidence showed that Saxon belongs to a class of workers who load and unload cargo frequently. The Court then holds that this class of loaders is engaged in foreign or interstate commerce because they are part of the interstate transportation of goods. Applying canons of construction, Justice Thomas concludes that both the FAA's text and context demonstrate that Saxon and workers like her belong to a class of workers in interstate commerce.

Justice Thomas' opinion rejects Saxon's attempt to broaden the decision to cover virtually all employees of the airline industry on the premise that the statutory terms "seamen" and "railroad employees" are, in her view, industry-wide terms. Justice Thomas, however, points out that seamen is limited to those who work on board a vessel, so the premise of Saxon's argument fails. On the other hand, Justice Thomas also rejects the employer's attempt to define the exempt class too narrowly. Southwest urged that only employees who accompany the cargo they load should be covered, just as seamen have to work on board a vessel. Rejecting both this argument and the employer's fallback reliance on the "pro-arbitration purpose" of the FAA, the Court affirms the Seventh Circuit's judgment that Saxon belongs to a class of workers that is exempt from FAA coverage.

* * * *

To be sure, this decision technically represents a victory for a small group of ramp supervisors at Southwest Airlines who frequently assist the unionized ramp agents in loading and unloading cargo. But, in a somewhat unexpected twist of fate, the Court unanimously had no qualm or difficulty concluding that these workers may escape compelled arbitration of their wage and hour claims because they fall within a class of workers in interstate commerce.

Before becoming too giddy over this decision, however, those who favor workers' interests should bear in mind that the Court also unanimously rejected Saxon's attempt to apply the FAA's exemption on an industry-wide basis. What that means on a practical level is that future cases are likely to be resolved by a more localized employee-based inquiry. That prospect is, perhaps, better suited to the side with more resources - namely employers. In short, it seems that while a group of ramp supervisors prevailed here, employers may have successfully dodged a more lethal dart.

Morgan v. Sundance, Inc., 596 U.S. ---, 142 S.Ct. 482, 212 L.Ed. 753 (2022).

The Court held that proof of prejudice to an employee is not required to establish waiver of her employer's right to compel arbitration of her claims.

Robyn Morgan was employed by Sundance, Inc., a Taco Bell franchise operator, for three months when her employment was terminated after she and other employees complained about not being paid overtime wages in accordance with the Fair Labor Standards Act of 1938 ("FLSA"). Morgan's employment application contained a compelled arbitration provision. It required her to "use confidential binding arbitration, instead of going to court, for any claims that arise" between her and Sundance. Despite that agreement, when the FLSA claims arose, Morgan filed a nationwide collective action against Sundance in federal court. Without mentioning any agreement to arbitrate Morgan's claims, Sundance filed a motion to dismiss her suit. The district court denied the motion, and Sundance then filed an answer that raised fourteen affirmative defenses, but failed again to mention the agreement to arbitrate. The parties soon thereafter participated in a joint mediation involving a similar collective action brought by other Taco Bell employees. The other suit settled, but Morgan's suit did not. Morgan and Sundance then began to talk about scheduling the rest of the litigation of Morgan's suit. At this point, however, nearly eight months after Morgan's lawsuit was filed, Sundance changed course and filed a motion to stay the litigation and compel arbitration under sections 3 and 4 of the FAA. Morgan opposed the motion, arguing that Sundance had waived its right to arbitration by choosing to litigate for so long.

The district court denied Sundance's motion, concluding that by invoking "litigation machinery" and waiting eight months to assert a right to arbitrate Morgan's claims, Sundance had waived its right to arbitration. The Eighth Circuit's panel reversed in a 2 to 1 decision concluding that Sundance's conduct, even if inconsistent with the arbitration agreement, did not prejudice Morgan in any meaningful way. The Eighth Circuit's prejudice requirement, based on "the strong federal policy favoring arbitration," is embraced by eight other circuits, while the remaining circuits have held that prejudice is not an essential element of proving waiver of the right to arbitrate. The Supreme Court granted certiorari to resolve this circuit split.

The Court, in a unanimous opinion by Justice Kagan, vacated the judgment of the Eighth Circuit and held that the FAA does not authorize the federal courts to create an arbitration-

specific rule that a party can waive its arbitration right by litigating only when its conduct has prejudiced the other side. After recounting the facts, Justice Kagan explains that the Court is not addressing many issues raised in the parties' briefs, such as the rules of waiver, forfeiture, estoppel, laches or procedural timeliness or the role of state law in resolving loss of a contractual right. Indeed, Justice Kagan even says that the Court is assuming without deciding that the lower courts are correct in resolving these cases "as a matter of federal law, using the terminology of waiver." Instead, the Court is addressing only whether the courts "may create arbitration-specific variants of federal procedural rules, like those concerning waiver based on the FAA's 'policy favoring arbitration.'" The answer to that question is no, and for that reason the Eighth Circuit "was wrong to condition a waiver of [Sundance's] right to arbitrate on a showing of prejudice [to Morgan]." Slip Opin., pp. 4-5.

Justice Kagan also stressed that the FAA "policy favoring arbitration" is simply a way to "make arbitration agreements as enforceable as other contracts, but not more so." Slip Opin., p. 5 [Citation omitted]. Put another way, the Court declares that the "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Ibid.* Referring to section 6 of the FAA, the Court also finds support for a bar on custom-made rules and an instruction not to write into the usual federal rule of waiver a prejudice requirement in order to promote arbitration. Accordingly, the Court remands the case to the Eighth Circuit where its waiver inquiry "would focus on Sundance's conduct." The Court suggests that the lower court may resolve the question about whether Sundance relinquished its arbitration right by acting inconsistently - or it may use a different procedural framework, such as forfeiture. What it cannot do, however, is make up a rule based on the FAA's "policy favoring arbitration."

* * * *

Justice Kagan's taut seven-page opinion cleverly uses the rubric of treating arbitration contracts just like other contracts to hold that equal treatment means no better in addition to no worse. That is, the Court's opinion emphasizes that adding a proof of injury or prejudice requirement to a claim that the employer waived its arbitration right by litigating in court would violate the established rule of equal treatment for arbitration contracts. As a practical matter, this ruling is a caution signal readily visible to employers hungering for two bites at the apple by choosing litigation first and then seeking to compel arbitration if litigation does not pay off.

Lest you think, however, that Robin Morgan prevailed, the Court did not hold that she has escaped from arbitration of her claims - yet. In fact, Justice Kagan's opinion is a roadmap for the Eighth Circuit not only to reconsider the waiver point, but also to choose a different approach to impose arbitration, such as forfeiture. Whether Sundance will prevail in compelling arbitration despite its delay will depend on how the lower courts apply the framework they choose - so long as they do not require Morgan to demonstrate prejudice, of course. Regardless of how the dispute turns out for the employee here, this decision represents at least a modest victory for workers, as they no longer have to demonstrate prejudice in order

to prevail on a claim that their employer waived its right to arbitrate. Especially because proof of prejudice was a requirement in nine circuits, Robyn Morgan altered the way employer waivers will be regarded in much of the nation.

Badgerow v. Walters, 596 U.S. ---, 142 S. Ct. 1310, 211 L. Ed. 2d. --- (2022)

The Court held that when a party seeks to confirm or vacate an arbitration award under the FAA, a federal court may look only to the party's application in determining whether it has subject matter jurisdiction.

Denise Badgerow, an associate financial advisor at REJ Properties, a Louisiana firm owned by three independent franchise advisors of Ameriprise Financial Services, Inc., raised concerns with both Ameriprise and regulatory authorities about workplace harassment. When an Ameriprise compliance officer contacted REJ Properties to investigate, she was fired the next day. Badgerow arbitrated her termination claim as required by financial industry regulations and her employment contract. After the arbitration panel dismissed her claims, Badgerow sought to vacate its award in state court. Her complaint against the three owners of her employer alleged on the basis of information obtained in a related suit that the award against her had been fraudulently obtained. Defendants removed the case to federal court and moved to confirm the award under the Federal Arbitration Act ("FAA"). Badgerow then moved to remand the case to state court because the federal court lacked jurisdiction under FAA sections 9 and 10 respectively to confirm or vacate the award.

The district court, relying on the "look through" approach to assessing jurisdiction, *Vaden v. Discover Bank*, 556 U.S. 49 (2009), concluded - by looking through the arbitration to Badgerow's underlying federal discrimination claims - that it would have jurisdiction by virtue of those claims, and it thus denied the request to remand. The court recognized that the "look through" approach in *Vaden* arose on a petition to compel arbitration under FAA Section 4, which has language requiring courts to assume the absence of the parties' arbitration agreement and determine jurisdiction instead on the basis of their underlying controversy. Despite the absence in FAA sections 9 and 10 of the special "look through" authorization in section 4, the district court applied the "look through" approach so that "consistent jurisdictional principles" would govern all kinds of FAA applications. Further concluding that fraud had not infected this particular arbitration, the court granted the Employer's application to confirm the award and denied Badgerow's application to vacate it. The Fifth Circuit affirmed based on a principle of uniformity requiring the same approach to jurisdiction under all sections of the FAA despite variations in the statute.

The Supreme Court granted certiorari in light of a circuit split about employing a "look through" approach to applications to confirm or vacate awards. The Court held in an 8-to-1 decision (with Justice Breyer as the sole dissenter) that *Vaden v. Discover Bank's* "look through" approach to determining federal jurisdiction does not apply to requests to confirm or

vacate arbitral awards under FAA Sections 9 and 10.

Justice Kagan's opinion for all members of the majority first reminds that while arbitration agreements are to be honored in both federal and state courts, the FAA's authorization in Section 10 of applications to confirm or vacate arbitral awards does not on its own confer subject matter jurisdiction on the federal courts. Because the face of the Employer's application revealed no basis for diversity jurisdiction and no federal question (because the enforceability of the arbitral award is nothing more than a state-law contract dispute), the only way to sustain federal jurisdiction would be to look through to Badgerow's federal employment claims underlying the parties' dispute.

In the Court's view, whether the "look through" approach to find a jurisdictional basis in FAA Sections 9 and 10 for confirming or vacating an award is dispositively different from finding jurisdiction to compel arbitration under FAA Section 4. Justice Kagan points out that Sections 9 and 10 do not mention subject matter jurisdiction, while Section 4 expressly refers to proceedings in district court "which, save for [the arbitration] agreement, would have jurisdiction" over "the controversy between the parties." 9 U.S.C. 4, quoted in Slip Opin., p. 7. Because Congress chose to limit the "save for" language to motions to compel arbitration, Justice Kagan reasoned that looking through to the underlying dispute to find federal jurisdiction for other purposes was not authorized.

Next, the Court rejects the Employer's two-part argument that FAA Section 4 is only a "capacious" venue provision and that Section 6's requirement that applications be heard in the manner of motion practice provides the basis for a look-through rule throughout the FAA. Justice Kagan, however, opines that FAA Section 4 is not a venue provision, as it specifies "jurisdiction" and not "venue" in its text. And, in any event, Congress did not in Section 6 prescribe an FAA-wide "look-through" rule when it simply told courts to treat FAA applications like motions.

Finally, Justice Kagan's opinion recognizes the virtues of a uniform jurisdictional rule based on a "look-through" approach to jurisdiction, but concludes that policy arguments cannot prevail against the clear statutory directives of the FAA itself. In so concluding, the Court observes that uniformity provides no real advantage anyway because federal district judges can tell which rules to apply in various applications. And, as Justice Kagan stresses, Congress intended - sensibly - that state courts, rather than federal courts, resolve claims between non-diverse parties involving state law. Because disputes about confirming or vacating arbitral awards concern contract-based rights arising out of arbitration agreements, state courts are the normal venues for enforcement, and Congress might well have thought (as the singular text of FAA Section 4 provides) that expanding federal jurisdiction should be limited to motions to compel alone.

Accordingly, the Court reversed the Fifth Circuit's judgment and remanded the case for further proceedings consistent with the Court's opinion.

Justice Breyer's dissent elides the decisive textual distinction between FAA Section 4 and FAA Sections 9 and 10 by concentrating on the FAA's purposes and warning of confusion and complexity likely to flow from the Court's failure to employ the "look through" approach to confirming or vacating awards. Indeed, the dissent says that while the Court's result "may be consistent with the statute's text," it nonetheless creates "curious consequences and artificial distinctions." Dissenting Slip Opin., p. 4.

* * * *

Putting aside for a moment the question about whether to apply the "look through" approach to determining federal court jurisdiction to review arbitral awards, the real significance of this decision is that state courts will hereafter be the primary battleground for deciding whether to confirm or vacate those awards. In light of the Court's near-unanimous decision that federal courts will in non-diverse cases lack an independent jurisdictional basis for deciding the fate of arbitration awards, the import of this case is its channeling review of arbitration awards to the state courts. As Justice Kagan put it, the Court has long recognized that enforcement of the FAA is left in large part to the state courts, for "Congress chose to respect the capacity of state courts to properly enforce arbitral awards. . . .[and]. . . we must respect that evident congressional choice." Slip Opin., p. 16.

As to the Court's conclusion that the special language in FAA Section 4 justifying a "look through" approach to determining federal jurisdiction does not apply to applications to confirm or vacate awards under FAA Sections 9 and 10, that conclusion seems unimpeachable in light of Congress' choice to embody an explicit textual distinction between the singular provision about "jurisdiction" in Section 4 and the absence of any such language in Sections 9 and 10. And, as Justice Kagan points out, the Employer's "thought-provoking" policy arguments are merely that -- policy arguments that cannot overcome a clear statutory directive. Of course, the practical effect of the Court's approach is to close the federal courthouse doors to arbitrated disputes that - like Badgerow's case - deal with underlying federal questions. But, just because the parties' underlying dispute may rest on federal claims, the question on review of an arbitration award is simply a common law matter that involves application of contract principles under the parties' arbitration agreement. Accordingly, channeling review of arbitration awards in non-diverse cases makes practical sense while it honors what Congress intended - and said.

Justice Breyer's dissent is a bit mystifying, as it is premised on policy arguments that echo the Employer's position and countermand what Justice Breyer himself concedes is a majority decision consistent with the FAA's text. Justice Breyer's fear that such a decision will "create unnecessary complexity and confusion" is ultimately unpersuasive not just because it dishonors the FAA's text, but also because it fails to convince. Apparently, the complexity that worries Justice Breyer, boiled down to its essence, is that the same federal judge who can order arbitration under FAA Section 4 will not be able to review what happens in that

arbitration because of the Court's view of Sections 9 and 10. In terms of simplicity, workability and fairness, however, splitting oversight of an arbitrated case does not seem beyond the capabilities of employment lawyers. In like manner, Justice Breyer's reliance on a desire to avoid complexity he alone finds in the FAA's legislative history also fails to persuade that the Congressional text should be ignored in favor of a unified rule of arbitral review crafted by the Supreme Court. From the pen of such an eloquent exponent of judicial modesty, this dissent is, as I mentioned, mystifying.

Viking River Cruises, Inc. v. Moriana, 596 U.S. ---, 142 S. Ct. 1906, 212 L. Ed. 2d --- (2022)

The Court held that the FAA partially preempts operation of California's Private Attorneys General Act ("PAGA") so that employees may be required to arbitrate their individual claims. The Court also held that the FAA preempts PAGA's claim joinder rule so that employees whose individual claims must be arbitrated lose their standing to assert representative claims on behalf of other aggrieved employees.

Angie Moriana worked as a sales representative for Viking River Cruises, Inc. ("Viking"). An agreement Moriana had signed with a company that contracted to provide human resources services for Viking as a "co-employer" provided that any dispute arising out of her employment with Viking must be arbitrated. The agreement also contained a "Class Action Waiver" providing that no such dispute may be pursued as a "class, collective, representative or private attorney general action." A severability clause required that if the class waiver is found invalid, any action would be litigated in court, but that if any portion of the waiver remained valid, it would be enforced in arbitration.

After leaving employment with Viking, Moriana sued Viking in California state court under the California Labor Code Private Attorneys General Act ("PAGA"), which permits an employee to enforce the state's labor law through a suit on behalf of the state for civil penalties to be shared with the state. An employee may join her own claims with those of other aggrieved employees. Moriana's suit against Viking included failure of timely payment of her own final wages and an array of violations sustained by other employees, such as minimum wage, overtime, rest periods and the like. Viking moved to compel arbitration of Moriana's individual claim and for dismissal of the claims on behalf of co-workers. The trial court denied the motion, and the California Court of Appeal affirmed, ruling in conformity with *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 382, 327 P. 3d 129, 148 (2014), that (i) categorical waivers of PAGA standing contravene state policy and (ii) PAGA claims cannot be split into arbitrable individual and non-arbitrable "representative" claims, so Viking was not entitled to arbitrate any of Moriana's individual or representative claims. The Supreme Court granted certiorari, and the case attracted a myriad of *amicus* briefs on both sides.

The Court, in an 8 to 1 decision, reversed the judgment of the California Court of Appeal. Justice Alito's majority opinion holds that the FAA preempts California precedent (*e.g.*, *Iskanian*, *supra*) that would invalidate Moriana's waiver of her individual PAGA claims. The majority also concludes that the FAA preempts PAGA's unique joinder provision. So, while the Court requires Moriana to arbitrate her individual claim for final wages, her representative claims on behalf of co-workers were remanded for dismissal. But, the remand was not based on FAA preemption. Instead, Justice Alito found that Moriana now lacked standing to litigate co-worker claims and that PAGA itself provided no way for a court to adjudicate those claims once the individual who brought them loses standing. Accordingly, Justice Alito declared that "the correct course is to dismiss her remaining claims."

Justice Alito's majority opinion says much more. Part I has an extended explication of PAGA and its unique joinder provision. The opinion also briefly reviews the factual background of Moriana's claims before discussing in some detail *Iskanian* and related California precedents. Part II is devoted to a review of FAA preemption by reference to the statute, its history and the Court's prior FAA preemption decisions. After spelling out (and disagreeing with) each side's characterization of FAA preemption, the opinion leaves unsettled the source of any conflict between California's prohibition on PAGA waivers and the FAA. Part III determines at the outset that the FAA's claim joinder mechanism is at the core of the preemption issue and that *Iskanian* is simply incompatible with the FAA. That is why the Court holds that the FAA preempts *Iskanian's* indivisibility rule that precludes "division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." Part IV opens with a restatement of the FAA preemption holding and essentially repeats the consequences of that holding, including reversal of the lower court's judgment, enforcement of compelled arbitration of Moriana's individual claim, and dismissal of Moriana's representative or co-worker claims because of her lack of standing to prosecute them in a PAGA action.

Justice Sotomayor filed an opinion concurring in full with the majority opinion on the following understanding: Based on the majority's rationale for dismissing Moriana's claims based on lack of standing, Justice Sotomayor opined that either the lower courts on remand or the California legislature could confer standing on plaintiffs in Moriana's position to pursue representative PAGA claims in court. The opinion stresses that the FAA poses no bar to adjudication of the co-worker claims.

Justice Barrett, joined in full by Justice Kavanaugh and in part by the Chief Justice, filed an opinion concurring in part and concurring in the judgment. This one-paragraph opinion joins Part III of the majority opinion and agrees that reversal is required because PAGA's procedure is "akin to other aggregation devices that cannot be imposed on a party to an arbitration agreement." Remarking that she "would say nothing more than that," Justice Barrett finds the discussion in Parts I, II and IV of Justice Alito's opinion unnecessary to the result. (The Chief Justice agrees as to Parts II and IV, but not Part I.) Additionally, Justice Barrett's opinion criticizes the Court's addressing disputed questions of state law, as well as arguments not pressed or passed upon in this case.

Justice Thomas dissented in an opinion repeating his consistent position that the FAA does not apply to proceedings in state court. In his view, therefore, California's courts are not required to enforce Viking's arbitration agreement forbidding Moriana from suing Viking under PAGA. On that basis Justice Thomas would affirm the judgment of the state court.

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California's notorious hostility to employment arbitration easily captured the attention of a Court that has embraced compelled employment arbitration at nearly every turn. But, in a ruling that has disappointed the business community, the Court did not do enough to squash California's PAGA regime. If anything, Justice Sotomayor's express invitation for either the California courts or General Assembly to confer representative standing on plaintiffs like Moriana is a rather unhappy prospect for employers who had sought wholesale FAA preemption in PAGA cases. Indeed, Senator Dave Cortese (D-San Jose), chair of California's Senate Labor, Public Employment and Retirement Committee said on June 15, 2022: " I am prepared to author legislation to respond; I believe that this ruling has provided a roadmap as to how we can create for employees a new pathway to legal standing as well as safeguard the protections that state law puts in place for our workers. Labor laws must be enforced in this state and with labor violations occurring at such a high rate, especially in certain industries, the legislature must and will intervene." Accessed at: <https://sd15.senate.ca.gov/news/senator-cortesese-statement-supreme-court-decision-regarding-paga>.

Much of Justice Alito's opinion - namely parts II and III - may ultimately be taken by many as dicta with little force. At most, those sections commanded a bare majority of five, and given Justice Sotomayor's invitation to the California courts or legislature to resurrect Moriana's representative claims (or at least provide that others will not suffer her fate), there are arguably only four solid votes for Justice Alito's extensive views about the FAA and PAGA. Leaving that tidbit for others to debate, the important point here is to keep a close eye on how California reacts to the Court's decision. In a sense the Court punted the most difficult issue about pursuit of representative claims back to the state courts, and all stakeholders in the workplace are again left without firm guidance.

As expected with so much pending PAGA litigation, this decision in Moriana's case spawned a number of rulings just before the summer recess -- where the Court granted certiorari, vacated the lower courts' judgments and remanded for further consideration in light of its Viking River decision. In sum, the Court vacated three judgments in the following six cases: Uber Technologies, Inc. v. Gregg, 597 U.S. ---, No. 21-453; Uber Technologies, Inc. v. Rosales, 597 U.S. ---, No. 21-526; Lyft, Inc. v. Seifu, etc., 597 U.S. ---, No. 21-742; Shipt, Inc. v. Green, 597 U.S. ---, No. 21-1079; Handy Technologies, Inc. v. Pote, 597 U.S. ---, No. 21-1121; Coverall N. Am. v. Rivas, 597 U.S. ---, No. 21-268. The Court issued no opinions in any of these rulings.

Finally, take note that on July 1, 2022, Moriana's counsel filed a Petition for Reconsideration seeking modification of Part IV of the Court's opinion to the extent that disposition of Moriana's individual claim and dismissal of her representative claim for lack of standing rest on issues of California law that should be determined on remand by the California courts because they were not briefed by the parties, not included in the original petition for certiorari and cannot in any event be resolved by the Supreme Court.

ZF Automotive US, Inc. v. Luxshare, Ltd., 596 U.S. ---, 142 S. Ct. 2078, 211 L. Ed. 2d --- (2022)

The Court held that arbitration panels are not "foreign or international tribunal[s]" under a federal law authorizing district courts to order discovery for use by such tribunals.

Luxshare, Ltd., a Hong Kong company, sued ZF Automotive US, Inc., a Michigan parts manufacturer and subsidiary of a German corporation. The parties' contract required that all disputes be resolved by a panel of arbitrators under the rules of a private German dispute resolution organization in Berlin. Luxshare applied to a district court in Michigan under 28 U.S.C. 1782 seeking discovery from ZF and its officers. The district court granted the request, and ZF moved to quash, arguing that the German arbitration panel was not a "foreign or international tribunal" under section 1782. The district court denied ZF's motion, and the Sixth Circuit denied a stay. ZF filed a petition for certiorari that the Court granted. The case was consolidated with a proceeding brought by a Russian corporation (assignee of a Russian investor's rights against an insolvent and nationalized Lithuanian bank) against Lithuania under a Russia-Lithuania investment treaty requiring disputes to be resolved by a panel of arbitrators. A New York district court granted the Russian corporation's discovery request and the Second Circuit affirmed, ruling that the arbitration panel was not private, but possessed attributes that made it a "tribunal" under section 1782. The Supreme Court granted certiorari and invited the Solicitor General's participation.

The Court, in a unanimous opinion by Justice Barrett, reversed in both cases, ruling that neither arbitration panel was a "foreign or international tribunal" for purposes of obtaining discovery under section 1782. The Court emphasizes that the statute reaches only governmental or intergovernmental adjudicative bodies and that neither panel here "fits that bill." Parsing at length the statute's text and context, examining its history, and making a comparison to the domestic discovery provisions of the Federal Arbitration Act, Justice Barrett concludes neither of these panels would be exercising governmental or intergovernmental authority and thus do not fall within section 1782.

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After dismissal of a prior grant of certiorari, the Court finally was able to address a circuit split about the federal courts' authority under 28 U.S.C. 1782 to assist foreign tribunals by ordering discovery for their use in private commercial international arbitrations. The decision is treated in abbreviated fashion here, as its application to employment arbitrations would only be pertinent in foreign employment disputes.

F. Adjective and Sundry Other Cases

First, witness the most closely examined and highly criticized (justifiably in my view!) decision of the last half-century: The Court's ruling in **Dobbs v. Jackson Women's Health Organization**, 597 U.S. ---, 142 S. Ct. 2228, 212 L. Ed. 2d --- (2022), that the Constitution does not confer a right to abortion and that *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), are overruled, will affect workplace rights and benefits for women in a myriad of life-changing ways. Although this article is not the appropriate place for assessing the legitimacy and rectitude of **Dobbs**, its regrettable impact on women and their hard-fought battle to achieve their rightful place in the nation's economic and social life simply cannot pass without this mention. My hope is that those reading this article will also read all of the opinions in **Dobbs** to appreciate this moment of jurisprudential life, as well as its relevance to workplace justice for women.

The Court also dealt with the availability of emotional distress damages for victims of intentional discrimination when their claims arise under Spending Clause statutes such as the Rehabilitation Act of 1973 and the Affordable Care Act. And, in a case summarized briefly below, the Court was unable to determine a difficult fact-intensive question affecting injured railroad employees because it was evenly split with Justice Barrett recused.

Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. ---, 142 S. Ct. 1562, 212 L. Ed. 2d --- (2022)

The Court held that emotional distress damages are not recoverable in private actions to enforce the Rehabilitation Act of 1973 and the Affordable Care Act.

Jane Cummings, a deaf and legally blind person, sought physical therapy services in October of 2016 from Premier Rehab Keller ("Premier"), a small business in the Dallas-Fort Worth area. Because Cummings communicates primarily in American Sign Language ("ASL"), she requested an ASL interpreter at her appointments. Premier declined the request, telling Cummings that she could use written notes, lip reading or gesturing to communicate with the therapist. Cummings then went elsewhere for her care. She later sued Premier for equitable relief and damages, alleging that the failure to provide an ASL interpreter constituted discrimination on the basis of disability in violation of the Rehabilitation Act of 1973 ("Rehab

Act") and the Patient Protection and Affordable Care Act ("ACA"). Because Premier receives reimbursement for some of its services through Medicare and Medicaid, it is subject to both the Rehab Act and the ACA.

The district court dismissed Cummings' complaint, finding that the only alleged compensable injuries were caused by humiliation, frustration and emotional distress and concluding that "damages for emotional harm" are not recoverable in private actions to enforce the Rehab Act and the ACA. The Fifth Circuit affirmed, adopting the same conclusion as the district court. The Supreme Court granted Cummings' petition for certiorari.

The Supreme Court, in a 6 to 3 decision, affirmed the Fifth Circuit's judgment and held that emotional damages are not recoverable under the Rehab Act and the ACA. Chief Justice Roberts' opinion for the majority first explains that Congress enacted four antidiscrimination statutes under its Spending Clause power to "fix the terms on which it shall disburse federal money." Because none of these statutes expressly provide for suits against the recipients of federal funds, a private right of action has been implied by the courts (and ratified by Congress) so that individuals may obtain both injunctive and monetary relief when these recipients violate the promise they made to obey these laws in order to get federal funds. Viewing the Spending Clause statutes through this contract-analogy lens, the Chief Justice opines that a particular remedy must be one that the fund recipients knowingly accepted. More particularly here, the Court asks simply: "Would a prospective funding recipient, at the time it . . . was in the process of deciding whether [to] accept federal dollars, have been aware that it would face [liability for emotional distress damages]?"

Applying what the Court terms its "clear notice" requirement, the Chief Justice explains that the statutory texts contain no express remedies, but that the Court had previously identified both compensatory damages and injunctive relief as being available for violations. By the same token, the Court previously concluded that punitive damages are generally not available for breach of contract claims. The Court thus concludes that funding recipients will be subject only to the "usual" contract remedies in private suits. Applying this framework, the Court proclaims as "hornbook law" that emotional distress is generally not compensable in contract. And thus it follows that emotional distress damages are not recoverable under the Spending Clause statutes at issue in Cummings' case.

Chief Justice Roberts' opinion rejects Cummings' argument that traditional contract remedies do include damages for emotional distress. First, the Court discounts Cummings' reliance on the entire law of remedies, noting instead how the *Restatement (Second) of Contracts* generally treats punitive damages and emotional distress damages in the same fashion by favoring neither. Second, even if funding recipients are aware that they could be subject to a broader and more rarified damages rule, a survey of state cases applying the *Restatement's* exception for cases likely to cause serious emotional disturbance demonstrates a lack of consensus for imposing damages in American jurisdictions. Finding no basis in contract law that emotional distress damages are traditionally available, the Court declines to

broaden the availability of such damages under the Spending Clause statutes.

Justice Kavanaugh, joined by Justice Gorsuch, filed a brief concurrence concluding that the contract law analogy employed by both the majority and the dissent is "an imperfect way" to determine remedies for an implied cause of action. The concurring Justices would focus on a principle rooted in the separation of powers limiting the judicial extension of implied rights of action and requiring that only Congress - not the Court - expand remedies for existing implied actions.

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented in an opinion that agrees with the majority's use of a contract law analogy, but concludes that victims of intentional violations of these antidiscrimination statutes can recover damages for emotional suffering. Agreeing that funding recipients like Premier must be on notice that they are subject to remedies that are traditionally available in contract breach suits, the dissent concludes that such damages have long been available where the breach is particularly likely to cause emotional suffering. In Justice Breyer's view, emotional distress damages are merely compensatory because they "make good the wrong done." (Slip Opin., p. 5, citation omitted.) In short, the dissent concludes that breach of a promise not to discriminate falls into this traditionally compensatory category. Indeed, Justice Breyer says that it is difficult to believe that funding recipients would be unaware that intentional discrimination based on disability is particularly likely to cause emotional suffering for which they could be liable. Rejecting the majority's reliance on both precedent and comparison to punitive damages, Justice Breyer advocates reliance on a sensible remedial scheme that comports better with other antidiscrimination laws that contain express authority for emotional distress damages.

* * * *

Despite the non-employment context of Cummings' particular complaint about obtaining physical therapy services, the applicability of this case to employment claims under the Rehabilitation Act and the ACA - as well as two other Spending Clause statutes (Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972) - is virtually absolute. Likewise, the dissent's observation that victims of intentional discrimination who suffer emotional injury will be left with no remedy, employees who suffer emotional injuries from intentional discrimination by employers will also be left without a remedy under these Spending Clause statutes. So, whether you agree with the majority or the dissent, there is no question that this decision crafts new protection for heedless (or willful) employers.

In straightforward fashion and without evident compunction about leaving victims of discrimination without a remedy for their emotional injuries, Chief Justice Roberts' opinion for the majority reaches the result urged by the business community in their submissions. See, <https://www.chamberlitigation.com/cases/cummings-v-premier-rehab-keller-pllc> (Amicus Brief of Chamber of Commerce and others, p. 5). But even the Court's approach was not enough for Justices Kavanaugh and Gorsuch, as their concurrence is premised on doing away

altogether with implied rights of action. They urge that the Court should simply leave it to Congress to say what remedies are available when rights they have created are violated.

Justice Breyer's dissenting opinion draws its force from conceding that the Court's premises for decision are correct, that the question it poses is the right one, but that its answer to the question is wrong because funding recipients do in fact understand that they are exposed to emotional distress damages. To conclude otherwise would leave victims whose rights have clearly been violated without any remedy - a conclusion that Congress assuredly did not contemplate in enacting laws under the Spending Clause..

**LeDure v. Union Pacific Railroad Co., 596 U.S. ---, 142 S. Ct. 1582
--- L. Ed. 2d ---- (2022)**

The Court affirmed by an equally divided vote a Seventh Circuit judgment that the Locomotive Inspection Act was inapplicable to a railroad engineer's work on a parked locomotive.

Bradley LeDure, a locomotive engineer employed by Union Pacific Railroad Company (UP), was a member of a replacement crew for a train stopping in Salem, IL, on its way from Chicago to Dexter, MO. LeDure was responsible for assembling the train for the remainder of its route, including which of the three locomotives would be shut down and towed to conserve fuel. He reported for work at 2:10 a.m. and determined that two of the three locomotives would be shut down. When he began working on one of the locomotives to be shut down, he slipped on a slick substance (later determined to be oil on an exterior walkway) and struck his head, back and shoulders. He was ultimately declared permanently disabled from railroad work after multiple surgeries. LeDure sued UP for negligence under the Federal Employers' Liability Act ("FELA"), alleging violations of a requirement of the Locomotive Inspection Act ("LIA") that locomotive surfaces (such as the walkway) must be free of hazards. UP denied liability and also disputed that the locomotive was "in use" under the LIA because it was on a sidetrack, not part of a fully assembled train and not moving at the time.

The district court granted the employer's summary judgment motion and dismissed LeDure's suit. The Seventh Circuit affirmed, holding that the locomotive could not be considered "in use" under the LIA at the time of LeDure's injury. The Supreme Court granted LeDure's petition for certiorari, and the case was briefed and argued. With major rail unions and rail labor attorneys joining forces to support his claims, LeDure faced both the Chamber of Commerce and the Association of American Railroads who denied that rail safety laws would be impaired by upholding dismissal of LeDure's claim. They also claimed that considering parked locomotives to be "in use" would lead to inefficiency, supply chain problems, daily inspections and ultimately further risks to employees. On April 28, 2022, the Supreme Court affirmed the Seventh Circuit's judgment by an equally divided Court, with Justice Barrett not participating.

* * * *

Whether a locomotive is "in use" for purposes of applying the LIA to a railroad employee's injury claim under the FELA is a question bound to recur in a countless variety of contexts. And, to my surprise in LeDure's case, resolving the question apparently was not an easy task. Perhaps with the full Court's participation, definitive guidance about application of the LIA will occur sooner than later.

II. Grants of Certiorari for the October 2022 Term.

Students for Fair Admissions v. President and Fellows of Harvard, No. 20-1199 Students for Fair Admissions v. University of North Carolina, No. 21-707

The principal question presented in both cases is: "Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?"

By order dated July 22, 2022, the Court noted in each of these two previously consolidated cases that they are no longer consolidated and that one hour of oral argument is allotted for each case. Justice Jackson took no part in the consideration of the order in the Harvard case. That decision is undoubtedly because of her role as a member of Harvard's Board of Overseers, the secondary governing body at the University.

In the Harvard case the following question is also presented: "Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?" In the University of North Carolina case the following question is also presented: "Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?"

These cases, while arising in a college admissions context, are poised to foretell how the Court is likely to approach race-based affirmative action in the workplace. Although Congress has been more explicit about taking race into account in order to achieve equal opportunity in employment, the Court's decision in these two cases may still alter how courts should regard employer efforts to achieve racial diversity and equal opportunity in the workplace.

303 Creative LLC v. Elenis, No. 21-476

The Court's grant of certiorari is limited to the following question: "Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."

Lorie Smith is an artist and website designer who creates original, online content consistent with her faith. She planned to design wedding websites promoting her understanding of marriage and post a statement explaining that she can only speak messages consistent with her faith. The Tenth Circuit upheld application of the Colorado Anti-Discrimination Act to require Smith to create custom websites for clients who are celebrating same-sex marriage and to prohibit her explanatory statement for declining to do so.

For our employment jurisprudence, how the Court resolves the broader underlying question of a faith-based exception to laws of general application is crucial to workplace justice.

Helix Energy Solutions Group, Inc. v. Hewitt, No. 21-984

The question presented is: "Whether a supervisor making over \$200,000 each year is entitled to overtime pay because the standalone regulatory exemption set forth in 29 C.F.R. §541.601 remains subject to the detailed requirements of 29 C.F.R. §541.604 when determining whether highly compensated supervisors are exempt from the FLSA's overtime-pay requirements?"

Stripped of regulatory jargon, the Court is being asked to address how the FLSA's overtime requirements should apply to highly compensated supervisors. Perhaps of little interest to the millions of workers who can only dream of six-figure wages, it will be interesting to learn the Court's reaction to a wage complaint from wage-earners at this end of the spectrum.

U.S. ex rel. Polansky v. Executive Health Resources, Inc., No. 21-1052

The question presented is: "Whether the government has authority to dismiss an FCA [False Claims Act] suit after initially declining to proceed with the action, and what standard applies if the government has that authority?"

The False Claims Act continues to generate considerable interest by both whistleblowers and employers alike, and this case is intended to decide in what circumstances the Government may, under 31 U.S.C. 3730, dismiss a *qui tam* action after initially declining to intervene and proceed with it. Conceivably, putting limits on the Government's right to control an FCA case may implicate the Constitution's requirement in Article II that the President (acting through the Executive Branch) "shall take care that the laws be faithfully executed."

Health and Hosp. Corp., etc. v. Talevski, No. 21-806

The question presented is whether Spending Clause legislation gives rise to privately enforceable rights under 42 U.S.C. 1983, including transfer and medication rules under the Federal Nursing Home Amendments Act of 1987.

Although this case does arise in an employment context, what the Court will confront in

deciding the scope of private enforcement actions under Spending Clause legislation may affect the vitality of Section 1983 enforcement of some laws covering the workplace.

III. Concluding Observations.

Difficult though it may be to analyze workplace issues while earth-shattering events swirl around us and capture our discourse, let's put aside predictions, personalities, and criticisms and concentrate on the down-to-earth practical. What is demonstrably most important to American workers and their families is simply whether our employment and labor laws protect their economic well-being and nurture opportunities for betterment - precisely what Congress intended in enacting those laws. In like juxtaposition, what is demonstrably important to American employers is not only survival in a global economy, but also maintenance of a reasonable return on their investment in workers and assets in order to provide equity and opportunity for all stakeholders - investors, customers, management and workers alike. We should thus review the Court's decision docket with these shared concerns in mind if we are to gain a richer appreciation for our employment jurisprudence.

First, despite the 2021 Term's empty labor law docket, the Court is freshly positioned to address what common wisdom says should be a minor blizzard of cases challenging what the Biden Board and its General Counsel are doing to protect concerted activity, promote organizing, and more aggressively redress employer violations of the NLRA. Moreover, with interest in unionizing enjoying a renaissance (particularly among younger workers) and unions making organizing inroads at some of the country's largest employers, the fallout from what is bound to be a large number of unfair labor practice charges portends Supreme Court involvement at the behest of highly motivated employers supported by able business groups such as the Chamber of Commerce. Well, serendipity! From a Court watcher's point of view, the coincidence of a business-friendly Court majority and a worker-friendly Board holds considerable promise for a busy Supreme Court labor law docket in the coming terms.

In contrast to the 2021 Term's dearth of labor law issues, there was certainly no shortage of arbitration rulings. A pragmatic question on the minds of many observers is whether forced employment arbitration has reached its high-water mark and is now ebbing. Indeed, some observers are quick to assume that two of the arbitration rulings -- (a) that no showing of prejudice is necessary to establish waiver of an employer's right to arbitrate (*Morgan, supra*) and (b) that ramp supervisors are exempt from FAA coverage (*Saxon, supra*) -- indicate that the Court is tempering its aggressive pro-arbitration stance. I do not find that assumption persuasive. My judgment is that the more precise takeaway from these two decisions is (a) that Robyn Morgan has not yet prevailed (if ever) on her claim of "waiver" and (b) that Latrice Saxon's victory will likely affect only a relatively tiny subset of airport employees. Seen in this light, there is little to support the notion that the Court's romance with compelled employment arbitration soured in any meaningful way this term. Take note, however, that forced arbitration of employment disputes has also caught the attention of Congress. On March 3,

2022 the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" was signed into law as amendments to the FAA. Enforcement of mandatory arbitration agreements and class action waivers in sex harassment and sexual assault disputes are henceforth prohibited at the discretion of employees. Additionally, Congress is now considering the FAIR Act, passed by the House as the "Forced Arbitration Injustice Repeal Act." That legislation would prohibit compelled arbitration agreements and class action waivers in a wide range of employment disputes.

To punctuate the profound worry I have expressed about creeping Christian nationalism in the workplace and civil society at large, *supra*, pp. 19-20, interested readers should not overlook a bevy of opinions in non-employment cases by Justices who supported the praying coach's religious exercise. *E.g.*, *Carson v. Makin*, 596 U.S. ---, 142 S. Ct. 1987, 211 L. Ed. 2d --- (2022) (Invalidation of Maine's exclusion of sectarian schools from tuition assistance for rural students); The COVID-19 Vaccine Cases, Section II-B, *supra*; *Trustees of the New Life in Christ Church v. City of Fredericksburg, Virginia*, 595 U.S. --- (Gorsuch, dissenting from the denial of certiorari) (January 18, 2022); *Coral Ridge Ministries, etc. v. Southern Poverty Law Center*, 597 U.S. --- (Thomas, dissenting from the denial of certiorari); and *Ramirez v. Collier*, 595 U.S. ---, 142 S. Ct. 1264, 211 L. Ed. 2d --- (2022) (Religious exercise in execution chamber). Given such insistent deference to -- nay, nurturing of -- sectarian practices (in plain disregard of the Establishment Clause) by some Justices, watch for more of a disturbing spillover to employment law.

A closing exhortation: Why not look at the Supreme Court's employment opinions through an entirely different lens? The United States is now a nation of about one-third of a billion individuals who are largely strangers to each other, but share in a common life together. So, instead of regarding the Court's work only for its doctrinal significance (or even more simply as wins and losses for workers or employers), perhaps we should try to determine the impact of the Court's decisions on "how we learn to negotiate and abide our differences, and how we come to care for the common good." Michael J. Sandel, *What Money Can't Buy, The Moral Limits of Markets*, p. 203 (2012). Because we are all in this together.

Readers, my wish for you is to be well, pursue justice and enjoy keeping watch on the Supreme Court's employment decisions.

Jonathan R. Harkavy
July 30, 2022

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CHAPTER II

Continuing to Pivot

Thomas M. Colclough
EEOC
Washington, DC

**There are no written materials for this chapter.
Please refer to the Appendix for a copy of the PowerPoint presentation slides.**

NORTH CAROLINA

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CHAPTER III

Fourth Circuit Update

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NORTH CAROLINA
BAR ASSOCIATION

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CHAPTER III
Fourth Circuit Update

Sean F. Herrmann – Charlotte

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CHAPTER III

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT MAKE-UP

Current Composition

- Biden Nominee: Judge Toby J. Heytens
- Trump Nominees: Judge Julius N. Richardson (SC), Judge A. Marvin Quattlebaum (SC), and Judge Allison Jones Rushing (NC)
- Obama Nominees: Judge James Andrew Wynn (NC), Judge Albert Diaz (NC), Judge Stephanie D. Thacker (WVa), and Judge Pamela A. Harris (Md)
- G.W. Bush Nominee: Judge G. Steven Agee (Va)
- Clinton Nominees: Judge Robert B. King (WVa), Chief Judge Roger L. Gregory (Va)
- G.H.W. Bush Nominee: Judge Paul V. Niemeyer
- Reagan Nominees: Judge J. Harvie Wilkinson III (Va)

Senior Status

- Senior Judge William B. Traxler, Jr.—August 31, 2018
- Senior Judge Barbara Milano Keenan (Va)—August 31, 2021
- Senior Judge Henry F. Floyd (SC)—December 31, 2021
- Senior Judge Diana Gribbon Motz (Md)—September 30, 2022

New Judge: Judge Toby J. Heytens (Judge Keenan’s Seat)

- Law Clerk for Judge Ginsburg, 2002-03
- Solicitor General for Virginia, 2018-21
- July 13, 2021: Nomination sent to Senate
- November 1, 2021: nomination confirmed; Sworn into office on November 4, 2021

Pending Nomination (Judge Floyd’s Seat)

- South Carolina Circuit Court for the fifth district, 2011

- September 6, 2022: Nomination sent to Senate
- Pending before the Senate Judiciary Committee

CASES TO KNOW FROM THE LAST YEAR

***Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222 (4th Cir. 2022)**

- Vacated and remanded to Western District of North Carolina on district court’s grant of employer’s motion for summary judgment.
- Judge King wrote the published opinion.
- The employee sued the employer and alleged race discrimination; specifically, she alleged hostile work environment and constructive discharge under Title VII and Section 1981.
- The employee worked as a cook for the company. She alleged the owner’s son called her the n-word. She alleged the child communicated that the owner himself had referred to her by that slur. The employee complained to the owner, who asked his son to apologize, but his son refused.
- The employee stopped working for the company. In the lawsuit, she alleged constructive discharge, discrimination, and hostile work environment based on race.
- The Court vacated and remanded, holding the comments were imputable to the employer. This was the main issue before the Court, but it found that the employee presented enough “severe or pervasive” evidence to reach a jury, as well.
- The Court noted that the district court used the correct standard—*i.e.*, “under which an employer is liable for a third party ‘creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment’” (internal citation omitted)—but erred in its application. It found that the district court only looked at actual knowledge, and incorrectly ignored evidence of constructive knowledge. There was evidence that the company did not have a reporting policy and, to the extent it had a relevant handbook, it did not distribute it.
- The Court also disagreed with the district court’s application of the employee’s EEOC documents and statements and found that it improperly took the issue of whether she reported the comments to her supervisor away from the jury.
- Finally, the Court disagreed with the district court’s conclusion that the evidence meant a jury could not find the company failed to take reasonable steps to stop the harassment.

Webster v. Chesterfield Cnty. Sch. Bd., 38 F.4th 404 (4th Cir. 2022)

- Affirmed Eastern District of Virginia’s grant of the company’s motion for summary judgment.
- Judge Gregory wrote the published opinion.
- The employee, who worked as an instructional assistant at an elementary school, filed a lawsuit against the school for hostile work environment sexual harassment under Title VII.
- The district court granted the school’s motion for summary judgment, holding that the touching at issue was not based on sex and the harassment was not severe pervasive. It also held that the conduct was not imputable to the school.
- The Court agreed and affirmed the district court’s ruling. In doing so, on the “based on sex” prong, the Court relied on an expert’s opinion that the student—who had Down’s Syndrome and ADHD—at issue was incapable of distinguishing between genders.
- On the severe or pervasive analysis, the Court found that the employee only presented evidence on the subjective prong and failed to do so on the objective prong, which made summary judgment appropriate. That is, the law requires both subjective and objective evidence and the employee presented zero evidence from which a jury could find the harassment was objectively severe or pervasive.
- On this issue, the Court dives into the role of experts: “In Webster's view, the district court mistakenly focused on the objective prong of the evaluation and accorded her affidavit zero weight to find that she failed to meet the objective prong. But by continuing to rely on her own statements, Webster conflates the objective and subjective prongs of the severe or pervasive analysis. . . . But when Webster’s statements are used to measure whether the conduct was *objectively* severe or pervasive—Webster’s argument fails. **Without any expert testimony to rebut the School Board's evidence that S.M.'s behavior was consistent with the behavior of a child his age and with his disabilities, Webster fails to cite to anything in the record suggesting that a reasonable person in her position—an experienced instructional assistant working in special education—would find S.M.'s conduct to be severe or pervasive.** Absent such evidence, we cannot find that Webster satisfied this element's objective prong.”
- The Court’s analysis of appropriate remedial measures took into account the right of all children to receive a public education, and, the Court held, in that context the school did enough to avoid liability.

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021)

- Vacated and remanded to the Eastern District of North Carolina.
- Judge Motz wrote the published opinion.
- The female employee sued the company and alleged Title VII disparate treatment on the basis of sex and “sex-plus-age” discrimination and retaliation and violations of the Equal Pay Act and wrongful discharge in violation of North Carolina Public Policy.
- The Court overturned the district court’s grant of summary judgment. In doing so, it hit on a myriad of often discussed employment law points:
 - **On the third prima facie element:** “Tactile asserts that we may solely consider the ‘perception of the [employer]’ on this factor, ‘not the self-assessment of the plaintiff,’ and that “an employer is free to set its own performance standards. . . . It is not clear that Tactile is correct — although we have held that we must focus on the employer’s perception in the context of the *pretext* stage, we have not so held with respect to a plaintiff’s prima facie case. . . . But even assuming that we must focus on just the employer’s perception at the prima facie stage, a plaintiff may still introduce evidence that demonstrates (or at least creates a question of fact) that the proffered expectation is not, in fact, legitimate at all.”
 - **On the relationship between the third prima facie element and pretext:** “Here, Sempowich has introduced a good deal of evidence suggesting that Tactile’s explanations for its decisions were false or inconsistent over time. Much of this evidence has already been discussed above in considering Sempowich’s prima facie case.”
 - **On business judgment:** “It is true that courts must defer to the company’s business judgment with regard to legitimate criteria it chooses to measure successful employee performance. . . . We are not free to substitute criteria of our own. But Sempowich has done more than challenge the criteria or merits of Tactile’s evaluations. Sempowich has done what the plaintiff in *Hawkins* failed to do — ‘supply evidence that [*her employer*] actually believed her performance was good.’”
 - **On the *Proud. v. Stone* defense:** “But Rishe did not reassign Sempowich ‘within a relatively short time span’ after he rehired her — far from it. In *Proud*, the time span was less than six month. . . . Here, Rishe reassigned Sempowich approximately *eight years* after he rehired her and four years after he promoted her.”

- **On temporal proximity in retaliation claims:** But it then held that no rational jury could find that a causal relationship existed, reasoning that (1) temporal proximity alone cannot establish a causal relationship; and (2) no temporal proximity existed in Sempowich's case. The court erred on both counts. . . . First, the court erred by holding that temporal proximity alone cannot establish a causal relationship. We have made abundantly clear that temporal proximity suffices to show a causal relationship.
- **On Equal Pay Act measuring:** “The text of the Equal Pay Act unambiguously states that an employer may not ‘discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex.’ 29 U.S.C. § 206(d)(1) (emphasis added). This critical portion of the statute says nothing about total wages; it places all the emphasis on wage rates.”

Cowgill v. First Data Techs., Inc., 41 F.4th 370 (4th Cir. 2022)

- Affirmed in part, vacated in part, and remanded to the District of Maryland.
- Judge Gregory wrote the published opinion; Judge Quattlebaum concurred in part and dissented in part.
- The employee sued the company and alleged ADA discrimination, failure to accommodate, and retaliation.
- The district court granted the company’s motion for summary judgment on all of the employee’s ADA claims.
- On the employee’s failure to accommodate claim, the district court held that the employee took the requested leave and the company approved the leave. **On the retaliation claim, the district court granted summary judgment because the employee’s EEOC charged did not contain information to put the company on notice that she was pursuing a retaliation claim. The Court agreed on both and affirmed.**
- On the discrimination claims, the district court found the employee presented insufficient evidence that: (1) she met the company’s legitimate expectations, (2) the circumstances raised a reasonable inference of unlawful discrimination; and (3) the company’s explanation was pretextual.
- The Court disagreed on all three points.

- On the third element, the Court stated, “**To satisfy the third element, a plaintiff need not ‘show that [s]he was a perfect or model employee. Rather, a plaintiff must show only that [s]he was qualified for the job and that [s]he was meeting [her] employer's legitimate expectations.’**” (Internal citation omitted.) It found highly relevant that the employee received positive performance reviews.
- With respect to the fourth element, the Court relied heavily on the close temporal proximity and a comment the jury could view as showing bias.
- Finally, on pretext, the Court found that the district court’s comparator application was too rigid—it effectively found that a proper comparator had to report to the same supervisor, but, the Court noted, that isn’t a requirement and the comparator need only be similar in “**all relevant respects.**”

Roberts v. Gestamp W. Virginia, LLC, 45 F.4th 726 (4th Cir. 2022)

- Affirmed in part, vacated in part, and remanded to the Southern District of West Virginia.
- Judge Diaz wrote the published opinion.
- The employee brought suit against the company for FMLA interference and retaliation and Western Virginia state law wrongful discharge.
- The district court granted the company’s summary judgment motion because it held the employee did not present sufficient evidence that the employee complied with the company’s “usual and customary” absentee notice procedures, as required by the FMLA (29 C.F.R. §825.303 (c)).
- The Court found that, on appeal, the employee failed to present sufficient evidence that the company fired him in retaliation for exercising his FMLA rights, so it affirmed the district court on the FMLA retaliation and state law wrongful discharge claims. However, the Court reversed on the FMLA interference claim.
- Specifically, **the Court held that the district court erred in limiting “usual and customary” notice procedures to the company’s written policies and should have allowed a jury to decide whether use of Facebook Messenger was “usual and customary” at the company.** The Court stated: “A plain reading of the phrase ‘usual and customary’ therefore includes methods of providing absentee notice that an employer has accepted as ‘a pattern or course of conduct to date’ or ‘by custom[]’” (internal citation omitted.) The employee presented evidence sufficient for a jury to find that his use of Facebook Messenger met the FMLA requirement.

- The company argued that, even if the employee properly notified it of his absences, he failed to meet his FMLA obligation to update the company on the duration of his absence, which should defeat the interference claim.
- The Court disagreed, finding that the evidence “cut both ways,” which meant a jury should decide and not the judge.
- Finally, with respect to the termination, the Court held that there was no reasonable evidence that the decision maker was aware of the employee’s request for leave, so the district court properly granted summary judgment on the termination claims.

***Coffey v. Norfolk S. Ry. Co.*, 23 F.4th 332 (4th Cir. 2022)**

- Affirmed the Eastern District of Virginia’s grant of the company’s motion for summary judgment.
- Judge Wilkinson wrote the published opinion.
- The employee, a train engineer, brought this suit against the company under the ADA to challenge the company’s right to request certain medical records and discharge him for his failure to comply.
- The company moved for summary judgment, and the district court granted its motion. It found that the company’s medical inquiry was proper under the ADA because it had an objectively reasonable basis to believe the employee could not properly carry out his duties and that he posed a safety risk. On the termination claim, the district court granted summary judgment because the employee presented insufficient evidence for a jury to find that he was disabled and to overcome the company’s legitimate, non-discriminatory reason for the termination.
- The Court agreed and affirmed.
- “Each of Norfolk Southern's specific inquiries into Coffey's medication usage—which included information about diagnoses, symptoms, side effects, ability to perform his job, compliance with prescription regimen, and possible adverse interaction between the medications—were related to Coffey's job. This information is unquestionably consistent with the necessity of ensuring the safe operation of Norfolk Southern's trains. That the inquiries may have required Coffey to provide ample records does not change this conclusion. While we in no way diminish employees' privacy rights against improper medical inquiries, Norfolk Southern, given its responsibility for public safety, was more than justified in requesting enough information to permit an informed decision about whether it was safe for its locomotive engineer to operate a train.”

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CHAPTER IV

What's Precedent Got to Do With It? The Earthshaking Employment Law Implications of *Dobbs*

Moderator: *Chandra A. Stallworth*
Richardson Plowden & Robinson PA
Columbia, SC

Panelist: *Susanna S. Birdsong*
Planned Parenthood South Atlantic
Raleigh, NC

Panelist: *Katherine Dudley Helms*
Ogletree Deakins Nash Smoak & Stewart PC
Columbia, SC

Panelist: *Grant Burnette LeFever*
Burnette Shutt & McDaniel PA
Columbia, SC

NORTH CAROLINA
BAR ASSOCIATION

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CHAPTER IV
**What’s Precedent Got to Do With It? The Earthshaking
Employment Law Implications of *Dobbs***

Moderator: *Chandra A. Stallworth – Columbia, SC*

Panelists: *Susanna S. Birdson – Raleigh, NC*

Katherine Dudley Helms – Columbia, SC

Grant Burnette LeFever – Columbia, SC

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CHAPTER IV

What's Precedent Got to Do With It? The Earthshaking Employment Law Implications of *Dobbs*

A. INTRODUCTION – NC/SC ABORTION LAW UPDATE

1. *Dobbs v. Jackson Women's Health Organization*

The United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 597 U.S. ____ (2022), holding that there is no federal constitutional right to abortion, overturned nearly 50 years of precedent beginning with *Roe v. Wade*, 410 U.S. 113 (1973), and conferred the authority to regulate abortion back to individual states. The *Dobbs* decision and states' efforts to ban, curtail, and criminalize abortions have created complex, evolving legal issues for both individuals and employers, ranging from leave and benefits to employee expression and workplace climate.

Below is a broad overview of key employment law issues implicated by the *Dobbs* decision this summer.

2. North Carolina

In 2019, a federal district court enjoined the state's 20-week ban on abortion, and in 2021, the Fourth Circuit affirmed that injunction. The state law, originally passed in the early 1970s, was amended in 2015 to significantly narrow the exception under which someone could access an abortion after 20 weeks of pregnancy, and, in 2016, Planned Parenthood, the Center for Reproductive Rights, and the ACLU challenged the amended law in federal court as an unconstitutional pre-viability abortion ban under *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

Following *Dobbs*, in July 2022, the district court judge who issued the injunction in 2019 *sua sponte* asked the parties for briefing on what the court should do with the injunction in light of the *Dobbs* decision. A month later, the court lifted the injunction, despite both plaintiffs and defendants agreeing that the injunction should remain in place.

Abortion currently is legal up to the twentieth week of pregnancy in North Carolina, with a very narrow "medical emergency exception" for abortions after 20 weeks.

3. South Carolina

In February 2021, the South Carolina General Assembly passed SB1, which bans abortions after the detection of fetal or embryonic cardiac activity, as early as six weeks of pregnancy. Planned Parenthood and the Center for Reproductive Rights immediately challenged the law on constitutional grounds under *Roe* and *Casey*. A federal district court preliminarily enjoined the six-week ban (affirmed by the Fourth Circuit) but subsequently stayed the case pending a decision in *Dobbs*.

Following *Dobbs*, in June 2021, the federal district court stayed the preliminary injunction, at which point the six-week ban went into effect, before ultimately dismissing the case without prejudice.

In July 2022, Planned Parenthood and the Center for Reproductive Rights challenged the law in state court under the state constitutional right to privacy and guarantees of equal protection and due process. The South Carolina Supreme Court accepted the case in its original jurisdiction and temporarily enjoined enforcement of the six-week ban in August 2022. The South Carolina Supreme Court heard arguments in the case on October 19, 2022.

Pending a ruling by the South Carolina Supreme Court, the six-week ban remains enjoined, and abortion is legal up to the twentieth week of pregnancy in South Carolina, under the state's prior law.

After *Dobbs*, the South Carolina General Assembly convened with the goal of passing more restrictive abortion legislation. However, the two chambers have not been able to agree on a version to send to the Governor, with the House passing a near-total abortion ban and the Senate placing additional restrictions on the six-week ban.

B. ANTI-DISCRIMINATION LAWS

1. Title VII

a. Sex

Title VII, as amended by the Pregnancy Discrimination Act (PDA), prohibits sex discrimination, including discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. § 2000e(k). Both the EEOC and federal courts have recognized these protections as extending to an individual’s decision to have, or not have, an abortion. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, No. 915.003 (June 25, 2015); *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3rd Cir. 2008); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996); *Ducharme v. Crescent City Deja Vu, LLC*, 406 F. Supp. 3d 548, 552 (E.D. La. 2019); *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007).

The PDA also specifically addresses health insurance coverage for abortions: “Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.” 29 C.F.R. 1604.10(b).

b. Religion

Title VII broadly defines “religion” as including “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. § 2000(j). Because positions on abortion often are closely intertwined with religious beliefs, employers’ policies or expressed viewpoints on abortion and responses to employees’ expressed viewpoints on abortion may implicate Title VII’s prohibition against religious discrimination. *See Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998); *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337 (8th Cir. 1995); *Turic v. Holland Hospitality, Inc.*, 849 F. Supp. 544 (W.D. Mich. 1994), *aff'd in part, rev'd in part*, 85 F.3d 1211 (6th Cir. 1996).

Recently, a Texas jury awarded more than \$5 million to a former flight attendant, who alleged she was fired for anti-abortion social media posts and messages, in violation of Title VII’s prohibition against religious discrimination, among other claims. *Carter v. Trans. Workers Union Local 556*, No. 3:17-cv-02278 (N.D. Tex. Jul. 14, 2022).

2. Americans with Disabilities Act

Title I of the ADA protects individuals from employment discrimination because of disability, limits when and how an employer may make medical inquiries or require medical examinations of employees and applicants for employment, and requires that an employer provide reasonable accommodation for an employee or applicant with a disability. While pregnancy itself is not a disability, pregnant workers and job applicants are not excluded from the protections of the ADA. Changes to the definition of the term “disability” resulting from enactment of the ADA Amendments Act of 2008 (ADAAA) make it easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA.

A pregnancy-related impairment is considered a disability if it substantially limits a major life activity, such as walking, standing, and lifting, or a major bodily function, such as the musculoskeletal, neurological, cardiovascular, circulatory, endocrine, and reproductive functions. An employer’s duties under the ADA may be triggered by an employee seeking an abortion due to a disability or an employee experiencing complications from an abortion.

Even if an employee’s condition does not qualify as a disability under the ADA, the Act’s confidentiality requirements for medical information still apply.

3. South Carolina Pregnancy Accommodations Act

The South Carolina Pregnancy Accommodations Act amends the South Carolina Human Affairs Law to require employers with at least 15 employees to provide reasonable accommodations to employees for medical needs arising from pregnancy, childbirth, or other related medical conditions. Under the Act, employers may be required to provide a reasonable accommodation, such as additional leave, to a pregnant employee seeking an abortion or abortion-related care.

4. N.C. Executive Order Nos. 82 and 263

Executive Order No. 82, signed by Governor Roy Cooper in December 2018, extends the state's nondiscrimination protections, including workplace modifications, to pregnant employees of a North Carolina agency, department, board, or commission under the purview of the Governor's Office.

Executive Order No. 263, signed by Governor Cooper in July 2022, prohibits cabinet agencies from requiring a pregnant state employee to travel to a state that has imposed restrictions on access to reproductive health care services if those restrictions do not include an exception for the health of the pregnant person.

C. LEAVE LAWS

1. Family and Medical Leave Act

As with the ADA, the FMLA does not recognize pregnancy, without more, as a "serious health condition" requiring FMLA leave. However, pregnancy often causes serious health conditions that entitle an employee to access FMLA leave. A pregnant employee may be entitled to job-protected leave for abortion-related care under the FMLA if a healthcare provider determines that the employee has a qualifying serious health condition. An employee also may be entitled to FMLA leave to care for a family member seeking abortion-related care.

2. Americans with Disabilities Act

See B.1.b.

3. Workers' Compensation

A pregnant employee who suffers an on-the-job injury for which a healthcare provider determines that an abortion is the appropriate treatment may be entitled to workers' compensation coverage.

D. EMPLOYEE EXPRESSION

1. First Amendment

Employees who work for governmental entities will have First Amendment protections as to their speech. Private sector employees' speech is not protected by the First Amendment.

2. National Labor Relations Act

The NLRA applies to both unionized and nonunionized facilities. The NLRA prohibits retaliation against employees who discuss the terms and conditions of employment. Thus, employees (1) discussing or advocating for an employer to provide benefits to women seeking reproductive and abortion-related healthcare services, (2) advocating for the employer to take a certain public stance on the issue, or (3) protesting the employer's public position on the issue may constitute protected activity under the NLRA.

3. S.C. Code Ann. § 16-17-560

S.C. Code Ann. section 16-17-560 prohibits an employer from discharging an employee "because of political opinions or the exercise of political rights." Violation of this section is a misdemeanor and can give rise to a wrongful discharge claim against the employer. A South Carolina federal district court has narrowly construed section 16-17-560 to apply "only to matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political contributions, and the right to vote." *Vanderhoff v. John Deere Consumer Prods.*, No. 3:02-0685-22, 2003 U.S. Dist. LEXIS 25805, at *7 (D.S.C. Mar. 12, 2003).

E. BENEFITS

ERISA neither restricts employer-sponsored health plans from covering abortion nor requires employer-sponsored health plans to cover abortion. The PDA requires coverage of abortion where the life of the mother would be endangered if the pregnancy were carried to term and for treatment for complications from an abortion.

Insured plans will be subject to the law of the state that governs its insurance contract. Self-insured plans can be designed to cover or exclude abortion, subject to the PDA.

In response to state restrictions on abortion access, many employers are considering adding medical travel expense benefits. Employers should carefully consider the scope and mechanics of administering these benefits to ensure compliance with the many potentially implicated laws, including ERISA, PDA, MHPAEA, HIPAA, and IRC.

F. PRIVACY

Previously, privacy lawyers have argued that personal data could be abused if it got into the wrong hands. However, the harm was difficult to understand. In 2015, an anti-abortion group took women's location data to display anti-abortion ads around abortion clinics. A data broker reportedly sold data of women visiting Planned Parenthood clinics, including how long they stayed, from where they came, and where they went after their visit. There are apps available that will track a women's menstrual cycle. Given some of the proposed restrictions, the ability for the government, employers, or other entities to obtain this information could raise questions.

In response to the *Dobbs* decision, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) released guidance materials discussing the roles that the Health Insurance Portability and Accountability Act of 1996, and its implementing regulation, as amended (HIPAA) plays in safeguarding protected health information (PHI) for women.

Additionally, employers must adhere to the confidentiality requirements of the ADA, FMLA, and other laws implicated by an employee seeking an abortion or abortion-related care. Information about an employee's health must be kept confidential and separate from the employee's personnel.

In disclosing information about policy changes related to state abortion laws, employers must be mindful not to disclose the names of affected employees.

South Carolina General Assembly
122nd Session, 2017-2018

Download [This Bill](#) in Microsoft Word format

A244, R244, H3865

STATUS INFORMATION

General Bill

Sponsors: Reps. Bernstein, Delleney, Ridgeway, King, Whipper, J.E. Smith and Knight

Document Path: I:\council\bill\13651sd17.docx

Introduced in the House on February 28, 2017

Introduced in the Senate on April 5, 2017

Last Amended on May 8, 2018

Passed by the General Assembly on May 10, 2018

Governor's Action: May 17, 2018, Signed

Summary: SC Pregnancy Accommodations Act

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
2/28/2017	House	Introduced and read first time (House Journal-page 37)
2/28/2017	House	Referred to Committee on Judiciary (House Journal-page 37)
3/22/2017	House	Member(s) request name added as sponsor: King
3/29/2017	House	Committee report: Favorable with amendment Judiciary (House Journal-page 43)
3/30/2017	House	Member(s) request name added as sponsor: Whipper, J.E.Smith
4/4/2017	House	Requests for debate-Rep(s). GR Smith, Loftis, Forester, Magnuson, Bernstein, Toole, Hiott, Crosby, S. Rivers, Davis, Hosey, Taylor, Finlay, Erickson (House Journal-page 20)
4/4/2017	House	Member(s) request name added as sponsor: Knight
4/4/2017	House	Amended (House Journal-page 52)
4/4/2017	House	Read second time (House Journal-page 52)
4/4/2017	House	Roll call Yeas-52 Nays-50 (House Journal-page 57)
4/5/2017	House	Read third time and sent to Senate (House Journal-page 78)
4/5/2017	Senate	Introduced and read first time (Senate Journal-page 11)
4/5/2017	Senate	Referred to Committee on Judiciary (Senate Journal-page 11)
1/24/2018	Senate	Referred to Subcommittee: Hutto (ch), Shealy, McLeod, Senn, R.J.Cash
2/21/2018	Senate	Committee report: Favorable with amendment Judiciary (Senate Journal-page 7)
2/22/2018		Scrivener's error corrected
5/1/2018	Senate	Committee Amendment Amended and Adopted (Senate Journal-page 58)
5/1/2018	Senate	Amended (Senate Journal-page 58)
5/2/2018		Scrivener's error corrected
5/8/2018	Senate	Amended
5/8/2018	Senate	Read second time
5/8/2018	Senate	Roll call Ayes-44 Nays-0 (Senate Journal-page 92)
5/9/2018		Scrivener's error corrected
5/9/2018	Senate	Read third time and returned to House with amendments (Senate Journal-page 33)

5/10/2018 House Concurred in Senate amendment and enrolled
 ([House Journal-page 54](#))
 5/10/2018 House Roll call Yeas-96 Nays-0 ([House Journal-page 55](#))
 5/14/2018 Ratified R 244
 5/17/2018 Signed By Governor
 5/30/2018 Effective date 05/17/18
 5/31/2018 Act No. 244

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VERSIONS OF THIS BILL

[2/28/2017](#)
[3/29/2017](#)
[4/4/2017](#)
[2/21/2018](#)
[2/22/2018](#)
[5/1/2018](#)
[5/2/2018](#)
[5/2/2018-A](#)
[5/8/2018](#)
[5/9/2018](#)

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

(A244, R244, H3865)

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE "SOUTH CAROLINA PREGNANCY ACCOMMODATIONS ACT"; TO AMEND SECTION 1-13-30, RELATING TO DEFINITIONS UNDER THE SOUTH CAROLINA HUMAN AFFAIRS LAW, SO AS TO REVISE THE TERMS "BECAUSE OF SEX" OR "ON THE BASIS OF SEX" USED IN THE CONTEXT OF EQUAL TREATMENT FOR WOMEN AFFECTED BY PREGNANCY, CHILDBIRTH, OR RELATED MEDICAL CONDITIONS, AND TO REVISE THE TERM "REASONABLE ACCOMMODATION" PERTAINING TO WHAT THIS TERM MAY INCLUDE; TO AMEND SECTION 1-13-80, AS AMENDED, RELATING TO UNLAWFUL EMPLOYMENT PRACTICES OF AN EMPLOYER, SO AS TO ADD CERTAIN OTHER UNLAWFUL EMPLOYMENT PRACTICES IN REGARD TO AN APPLICANT FOR EMPLOYMENT OR AN EMPLOYEE WITH LIMITATIONS BECAUSE OF PREGNANCY, CHILDBIRTH, OR RELATED MEDICAL CONDITIONS, TO PROVIDE FOR NOTICE AND APPLICABILITY TO NEW AND CURRENT EMPLOYEES TO WHOM SPECIFIC PROVISIONS APPLY, AND TO PROVIDE FOR CERTAIN PUBLIC EDUCATION EFFORTS BY THE HUMAN AFFAIRS COMMISSION; AND TO PROVIDE THAT THE HUMAN AFFAIRS COMMISSION WITH STATED LIMITATIONS MAY PROMULGATE REGULATIONS TO CARRY OUT THIS ACT.

Be it enacted by the General Assembly of the State of South Carolina:

Citation

SECTION 1. This act is known and may be cited as the "South Carolina Pregnancy Accommodations Act".

Intent

SECTION 2. It is the intent of the General Assembly by this act to combat pregnancy discrimination, promote public health, and ensure full and equal participation for women in the labor force by requiring employers to provide reasonable accommodations to employees for medical needs arising from pregnancy, childbirth, or related medical conditions. Current workplace laws are inadequate to protect pregnant women

from being forced out or fired when they need a simple, reasonable accommodation in order to stay on the job. Many pregnant women are single mothers or the primary breadwinners for their families; if they lose their jobs then the whole family will suffer. This is not an outcome that families can afford in today's difficult economy.

Definitions revised

SECTION 3.A. Section 1-13-30(l) of the 1976 Code is amended to read:

"(l) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, including, but not limited to, lactation, and women affected by pregnancy, childbirth, or related medical conditions must be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in item (3) of subsection (h) of Section 1-13-80 must be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion. However, nothing in this subsection shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion. This subsection shall not apply to any fringe benefit fund or insurance program which was in effect on October 31, 1978, until April 30, 1979. Until after October 31, 1979 or, if there was an applicable collective bargaining agreement in effect on October 31, 1978, until the termination of that agreement, no person who, on October 31, 1978, was providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation of the provisions of this chapter relating to sex discrimination in employment shall, in order to come into compliance with such provisions, reduce the benefits or the compensation provided any employee on October 31, 1978, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program, except that where the costs of such benefits on October 31, 1978 are apportioned between employers and employees, the payments or contributions required to comply with the provisions of this chapter relating to sex discrimination in employment may be made by employers and employees in the same proportion. Nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with the provisions of this chapter relating to sex discrimination in employment."

B. Section 1-13-30(T) of the 1976 Code, is amended to read:

"(T) 'Reasonable accommodation' may include:

(1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities and individuals with medical needs arising from pregnancy, childbirth, or related medical conditions provided the employer shall not be required to construct a permanent, dedicated space for expressing milk; however, nothing in this section exempts an employer from providing other reasonable accommodations; and

(2)(a) for individuals with disabilities: job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations; or

(b) for individuals with medical needs arising from pregnancy, childbirth, or related medical conditions providing more frequent or longer break periods; providing more frequent bathroom breaks; providing a private place, other than a bathroom stall for the purpose of expressing milk; modifying food or drink policy; providing seating or allowing the employee to sit more frequently if the job requires the employee to stand; providing assistance with manual labor and limits on lifting; temporarily transferring the employee to a less strenuous or hazardous vacant position, if qualified; providing job restructuring or light duty, if available; acquiring or modifying equipment or devices necessary for performing essential job functions; modifying work schedules; however, the employer is not required to do the following, unless the employer does or would do so for other employees or classes of employees that need a reasonable accommodation:

- (i) hire new employees that the employer would not have otherwise hired;
- (ii) discharge an employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the new job;
- (iii) create a new position, including a light duty position for the employee, unless a light duty position would be provided for another equivalent employee; or
- (iv) compensate an employee for more frequent or longer break periods, unless the employee uses a break period which would otherwise be compensated."

Unlawful employment practices added, notice and public education required

SECTION 4. Section 1-13-80(A) of the 1976 Code is amended to read:

"(A) It is an unlawful employment practice for an employer:

- (1) to fail or refuse to hire, bar, discharge from employment, or otherwise discriminate against an individual with respect to the individual's compensation or terms, conditions, or privileges of employment because of the individual's race, religion, color, sex, age, national origin, or disability;
- (2) to limit, segregate, or classify employees or applicants for employment in a way which would deprive or tend to deprive an individual of employment opportunities, or otherwise adversely affect the individual's status as an employee, because of the individual's race, color, religion, sex, age, national origin, or disability;
- (3) to reduce the wage rate of an employee in order to comply with the provisions of this chapter relating to age;
- (4)(a) to fail or refuse to make reasonable accommodations for medical needs arising from pregnancy, childbirth, or related medical conditions of an applicant for employment or an employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer;
- (b) to deny employment opportunities to a job applicant or employee, if the denial is based on the need of the employer to make reasonable accommodations to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions of an applicant for employment or an employee;
- (c) to require an applicant for employment or an employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that the applicant or employee chooses not to accept, if the applicant or employee does not have a known limitation related to pregnancy, or if the accommodation is unnecessary for the applicant or employee to perform the essential duties of her job;
- (d) to require an employee to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions; or
- (e) to take adverse action against an employee in the terms, conditions, or privileges of employment for requesting or using a reasonable accommodation to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions.

For the purposes of this item:

- (i) An employer shall provide written notice of the right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions, pursuant to this item to new employees at the commencement of employment, and existing employees within one hundred twenty days after the effective date of this item.

(ii) The notice required by subsubitem (i) also must be conspicuously posted at an employer's place of business in an area accessible to employees.

The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employees, employment agencies, and applicants for employment about their rights and responsibilities under this item."

Regulations authorized

SECTION 5. The South Carolina Human Affairs Commission may promulgate regulations to carry out this act, provided the regulations do not exceed the definition of "reasonable accommodation" requirements for employers under federal or state law. These regulations may identify some reasonable accommodations addressing medical needs arising from pregnancy, childbirth, or related medical conditions that must be provided to a job applicant or employee affected by these known limitations, unless the employer can demonstrate that doing so would impose an undue hardship.

Construction of act

SECTION 6. Nothing in this act shall be construed to preempt, limit, diminish or otherwise affect any other provision of federal, state, or local law relating to discrimination based on sex or pregnancy, or to invalidate or limit the remedies, rights, and procedures of any federal, state, or local law that provides greater or equal protection for employees affected by pregnancy, childbirth, or related conditions.

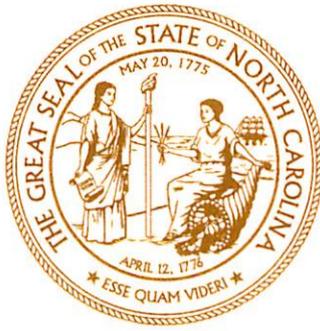
Time effective

SECTION 7. This act takes effect upon approval by the Governor.

Ratified the 14th day of May, 2018.

Approved the 17th day of May, 2018.

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State of North Carolina

ROY COOPER
GOVERNOR

December 6, 2018

EXECUTIVE ORDER NO. 82

PROMOTING HEALTH AND WELLNESS BY CLARIFYING PROTECTIONS AFFORDED TO PREGNANT STATE EMPLOYEES

WHEREAS, North Carolina state government is made stronger by the talent, diligence, experience, and integrity of its workforce; and

WHEREAS, North Carolina state government strives to retain its existing workforce and recruit new employees that can best provide services to North Carolinians; and

WHEREAS, initiatives that seek to improve employee wellness and health are vital to recruitment and retention efforts; and

WHEREAS, research suggests that workplace adjustments for pregnant workers promote physical and mental health; reduce the risk of poor birth outcomes; and increase workplace productivity, retention, and morale; and

WHEREAS, the North Carolina Office of State Human Resources (“OSHR”) issues and implements policies and procedures that protect pregnant state employees (collectively “OSHR Policies”); and

WHEREAS, the undersigned is committed to promoting policies that support pregnant workers to ensure their safety and prevent discrimination, harassment, and retaliation in state government employment.

NOW, THEREFORE, by the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Purpose

It shall be the policy of the Office of the Governor and State Agencies, as defined herein, to extend workplace protections and modifications to pregnant, State Agency employees upon request, unless doing so would impose significant burdens or costs.

Section 2. Definitions

- a. “State Agency”: Any North Carolina department, agency, board, commission, or committee for which the Governor has oversight responsibility.
- b. “Contractor”: An individual or group of individuals, however organized, that provides goods and services pursuant to a contract with a State Agency.
- c. “Subcontractor”: An individual or group of individuals, however organized, that contracts with a Contractor as defined in Section 2.b of this Executive Order.
- d. “Pregnant”: Concerning pregnancy, childbirth, or a related medical condition.

- e. “Eligible State Employee”: A State Agency employee who is pregnant.
- f. “Workplace Adjustments”: Changes in the work environment or in the way things are customarily done that enable pregnant employees to perform their jobs’ essential functions or enjoy equal benefits and privileges of employment. Workplace Adjustments may include, but are not limited to, the following temporary accommodations: (i) a change in workstation and seating equipment, and/or relocation of workplace materials and equipment to make them more accessible; (ii) more frequent and/or longer breaks; (iii) periodic rest; (iv) assistance with manual labor; (v) modified work schedules, including the option to work from home; (vi) modified work assignments; (vii) adjustment of uniforms or dress codes; (viii) provision of properly sized safety gear; (ix) temporary transfer; (x) reasonable break time and access to appropriate, non-bathroom lactation accommodations for rest and/or to express breast milk; (xi) access to food and drink and permitting meals and beverages at workstations; (xii) changes in lighting and noise levels; and (xiii) closer parking and/or access to mobile assistance devices.

Notwithstanding Section 2.g of this Executive Order, it is the undersigned’s intent to ensure that Eligible State Employees are provided the widest range of pregnancy protections, including Workplace Adjustments, upon compliance with Section 5 of this Executive Order.

- g. “Undue Hardship”: A significant difficulty or expense imposed upon an employer as a result of offering or providing Workplace Adjustments. When determining whether a difficulty or expense constitutes an Undue Hardship, an employer may consider the following factors: (i) the nature and cost of the Workplace Adjustments; (ii) overall financial resources; (iii) the number of employees and the number, type, and location of facilities; and (iv) the impact of Workplace Adjustments on the employer’s expenses, resources, or operation(s).

Section 3. OSHR Responsibility

- a. OSHR shall work with State Agencies to ensure Eligible State Employees and all relevant State Agency management and staff receive information about and understand the obligations and protections established by the OSHR Policies and this Executive Order.
- b. OSHR shall prepare and distribute updated equal employment opportunity plan guidelines (“the Guidelines”) to State Agencies. The Guidelines will set forth what information State Agencies will be required to collect regarding their efforts to educate management and staff of their obligations and employee rights under the OSHR Policies and this Executive Order. The Guidelines will also require that the information collected be included in State Agencies’ equal employment opportunity plans (“EEO Plans”). The Guidelines will be disseminated as soon as practicable to ensure the collection and reporting of meaningful data in the EEO Plans due March 1, 2019, and every year thereafter. OSHR shall compile this data and provide it to the Governor’s Office for review.
- c. Consistent with existing state law, OSHR shall take any additional steps necessary to prevent and stop discrimination, retaliation, and harassment against Eligible State Employees, including, where necessary, amending OSHR Policies in accordance with this Executive Order and providing Eligible State Employees a means of challenging adverse Workplace Adjustment determinations.

Section 4. State Agencies’ Responsibility

- a. Absent an Undue Hardship, State Agencies shall provide Workplace Adjustments to Eligible State Employees upon request.
- b. Notwithstanding Section 4.a of this Executive Order, a State Agency may require documentation from an Eligible State Employee’s health care provider certifying the necessity of Workplace Adjustments.
- c. State Agencies must post written notice of the rights afforded to Eligible State Employees under the OSHR Policies and this Executive Order. This notice must be physically displayed in a conspicuous area in each office maintained by a State Agency.
- d. A State Agency may not force an Eligible State Employee to accept Workplace Adjustments.

- e. State Agencies shall collect and compile information regarding their efforts to educate their management and staff of their obligations and employee rights under the OSHR Policies and this Executive Order. This information will be provided to OSHR in the EEO Plans due March 1, 2019, and every year thereafter, and shall include, at minimum, the following: (i) the number of notices in each of the State Agency's offices that educate management and staff of their obligations and employee rights under the OSHR Policies and this Executive Order; (ii) the content of those notices; and (iii) information regarding any additional education initiative(s) carried out by the State Agency, specifically the nature of the initiative (form and/or medium), the information conveyed, and the estimated number of management and staff who were able to obtain information from or otherwise had access to the initiative(s).
- f. State Agencies shall take any additional steps necessary to prevent discrimination, retaliation, and harassment against Eligible State Employees.
- g. Consistent with existing state law, State Agencies shall take any additional actions necessary to foster Contractor and Subcontractor compliance with OSHR Policies and this Executive Order, including, but not limited to, adopting measures that would identify whether and under what circumstances Contractors and Subcontractors may be barred from consideration from future State Agency contracts and subcontracts for failing to adopt policies consistent with this Executive Order.

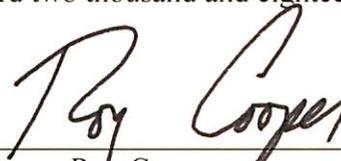
Section 5. Eligible State Employees' Responsibility

Eligible State Employees shall notify their supervisors if Workplace Adjustments are needed and may be required to provide certification from a health care provider.

Section 6. Miscellaneous

- a. Notwithstanding Section 4.g of this Executive Order, this Executive Order does not apply to counties, municipalities, political subdivisions, local government agencies, or private entities.
- b. State entities not subject to the undersigned's oversight are encouraged but not required to comply with Sections 3 and 4 of this Executive Order.
- c. Unless otherwise provided, this Executive Order supersedes and rescinds any previous Executive Order to the extent that they conflict.
- d. This Executive Order does not abrogate the workplace and contracting protections set forth in *Policies Prohibiting Discrimination, Harassment, and Retaliation in State Employment, Services, and Contracts under the Jurisdiction of the Office of the Governor*, Exec. Order No. 24, 32 N.C. Reg. 958-62 (Oct. 18, 2017).
- e. This Executive Order is effective immediately and shall remain in effect until amended or rescinded by future Executive Order of the Governor.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 6th day of December in the year of our Lord two thousand and eighteen.



Roy Cooper
Governor

ATTEST:



Elaine F. Marshall
Secretary of State



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State of North Carolina

ROY COOPER
GOVERNOR

July 6, 2022

EXECUTIVE ORDER NO. 263

PROTECTING ACCESS TO REPRODUCTIVE HEALTH CARE SERVICES IN NORTH CAROLINA

WHEREAS, the United States Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* overturned almost fifty (50) years of legal precedent regarding the federal right to reproductive health care services; and

WHEREAS, reproductive freedom is still protected in North Carolina and reproductive health care services remain available in North Carolina; and

WHEREAS, the undersigned is committed to protecting reproductive freedom and the right for women to make their own medical decisions in North Carolina; and

WHEREAS, other states have enacted or plan to enact restrictions on reproductive health care access, including restrictions on abortion without exception for cases of rape or incest or when the health of the pregnant person is in danger; and

WHEREAS, those restrictions are forcing people to travel to other states that protect reproductive freedoms, including North Carolina, in order to access essential reproductive health care services; and

WHEREAS, other states may seek to impose criminal or civil penalties on health care workers or entities that provide reproductive health care services; and

WHEREAS, other states may seek to impose criminal or civil penalties on people who travel to North Carolina to access reproductive health care services; and

WHEREAS, North Carolina will serve as an increasingly critical access point for reproductive health care services for people across the Southeast and country; and

WHEREAS, research demonstrates that unnecessary restrictions and bans on reproductive health care rights have harmful consequences on people's health, safety, and economic stability; and

WHEREAS, unnecessary reproductive health care restrictions disproportionately impact people of color, people with disabilities, people with low incomes, and people who live in rural areas; and

WHEREAS, those who lawfully provide, assist, seek, or obtain reproductive health care services in North Carolina should not be subject to criminal or civil penalties in other states; and

WHEREAS, this Executive Order is not intended to change and does not change North Carolina law, but rather ensures that North Carolinians are afforded the protections and rights provided under North Carolina law; and

WHEREAS, pursuant to Article III of the Constitution of North Carolina and N.C. Gen. Stat. §§ 143A-4 and 143B-4, the Governor is the chief executive officer of the state and is responsible for formulating and administering the policies of the executive branch of state government and ensuring that the laws are faithfully executed; and

WHEREAS, pursuant to N.C. Gen. Stat. § 147-12, the Governor has the authority and duty to supervise the official conduct of all executive and ministerial officers; and

WHEREAS, pursuant to N.C. Gen. Stat. § 15A-726, the Governor has discretionary authority regarding the fulfillment of demands for extradition of individuals charged with crimes in other states.

NOW, THEREFORE, by the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Definitions.

- i. "Cabinet Agencies" are those agencies that are part of the Governor's Office or are headed by members of the Governor's Cabinet.
- ii. "Reproductive health care services" means all medical, surgical, counseling, or referral services relating to the human reproductive system, including, but not limited to, services relating to pregnancy, contraception, or the termination of a pregnancy.

Section 2. Cabinet Agency Coordination to Protect Reproductive Health.

All Cabinet Agencies shall coordinate with each other and pursue opportunities to protect people or entities who are providing, assisting, seeking, or obtaining lawful reproductive health care services in North Carolina.

Section 3. No Assistance from Cabinet Agencies.

To the maximum extent permitted under federal or North Carolina law, and except as required by court order, no Cabinet Agency and no employee, officer, or other person acting on behalf of any Cabinet Agency may provide information or expend or use time, money, facilities, property, equipment, personnel, or other resources in furtherance of any investigation or proceeding that seeks to impose civil or criminal liability or professional sanction upon a person or entity for: (i) the provision of, securing of, receipt of, or any inquiry concerning reproductive health care services that are legal in North Carolina; or (ii) any assistance given to any person or entity that relates to the provision of, securing of, receipt of, or any inquiry concerning reproductive health care services that are legal in North Carolina.

This Section 3 shall not apply to any investigation or proceeding where the conduct that is the subject of potential liability or professional sanction under the investigation or proceeding initiated in or by the other state would be subject to civil or criminal liability or professional sanction under the laws of North Carolina if committed in North Carolina. Notwithstanding the general prohibition of this Section 3, Cabinet Agencies and individuals acting on their behalf may provide information or assistance in connection with such an investigation or proceeding if provided at the written request of the subject of such an investigation or proceeding.

Section 4. Protection Against Extradition.

To the maximum extent permitted under the United States and North Carolina Constitutions, federal and state law, and pursuant to North Carolina General Statute Chapter 15A, Article 37, the undersigned will exercise his discretion to decline requests for the extradition of any person charged with a criminal violation in another state where the violation alleged arises out of the inquiry into, provision of, assistance with, securing of, or receipt of reproductive health care services that are lawful in North Carolina, unless the acts forming the basis of the prosecution of the crime charged would also constitute a criminal offense under North Carolina law.

Section 5. Travel for Pregnant Cabinet Agency Employees.

Cabinet Agencies may not require any pregnant Cabinet Agency employee to travel from North Carolina to a state that has imposed restrictions on access to reproductive health care services if those restrictions do not include an exception for the health of the pregnant Cabinet Agency employee satisfactory to that employee.

Section 6. Protecting Access to and Egress from Reproductive Health Care Facilities.

The North Carolina Department of Public Safety shall work with law enforcement agencies and reproductive health care services facilities to ensure the enforcement of N.C. Gen. Stat. § 14-277.4, which protects access to and egress from health care facilities.

Section 7. Participation of Other State Agencies.

All other state agencies are encouraged to voluntarily adopt the provisions of this Executive Order, or similar provisions.

Section 8. No Private Right of Action.

This Executive Order is not intended to create, and does not create, any individual right, privilege, or benefit, whether substantive or procedural, enforceable at law or in equity by any party against the State of North Carolina, its agencies, departments, political subdivisions, or other entities, or any officers, employees, or agents thereof, or any other person.

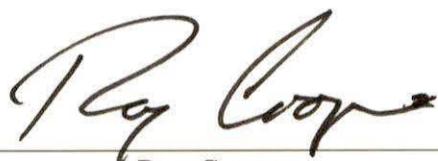
Section 9. Savings Clause.

If any provision of this Executive Order or its application to any person or circumstances is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.

Section 10. Duration and Effective Date.

This Executive Order is effective immediately and shall remain in effect until repealed, replaced, or rescinded by future Executive Order.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 6th day of July in the year of our Lord two thousand and twenty-two.



Roy Cooper
Governor

ATTEST:



Elaine F. Marshall
Secretary of State



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October 21, 2022

Ms. Carol R. Miaskoff
Legal Counsel
Office of Legal Counsel
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Submitted via email: Carol.miaskoff@eeoc.gov

Re: Request for Immediate Investigation

Dear Ms. Miaskoff,

We are writing to request that your office conduct an investigation into potential ethics and rule violations in connection with a letter sent by the former General Counsel to the U.S. Equal Employment Opportunity Commission (the "Commission"), Sharon Gustafson. As you may be aware, Ms. Gustafson has sent letters to a large number of US employers, including many of our clients. The letter suggests the Commission will initiate charges against employers that provide medical travel benefits if those benefits are related to obtaining an abortion. Ms. Gustafson is misleading and intimidating employers who lawfully provide travel benefits under their health plans for those who need medical care that is not available in their own states.

This letter has caused our clients significant confusion and concern. In the opening sentence of the letter Ms. Gustafson states: "I write this letter as a recent General Counsel of the Equal Employment Opportunity Commission (EEOC) with 31 years of experience practicing primarily employment law." In so writing, she suggests she has some measure of legal authority and implies she is acting with the support of the Commission.

She further asserts in her letter that:

EEOC Commissioners may bring Commissioner charges alleging pattern-or-practice discrimination against employers that provide abortion travel benefits because the EEOC's Pregnancy Discrimination Guidance makes clear that an employer may not lawfully withhold from a pregnant employee or dependent an insured fringe benefit based on her decision not to have an abortion. To provide a cash travel benefit only for abortion is to encourage employees to have

abortions, and such encouragement has been found to be evidence supporting a class claim of pregnancy discrimination.

The Commission has not publicly stated that providing abortion-related travel expenses is discriminatory. We do not have any knowledge as to whether the Commission has ever brought discrimination charges against an employer for providing such benefits. However, this statement broadly insinuates that the Commission has and/or will be bringing charges against employers that support access to restricted care. Further, the position that providing travel benefits related to abortion is discriminatory is highly questionable. Health plans are required to cover pregnancy-related healthcare expenses under Federal law, and importantly, healthcare services for full-term pregnancies are not restricted by state law.

In any event, Ms. Gustafson no longer has a position with the Commission and she does not have the authority to assert that the Commission has or will bring such charges. Ms. Gustafson is using her former position to intimidate employers who provide or are considering providing a benefit that is otherwise legal under Federal law in furtherance of her own law practice and personal beliefs.

We ask that your office formally investigate whether Ms. Gustafson's actions constitute a breach of ethical rules or regulations. Further, we urge the Commission to move swiftly to dispel any notion that Ms. Gustafson's letter was authorized by or reflects the Commission's current position with respect to employers providing abortion-related travel benefits.

Sincerely,

A handwritten signature in blue ink, appearing to read 'M. Lotito', with a long horizontal stroke extending to the right.

Michael J. Lotito
Shareholder and Co-Chair of Littler Workplace Policy Institute

Attachment: Letter from Sharon Gustafson dated October 11, 2022

cc: The Honorable Charlotte Burrows, Chair
The Honorable Jocelyn Samuels, Vice Chair
The Honorable Janet Dhillon, Commissioner
The Honorable Keith Sonderling, Commissioner
The Honorable Andrea Lucas, Commissioner

SHARON FAST GUSTAFSON
ATTORNEY AT LAW, PLC
2601 Oberlin Rd, Ste 100-AJB
Raleigh, NC 27608

October 11, 2022



Dear [REDACTED]:

I write this letter as a recent General Counsel of the Equal Employment Opportunity Commission (EEOC) with 31 years of experience practicing primarily employment law.

Employment lawyers have recently learned that [REDACTED] is considering a travel fringe benefit that it may provide to employees who travel to terminate pregnancies. We understand that you have not announced this healthcare travel benefit as extending to employees who wish to travel for other healthcare reasons.

Pregnancy and Childbirth Discrimination

[REDACTED] may violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq* (1964), if it provides such benefits for employees, spouses, or dependents, while not providing equivalent benefits for those who wish to access healthcare that will help them conceive a child, maintain a pregnancy, or care for the health of their unborn children. Pursuant to Title VII, affected employees may commence lawsuits seeking the value of the denied benefits, emotional distress damages, punitive damages, and costs and attorney's fees.

EEOC Commissioners may bring Commissioner charges alleging pattern-or-practice discrimination against employers that provide abortion travel benefits because the EEOC's Pregnancy Discrimination Guidance makes clear that an employer may not lawfully withhold from a pregnant employee or dependent an insured fringe benefit based on her decision not to have an abortion. To provide a cash travel benefit only for abortion is to encourage employees to have abortions, and such encouragement has been found to be evidence supporting a class claim of pregnancy discrimination.

The EEOC has been clear that "an employer [that] decides to cover the costs of abortion, ... must do so in the same manner and to the same degree as it covers other medical conditions" and that "[p]regnancy-related expenses should be reimbursed in the same manner as are expenses incurred for other medical conditions." See 29 CFR 1604.10(a) Pregnancy Discrimination Guidance and 29 C.F.R. pt. 1604 app., Question 37 (1979).

Disability Discrimination

Abortion-travel benefits likely violate the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (2018), if you do not provide equivalent benefits for employees with physical or mental disabilities who have other healthcare needs, that could be addressed by the payment of related travel expenses. *Id.* at § 12112(b)(6). The “equality of opportunity” required by the ADA includes equality in fringe benefits. *Id.* at § 12112(b)(3) (B)(4).

Covered disabilities include impairments of the reproductive system, impairments caused or exacerbated by pregnancy (*e.g.*, anemia, sciatica, carpal tunnel syndrome, gestational diabetes, nausea, abnormal heart rhythms, circulatory problems, depression, pelvic inflammation, symphysis pubis dysfunction), as well as treatable conditions of unborn fetuses (*e.g.*, spina bifida). Specialized care is unavailable in every locale for some of these conditions. To comply with Title VII and the ADA, employers who provide abortion-travel benefits must provide equivalent benefits for those who travel for pregnancy or disability-related healthcare.

Your employees are not blind to the financial benefit to the corporation in subsidizing their abortions. An employer’s “reason” for providing a benefit to some workers that it does not provide to pregnant workers “normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ... whom the employer accommodates.” *Young v. UPS*, 575 U.S. 206, 21; 135 S.Ct. 1338 (2015).

Religious Discrimination

Your abortion-travel benefit will likely have a disparate impact on those who, for reasons of religious belief, are less likely to have abortions and more likely to give birth. And an employer that “explicitly or implicitly coerces an employee to abandon ... a religious [belief or] practice as a condition of receiving a job benefit or privilege” violates the law. EEOC Religious Discrimination Guidance at 12.III.B

The EEOC has recognized that financial incentives can remove the voluntariness component of an employee fringe benefit program. By offering travel benefits for abortion, the employer incentivizes pregnant workers to choose abortion and incentivizes others to pressure pregnant spouses or dependents into choosing abortion, thereby creating an intimidating, hostile, or offensive work environment for affected employees.

Employers should closely examine abortion-related benefits to ensure that they do not discriminate on the basis of pregnancy, disability, or religion, and thereby protect themselves from liability pursuant to Title VII and the ADA. Employers would avoid liability and protect shareholder and employee interests by not providing abortion travel benefits.

Sincerely yours,



Sharon Fast Gustafson
sharon.fast.gustafson@gmail.com



P.O. Box 806 | Austin, Texas 78767-0806
(512) 228-6862 | www.FreedomForTexas.com

Rep. Mayes Middleton
District 23 – Wallisville
Chairman

Rep. Matt Schaefer
District 6 – Tyler
Vice-Chairman

Rep. Matt Krause
District 93 – Fort Worth
Treasurer/Secretary

Rep. Briscoe Cain
District 128 – Deer Park

Rep. Gary Gates
District 28 – Fulshear

Rep. Brian Harrison
District 10 – Waxahachie

Rep. Matt Shaheen
District 66 – Plano

Rep. Valoree Swanson
District 150 – Spring

Rep. Steve Toth
District 15 – The Woodlands

Rep. Cody Vasut
District 25 – Angleton

Rep. James White
District 19 – Woodville

July 7, 2022

Yvette Ostolaza
Chair of the Management Committee
Sidley Austin LLP
2021 McKinney Ave #2000
Dallas, Texas 75201
yvette.ostolaza@sidley.com

Dear Ms. Ostolaza:

It has come to our attention that Sidley Austin has decided to reimburse the travel costs of employees who leave Texas to murder their unborn children. It also appears that Sidley has been complicit in illegal abortions that were performed in Texas before and after the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. We are writing to inform you of the consequences that you and your colleagues will face for these actions.

Abortion is a felony criminal offense in Texas unless the mother's life is in danger. *See* West's Texas Civil Statutes, article 4512.1 (1974) (attached). The law of Texas also imposes felony criminal liability on any person who "furnishes the means for procuring an abortion knowing the purpose intended." West's Texas Civil Statutes, article 4512.2 (1974). This has been the law of Texas since 1925, and Texas did not repeal these criminal prohibitions in response to *Roe v. Wade*, 410 U.S. 113 (1973). These criminal prohibitions extend to drug-induced abortions if any part of the drug regimen is ingested in Texas, even if the drugs were dispensed by an out-of-state abortionist. To the extent that Sidley is facilitating abortions performed in violation of article 4512.1, it is exposing itself and each of its partners to felony criminal prosecution and disbarment.

We will also be introducing legislation next session that will impose additional civil and criminal sanctions on law firms that pay for abortions or abortion travel. The legislation that we will introduce will include each of the following provisions.

First. It will prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs. This provision will impose felony criminal sanctions on anyone who pays for these abortions to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law.

Second. It will allow private citizens to sue anyone who pays for an elective abortion performed on a Texas resident, or who pays for or reimburses the costs associated with these abortions—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs. This provision will be modeled after the Texas Heartbeat Act and its private civil-enforcement mechanism.

Third. It will require the State Bar of Texas to disbar any lawyer who has violated article 4512.2 by “furnishing the means for procuring an abortion knowing the purpose intended,” or who violates any other abortion statute enacted by the Texas legislature. If the State Bar fails to disbar an attorney who has violated these laws, then any member of the public may sue the officers of the State Bar and obtain a writ of mandamus compelling them to impose the required disciplinary sanctions.

Fourth. The legislation that we will introduce next session will empower district attorneys from throughout the state to prosecute abortion-related crimes—including violations of article 4512.2 of the Revised Civil Statutes—when the local district attorney fails or refuses to do so. It will also eliminate the three-year statute of limitations that currently applies to violations of article 4512.2. The state of Texas will ensure that you and colleagues are held accountable for every abortion that you illegally assisted.

It also appears that Sidley may have aided or abetted drug-induced abortions in violation of the Texas Heartbeat Act, by paying for abortions (or abortion-related travel) in which the patient ingested the second drug in Texas after receiving the drugs from an out-of-state provider. Litigation is already underway to uncover the identity of those who aided or abetted these and other illegal abortions. In light of this pending litigation, as well as any anticipated litigation that might ensue, you and your colleagues at Sidley must preserve and retain all documents, data, and electronically stored information relating in any way to: (1) Any abortions performed or induced in Texas on or after September 1, 2021, in which a fetal heartbeat was detectable (or likely to be detectable if tested), including any such abortions that occurred while Judge Pitman’s injunction was in effect from October 6–8, 2021; (2) Any abortions performed or induced in Texas on or after June 24, 2022, including abortions performed while Judge Weems’s TRO was in effect from June 28, 2022, through July 1, 2022; (3) Any abortion that occurred on or after September 1, 2021, if there is any possibility that the patient might have opted for a drug-induced abortion and ingested either of the abortion drugs in Texas, even if the drugs were dispensed by a provider outside the state of Texas; and (4) The identity of any person or entity who has aided or abetted the abortions described in (1) – (3), including anyone at your firm, and anyone who paid for or in any way reimbursed the costs of those abortions.

You and your colleagues must preserve these items regardless of the medium, format, or device on which they are stored or hosted, and regardless of whether they appear in documents, drafts, notes, calendar entries, emails, text messages, voicemails, social-media posts, or any other form. Failure to preserve these documents could subject you and your colleagues to significant penalties.

Conduct yourselves accordingly.

Sincerely,

A handwritten signature in black ink, appearing to read "Mayes Middleton", with a long, sweeping horizontal stroke extending to the right.

Rep. Mayes Middleton
Chairman, Texas Freedom Caucus

Enclosure: West's Texas Civil Statutes, articles 4512.1 – 4512.6 (1974)

cc: All attorneys at Sidley Austin LLP
Ken Paxton, Attorney General of Texas

deformity or injury, by any system or method, or to effect cures thereof.

2. Who shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas¹ and Article 4504, Revised Civil Statutes of Texas as contained in this Act.

[1925 P.C.; Acts 1949, 51st Leg., p. 160, ch. 94, § 20(b); Acts 1953, 53rd Leg., p. 1029, ch. 426, § 11.]

¹ See, now, article 4504a.

Art. 4510b. Unlawfully Practicing Medicine; Penalty

Any person practicing medicine in this State in violation of the preceding Articles of this Chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than Fifty Dollars (\$50), nor more than Five Hundred Dollars (\$500), and by imprisonment in the county jail for not more than thirty (30) days. Each day of such violation shall be a separate offense.

[1925 P.C.; Acts 1939, 46th Leg., p. 352, § 10.]

Art. 4511. Definitions

The terms, "physician," and "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practitioners," "practitioners of medicine," and, "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons.

[Acts 1925, S.B. 84.]

Art. 4512. Malpractice Cause for Revoking License

Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they used the medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall, by any untrue or fraudulent statement or representations made as such physician or person to a patient or other person being treated by such physician or person, procure and withhold, or cause to be withheld, from another any money, negotiable note, or thing of value, may be suspended in his right to practice medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false representations occurred, in the manner and form provided for revoking or suspending license of attorneys at law in this State.

[Acts 1925, S.B. 84.]

CHAPTER SIX ½. ABORTION

Article

- 4512.1 Abortion.
- 4512.2 Furnishing the Means.
- 4512.3 Attempt at Abortion.
- 4512.4 Murder in Producing Abortion.
- 4512.5 Destroying Unborn Child.
- 4512.6 By Medical Advice.

Art. 4512.1 Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

[1925 P.C.]

Art. 4512.2 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

[1925 P.C.]

Art. 4512.3 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

[1925 P.C.]

Art. 4512.4 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

[1925 P.C.]

Art. 4512.5 Destroying Unborn Child

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

[1925 P.C.]

Art. 4512.6 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[1925 P.C.]

CHAPTER V

Ethical Considerations in Employment Settlement Agreements

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CHAPTER V
Ethical Considerations in Employment Settlement Agreements

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**Relevant Rules and Ethics Opinions for Settlement Agreements,
No-Rehire Provisions and
Ethical Considerations in Mediation and Collaborative Law**

I. HOW DID WE GET TO SETTLEMENT?

- A. Pre-Litigation
- B. Litigation
- C. Collaborative Law or other Alternative Dispute Resolution

II. SOME RELEVANT RULES OF N.C. RULES OF PROFESSIONAL CONDUCT ("RPC")

A. RPC 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer

B. RPC 1.4 - Communication

C. RPC 4.1 - Truthfulness in Statements to Others

D. PREAMBLE AND SCOPE: A LAWYER'S PROFESSIONAL

RESPONSIBILITIES: (1) A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. (2) As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. (3) In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals.¹ (See, e.g. , Rules 1.12 and 2.4...)²

[13] Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel with courtesy and respect. The legal dispute of the client must never become the lawyer's personal dispute with opposing counsel. A lawyer, moreover, should provide zealous but honorable representation without resorting to unfair or offensive tactics. The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave with dignity. A lawyer's word to another lawyer should be the lawyer's bond. As professional colleagues, lawyers should encourage and counsel new lawyers by providing advice and mentoring; foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of the client; and counsel and assist peers who fail to fulfill their professional duties because of substance abuse, depression, or other personal difficulties. [...] (FN. 1)

¹ 27 NCAC 02 Rule 0.1, Preamble;

² RPC 1.12 - Client-Lawyer Relationship: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
RPC 2.4 - Client-Lawyer Relationship: Lawyer Serving as Third-Party Neutral

III. ETHICS OPINIONS ADOPTED (RE: SETTLEMENT AGREEMENTS)

A. SETTLEMENT AGREEMENT RESTRICTING A LAWYER'S PRACTICE (RPC 179)³

This opinion was adopted on July 21, 1994 and discusses the possibility of a settlement agreement restricting a lawyer's practice. The opinion rules that a lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party. The following is a scenario as taken from the N.C. State Bar's website.

Inquiry #1:

Attorney A and counsel represent several plaintiffs whose civil rights and constitutional rights were allegedly violated as a result of the conduct of defendant municipality and several of its employees. During the course of litigation and settlement negotiations, individual settlement offers are made by Attorney B and his counsel who represent the municipality and its employees.

Attorney B submits to Attorney A a settlement agreement and release that requires Attorney A and his counsel to join in the release and agree not to represent any potential claimants (other than those already represented by Attorney A and counsel) who may have also been damaged by the alleged conduct of the municipality. The settlement documents also contain provisions requiring confidentiality as to the terms and content of the settlement agreement and the sealing of the agreement by court order. Because the defendant is a municipality, in order to seal what would otherwise be public records, a court order will have to be entered pursuant to G.S. §132-1.3(b).

May Attorney A enter into such an agreement?

Opinion #1:

No. A lawyer may not be a party to a settlement agreement wherein he agrees to refrain from representing other potential plaintiffs in the future. To do so would be a violation of Rule 2.7(b) which prohibits a lawyer from entering into an agreement, in connection with the settlement of a controversy or suit, that restricts his right to practice law. Although public policy favors settlement, the policy that favors full access to legal assistance should prevail.

Nevertheless, participation in a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement is not unethical. The amount and terms of any settlement which is not a matter of public record are the secrets of a client which may not be disclosed by a lawyer without the client's consent. If a client desires to enter into a settlement agreement requiring confidentiality, the lawyer must comply

³ <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-179/>

with the client's request that the information regarding the settlement be confidential. See Rule 4.

Inquiry #2:

May Attorney B offer such a settlement agreement?

Opinion #2:

No. A lawyer may not offer a settlement agreement that contains a restriction on a lawyer's right to practice law as a condition of the agreement.

Inquiry #3:

What should Attorney A do when his client desires to accept the agreement?

Opinion #3:

Attorney A must advise his client that neither he nor Attorney B may ethically participate in an agreement restricting a lawyer's right to practice law.

Inquiry #4:

May Attorney A withdraw with the permission of the client so that the client may accept the monetary terms of the settlement?

Opinion #4:

Since the participation of both the plaintiff's attorney and the defendant's attorney in such an agreement is unethical, this inquiry is moot.

Inquiry #5:

May Attorney B settle with Attorney A's then former client after Attorney A withdraws?

Opinion #5:

See Opinion #4 above.

***B. CONDITIONS IMPOSED ON LAWYER BY CLIENT'S ERISA PLAN
(2019 FEO 2)***⁴

This opinion was adopted on April 26, 2019 and discusses conditions imposed on a lawyer and rules that a lawyer may not agree to terms in an ERISA plan agreement that usurp the client's authority as to the representation. The following is a scenario as taken from the N.C. State Bar's website.

Lawyer represents an injured worker in a denied workers' compensation claim. Client participated in a self-funded health benefits plan (Plan) through his workplace. The Plan

⁴ <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2019-formal-ethics-opinion-2/>

was established under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. § 1001 *et seq.* As a precondition to issuing payments for Client’s medical expenses, the Plan requested that Client and Lawyer sign an Agreement that includes the provisions described below.

The Agreement between the Plan and Lawyer’s client (referred to as “the promisor”) sets out that the promisor was injured on the job; that the promisor is currently proceeding or promises to initiate a claim against his employer; that the promisor’s claim is disputed; and that the promisor is in need of benefits under the Plan.

The Agreement states that, as a condition of receiving Plan benefits, the promisor agrees to fully prosecute his pending claim and agrees not to abandon or settle his claim without the written approval of the Plan. The Agreement states that the promises made in the Agreement are binding upon the promisor and the promisor’s attorney and requires the signature of the promisor’s attorney.

Inquiry #1:

Do the Rules of Professional Conduct permit Lawyer to agree not to abandon or settle the Client’s claim without the approval of the Plan?

Opinion # 1:

No. Lawyer may not agree to any terms in the Agreement that contradict Lawyer’s professional responsibility to abide by Client’s directives regarding the representation as set out in Rule 1.2. The Agreement requires Client and his counsel to fully prosecute the pending workers’ compensation claim and to obtain written approval from the Plan before abandoning or settling the claim. As to Lawyer, these requirements conflict with Lawyer’s professional responsibilities to Client as set out in Rule 1.2. Pursuant to Rule 1.2, Lawyer has an ethical obligation to “abide by a client’s decisions concerning the objectives of representation” and “abide by a client’s decision whether to settle a matter.” If Client signs the Agreement and subsequently decides to abandon or settle the matter without the Plan’s approval, Lawyer has a professional obligation to follow Client’s directives. Lawyer may not agree to the conditions in the Agreement that usurp Client’s authority as to the objectives of the representation.

C. CONFIDENTIALITY PROVISION:
REPRESENTATION OF CLIENTS WITH SIMILAR CLAIMS AFTER PARTICIPATION IN A CONFIDENTIAL SETTLEMENT AGREEMENT FOR ANOTHER CLIENT (2003 FEO 9)⁵

This opinion was adopted on January 16, 2004 and rules that a lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

⁵ <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-9/>

Inquiry #1:

Attorney represents Plaintiff in an employment dispute with Employer. There are several other employees with factually similar potential claims. Attorney does not represent these employees and they have not yet asserted claims against Employer. Attorney negotiates his client's claim with counsel for Employer. Counsel for Employer explains to Attorney that Employer is willing to negotiate the matter and perhaps settle it if it can be done confidentially to avoid additional claims by the other potential plaintiffs. At this point Attorney has no intention of representing the other potential plaintiffs and tells Counsel for Employer this. Based on this representation, Counsel for Employer agrees to provide Attorney with information about Employer's financial status, insurance coverage, and other facts about the case.

While negotiating the terms of a settlement that will be favorable to Plaintiff, Counsel for Employer requests that the settlement agreement include a provision prohibiting Attorney from representing any other employee who has a factually similar potential claim against Employer. May Counsel for Employer propose such a settlement provision and, if so, may Attorney participate in a settlement agreement that includes such a provision?

Opinion #1:

No. Rule 5.6(b) of the Rules of Professional Conduct provides that "[a] lawyer shall not participate in offering or making. . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." An agreement not to represent other claimants against the opposing party denies members of the public access to the very lawyer who may be best suited, by experience and background, to represent them. RPC 179 ("Although public policy favors settlement, the policy that favors full access to legal assistance should prevail.") In addition, such agreements result in a personal conflict for the lawyer who is asked to give up future representations in the interest of a current client. ABA Formal Opinion 00-417, 1101: 204 (2000). Restrictive provisions of this nature also raise public policy concerns that the ultimate settlement figure will bear less of a relationship to the merits of the case than to the amount necessary to "buy off" defendant's counsel. *Id.*

Inquiry #2:

Counsel for Employer withdraws the request for a term in the settlement agreement that would prohibit Attorney from representing other employees. Instead, he requests that the agreement include the following provision:

"Confidentiality: The parties stipulate, acknowledge, and agree that the Agreement and its terms shall remain confidential to the maximum extent allowable under North Carolina law and that such confidentiality is of the essence of the Agreement and its underlying terms. The parties agree not to disclose to anyone the terms of the Agreement, save and except to their tax return preparers, accountants, auditors, lenders, attorneys, courts, or to governmental agencies where such disclosure is required by law or administrative regulation, only as

necessary, and to that extent the parties agree to use their best efforts to assure that such disclosure of the terms of the Agreement is not further disclosed."

May Counsel for Employer propose such a settlement provision and, if so, may Attorney participate in a settlement agreement that includes such a provision?

Opinion #2:

Yes. The confidentiality provision above does not specifically prohibit Attorney's use of confidential information learned during the representation or representation of other claimants with similar claims against Employer. Instead, it restricts only the disclosure of certain information gained in the representation. The provision is not proscribed by Rule 5.6(b) which is silent on participation in a settlement agreement that prohibits a lawyer from revealing information about the matter or the terms of the settlement. In fact, such a provision is consistent with the lawyer's continuing duty to not reveal the confidential information of a client or a former client without the informed consent of the client or the former client. Rule 1.6 and Rule 1.9(c), Accord, ABA Formal Opinion 00-417.

Inquiry #3:

A settlement agreement containing the confidentiality provision set forth in Inquiry #2 is entered into by Plaintiff and Employer, and Plaintiff's representation by Attorney is concluded. May Attorney subsequently agree to represent the other employees on their similar claims against Employer?

Opinion #3:

Yes, provided it can be done without revealing Plaintiff's confidential information, including the terms of the settlement agreement, and without exposing Plaintiff to liability under the agreement.

Attorney may be able to represent other employees without revealing Plaintiff's confidential information to them or to any third party. However, it will be difficult for Attorney to represent other employees without using Plaintiff's confidential information to advance their claims—for example, to obtain certain records from Employer, to subpoena witnesses, or in settlement negotiations.

Rule 1.9(c) prohibits a lawyer who has formerly represented a client in a matter from using information relating to the representation to the disadvantage of the former client except as permitted by the Rules or when the information has become generally known. Thus, Attorney may not use the confidential information of Plaintiff to advance the interests of new clients if doing so will harm the interests of Plaintiff. Attorney's use of Plaintiff's confidential information to represent the other employees, even without overt disclosure of the information, would violate Rule 1.9(c) if it exposed Plaintiff to liability under the confidentiality provision of the settlement agreement. In this event, Attorney would be prohibited from representing other employees because Attorney's failure to use Plaintiff's confidential information would materially limit his representation of the other employees. Rule 1.7(a)(2). But see, ABA Formal Opinion 00-417.

As to whether representation of the other employees may expose Plaintiff to liability under the agreement, it is beyond the purview of the Ethics Committee to interpret contractual language in a settlement agreement.

IV. NO RE-HIRE PROVISION (NO-REHIRE CLAUSES)

Some states prohibit employers from including provisions in settlement agreements that prevent employees from applying for, accepting, or in any way engaging in future employment with the company. This prohibition is known as a no-rehire provision or a no-rehire clause. Where prohibited, such a clause is deemed to be unenforceable. The rest of the settlement agreement remains enforceable and the employer would still be bound by the remaining terms of the agreement, including the payment of the amount promised in the agreement.

North Carolina is not one of the states where employers are prohibited from including a no re-hire provision, and such a clause is quite common in North Carolina employment related settlement agreements. Often one might see terms like "Affiliates" or "Associates," with regard to restricting prospective employment by the former employee with the employer.

An example of a very restrictive No Re-Hire Clause might look something like this:

No Rehire. Perfect Employee understands and agrees that, as a condition of receiving the consideration described in Paragraphs 2 through 5 herein, Perfect Employee will not be entitled to any future employment with BIGCO, its subsidiaries, affiliates or successors ("Releasees"). Perfect Employee further agrees that he/she will not apply for or otherwise seek future employment with or engagement by BIGCO, its subsidiaries or affiliates in any capacity, including employee, independent contractor or vendor. Perfect Employee further agrees that if Perfect Employee inadvertently applies for employment, he/she shall immediately withdraw the application or Releasees may summarily disregard and reject any future application with no advance notice to Perfect Employee. Perfect Employee acknowledges and understands that these provisions are negotiated provisions of this Agreement and General Release and not evidence of retaliation.

However, the U.S. Equal Employment Opportunity Commission (EEOC) has been clear on its position that it deems "No-Rehire" provisions illegal and retaliatory when included in employment settlement agreements related to discrimination, retaliation and harassment claims. However, federal courts have upheld the use of No-Rehire provisions where there is no state statute prohibiting such a provision and the plaintiff cannot show pretext. Generally where courts have upheld such provisions when an employer has refused to rehire a former employee under the terms of a settlement agreement entered into after the employee's earlier discrimination, the courts have distinguished between the fact of the settlement and its terms. For example, if the [employer] refused to consider an employee for future employment because she brought a Title VII claim that the agency had to settle, the agency would be in violation of Title VII. If, on the other hand, the

agency relied not on the fact that it settled the employees Title VII claim, but on the terms pursuant to which the claim was settled, it did not *necessarily* violate Title VII. *Id.* at 851.

"As in Kendall, MWA's interpretation and reliance on the terms of the Settlement Agreement does not itself violate Title VII and can serve as a legitimate, nondiscriminatory reason for MWA's actions. Kendall, 998 F.2d at 851. Our holding in this regard is narrow. We do not imply that MWA was correct in its interpretation of and reliance on the Settlement Agreement, only that its stated reason was 'facially non-discriminatory' and thus sufficient to satisfy its burden in establishing a legitimate, non-discriminatory reason for its decision. Stinnett v. Safeway, Inc., 337 F.3d 1213, 1218 (10th Cir.2003). "

Putting the issue of retaliation aside just for purposes of this discussion, for the employer, including a No-Rehire Provision in a settlement agreement mitigates the risk of having a former employee who was dissatisfied or wrongfully terminated from returning in the future only to sow seeds of disruption in the workplace or undertaking a repeat action against the company with each new application or position, if the employee is denied a position or terminated.

For the employee, including a No-Rehire Provision in a settlement agreement prevents the employee from having multiple employment options, and forecloses on future employment possibilities, whether directly, indirectly or through third party agencies. This is especially true where there may be a merger between the former company and another company in the future, well beyond the date of the settlement agreement, or where there may be limited job opportunities in a particular industry or area.

Several states have pending legislation or have contemplated legislation to prohibit these No-Rehire provisions, and an interesting analysis involving a No-Rehire Clause is undertaken in a Tenth Circuit Case, Jencks v. Modern Woodmen, 479 F.3d 1261 (10th Cir. 2007), and offers some insight as to how these provisions impact employees and are viewed where there is an option to assert pretext and the working relationships defined using the "affiliation language." Seven years after Karen Jencks won a Title VII claim against her employer, Modern Woodmen of America (MWA), she again brought suit against MWA. Her second lawsuit alleges she was denied an opportunity with the company in retaliation for her earlier victory. The district court granted summary judgment in favor of MWA. Jencks appealed. The court affirmed the lower court's decision, granting summary judgment where plaintiff failed to point to facts that would allow a reasonable fact-finder to infer that defendant did not rely on the terms of a settlement agreement foreclosing plaintiff from all forms of future employment with defendant when it decided to reject her application for employment and no finding of pretext. Id.

While there were other underlying reasons for the outcome of the case, in the above-referenced 10th circuit Jencks' case, the company referred to the employee's relationship with it, both in past and present, as an "affiliation" and not employment. There were also distinctions made between independent contractors and employees. There is something to

be gleaned from the case, as it relates to how this language can be very important for counsel representing the employee and the employer.

As it relates to North Carolina and the 4th Circuit, No-Rehire Provisions do not appear to be going anywhere anytime soon and have been held to be valid. Hence, it is important to consider the ethical considerations with respect to the fairness to your client and how you can be a zealous advocate when negotiating these clauses. Finding the right language to ensure the clause is not overly restrictive or overly broad is key so that you have truly engaged in a fair negotiated settlement agreement.

One might consider using language that specifically addresses what happens if there is a change in ownership such as with a merger. Other considerations include whether the employee could be in an existing position when the company merges with another company as opposed to the former employee applying for a new position after the company has merged with the company. And, just specifically stating the intent of the parties in a way that clearly identifies the goal. These are just a few considerations that serve to prevent an overly restrictive No-Rehire provision. Such language might just state, the employee agrees that he or she is ineligible or prevented from applying for, accepting, or in any way engaging in future employment with the company. This prohibition does not require the use of Associate, Affiliate and/or Affiliation language to make it clear that the employee shall not be rehired. Of course if there is absolute resistance to removing the language, suggest defining the terms affiliates and associates, and/or minimally modifying the term using a modifier like "corporate" affiliate or related company affiliates, if you must use these terms.

Additionally, further ways to meet the objectives of both parties include restricting the no-rehire clause by area, positions, or division. The goal is to use language that is the least restrictive while accomplishing both parties' objectives. Otherwise, it could feel retaliatory and adversely impact the ability to reach a global settlement. This is a much more balanced approach and does not prevent either counsel from being a zealous advocate for his or her client.

V. SIX PRIMARY ETHICAL CONSIDERATIONS IN SETTLEMENTS INVOLVING MEDIATION AND COLLABORATIVE LAW, A NOVEL ALTERNATIVE DISPUTE RESOLUTION OPTION

A. MEDIATION ATTENDANCE

Inquiry/Concern #1:

A new party, a Georgia resident, was added to a superior court case just prior to a scheduled mediation. The new party's attorney is a Georgia lawyer who has not been admitted to practice in North Carolina. That attorney contacted the mediator and asked whether he could participate in the mediation. Mediator asks the Commission whether, if he allows the out-of-state attorney to attend and participate, he will be facilitating the unauthorized practice of law.

Opinion #1:

The mediator has a duty to serve as a neutral facilitator of the parties' negotiations. Public policy encourages the process of bringing the parties together. While parties and their attorneys are required to attend pursuant to rules promulgated by the Supreme Court, the mediator is not required to police attendance issues. The mediator should proceed to hold the conference, facilitate the parties' negotiations, and report to the court those individuals who were present at the conference. The parties should direct any questions about attendance to the court.

Pursuant to North Carolina Rules of Professional Conduct Rule 5.5(c)(2), a lawyer admitted to practice in another jurisdiction, but not in North Carolina, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer acts with respect to a matter that is reasonably related to a pending or potential mediation, the services are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice, and the services are not services for which pro hac vice admission is required.

However, pursuant to Comment 6 to Rule 5.5, a lawyer must obtain admission pro hac vice in the case of a court-annexed mediation. Rule 5.5(d) prohibits a lawyer from assisting another person in the unauthorized practice of law. When there is existing litigation and the court orders the case to mediation, a mechanism is in place for the lawyer to be admitted pro hac vice for the mediation. On the other hand, if the case is not in litigation, the lawyer may participate in the mediation without being admitted pro hac vice as long as the services are related to the lawyer's representation of that client in a jurisdiction in which the lawyer is admitted to practice. In the event the lawyer is not admitted pro hac vice for the court-annexed mediation conference and absent an order of the court dispensing with the mediation, the mediator should hold the conference as originally ordered by the court and would not be in violation of Rule 5.5(d) of the North Carolina Rules of Professional Conduct. Serving as a mediator is not the practice of law, and therefore, as long as the lawyer mediator is acting as a mediator consistent with court-ordered program rules and the Standards of Professional Conduct for Mediators, the mediator will not be assisting in the unauthorized practice of law by conducting the settlement conference as ordered by the court. In an effort to help the parties make informed decisions about attendance, and to help make their time spent at mediation more productive, mediators are encouraged to engage the parties and/or attorneys (whether together or separately) in conversation about attendance issues. Mediators may help the parties and/or attorneys become aware of attendance requirements and raise questions about the consequences of the decisions of the parties and/or attorneys regarding attendance. This scenario also presents a "best practice" issue. Questions about attendance often arise before mediation is scheduled or held, and such disputes can become highly charged and confrontational. Mediators who go beyond the suggestions discussed above and take a position on an attendance issue may find themselves in an adversarial relationship with one or more parties. If there are concerns of lack of impartiality, the mediator may be in violation of Standard II, which requires the mediator to maintain impartiality toward the parties, and pursuant to Standard II.C, may be required to withdraw. If the mediator gives legal advice about attendance issues, this would violate Standard VI, which requires the mediator to limit himself or herself solely

to the role of mediator and prohibits the mediator from giving legal or other professional advice during the mediation. Ultimately, as noted above, the parties should address attendance questions to the court.

[Advisory Opinion of the NC Dispute Resolution Commission Advisory Opinion No. 24 (2013) (Adopted and Issued by the Commission on February 1, 2013) N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department.” On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.]

B. SIX PRIMARY ETHICAL CONSIDERATIONS FOR COLLABORATIVE LAW ATTORNEYS⁶

The distinctive feature of Collaborative Law, as compared to other forms of alternative dispute resolution such as mediation, is that parties are represented by lawyers ("Collaborative Lawyers") during negotiations. Collaborative Lawyers may also be litigators, but when acting in the capacity of a Collaborative Lawyer, he or she is not representing the party in court, but only for the purpose of negotiating agreements. The parties agree in advance that their lawyers are disqualified from representing the parties in court or appearing before any tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative law process ends without complete agreement. The exception is where a "status quo" type of proceeding may be needed as set out in the Uniform Collaborative Law Act. These issues become relevant as it relates to the representation, but also the settlement agreements.

1. Limited Scope of Representation - RPC 1.2(c)

2. Informed Consent - RPC 1.0(e)

3. Suitability (Apply the Suitability Factors)

4. Zealousness - RPC, Preamble, ¶2

5. The Disqualification Agreement (See the "UCLA")

6. Conflicts of Interest -waivable/non-waivable (States with Ethics Opinions allowing Collaborative Practice: Minnesota, North Carolina, Pennsylvania, Maryland, Kentucky, New Jersey, Washington, Missouri, South Carolina, Alaska, and North Dakota.)

⁶ Also refer to the N.C. Uniform Collaborative Law Act (Article 53 of the N.C. Gen. Statutes), which was signed into law on July 1, 2020.

Ethics of Certain "Standard" Clauses in Settlement Agreements

Hypothetical:

Plaintiff Velma filed suit against Defendant Mystery Incorporated for discrimination claiming she was wrongfully terminated on the basis of her sexual orientation. Following several months of negotiation, the parties reached a settlement in principle in which Mystery Inc. would pay Velma \$50,000 in exchange for her execution of a general release of claims. In their proposed settlement agreement, Defendants included three provisions that Plaintiff Velma objected to:

1. A **confidentiality provision that prohibited Velma and her attorneys from "disclosing the facts and circumstances relating to any dispute or disagreement Velma may have or may believe she has, or had, with Mystery Inc.** including, but not limited to, any allegations of discrimination, harassment or retaliation by Mystery Inc. current or former owners, partners, employees, officers, agents, affiliates, vendors, directors or board members concerning Velma's employment, workplace or work environment at, and separation from employment with Mystery Inc. without limitation in time."

2. A **liquidated damages clause** that if Velma violated the confidentiality provision of the settlement agreement, Mystery Inc. would suffer "immediate, substantial, and irreparable injury," **amounting to \$250,000 in damages for each violation.**

3. A "**non-participation in litigation**" clause that read as follows: "Velma will not sue Mystery Inc. and the Related Parties on any matters relating to her allegations against Mystery Inc., her employment or separation therefrom *or join as a party with others who may sue on any such claims, or opt-in to an action brought by others asserting such claims, and in the event that Velma is made a member of any class asserting such claims without her knowledge or consent, Velma shall opt out of such action at the first opportunity.*"

What are the ethical obligations of the attorneys for Velma and Mystery Inc. regarding these provisions?

I. Clause Prohibiting Plaintiff from Disclosing Facts and Circumstances Underlying the Alleged Claims

Provisions that go beyond mandating confidentiality of the amount and terms of the settlement, and require the parties or their attorneys to refrain from disclosing the facts underlying the dispute, may violate provisions of the American Bar Association's Model Rules of Professional Conduct ("Model Rules") and North Carolina's Rules of Professional Conduct ("N.C. Rules")

Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The Rule's rationale begins with the recognition that witness interviews are essential to the effective and efficient operation of the civil justice system. A functioning justice system works because witnesses do not "belong" to either party.

It is potentially a violation for a defense attorney to ask another person (the plaintiff) to refrain from voluntarily disclosing the facts and circumstances of her claims to others. More troubling to justify under Rule 3.4 are blanket confidentiality clauses that make no exception for disclosures of relevant information to other litigants. Courts have invalidated settlement agreements that bar a plaintiff from voluntarily providing relevant information to others suing the same defendant or public agencies investigating the defendant's conduct. Courts have found such contracts void as a matter of public policy because they interfered with the proper administration of justice. See, e.g., EEOC v. Astra U.S.A., Inc., 94 F.3d 738, 744-45 (1st Cir. 1996) ("This boils down to a contention that employees who have signed settlement agreements should speak only when spoken to. We reject such a repressive construct.") In re J.D.S. Uniphase Corp. Securities Litigation, 238 F.Supp.2d 1127 (N.D. Cal. 2002), the court found that the blanket use of a non-disparagement clause in severance agreements for laid-off employees was overly broad and in violation of public policy as it prevented the federal government from investigating the company's wrongful acts.

While these concerns may be less of an issue in a pre-suit settlement, restriction of disclosure of any unsealed public filings should be pursued with caution. Other information in the release, such as the amount of the consideration, trade secrets, or privileged attorney-client information that the former employee obtained at the defendant's workplace, could be the subject of a confidentiality provision without violating the ethics rules.

II. Clause Prohibiting the Attorney from Disclosing Facts and Circumstances Underlying the Alleged Claims

Rule 5.6(b): Restrictions on the Right to Practice

A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Rule 8.4(a): Misconduct

It is s professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

Rule 5.6(b), which bars lawyer participation in settlement agreements that restrict a lawyer's right to practice, has been interpreted to prohibit confidentiality agreements that interfere with a lawyer's ability to inform prospective clients about the lawyer's experience and expertise. Thus, settlement agreements prohibiting an attorney of record from disclosing **public record information** about the issues and allegations involved in a settled case will likely violate Rule 5.6. Further, such a restriction makes the lawyer a party to the settlement agreement, which is disallowed when it affects the lawyer's right to practice law. A South Carolina ethics advisory opinion found that the defense attorney's request that the plaintiff's attorney not identify or use the defendant's name for "commercial or ... publicity purposes" violated this rule.

<https://www.sctbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-10-04/#:~:text=It%20is%20improper%20for%20a,part%20of%20the%20lawyer's%20business.>

Of course, the client may request that her lawyer refrains from disclosing information about the matter (even publicly available material), and the attorney must abide by those wishes. On the other hand, even though a client may want to accept a settlement offer that impermissibly restricts their lawyers' future right to practice, Rule 5.6(b)'s proscription precludes the lawyer from complying with the client's instructions under these circumstances. Further, Rule 8.4 requires the attorney to adhere to all rules of professional conduct.

III. Liquidated Damages Clauses

A liquidated damages clause specifies a predetermined amount of damages owed by a party in breach of a contract. The parties determine the amount at the time they execute the agreement. In the employment law context, defendants frequently insist upon liquidated damages for breaches of confidentiality or non-disparagement provisions in settlement agreements. Attorneys negotiating a settlement agreement must remember that predetermined damages are intended to be the best estimate of the damages incurred in the event of a breach. If the liquidated damage amount is not reasonably related to the forecast of actual injury, then such a provision may be unenforceable as a "penalty." A contract provision can be so fundamentally unfair that a court will rule the contract unconscionable and unenforceable. Model Rules 3.3 and the NC Rules 3.3 both prohibit a lawyer from advancing a claim likely unsupported by law.

Rule 3.3. Candor to the Court:

*This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. A lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, **the lawyer must not allow the tribunal to be misled by false statements of law** or evidence that the lawyer knows to be false.*

The Restatement of Contracts makes clear that "the purpose of awarding contract damages is to compensate the injured party." Restatement (Second) of Contracts § 355 cmt. a (1981); see also Strum v. Exxon Co., U.S.A., 15 F.3d 327, 330 (4th Cir. 1994). Therefore, "[i]t can be laid down as a general rule that punitive damages are not recoverable for breach of contract." 5 Arthur L.

Corbin, Corbin on Contracts § 1077, at 438 (1964); Strum, 15 F.3d at 330. Liquidated damages which are penal in nature are likewise disfavored. Restatement (Second) of Contracts § 356 ("A term fixing unreasonably large, liquidated damages is unenforceable on grounds of public policy as a penalty."); Kirkland Distrib. Co. of 6 Columbia, S.C. v. United States, 276 F.2d 138, 144–45 (4th Cir. 1960). Courts will enforce liquidated damages provisions only if actual damages would be difficult to ascertain and the liquidated damages bear some reasonable relationship to the actual harm that was caused. Plumbers & Pipefitters Local 625 v. Nitro Constr. Servs., 27 F.4th 197, 201 (4th Cir. 2022).

Damages for breach by either party may be liquidated in the agreement but only at a reasonable amount in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large, liquidated damages is unenforceable on grounds of public policy as a penalty. See, Plumbers & Pipefitters Local 625 v. Nitro Constr. Servs., 27 F.4th 197, 201 (4th Cir. 2022).

For Mystery Inc. attorneys, a liquidated damages amount of \$250,000 may be challenging to support in compliance with the law ethically. While Mystery Inc. may be able to argue that damages from Velma revealing information about the alleged wrongful termination are "incapable or difficult of estimation" an amount of \$250,000 per violation is unlikely to be a reasonable forecast of actual damages. Given that the liquidated damages is almost five times the amount of consideration Mystery Inc. will pay to obtain Velma's commitment to non-disclosure, a court would probably find such a provision unenforceable as a matter of law.

IV. Non-Participation in Other Litigation Clauses

Rule 8.4(d) Misconduct: *prohibits attorneys from engaging in "conduct that is prejudicial to the administration of justice."*

The first ethics argument against non-participation clauses rests on the idea that such clauses are against public policy. A South Carolina Bar ethics advisory opinion found that a defense lawyer's demand for a non-participation clause as part of a settlement violated Rule 3.4(f) and that a plaintiff's lawyer would be violating their ethical obligations by agreeing to it. <https://www.scbar.org/lawyers/legal-resources-info/ethics-advisory-opinions/eao/ethics-advisory-opinion-93-20/>. In an opinion removing a confidentiality provision from a settlement agreement, the district judge noted that South Carolina's public policy favors more disclosure in litigation, not less (although the court did not believe that the advisory opinion noted above was dispositive of the issue). Wright v. Liberty Med. Supply, Inc., No. 7:09-cv-02490-JMC, 2011 U.S. Dist. LEXIS 81621, at *11 (D.S.C. July 25, 2011). In EEOC v. Astra U.S.A., Inc., 94 F.3d 738 (1st Cir. 1996), the court found that settlement agreements prohibiting cooperation with government agencies are void on public policy grounds. However, non-cooperation clauses that allow the plaintiff to cooperate with agency investigations and provide information pursuant to subpoenas or court orders may be enforceable and not against public policy. Alston v. Town of Brookline, 997 F.3d 23, 52 (1st Cir. 2021) ("The Town's use of non-cooperation clauses as a bargaining chip in settlement negotiations may be controversial, but we are not prepared to break new ground and hold that a municipality's use of such clauses is against public policy.").

The second argument against non-participation clauses in settlement agreements relies on the principle that an attorney must act in a way that supports a fair and functional adversary system. While an attorney must act as a zealous advocate, an attorney must also comport their behavior as an officer of the court with special responsibility for the quality of justice. "When lawyers try to obstruct voluntary cooperation, they are interfering with the proper functioning of the adversary system by making informal witness interviews, an essential tool of case preparation, unavailable to their adversaries, requiring them to resort to more costly and often less effective means of gathering evidence." <https://www.plaintiffmagazine.com/recent-issues/item/provisions-that-should-be-prohibited-in-settlement-agreements>.

NC/SC Labor and Employment Law Program

“Ethical Considerations in Employment Settlement Agreements”

While the old saying that, “A good settlement is one in which neither party is happy,” may often be true in the context of employment law, there are several factors employment counsel should consider when the parties have reached a settlement that can enable counsel to maximize the benefits and avoid unnecessary penalties for their clients.

Tax Treatment of Settlement Proceeds

Pursuant to Rule 1.2(a)(1) of the N.C. Rules of Professional Conduct, a “lawyer shall abide by a client’s decision whether to settle a matter.” In the context of the settlement of employment disputes, this obligation goes hand in hand with another commitment of Rule 1.2. Specifically, Rule 1.2(d) requires the following: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of action with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

This latter obligation relates to a lawyer’s role in determining the tax treatment of payments made in an employment dispute settlement agreement. There are two types of tax treatments for settlement proceeds in employment settlements – taxable wages/gross income and non-wage damages. Taxable wages are reported to the IRS on a W-2, like any other wages paid to the employee, subject to withholdings by the employer for income taxes, FICA deductions, other standard payroll deductions, and any deductions the employee has expressly authorized.

Non-wage damages are reported to the IRS on a 1099-MISC, and thus, do not have taxes taken out of the initial payment. Determining which type of tax treatment settlement proceeds are subject to may seem intuitive/obvious; however, it is important that counsel thoroughly reviews the following factors to determine the appropriate tax treatment to protect their client from unnecessary penalties. Additionally, clearly identifying the relevant tax treatment in the settlement agreement has 2 key benefits: (1) the tax treatment will not come as a surprise and prompt one of the parties to renege on the settlement, and (2) if the IRS were to challenge the tax treatment of the settlement payment, the settlement agreement itself can help provide some background/support as to how the tax treatment was decided.

The IRS issued a memorandum in 2008 identifying 4 key steps that both Plaintiffs’ and Defendants’ counsel should take in determining the correct treatment of employment-related settlement payments. While several years have passed since this memorandum was issued, these 4 key steps remain the most thorough approach to determining proper tax treatment.

Step 1: Determine the Character of the Payment and the Nature of the Claim Giving Rise to the Payment

When determining if a settlement payment falls under the category of “taxable wages,” for the purposes of employment taxes, the IRS will look to the nature of the claim that was the basis for settlement.

As a general rule, most settlement payments in employment matters are considered taxable wages. This includes payments for:

- Back wages – compensation paid to an employee for remuneration that would have been received up to the time of settlement (or court award) but for the employer’s alleged wrongful conduct
- Front pay – compensation paid to an employee for remuneration that would have been received after the settlement date/court award but for the employer’s alleged wrongful conduct and circumstances
- Punitive and liquidated damages
- Restoration of benefits, which includes payment of health insurance premiums, Thrift Savings Plan employer and employee contributions, and other retirement contributions
- Interest awards

Once you have determined the character of the settlement payment, the next step is to determine whether the payment constitutes “gross income.”

Step 2: Determine Whether the Payment Constitutes an Item of Gross Income

According to the IRS, characterization of settlement payments must be consistent with the relief that would have been available to the plaintiff if the claim(s) had not been settled. Typically, to be excluded from gross income under the Internal Revenue Code, the payments received must be due to “personal physical injuries or physical sickness, or must be reimbursed expenses for medical treatment for emotional distress.” 26 U.S.C. § 104(a)(2). To be clear, emotional distress is not, standing alone, considered a physical injury or physical sickness that may be excluded from gross income. *Id.* However, recoveries paid for medical care attributable to emotional distress (“for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body”) are excludable.

One key consideration in determining whether the payment constitutes gross income is whether the payment is made in settlement of a claim. The IRC requires that damages must have been received through prosecution of a legal suit or in a settlement agreement lieu of the prosecution of a suit, i.e. a colorable claim must have been asserted. The practical implication of this requirement is that a general severance agreement is not a claim under the IRC.

Once you have determined whether the payment constitutes gross income, or stated differently, whether the payment is for any damages that is not a “personal physical injury or physical sickness,” the next step is to determine whether the payment is wages for employment tax purposes.

Step 3: Determine Whether the Payment is Wages for Employment Tax Purposes

The following types of payments are considered “wages” for employment tax purposes:

1. Severance pay – severance pay, like the pay it replaces, is includible in gross income and is wages for FICA and income tax withholding purposes
2. Back pay – back pay is considered wages for FICA and income tax purposes, except where received on account of a personally physical injury or physical sickness
 - a. This includes back pay awarded for an alleged illegal refusal to hire
3. Front pay
4. Emotional distress damages – damages for emotional distress are considered wages. However, as previously mentioned, this does not include damages for the medical care for physical injury or physical sickness resulting from the emotional distress.

One key question that arises regarding the amount of employment taxes owed by the employer is whether the employment taxes are calculated based on the year of payment or the time period/year when the wages would have been paid absent the alleged wrongful conduct. In 2001, the Supreme Court held that employment taxes on back are calculated with respect to the period during which the wages are actually paid, rather than during the period in which the wages should have been paid.

Another key consideration regarding the amount of employment taxes owed is how the settlement payment will be allocated. In determining the allocation, the parties must determine the elements/make up of the settlement amount and consider the remedies available for each particular claim.

The most controversial/confusing consideration in determine whether a settlement payment is “wages” for employment tax purposes is how to treat an award of attorneys’ fees and interest. The IRS has held that in almost all cases, attorneys’ fees and interest constitute gross income to the plaintiff, subject to standard payroll deductions discussed above. However, the IRS has identified 2 very narrow circumstances in which attorneys’ fees do not constitute wages:

1. In certain opt-out class action lawsuits, the attorneys’ fees are not included in class members’ income where there is no contractual agreement between the members and counsel; and
2. In lawsuits brought by a union against an employer to enforce a collective bargaining agreement, attorneys’ fees are not included in the union members’ income.

One important note for plaintiffs’ counsel – even though a plaintiff will generally be taxed on the entire settlement, including attorneys’ fees paid directly to the attorney, the plaintiff will likely be entitled to deduct attorneys’ fees. IRC § 62(a)(20) provides above-the-line deductions for

attorneys' fees incurred in claims for unlawful discrimination, and other employment related claims.

Once you have determined whether the payment constitutes wages, the final step to is ensure that the wages and non-wage damages are properly reported to the IRS.

Step 4: Determine the Appropriate Reporting of the Payment and Any Attorney's Fees

For payments that are considered wages for tax purposes, the employer is required to provide information returns (either a W-2 or a Wage and Tax Statement), which includes the amount of wages and withholdings. For non-wage payments, the payment will be reported on a 1099-MISC. And finally, payment made to attorneys will also be made on a 1099, regardless of whether the payment constitutes income to the attorney.

Non-waivable Claims in a Settlement Agreement

Another consideration in ensuring your client's interests are adequately protected under an employment settlement agreement is to ensure that the settlement agreement properly addresses non-waivable claims. Ensuring that your client understands this issue is obviously important for both plaintiff and defense attorneys.

These issues implicate a number of Rules of Professional Conduct, including Rule 1.1 (Competence) and Rule 1.4(b) (Communication). The latter Rule requires lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Plaintiff's attorneys will want to ensure that they have appropriately probed each potential claim, while defense attorneys will want to alert their clients to ensure no later claims filed by the plaintiff come as a surprise. In order to ensure that these issues can be appropriately discussed with clients, lawyers must ensure that they know the scope of what claims can and cannot be waived under these agreements.

Certain claims or rights that may not be waived in a settlement agreement include:

- Claims arising after the employee signs the settlement agreement;
- Certain federal claims, such as claims arising under the Fair Labor Standards Act;
 - The Supreme Court held in *Brooklyn Savings Bank v. O'Neil* (1945) that employees may not waive the substantive protections of the FLSA. In other words, without a true dispute over liability (e.g. the numbers of hours an employee has worked), a settlement agreement in which an employee waived his or her claims is not valid because the employee lacks the bargaining power of the employer.
 - Additionally, the 4th Circuit has restricted the ability of employers and employees to release claims for unpaid overtime and minimum wages under the FLSA, relying on an old DOL regulation stating that such claims may only be released under court or DOL supervision (while most appellate courts outside of the 4th

Circuit have applied this rule only to prospective wage violations, and not to general releases of claims for possible past violations).

- The right to file an EEOC charge or participate in any EEOC investigation, hearing, or proceeding;
- The right to file an unfair labor practice charge under the NLRA or otherwise access the NLRB's processes;
- Certain state claims, such as claims for workers' compensation or unemployment compensation;
- The right to receive a whistleblower award under the Sarbanes-Oxley Act or the Dodd-Frank Act if the employer is covered by those statutes; and
- Rights to vested benefits, such as pension or retirement benefits, that are governed by the terms of the applicable plan documents and award agreements.

It is important to keep in mind that if an employee brings an action against his or her employer based on one of the aforementioned non-waivable claims, the employer cannot rely on the release/waiver as defense to the lawsuit.

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CHAPTER VI

DEI

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**There are no written materials for this chapter.
Please refer to the Appendix for a copy of the PowerPoint presentation slides.**

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CHAPTER VII

Choosing Wellness for Your Mind, Body and Best Life as an Attorney

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There were no materials for this chapter at the time of distribution.

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CHAPTER VIII-A

National Labor Relations Board Update

Jordan N. Wolfe
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Winston-Salem, NC

NORTH CAROLINA
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CHAPTER VIII-A
National Labor Relations Board Update

Jordan N. Wolfe – Winston-Salem

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CHAPTER VIII-A

National Labor Relations Board Update

Objective: This manuscript provides an overview of the National Labor Relations Act (Act) for those of you who may not be familiar. We begin with a brief description of the National Labor Relations Board (NLRB), the regional offices, and the Agency’s case intake. We then turn to some recent General Counsel initiatives and case law developments.

I. Brief Overview of the NLRB

A. What is the NLRB?

The NLRB is an independent Federal agency created in 1935 to enforce the Act. The Act is a Federal law that guarantees the right of most private sector employees to:

- Organize or form a union
- Engage in collective bargaining
- Engage in group behaviors to improve their wages and working conditions
- Or refrain from engaging in any of these activities

B. Primary functions of the NLRB

The NLRB has two primary functions:

- Representation matters – The NLRB conducts representation elections to allow employees to vote on whether they want union representation in their workplace.
- Investigate and prosecute unfair labor practice charges – The NLRB investigates unfair labor practice charges filed against employers or unions.

C. The NLRB’s Structure

The Agency is headquartered in Washington, D.C. and divided into two sides:

- *The Board:* Consisting of the 5-member Board, its staff, and several related divisions, including the Executive Secretary and Solicitor.
- *The General Counsel:* Consisting of the General Counsel, the Division of Operations Management, the Regional Offices, and several related divisions.



II. Regional Offices

A. Where we work

In addition to headquarters, the NLRB has 26 regional offices and several subregional and resident offices in most major cities, including San Juan, Puerto Rico.

B. Region 10, Subregion 11 (Winston-Salem, NC)

Region 10 is seated in Atlanta, Georgia and covers the largest geographical territory in the country:

- Alabama (in part)
- Georgia
- Kentucky (in part)
- North Carolina
- South Carolina
- Tennessee (in part)
- Virginia (in part)
- West Virginia (in part)

Region 10, headed by Regional Director Lisa Henderson, consists of four offices:

- Atlanta Regional Office
- Birmingham Resident Office
- Nashville Resident Office
- Winston-Salem Subregional Office (Subregion 11)



Subregion 11 investigates and prosecutes cases arising in North Carolina, South Carolina, and some parts of Virginia/Tennessee/West Virginia.

Region 10 has recently had some promotions to supervisory positions:

- In February of this year, Shannon Meares, who was previously a Supervisory Attorney in Subregion 11, was promoted to Regional Attorney of Region 10.
- In August of this year, Lanita Cravey, who was a Field Examiner in the Birmingham Resident Office, was promoted to the Birmingham Resident Officer position.
- Recently, we've had several field agents move to supervisory roles in the Region: Kerstin Myers is now a Supervisory Attorney in Region 10 – Atlanta; Neil Sagucio is now a Supervisory Field Examiner in Subregion 11; and Donna Nixon, who is joining us from Region 7 in Detroit, is now a Supervisory Attorney for Subregion 11.
- The other big regional news is that our Winston-Salem office has moved; in fact, we just finished moving this week. We are now located in downtown Winston-Salem.

III. Filing Statistics

A. Agency Filing Statistics

FY 2020 – 15,867 charges
FY 2021 – 15,083 charges
FY 2022 – 17,988 charges

Additionally, there were 2,510 union representation petitions filed in FY 2022, which is a 53% increase from FY 2021.

[Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22 | National Labor Relations Board \(nlrb.gov\)](#)

B. Region 10 filing statistics:

FY 2020 – 1,125 charges

FY 2021 – 1,152 charges

FY 2022 – 1,399 charges

As far as R-cases, there were 90 petitions filed in FY 2022, which is a 61.1% increase from FY 2021, in which 55 petitions were filed.

Region 10 has the highest case intake in the country.

IV. General Counsel Initiatives:

A. Settlement/Remedies

Most of our merit cases (well over 90%) settle prior to the Region issuing complaint or before the administrative hearing.

Remedies for unfair labor practices vary depending on the nature of the violation. However, ALL BOARD SETTLEMENTS REQUIRE A 60-DAY (or longer) NOTICE POSTING (could be physical, electronic, mailing, by text message, in-person reading depending on how the charged party regularly communicates with employees and/or members).

- Traditional make-whole remedies include:
 - Backpay (including wages, related expenses, and interest)
 - Reinstatement
 - Rescinding and expunging discipline/discharge
 - Rescinding unlawful policies/rules and notifying employees

- Current Board law does not provide for the following:
 - Punitive damages
 - Liquidated damages
 - Consequential damages
 - Pain and suffering

General Counsel Abruzzo recently issued GC Memorandum 21-06 “*Seeking Full Remedies*” and GC Memorandum 21-07 “*Full Remedies in Settlement Agreements*”, on September 8 and 15, 2021, respectively.

See <https://www.nlrb.gov/guidance/memos-research/general-counsel-memos>

These memos instruct Regions to consider and seek non-traditional remedies, both in complaints and in settlements, with the end goal of delivering timely, effective, and full relief to discriminatees and the public. Some of the non-traditional remedies include:

- Default language in settlements
- Consequential damages
- Front pay (in lieu of reinstatement)
- Liquidated Backpay (where appropriate)
- Tailored remedies for discharges during a union organizing campaign such as union access, reimbursement of organizational costs, extended posting period, notice reading, public publication of the Notice (e.g., in the local newspaper or on social media), supervisor and manager training, and instatement of a qualified applicant of the union’s choice if the discriminatee is unavailable to work.
- Letters of apology to discriminatees
- Sponsorships of Work Authorizations and other remedies in cases involving immigrant workers

On June 23, 2022, General Counsel Abruzzo issued GC Memorandum 22-06, “*Update on Efforts to Secure Full Remedies in Settlements*,” which updates GC 21-07. This memo details some of the remedies Regions have obtained in settlements since GC 21-07 issued on September 15 of last year.

- Some of these remedies are monetary, such as reimbursement fees for late payments on rent or on car loans, the cost of baby formula due to the loss of a workplace pumping station, payment of monthly interest on a loan taken out to cover living expenses, and the cost of retrofitting a car to make it useable for a discriminatee’s new job.
- Other remedies obtained in settlement have included taking actions such as issuing a letter of apology to reinstated employees (so you see some things that are mentioned in GC 21-06 and 21-07), training of supervisors/managers/employees on employee rights under the Act mailing of the Notice to previous employees, distributing to employees a video of a Notice reading, notifying applicants and new employees of employee rights, including through a statement on application forms and recruitment ads, permitting union use of employer bulletin boards and providing employee contact information to the union.
 - Of course, these are not all of the remedies Regions have been able to obtain in settlement, but just some of the ones highlighted in the memo.

B. Captive Audience Meetings

The General Counsel also issued GC 22-04, “*The Right to Refrain from Captive Audience and other Mandatory Meetings*,” on April 7, 2022. This memo explains the following:

- General Counsel will, in appropriate cases, ask the Board to reconsider current precedent on mandatory meetings in which employees are forced to listen to

employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns.

- General Counsel plans to propose that the Board adopt sensible assurances that an employer must convey to employees in order to make clear that their attendance at meetings is truly voluntary. The underlying rationale is so that employers may exercise their free-speech rights to express views, arguments, or opinions concerning the employees' exercise of Section 7 activity, without unduly infringing on the Section 7 rights of employees to refrain, or not, from listening.
- The reasoning outlined in the memo is that these meetings inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to this type of speech. The General Counsel notes that individual employees experience an "inequality of bargaining power" with employers, and that employees depend economically on their employers.

C. Case Processing Goals:

As you may know, Regional offices have case processing goals based on a variety of considerations. General Counsel Abruzzo issued GC Memorandum 22-05, "Goals for Initial Unfair Labor Practice Investigations," on May 27, 2022. This memo replaced former General Counsel Peter Robb's GC Memo 19-02, which along with the then-Strategic Plan (which has since been superseded), implemented certain timeliness goals for case processing at the field office level.

- GC 22-05 reimplemented an Impact Analysis system, with some modifications.
- To understand the timeliness goals, I will first note that there are three categories of cases: 1, 2, and 3. Category 1 cases are the lowest impact cases. Conversely, Category 3 cases are the highest impact cases—these cases are the most complex and involve more in-depth investigation. Category 2 cases are somewhere in between.
 - An example of a category 1 case would be a charge that would, on its face, be outside of the 10(b) period.
 - An example of a category 3 case would be a charge alleging a PCA discharge.
 - GC 22-05 essentially flipped the processing goals that Robb set, so that now the target time for processing category three cases is the longest and category one cases are the shortest. The time targets are as follows:
 - Cat 1 = 49 days
 - Cat 2 = 91 days
 - Cat 3 = 105 days

- The average goal is 91 days from filing date to the date either of disposition or stopping point of investigation beyond the Region’s control. The 91-day overall goal and the 105-day goal for Cat 3 cases will go to the agency’s institutional timeliness. The rest will just be for case management.

D. Injunctive Relief:

Section 10(j) of the Act provides that:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

The most recent General Counsel Memorandum relates to injunctive relief. That memo is GC 23-01, “*Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns*,” issued October 20, 2022.

- In this memo, the GC provides that in cases that involve 10(j) injunctive relief, Regions should seek interim settlements with charged parties by the charged party’s written agreement to resolve the Section 10(j) portion of the case. Then, in the event the parties can only settle the 10(j) portion of the case, then they will continue to litigate the underlying administrative case.
 - These interim settlements could include remedies like reinstating alleged discriminatees or agreeing to bargain, pending final resolution of the administrative case by the Board.
 - Appropriate circumstances in which an interim settlement may be sought include:
 - Discharges during an organizing campaign
 - Violations during an organizing campaign that warrant a *Gissel* bargaining order
 - Violations during initial contract bargaining
 - Unlawful withdrawals of recognition
 - Unlawful successor refusals to bargain
 - Threats and other unlawful statements as referenced in GC 22-02
 - Any other situation where a charged party’s unlawful conduct threatens the viability of the Board’s final order

- The Region may still proceed straight to recommending to the Injunctive Litigation Branch to seek 10(j) relief if it has reason to believe that a charged party would not agree or adhere to the terms of an interim settlement.
- Another recently issued memo regarding 10(j) injunctive relief is GC 22-02, “Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns,” which was issued on February 1, 2022. This memo encourages Regions to “consider seeking Section 10(j) injunctions immediately after determining that workers have been subject to threats or other coercive conduct during an organizing campaign, before an employer follows through on its threats or coercion when it becomes more challenging to fully erase the chilling impact on organizing activity.”
 - The General Counsel explained that doing so will protect employee rights and deter employers from further committing statutory violations.
 - This memo provides that the General Counsel will seek injunctive relief “in all organizing campaigns where the facts demonstrate that employer threats or other coercion may lead to irreparable harm to employees’ Section 7 rights.”
 - Such threats/coercion can include:
 - Threats of business closure
 - Threats of discharge
 - Threatening to withhold or promising to grant benefits
 - Threatening workers based on their immigration status or work authorization
 - These violations constitute “hallmark violations”: they are highly coercive and “destroy the laboratory conditions necessary for a fair election.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969).

E. Rights of Players at Academic Institutions:

On September 29, 2021, the General Counsel issued GC Memo 21-08, “Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act.” In this memo, the General Counsel stated her position that certain Players at Academic Institutions are employees under the Act. The General Counsel also stated her intent to allege in appropriate situation that an employer violates Section 8(a)(1) of the Act when it misclassifies these employees and leads them to believe that they do not have statutory rights. The General Counsel also notes that the term “student athlete” was created to avoid paying these employees workers’ compensation claims, and has been continued to be used in litigation to deprive employees of workplace protections.

F. Rights/Remedies for Immigrant Workers Under the NLRA

GC Abruzzo has also detailed her position on how the Act relates to immigrant workers. In GC Memo 22-01, “*Ensuring Rights and Remedies for Immigrant Workers Under the NLRA*,” issued on November 8, 2021, she stated her intention to “hold fully accountable those entities that, by targeting immigrant workers and their workplaces, undermine the policies of the NLRA and the nation’s immigration laws.”

- As what is hopefully a reminder, the Supreme Court has held that undocumented workers are statutory employees under the Act. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891-892 (1984).
- The memo provides that the NLRB will, should a charging party or witness request it, “seek immigration relief including deferred action, parole, continued presence, U or T status, a stay of removal,” or any other appropriate and available relief to protect noncitizen workers who are exercising their Section 7 rights.
 - When appropriate, the agency will certify applications for victims of labor exploitation who are seeking U and T visas/status. U visas are for victims of certain crimes who assist law enforcement in the investigation or prosecution of a qualifying crime. T visas are for, in this context, certain victims of labor trafficking.
- The memo also emphasized the agency’s commitment to being vigilant about a charged party/respondent’s unlawful conduct related to immigration status or work authorization. The memo provides that not only will Regions take such action as seeking 10(j) injunctive relief, Regions should also consider referring charged party/respondent’s counsel for misconduct or state bar sanctions, if counsel is involved in this unlawful conduct.
- The memo also instructs Board agents to advise each witness providing a Board affidavit that their immigration or work authorization status is not relevant to the investigation of whether an entity has violated the Act. Similarly, the Board agent will advise each witness that the agent will not inquire about the witness’ immigration or work authorization status.
- There is also discussion about addressing witnesses’ hesitancy and various things that witnesses may be concerned about, such as where they are meeting the Board agent or what personal information they provide the Board agent.
- **Remedies** → Regions will seek traditional, make-whole remedies in cases of unlawful discharge. The Region cannot seek unconditional reinstatement and full backpay if it has actual or constructive knowledge that a discriminatee does not currently have work authorization, but a Region should contact the Immigration Team for help if it believes that may be the case, and the Immigration Team will help. In situations where a Region determines that it cannot seek backpay or reinstatement, it should consider alternative relief:
 - Conditional reinstatement order so that the discriminatee can have a “reasonable period of time” to complete forms and present documentation necessary for the respondent to meet federal requirements regarding verification of employee work authorization.

- “Order of reinstatement of a qualified candidate referred by a labor organization, where support for that organization has been eroded”
- Another remedy Regions may seek specific to these types of cases is requiring supervisors and managers to undergo training in the following subjects, by the following entities:
 - Non-discriminatory immigration practices offered by the Department of Justice’s Immigrant and Employee Rights Section
 - (In cases where respondent manipulated the e-Verify system to violate the Act) the appropriate use of the E-Verify system, provided by the U.S. Citizenship & Immigration Services.
- In 10(j) proceedings, Counsel for General Counsel should seek all safeguards to ensure that there is not a fishing expedition into witnesses’ immigration or work authorization status. In certain situations, a respondent’s probing of a witness about their immigration status or work authorization may itself constitute an unfair labor practice.

G. Inter-Agency Coordination

The General Counsel has also created a White House Task Force on Worker Organizing and Empowerment, which will encourage inter-agency collaboration and coordination. The General Counsel is actively partnering with the Department of Labor and the Equal Employment Opportunity Commission at the Headquarters’ level in this collaboration. You can find more details about this inter-agency cooperation in GC Memorandum 22-03.

V. New Developments in Case Law

Before I get into recently issued Board decisions, now is probably a good time to very briefly mention that there has been some litigation over the prior General Counsel’s removal and the appointment of the current General Counsel. Thus far, the courts have rejected the argument that the office of the General Counsel does not have the authority to prosecute cases based upon the President’s removal of former General Counsel Robb. See *Aakash, Inc. d/b/a Park Central Care and Rehabilitation Center*, 371 NLRB No. 46, slip op. at 1–2 (2021); *Exela Enterprise Solutions, Inc. v. NLRB*, 32 F.4th 436 (5th Cir. 2022).

A. Valley Medical Hospital, 371 NLRB No. 160 (2022):

- This case was decided by a five-member Board after the Ninth Circuit remanded it to the Board.
- The situation involved here is when a labor organization represents a Unit of employees, has a collective-bargaining agreement with an employer, that agreement contains a dues checkoff provision (in which an employer automatically deducts union dues from an employee’s paycheck for membership in the union, and then remits those dues to the union), and that agreement is expiring. In this case, the employer unilaterally ended dues

checkoff after the expiration of its collective-bargaining agreement with the Union, although it did so more than a year after that expiration.

- The issue the Board decided is whether an employer may unilaterally cease dues checkoff after the expiration of a collective-bargaining agreement that provides for it.
- *Bethlehem Steel*, 136 NLRB 1500 (1962), is the seminal decision on this issue. The Board in that case concluded that after a collective-bargaining agreement containing a checkoff provision expired, an employer no longer had a statutory obligation to check off union dues. In 2015, the Board overruled *Bethlehem Steel* in *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015). In *Valley Hospital I*, the first iteration of this case, the Board overruled *Lincoln Lutheran of Racine*. *Valley Hospital I* went to the Ninth Circuit, who remanded the case back to the Board.
- The Board, in a split decision, concluded that dues checkoff provisions constitute a mandatory subject of bargaining, and therefore an employer who unilaterally changes it after the expiration of a collective-bargaining agreement violates Section 8(a)(5) of the Act by doing so.
- The Board applied this decision retroactively in all pending cases, including this one.

B. *Pain Relief Centers, P.A.*, 371 NLRB No. 143 (2022):

- This case is related to another case that is referred to as *Pain Relief I*. *Pain Relief I* involved the discharge of five discriminatees in retaliation for their protected concerted activities at a medical office in Conover, North Carolina. *Pain Relief I* is currently pending with the Fourth Circuit Court of Appeals.
- After the five discriminatees in this case filed NLRB charges and the Region issued complaint, the employer filed a state court lawsuit against the five discriminatees, alleging defamation and breach of contract claims. Hence, this case, involves whether the employer’s state court lawsuit and discovery requests violated the Act.
- The Board concluded the following:
 - Most of Respondent’s defamation claims violated Section 8(a)(1) of the Act because they were preempted.
 - Respondent’s breach of contract claims violated Section 8(a)(1) of the Act because they were preempted.
 - Respondent’s state court discovery requests violated Section 8(a)(1) of the Act →
 - “[A]ll documents that the Charging Parties in *Pain Relief I* had submitted to the General Counsel or planned to introduce into evidence, the identity of all persons with whom they had discussed their NLRB case, “all facts you alleged support a violation of the [NLRA],” and all persons whom they had contacted about serving as a witness in their NLRB case.” (slip op. 2).

- The Board applied *Guess? Inc.*'s three-part test for determining whether discovery requests in a separate proceeding violate the Act. The Board found that the discovery requests had an illegal aim based on the timing of the discovery requests, and that the employees' interests in keeping their Section 7 activities confidential outweighed the Respondent's interest in obtaining the information.
 - Broad requests
 - Rather than seeking public statements relevant to injury to reputation, sought information given in confidence, which the Board pointed out, "by definition cannot support a defamation claim."
 - The employees' Section 7 activities involve a core right, specifically the details of their participation in a Board proceeding

C. The Future

Recently, in *Stericycle Inc.*, 371 NLRB No. 48 (January 6, 2022), the Board majority issued a Notice and Invitation to File Briefs, inviting parties and *amici* to address:

- Whether it should continue to adhere to the *Boeing* standard, as revised in *LA Specialty*?
- In what respects, if any, should the Board revise existing law regarding maintenance of rules to better ensure that it:
 - Interprets rules in a way that accounts for the economic dependence of employees on their employers and the potential for a work rule to chill Section 7 activity;
 - Properly allocates the burden of proof; and
 - Properly balances employees' rights and employers' legitimate business justifications.
- Whether it should continue to hold that certain categories of rules – such as investigative-confidentiality, non-disparagement, and rules prohibiting outside employment – are always lawful to maintain?
- General Counsel is arguing that the Board should overrule *Boeing Co.*, 365 NLRB No. 154 (2017), and implement a new standard for determining whether facially neutral work rules violate the Act, based on *Lutheran Heritage analysis*, with some refinements.

Recently, in *Atlanta Opera*, 371 NLRB No. 45 (December 27, 2021), which is a case arising out of this Region, the Board majority issued a Notice and Invitation to File Briefs, inviting parties and *amici* to address:

- Whether the Board should adhere to the independent contractor standard in *Supershuttle DFW, Inc.*, 367 NLRB No. 75 (2019).
- If the Board declines to adhere to the *Supershuttle* standard, what standard should replace it?
 - The follow-up question from that is whether the Board should return to the standard in 361 NLRB 610, 611 (2014), and whether the Board should do so in its entirety or with modifications.
- The General Counsel filed an amicus brief asking the Board to overrule *SuperShuttle DFW*. General Counsel further urges the Board to implement a new standard for determining employee and independent contractor status in a way consistent with *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), with necessary and appropriate refinements.

D. Updates for representation cases

Although there is quite a bit of initiatives taken relating to unfair labor practices, as you saw in the statistics I provided earlier, there has also been a significant amount of R-Case work throughout the country, including in Region 10. The major update relating to representation cases is the Board’s decision in *Starbucks Corporation*, 371 NLRB No. 154 (2022). This decision is significant because it revisits one of the *Aspirus* factors for deciding the appropriateness of a mail-ballot election.

- As background, the Board’s decision in *Aspirus*, 370 NLRB No. 45 (2020) set forth six factors for Regional Directors to consider in determining whether to direct a mail-ballot election rather than a manual ballot election. Of course, this decision arose from the COVID-19 pandemic. In this case, the Board held that the presence of any one of the six factors would justify directing a mail-ballot election, though it would not require it.
- I’m not going to go into all of the factors today, but instead want to highlight the second factor, which is the one dealt with in *Starbucks*. The second *Aspirus* factor asks if “[e]ither the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.” 370 NLRB at slip op. 5.
- Of course, since the Board issued *Aspirus*, much has changed about the COVID-19 pandemic, including how the severity of spread is measured. Hence, in *Starbucks*, the Board realigned the second factor of *Aspirus* so that it would be in conformity with the CDC’s county-based Community Level system. The Board concluded that “a Regional Director will not abuse their discretion by directing a mail-ballot election where the relevant Community Level is “high.”
 - To note, the CDC categorizes COVID-19 community levels based on transmission based in each county. There are three categories: low, medium, and high.

- The CDC updates this measurement once a week.
- The CDC bases the measurement on three indicators:
 - New COVID-19 hospital admissions per 100,000 population in the last 7 days;
 - Percent of staffed inpatient beds occupied by patients with confirmed COVID-19; and
 - New COVID-19 cases per 100,000 populations in the last 7 days
- As for the case in *Starbucks*, the second factor of *Aspirus* was the only factor present. The Regional Director issued a Decision and Direction of Election determining that a mail-ballot election was appropriate; the Employer filed a request for review, and this decision is the result.
 - The Board declined to revisit *Aspirus* as a whole, but agreed that it was necessary to refine the second factor.
 - The Board rejected the Employer’s argument that the Regional Director abused his discretion in ordering a mail-ballot election because the data relating to the second *Aspirus* factor was not relevant. In rejecting this argument, the Board explained that although this data does not, on its own, precisely measure the prevalence of COVID-19 in a community, the positivity rate in a community, it is at least suggestive of transmission rates among those in the locality who haven’t been test.

VI. Additional Resources

- Visit the Agency’s website at <https://www.nlr.gov/>
- Visit the Region’s website at www.nlr.gov/about-nlr/who-we-are/regional-offices/region-10-atlanta
- Call or visit our office. Currently, during the COVID pandemic, in-person visits are by appointment only.

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National Labor Relations Board Update Program Materials

Links to Memoranda:

1. **Remedies** →
 - a. GC 21-06: [Seeking Full Remedies](#)
 - b. GC 21-07: [Full Remedies in Settlement Agreements](#)
 - c. GC 22-06: [Update on Efforts to Secure Full Remedies in Settlements](#)
2. **Captive Audience Meetings** → GC 22-04: [The Right to Refrain from Captive Audience and other Mandatory Meetings](#)
3. **Case Processing Goals** → GC 22-05: [Goals for Initial Unfair Labor Practice Investigations](#)
4. **Injunctive Relief** →
 - a. GC 22-02: [Seeking 10\(j\) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns](#)
 - b. GC 23-01: [Settling the Section 10\(j\) Aspect of Cases Warranting Interim Relief](#)
5. **Rights of Players at Academic Institutions** → GC 21-08: [Statutory Rights of Players at Academic Institutions \(Student-Athletes\) Under the National Labor Relations Act](#)
6. **Rights/Remedies for Immigrant Workers Under the NLRA** → GC 22-01: [Ensuring Rights and Remedies for Immigrant Workers Under the NLRA](#)
7. **Inter-Agency Coordination** → GC 22-03: [Inter-agency Coordination](#)

Links to Developments in Case Law:

1. **Valley Hospital Medical Center, 371 NLRB No. 160 (2022)** → [Valley Hospital Medical Center Inc., d/b/a Valley Hospital Medical Center](#)
2. **Pain Relief Centers, P.A., 371 NLRB No. 143 (2022)** → [Pain Relief Centers, P.A.](#)
3. **Stericycle Inc., 371 NLRB No. 48 (2022)** → [Stericycle, Inc.](#)
 - **GC Brief:** [Brief in Response to Board Notice and Invitation to File Briefs](#)
4. **The Atlanta Opera, 371 NLRB No. 45 (2022)** → [The Atlanta Opera, Inc.](#)
 - **GC Brief:** [Brief on Review](#)
5. **Starbucks Corporation, 371 NLRB No. 154 (2022)** → [Starbucks Corporation](#)

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CHAPTER VIII-B

The Evolving Legal Landscape in Employee Departures

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NORTH CAROLINA
BAR ASSOCIATION

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CHAPTER VIII-B
The Evolving Legal Landscape in Employee Departures

M. Todd Sullivan – Raleigh

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CHAPTER VIII-B

A NC/SC UPDATE: THE EVOLVING LEGAL LANDSCAPE IN EMPLOYEE DEPARTURES

I. SCOPE NOTE

This article examines the evolving legal landscape in employee departure matters, focusing on the methods for addressing, and rules applying to, departures in both North Carolina and South Carolina. Part I examines the Supreme Court's long-awaited resolution of the circuit split regarding computer theft claims made under the federal Computer Fraud and Abuse Act. Part II identifies and trouble-shoots employment agreement provisions dealing with departures and annexes to this article a sample employment agreement for review and consideration. Part III identifies key fact patterns and holdings of heavily cited employee departure cases from both North Carolina and South Carolina. Part IV identifies tips for practitioners when making arguments for the former employer or the departed employee once litigation commences. And Part V forecasts existing and potential developments in the law anticipated by the author.

II. SUPREME COURT HANDS DEPARTING EMPLOYEES A VICTORY IN FINALLY RESOLVING THE MEANING OF "EXCEEDING AUTHORIZED ACCESS"

The Computer Fraud and Abuse Act ("CFAA") prohibits "intentionally access[ing] a computer without authorization or exceed[ing] authorized access," as well as "intentionally access[ing] a protected computer without authorization." 18 U.S.C. §§ 1030(a)(2), 1030(a)(5)(C). According to the CFAA, 18 U.S.C. § 1030(e)(6), "exceeds authorized access" means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled *so to obtain or alter*." Violations of the CFAA can result in both civil and criminal liability.

For years, employers brought civil cases under the CFAA arguing that departing employees who accessed their current-but-soon-to-be-former employer's databases to misappropriate data and documents had "exceeded authorized access" because their intent was obviously disloyal and competitively-threatening and not in furtherance of their employment responsibilities. These claims were aided by Judge Richard Posner's analysis in a Seventh Circuit opinion called *International Airport Ctrs., LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006). Judge Posner reasoned, essentially, that a disloyal employee with nefarious plans ceases to be an agent and loses, as a result, their authorization to access data. The Fourth Circuit rejected Judge Posner's "cessation of agency" analysis in an opinion called *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012).

There was a clear and longstanding split in the circuit courts regarding the meaning of the CFAA and whether it's language created liability for the employee having authorization to access an employer's computer but doing so with disloyal intent and thereby *exceeding* their authorization.

In *Van Buren v. United States*, 141 S. Ct. 1648 (2021), the United States Supreme Court examined what constitutes “unauthorized access” for purposes of CFAA liability. It did so reviewing a *criminal* conviction under the CFAA. A Georgia police sergeant named Van Buren was caught, and later criminally convicted of and sentence to eighteen months for, selling license plate information he obtained from a law enforcement database he had access to in his patrol car. Van Buren appealed his conviction to the Eleventh Circuit and lost; the Eleventh Circuit had essentially adopted the conclusion of Judge Posner in *Citrin* that authorized access coupled with an improper purpose established CFAA liability.

Rejecting the reasoning of and overruling the circuit court decisions that found CFAA violations and liability when authorized users engaged in unauthorized access and use, the Supreme Court reasoned and held that the CFAA only targets persons who are not provided access to a database, such as external hackers *or* internal users who improperly gain access to a part of a computer system to which they do not have authorized privileges. As the court put it, for CFAA liability to attach an employee with authorized access to the computer needs to enter “particular areas of the computer— such as files, folders, or databases—that are off limits to him.” Employees with access, of course, fit into this latter category of so-called “inside hackers.” Van Buren was not an inside hacker; he had authorized access to the license plate database and, as a result, his conviction was overturned.

Van Buren now mostly shuts off employers seeking to assert a CFAA claim against departing employees who use their authorized access to areas of an employer’s computer system for improper purposes, such as the misappropriation of confidential files. But there is a technical solution employers could and presumably should use that would still generate employee liability under the CFAA: allocate and restrict authorized access to confidential files, folders, or databases on a need-to-know basis.

And employers in South Carolina and North Carolina still have, of course, potential redress under the federal Defend Trade Secrets Act of 2016 and the South Carolina Trade Secrets Act and the North Carolina Trade Secret Protection Act, respectively. North Carolina employers also still have potential civil claims for computer trespass. See, e.g., *CHGYM LLC v. Unify Ath., LLC*, 2022 U.S. Dist. LEXIS 6249 (M.D.N.C., January 12, 2022) (granting preliminary injunction to former employer under the North Carolina Computer Trespass Act against former employee who copied documents and deleted evidence of his activity).

III. THE WELL-DRAFTED RESTRICTIVE COVENANT AGREEMENT

Recent studies estimate that perhaps twenty five percent (25%) of the American workforce have signed some form of written agreement containing restrictive covenants that inhibit active employment and post-departure competitive activity. Additionally, employers routinely place affirmative pre-departure contractual obligations upon employees who will be departing. What are the most common restrictive (and affirmative) covenants employees commit to and what can employers and employees do to better secure enforceable restrictions and pre-departure obligations that are fair and reasonable?

a. Nondisclosure Covenants. Some key issues here are (i) choice of law; (ii) consideration, (iii) defining “confidential information” sufficiently inclusive but not too broad or including information the employee would have no access to, and (iii) acknowledging that the purpose of an NDA is to protect against the loss of informational value and *not* to inhibit or restrict competition.

b. Non-inducement of Colleagues Covenants. Sometimes called nonsolicitation of employees covenants, some key issues here are (i) choice of law and consideration, (ii) establishing some pre-departure nexus between departing employee and remaining colleagues, and (iii) reasonably limiting the look-back period and the prospective restriction period.

c. Nonsolicitation of Customers and Partners Covenants. Remember: (i) the enforceability considerations, except that requiring an express and defensible geographic scope, are virtually identical for nonsolicitation covenants as they are for noncompete covenants, (ii) the customers/partners must be ones that employee had material contact or responsibility for, (iii) the “prospective customer” is becoming an enforcement and overbreadth problem area, and (iv) the distinction between “do not solicit or induce” and “do not service, no matter who initiates communications is huge at the enforcement stage.

d. Noncompetition Covenants. Key issues here are (i) choice of law and whether that choice of law conflicts with the public policy of a state having greater interest in the restrictions; (ii) consideration – this is an increasingly litigated topic; (iii) geographic reach and whether that reach is no broader than necessary to protect the business interest sought to be protected; (iv) scope of competitive restriction – increasing litigation over “in any capacity” or “would even prevent janitorial employment” conundrums along with affiliates and subsidiaries restrictions and definitions of “the business”; and (v) if loss of information, not customer relationships, is the competitive threat justifying noncompete, does the noncompete limit the prospective customers to those who could make use of the information at risk?

e. Duty of Loyalty and Prospective Employer Notice Provisions. Key issues here include (i) how will conflicts of interests and employee notice obligations be addressed and will the employee be obligated to provide a copy of the restrictions to their prospective employers?; (ii) if the terms of the agreement are confidential, how will that be handled in the notice provision?; (iii) does the employer breach the agreement if it terminates the employee who complies with a provision requiring notice to the existing employer?; and (iv) is breach of the notice provision material?

f. Employee Representation Employment Will Not Breach Other Agreements. These are increasingly common affirmative representations by the employee. Issues here include: (i) can new employers actually rely on these to avoid liability for interference?, (ii) should employees push back and refuse to execute?, (iii) should the new employer seek copies of

all such restrictions and make its own determination?, and (iv) should an employee ever agree to indemnify the employer for these issues?

g. Choice of Law and Forum Selection Provisions. Employees are increasingly being asked to agree to provisions that stipulate some foreign state's law applies to the interpretation and construction of the agreement and that any litigation regarding the agreement will take place somewhere other than their state of residence. Issues here include: (i) does the chosen state's law conflict with the basic legal precepts of the state in which they reside?, (ii) does the chosen state's law change the enforceability arguments?, (iii) what additional expense and logistical difficulty will the employee bear agreeing to litigate their dispute in a different state?

h. Equitable Tolling and Blue-Penciling. These provisions are more common now. Key issues: (i) can the employer seek equitable tolling and damages for breach?, (ii) does a court's refusal to equitably toll an agreement bind the appellate court's hands regarding mootness doctrine?, (iii) is blue-penciling a public policy issue?

Annexed to this article as Appendix A is a form employment agreement addressing all of these and additional issues; Appendix A will be analyzed in the presentation.

IV. KEY EMPLOYEE DEPARTURE LAW OPINIONS AND DECISIONS IN NORTH CAROLINA AND SOUTH CAROLINA OVER THE LAST HALF CENTURY

1. *Kadis v. Britt (1944): North Carolina Supreme Court sets the table for restrictive covenants.*

- a. Isaac Kadis was employed by E.G. Britt as a delivery man and bill collector for his retail clothing business in Goldsboro.
- b. Britt signed an agreement with a covenant that said "he will not work for, or be employed as an agent, servant, or employee, partner, shareholder, or in anywise interested in, any firm or corporation engaged in any business or businesses such as is conducted by [Kadis]."
- c. The geography of the noncompete covenant was "in Wayne County, North Carolina ... not in any county whose borders touch Wayne County."
- d. The duration was two years from termination.
- e. Interestingly, the covenant also prohibited Britt from "allowing or permitting his wife or any member of his immediate family to engage in any business that is herein restricted."
- f. Kadis discharged Britt after two years noting "he needed him no longer, but expressing his satisfaction with the service and efficiency of the defendant."
- g. Britt drives a truck for a while and, then, within the two year period, accepts employment with L.A. Collins, a competing clothing business in Goldsboro doing the same kind of work he did for Kadis.

- h. Kadis sues for an injunction but it is denied and an appeal is taken to the Supreme Court.
 - i. “Equity will not specifically enforce, as of course, the naked terms of a negative covenant restricting other employment, unless ancillary to and supported by a valid affirmative covenant of the employer, who has a substantial right—unique in his business—which it is the office of the court to protect; and the restriction laid upon the employee has a reasonable relevancy to that result, and imposes no undue hardship...but...the right of the employer to protect, by reasonable contract with his employee, the unique assets of his business, a knowledge of which is acquired in confidence during the employment and by reason of it, is recognized everywhere.”
 - j. “We cannot ignore the fact that the defendant had lived by this contract for several years before the sword of Damocles fell, nor can we ignore the fact that the contract itself is of a type which, when exacted under the circumstances just outlined, is admirably adapted to effect economic peonage.”
 - k. Denial of injunction AFFIRMED.
2. Standard Register Co. v. Kerrigan (1961): South Carolina Supreme Court sets the table for restrictive covenants.
- a. Standard Register Company employed Kerrigan as a sales representative for its business forms and equipment in Greenville, S.C.
 - b. Kerrigan signed an agreement with a covenant that said “for a period of two years after leaving the employment of the Company, that he will not engage, directly or indirectly, in competition with said Company in selling to the accounts or in the territory in which he has been performing his duties as such sales representative.”
 - c. Kerrigan quit on May 1, 1959 and incorporated Southern Systems & Forms, Inc., selling forms competitive with those of Standard Register Company of Greenville, S.C.
 - d. It was stipulated that he contacted 17 of the 18 accounts he had in Greenville following his resignation.
 - e. “The general rule is that restraint as to territory, in order to be reasonable, must be necessary in its full extent for the protection of some legitimate interest of the employer. Stated negatively, the territorial scope renders the restraint unreasonable if it covers an area broader than necessary to protect the legitimate interest of the employer. It has been said that the most important single asset of most businesses is their stock of customers. ... A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers.”
 - f. “We think the restrictive covenant not to compete limited to the eighteen assigned accounts, and limited in duration to two years, was reasonable as to the employer, the employee and the public, and hence, the provision is not contrary to the public policy of this State. The failure of the Trial Judge to so hold was error.”
 - g. Denial of Injunction REVERSED.

3. *Welcome Wagon International v. Pender (1961): North Carolina Supreme Court established the “blue pencil” rule.*
 - a. Evelyn Pender worked for Welcome Wagon as a “Hostess” which involved calling upon new families moving to town, local families moving from one house to another, girls who have reached their 16th birthdays, etc. and provide them gifts and literature from companies.
 - b. Ms. Pender’s employment agreement had the following provision: “she will not during her employment, and for a period of five whole years thereafter, engage directly or indirectly for herself or as agent, representative or employee of others, in the same kind or similar business as that engaged in by the Company (1) in Fayetteville, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina, in which the Company is then engaged in rendering its said service, (3) in any city, town, borough, township, village or other place in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, town, borough, township or village in the United States in which the Company has been or has signified its intentions to be, engaged in rendering its said service.”
 - c. Evelyn Pender resigned from Welcome Wagon on September 22, 1958 and then set up “Fayetteville Hospitality Service” doing lots of the same things.
 - d. Welcome Wagon sued and Pender defended saying the agreement was overbroad in time and territory. The trial court agreed and dismissed the case. Welcome Wagon appealed.
 - e. The Supreme Court of North Carolina reverses, holding “The court is without power to vary or reform the contract by reducing either the territory or the time covered by the restrictions. However, where, as here, the parties have made divisions of the territory, a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable. It is patent that division (1) Fayetteville is not unreasonable.
 - f. This becomes known as the “blue pencil” rule.

4. *Sermons v. Caine & Estes Ins. Agency, Inc. (1980): South Carolina Supreme Court*
 - a. William O. Sermons was employed by Caine & Estes as an insurance agent in 1973.
 - b. He signed the first agreement in 1973, the next in 1977 that was similar, and in 1978 the company’s stock was obtained by another company and he had to sign a third one in connection with the sale of stock.
 - c. In 1979 he resigned and set up a competing insurance agency and filed a D.J. action seeking a declaration that the agreements were overbroad; employer counterclaimed.
 - d. The prohibited geography of two of the three were the entire State of South Carolina but the evidence was that he sold insurance primarily within a 50 mile radius of Greenville, S.C.
 - e. “The enforceability of a noncompetition clause depends on whether it is necessary for the protection of the legitimate interest of the employer, is reasonably limited in its operation with respect to time and place, is not unduly harsh and oppressive

in curtailing the legitimate efforts of the employee to earn a livelihood, is reasonable from the standpoint of sound public policy, and is supported by a valuable consideration.”

- f. “There is no good reason for limiting the activity of the employee throughout the entire state of South Carolina. ... While recognizing the legitimate interests of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living. The facts of this case, considered under the policy of this state, render these noncompetition covenants void and unenforceable as being an unwarranted limitation on the plaintiff’s right to make a livelihood.”
 - g. Author’s note: The Court did not note where sermons opened his new insurance agency.
5. *Rental Uniform Service of Florence, Inc. v. Dudley (1983): South Carolina Supreme Court*
- a. Rental Uniform was in the business of laundering and furnishing coveralls, work clothes, and uniforms in fourteen South Carolina counties.
 - b. James Dudley drove a truck to pick up and deliver the industrial laundry in a six-county area of the fourteen counties Rental Uniform Service handled.
 - c. Mr. Dudley signed an agreement in 1972 that stated “upon termination of employment and for three years after I shall not...engage in the industrial laundry business...in any capacity whatsoever in the area I worked or to which I was assigned at any time during my employment...”
 - d. Mr. Dudley resigned in 1979 and started working for another company doing the same thing in the same area; Rental Uniform Services sued and the trial court found the agreement to be “unreasonably restrictive” and refused to issue an injunction.
 - e. The Supreme Court of South Carolina reverses finding the time and territory reasonable under the facts of the case.
 - f. Author’s Note: The “in any capacity” restriction was no concern for the Court—even though Mr. Dudley only drove a truck picking up laundry.
6. *A.E.P. Industries v. McClure (1983): North Carolina Supreme Court materially changes the irreparable harm analysis in favor of employers.*
- a. A.E.P. Industries manufactured and sold polyethylene products “throughout the United States.”
 - b. McClure was hired on October 4, 1976 as a sales representative out of A.E.P.’s North Carolina office.
 - c. McClure’s agreement with A.E.P. stated that he would not, for 18 months following termination, “directly or indirectly, as a sole proprietor, or as a principal, partner, stockholder, director, officer, employee, agent or other representative, engage, participate or become interested in, affiliated or connected with, be employed by or render service to, any corporation, firm, association, or other enterprise which shall market or sell the same or substantially similar products as those marketed or sold by A.E.P. Industries, Inc. at the time of the

termination of my employment or within the 6 month period immediately preceding such termination.”

- d. McClure then was transferred to an affiliated company called Design Poly Bag Co. by A.E.P. Industries and was paid \$20,000.00 to agree “he will not at any time hereafter use or disclose any proprietary information of A.E.P. which has been acquired by him directly and solely as a result of his previous employment by A.E.P. The Employee agrees that customer lists and prospective lists of customers together with addresses of same, products acquired by same, price information on customers and sales and financial information of A.E.P. and all items of confidential and proprietary information are included within this Agreement.”
- e. This new agreement had a new covenant not to compete for 18 months and the geography was identified as “300 mile radius of any A.E.D. office.”
- f. McClure resigned from Design Poly Bag on September 18, 1982 and “immediately began contacting several of the A.E.P. customers—including Chatham Manufacturing Co. of Elkin, North Carolina and Reeves Bros., Inc. of Cornelius, North Carolina.”
- g. A.E.D. sued, sought, and obtained a TRO and then the trial court dissolved the TRO and refused to issue a preliminary injunction.
- h. The trial court’s reasoning was that “while there is probable cause to believe that plaintiff may prevail at the hearing...plaintiff has failed to establish through its evidence the reasonable likelihood of any substantial monetary damage.”
- i. The Court of Appeals affirmed.
- j. The Supreme Court reversed and remanded.
- k. The Supreme Court reminded us of the five elements for a noncompete: (a) in writing; (b) made part of a contract of employment; (c) based on reasonable consideration; (d) reasonable both as to time and territory; (e) not against public policy.
- l. It moved on to distinguish noncompete cases from virtually all other cases—that in noncompete cases it is enforcement of the covenant that is the preliminary relief sought, an injunction.
- m. It went on to say “the second distinguishing feature of this case is that the decision made at the preliminary injunction stage of the proceedings becomes, in effect, a determination on the merits.”
- n. “We hold that where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no ‘legal’ (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation.”
- o. “Finally we believe our holding is in accordance with the policy of our State to encourage growth in new ‘high tech’ industry.”
- p. Citing law review article from H. Constangy, “Employment Contract Covenants Not to Compete: Enforceability Under North Carolina Law,” 10 Wake Forest L. Rev. 217 (1974) stating “the rapid technological advances accompanying North

Carolina’s industrial growth and increased employment opportunities, especially for technical and professional occupations, gives added significance and immediacy to the problem of the enforceability of covenants not to compete contained in employment contracts.”

- q. Author’s Note: the Supreme Court noted that the 18-month period of McClure’s agreement had completely elapsed and noted that A.E.P. still had a claim for substantial money damages” but it still remanded the case back to Mecklenburg County “for further proceedings not inconsistent with this opinion.”
 - r. The dissent notes “This ‘holding’ removes the requirement of showing of real and immediate irreparable injury before injunctive relief can be allowed”—in other words, it is presumed.
7. *United Labs, Inc. v. Kuykendall* (1988): Supreme Court starts addressing the “legitimate business interest” issue.
- a. United Laboratories is in the business of selling specialty chemicals products throughout the county.
 - b. William Kuykendall started as a sales representative in 1972 in North Carolina.
 - c. Mr. Kuykendall resigned in 1979 and went to work for Share Corporation in the same territory.
 - d. Mr. Kuykendall received a threatening letter and went back to work for United Laboratories the same year as a sales manager.
 - e. Noncompete was contained in a voluntary profit-sharing pension plan and he signed up as a salesman.
 - f. Noncompete was 18-month restriction from calling on same, actual, or potential customers in same territory he was assigned to.
 - g. 1985 he resigns again to work for Share Corporation in the same territory and called on the same customers.
 - h. United Laboratories sues and gets a preliminary injunction.
 - i. Case went to trial and jurors find for United Laboratories and renders judgment for damages and attorneys’ fee plus a permanent injunction for the remainder of the contract. Defendant appeals.
 - j. Court of Appeals says agreement was unenforceable and reverses; Judge Phillips dissented.
 - k. Supreme Court says “there are two separate and distinct legitimate bases for enforcing restrictive covenants in the employer-employee relationship”: (a) customer relationships or good will; and (b) valuable information about the nature and character of its business and the names and requirements of its customers.
 - l. “We disagree with the implication that information obtained through a salesman’s efforts during the court of employment belongs to the employee.”
 - m. “We hold therefore that plaintiff did have a near-permanent relationship with its customers and that Kuykendall acquired confidential information regarding those customers.”
 - n. REVERSED.

8. *Iredell Digestive Disease Clinic, P.A. v. Petrozza (1988): North Carolina Court of Appeals established public policy invalidating some physician noncompetes that impair access to specialists.*
 - a. Iredell Digestive Disease Clinic was a gastroenterology and general internal medicine practice in Statesville, North Carolina. It was owned by Dr. David Kohut.
 - b. Dr. Petrozza signed a three-year employment agreement with Iredell Digestive on August 18, 1983 right after graduating from medical school.
 - c. The noncompete covenant stated that Petrozza would not, for three years following termination, within a 20-mile radius of Statesville or 5 miles from any hospital serviced by Iredell Digestive practice internal medicine or gastroenterology.
 - d. Things went along smoothly, apparently, until the issue of Petrozza's partnership arose three years in and both sides accused the other of negotiating in bad faith.
 - e. Dr. Petrozza resigned and opened a gastroenterology and internal medicine practice in Statesville in September of 1987; Iredell Digestive sued and obtained a TRO but was denied a preliminary injunction; they appealed.
 - f. The trial court, in denying the injunction made the following findings—(i) that Dr. Kohut cannot maintain the established level of medicine services in gastroenterology to which the locale served by Iredell Memorial and Davis Community Hospitals has become both accustomed and entitled; and (ii) that the welfare of the service area for gastroenterology would be harmed if only Dr. Kohut were present and not Dr. Petrozza too.
 - g. Court of Appeals AFFIRMS citing case law from other states and setting the public policy.

9. *Triangle Leasing v. McMahon (1989): North Carolina Court of Appeals starts knocking down covenants due to geographic overbreadth.*
 - a. Triangle Leasing was in the business of leasing vans, trucks, and automobiles and had offices at RDU, Greensboro Airport, and in Wilmington, NC.
 - b. McMahon was the manager of the Wilmington, NC site and his job assignment was “calling on certain accounts” and he had knowledge of pricing the Wilmington accounts.
 - c. Triangle Leasing had a “rate book” identifying customers by name and “class of customer.”
 - d. Triangle Leasing's noncompete was a two-year restriction “within the State of North Carolina or any other state or territory in which Triangle Leasing conducts business” from “directly or indirectly soliciting or attempting to procure the customers, accounts or business of Triangle Leasing or directly or indirectly making or attempting to make car or truck-van rental sales to customers of the Company.”
 - e. McMahon worked at Triangle Leasing for two years and then began work with Wilmington Auto Rental, which owned the Thrifty Car Rental franchise for Wilmington.
 - f. Triangle Leasing sued and won a preliminary injunction with a finding of that injunction being “the territorial restriction of the State of North Carolina

contained in the covenant not to compete is necessary to protect the business and good will of the Plaintiff.”

- g. Court of Appeals REVERSES stating “In reviewing the necessity of protection for an employer’s business in a wide territory, we take particular notice of the employee’s ‘personal association with customers’ because of his status as manager of his employer, and the employee’s acquisition of ‘intimate knowledge’ about the employer’s business.”
- h. “The former activities are known commonly as ‘customer contact’ and the latter as ‘confidential information’—however, when such contact and information derives from an employee’s employment which is limited to a portion of employer’s total business area, the employer must correlate the protection sought [over the total business area] with a need of his business.”
- i. “Furthermore, in determining the reasonableness of territorial restrictions, when the primary area of concern is the employee’s knowledge of customers, the territory should only be limited to the areas where employees made contacts during his employment.” (citations omitted)
- j. “From the information that Triangle Leasing introduced at the preliminary injunction hearing, we find no indication that McMahan had customer lists from Company locations other than the Wilmington location. ... As to confidential information of business outside Wilmington, the record shows only that the Company gave McMahan ‘price information at the then Western Boulevard [Raleigh] location’ approximately two years prior to Employee’s resignation while Employee was in training. ... The Company also admitted that it priced its products to the ‘individual consumer,’ and ‘the prices will fluctuate.’”
- k. “The Company seeks to bar Employee from competing with it for its customers anywhere in North Carolina, despite the Company’s failure to show Employee’s knowledge of Company’s current customers and accounts outside Wilmington, or Employee’s knowledge of the Company’s records of customer buying habits, pricing formula, vehicle inventory, or market factors outside Wilmington, for the period of two years.”
- l. “In sum, the practical effect of the territorial provision is to stifle normal competition for vehicle rentals and leasing through the State of North Carolina. A contract whose provision has such an effect ‘is as much offensive to public policy as it ever was in promoting monopoly at the public expense and is bad.’”
- m. REVERSED.
- n. Author’s Note: Witness the Court of Appeals using precedent and challenging agreements for technical enforceability and the dissent of Judge Cozort to the effect of “hey, we permitted a noncompete having a geography of North Carolina, South Carolina and parts of Virginia and Tennessee even though the salesman was assigned to a 10-county area in North Carolina” and further noting “and two years was not too long in an earlier case.”

10. *Young v. Mastrom, Inc. (1990)*: North Carolina Court of Appeals confirms that missing “additional consideration” will invalidate a noncompete.

- a. Mastrom was a consulting firm that provided its services to the medical and dental professions.

- b. Young was a bookkeeper who had some client contact in his job.
- c. Mastrom showed Young no noncompete when he interviewed and he accepted and began work on August 16, 1971.
- d. On August 23, 1972 Mastrom asked Young to sign an agreement with a noncompete in it—and he did.
- e. The Court noted that if the employment relationship already exists the newly proffered noncompete must be based on additional consideration that is not illusory.
- f. AFFIRMED on no consideration ground.
- g. Author's Note: It is important to note that exception to this rule—if the noncompete were verbally agreed to prior to starting work then the law will respect the agreement's consideration even though later signed.

11. *Stringer v. Herron (1992): South Carolina Court of Appeals starts knocking down covenants due to geographic overbreadth.*

- a. Stringer was a veterinarian who operated three animal hospitals in Anderson County—(i) on Shockley Ferry Road; (ii) on Clemson Boulevard, both in Anderson; and (iii) on Anderson Street in Belton.
- b. Herron was a younger veterinarian who went to work for Stringer. Stringer asked Herron to sign a noncompete.
- c. The noncompete stated Herron was not to “associate himself or engage in, directly or indirectly, any business or practice which exists for the practice of veterinary medicine within 15 miles of an veterinary practice operated by the employer...at the time of termination.” The term was for three years. It also had a \$30,000.00 liquidated damages provision in the event of breach.
- d. Herron resigned after a few years and started an ambulatory veterinary practice that moved around Anderson County. “According to records filed with the South Carolina Department of Health and Environmental Control Herron vaccinated at least 249 animals formerly listed on Stringer’s active customer lists.”
- e. Taking a 15-mile radius from Stringer’s three locations, this created a territory including “all of Anderson County, parts of Abbeville, Greenville, Pickens, and Oconee Counties and, indeed, a small part of Georgia.”
- f. The appeals court found this unenforceably overbroad in that “an overwhelming majority of Stringer’s clients lived much closer than 15 miles from the practice locations.”
- g. Author's Note: This case teaches attorneys to use maps and draw circles when analyzing radius restrictions in South Carolina.

12. *Hartman v. W.H. Odell & Associates (1994): North Carolina Court of Appeals applies “blue pencil” test and concluded covenant cannot be saved.*

- a. Mark Hartman worked as an actuary serving insurance industry customers for W.H. Odell & Associates from 1986 to 1991 and signed a covenant not to compete at the inception of his employment.
- b. Hartman resigned in 1991 and got so many nasty letters threatening him with enforcement of the covenant that he filed a DJ action in Davidson County Superior Court.

- c. The case was tried in a bi-furcated setting, the first part a bench trial concerning judicial enforceability and the second party concerning possible damages to be decided by the jury.
 - d. The trial judge found that portions of the noncompete were overbroad as to “the nature of the restricted activity” and also “time period” and “geography”—so the trial judge “blue penciled” them.
 - e. The trial judge’s “blue pencil” effort was rejected— “the court will not rewrite the contract but will simply not enforce it.”
 - f. This case also resurrected the six factors courts should use in examining geographic reasonableness: (i) the area, or scope, of the restriction; (ii) the area assigned to the employee; (iii) the area where the employee actually worked; (iv) the area where the employer operated; (v) the nature of the business involved; and (vi) the nature of the employee’s duty and knowledge of the employer’s business operation.
13. *Professional Liab. Consultants v. Todd* (1996): North Carolina Court of Appeals dissent by Judge Smith adopted by North Carolina Supreme Court and using duration analysis that tacks on “look-back” provisions.
- a. Professional Liability Consultants was in the insurance business and Homer Todd was employed there from July 1989 to July 1993.
 - b. Todd signed a 5-year following termination agreement not to contact or solicit the business of customers who were customers at any time during the last 3 years of his employment.
 - c. This 3-year period is sometimes called a “look back” provision.
 - d. Todd resigned in 1993 and set up his own business and was accused of selling insurance to and soliciting his former customers; a preliminary injunction was sought and granted.
 - e. Todd appealed; the majority affirmed the entry of the injunction even though there was no evidence of “direct” solicitation.
 - f. Interesting statement from majority “We do note that the plaintiff does not dispute that the defendants are permitted to open an office to sell insurance, even though this constitutes an indirect solicitation of plaintiff’s business.”
 - g. “Therefore, it is only the selling of insurance to plaintiff’s customers who contact the defendants as a result of this indirect solicitation that is at issue in this case.”
 - h. Majority affirms grant of injunction; Judge Smith dissents saying Hartman controls and mandates reversal.
 - i. Judge Smith first notes that Plaintiff’s customer base identifies and their locations are not in the record, thus reasoning it is not clearly reasonable.
 - j. He then analyzes the duration of the covenant noting five years AFTER termination plus three years BEFORE resignation transforms the agreement facially to eight years.
 - k. Judge Smith concludes by noting the blue-pencil rule sinks the durational term and its excessive duration and the injunction should not have been issued.
 - l. The Supreme Court agrees with Judge Smith and adopts his dissent in toto.

14. *Carolina Chem. Equip. Co. v. Muckenfuss* (1996): *South Carolina Court of Appeals knocks down “Covenant Not to Disclose Trade Secrets” Because Its Effect Was to Inhibit Competition and Thus Must Be Analyzed as a Noncompete Covenant.*
- a. Carolina Chemical Equipment Company sold industrial cleaning equipment and supplies; Muckenfuss was one of three shareholders.
 - b. Muckenfuss was voted out in 1989 and sold his shares back via a stock agreement that contained a “Covenant Not to Disclose Trade Secrets” and a covenant not to compete.
 - c. After Muckenfuss went to work with Energen, a direct competitor, Carolina Chemical got a preliminary injunction and the case was tried to a jury twice—both times the jury found for Carolina Chemical but gave them no damages; instructed to do so or give a verdict to Muckenfuss, they awarded \$75,000.00 to Carolina Chemical and the trial court tacked on a five year injunction against Muckenfuss and Energen from selling competing products in Charleston County for five years and all sides appealed.
 - d. The covenant stated: “Muckenfuss agrees not to divulge any trade secrets of the Corporation. Trade secrets means any knowledge or information concerning any process, product or customer of the Corporation and more generally any knowledge or information concerning any aspect of the business of Corporation which could, if divulged to a direct or indirect competitor, adversely affect the business of Corporation, its prospects or competitive position. Seller shall not use for his own benefit any trade secret in any manner whatsoever.”
 - e. South Carolina Court of Appeals finds this is essentially a noncompete because it would limit his employment opportunities and, as such, needed to be subject to the scrutiny of a noncompete.
 - f. They note it is unlimited in time and territory and is far greater than necessary to protect Carolina Chemical from unfair competition—noting South Carolina law respects no commercial interest from mere competition itself.
 - g. They then note its oppression to Muckenfuss in impairing his ability to earn a livelihood and would “prevent Muckenfuss from using the general skills and knowledge he acquired at Carolina Chemical.” REVERSED and REMANDED.
 - h. Author’s Note: The Muckenfuss case illustrates how tough cases can make bad law—an alternative holding could have been that the trade secret covenant was impermissibly overbroad on its face and unenforceable as written.
15. *Moser v. Gosnell* (1999): *South Carolina Court of Appeals finds covenant’s definition of business restricts scope of prohibited competition even if buyer of business purchased more business than reflected in the covenant.*
- a. The Gosnells ran a full-service construction and carpet-cleaning company that did remodeling, renovation, restoration and painting and 80% of their business came from insurance-funded restoration work and the rest was not insurance-funded.
 - b. The Mosers bought the company from the Gosnells and the sale-related noncompete stated that “seller has been engaged in the business of insurance-funded restoration work” and for three years prohibited competition in the “same” business and provided for liquidated damages in the amount of the purchase price.

- c. The company went out of business and the Mosers sued the Gosnells claiming the Gosnells had competed impermissibly and that included in noninsurance-funded business; trial court said that was not included and the liquidated damages clause was an unenforceable penalty.
 - d. On appeal, the Court of Appeal affirmed saying the agreement controls, not the unstated intentions of the parties.
 - e. Author's Note: This case is included because it emphasized the harsh result of covenant drafting errors in defining “the business” poorly.
16. *Market America, Inc. v. Christman-Orth* (1999): North Carolina Court of Appeals finds noncompete with no geographic scope still enforceable because geography was implied to be nation-wide.
- a. Market America is a multi-level product brokerage company which distributes about 300 products through a network of approximately 75,000 distributors.
 - b. Robin Christman-Orth was one of those 75,000 distributors and she signed the noncompete that prohibited her from six months from assisting or working for “another company or direct sales program using a similar matrix marketing structure or handling similar products to that of Market America.”
 - c. Christman-Orth thereafter assisted a company called Club Atlanta Travel that used multi-level marketing to sell vacations and airline flights; Market America sent her a cease-and-desist letter and she rejected it.
 - d. Market America was awarded summary judgment on its noncompete breach claim and Christman-Orth appealed, arguing “no geographic scope equals per se unenforceable.”
 - e. Court of Appeals rejects Christman-Orth’s argument stating “the noncompetition covenant contains no fixed geographic restriction, but given that Market America is a national company it is likely that the covenant is intended to reach the entire United States...we cannot say that Market America’s covenant not to compete is unreasonable as a matter of law.”
 - f. Author's Note: Was this agreement strictly construed? Is the implication of a geographic scope blue-penciling?
17. *Farr Assocs. v. Baskin* (2000): North Carolina Court of Appeals says that if a customer-based restriction is used then it should be limited to customers employee had contact with to be enforceable.
- a. Farr Associates is a behavior science consulting firm based in High Point that conducted leadership and self-awareness seminars.
 - b. Baskin was a consultant who met with customers primarily in North Carolina and not to customers and offices in 41 other states and 4 other countries.
 - c. Baskin’s noncompete stated “for a period of three years following termination...he will not directly or indirectly render any services of a similar kind...to customers who were customer in the two years prior to termination.”
 - d. Trial court actually dismissed the noncompete claim on overbreadth ground and Court of Appeals AFFIRMED.
 - e. Author's Note: How do Triangle Leasing and Kuykendall square with this reasoning?

18. *Rug Doctor, L.P. v. Prate* (2001): North Carolina Court of Appeals applies appellate “mootness” doctrine where covenant does not survive during appeal.
- James Prate was a district manager for Rug Doctor, which marketed and sold industrial cleaning services.
 - Rug Doctor fired Prate and then he and his wife started Contract Management Professionals and won the Food Lion customer away from Rug Doctor.
 - Trial judge denied Rug Doctor an injunction and Rug Doctor appealed.
 - Appeal declared “moot” and appeal dismissed.
19. *Poole v. Incentives Unlimited, Inc.* (2001): South Carolina Supreme Court adopts North Carolina’s additional consideration test if noncompete entered into after inception of employment.
- Carol Poole started working as a travel agent for Incentives in 1992 and in April of 1996 they asked her to sign noncompete, which she did.
 - Poole worked through November 1996 and then left for another agency—no additional consideration was given for the April 1996 signing.
 - “We adopt the rule that when a covenant is entered into after inception of employment, separate consideration, in addition to the continued at-will employment, is needed.”
20. *Precision Walls v. Servie* (2002): North Carolina Court of Appeals affirms geography in places where employee had no customer contacts because information risk was real and employee could harm former employer in other capacities than in just the one he served former employer.
- Precision Walls manufactured, sold and installed interior and exterior wall systems in 12 states, including throughout all of North Carolina and South Carolina.
 - Mr. Servie was an Estimator/Project Manager who signed a one-year post-termination covenant that prohibited him from: (a) soliciting business from, diverting business from, or attempting to convert any customer; (b) being engaged in the Business in the territory or (c) soliciting employees away. The geography for the covenant was North Carolina and South Carolina.
 - Mr. Servie resigned in 2001 and went to work for Shields in Winston-Salem in the same capacity.
 - A TRO and PI were issued but Mr. Servie was able to obtain a supersedeas writ from the Court of Appeals.
 - Notwithstanding the supersedeas writ protecting service, the Court of Appeals affirms.
 - Importantly, the Court of Appeals rejects Servie’s “in any capacity” argument that stopping him from servicing in other job titles is overbroad; the Court says “we conclude that defendant would not be less likely to disclose the information and knowledge garnered from his employment with plaintiff if he worked for defendant’s competitors in a position different from the one in which he worked with plaintiff.”

- g. Author's Note: This opinion, in my view, sets the stage for an argument that will ebb and flow with the facts of many future cases—the “in any capacity” restrictions being necessary to protect an employer’s legitimate business interest in either customer relationships or to preserve the competitive value of confidential information.
21. *Rockford Mfg. v. Bennett* (2003): *Federal District Court finds that South Carolina does permit “severable” “blue-penciling.”*
- “It is clear that Somerset contemplates as much...to, in effect, blue pencil any overbroad provisions of the covenant and enforce the narrowly tailored ones.”
 - Preliminary Injunction GRANTED.
22. *Kennedy v. Kennedy* (2003): *Rare North Carolina Court of Appeals case rejecting and reversing “public policy” finding by trial court that denied injunction to Chapel Hill dental practice.*
- Nephew/Plaintiff was a general dentist in Chapel Hill; Uncle/Defendant was also a general dentist who worked as his nephew’s partner for five years but sold out to him over time.
 - Noncompete signed by Uncle was three years after Uncle’s employment terminated within 15-mile radius of the 123 Franklin Street address.
 - Nephew asked Uncle to work more regimented schedule and Uncle refused; they agreed to part and Uncle set up practice in Hillsborough within the 15-mile radius.
 - Nephew sued and sought a preliminary injunction which trial court denied on grounds that included: (i) rights of patients would be impaired to choose their own dentists; (ii) 15-mile radius and 3 year term was overbroad as to time and geography; and (iii) there was no irreparable harm threatened.
 - Court of Appeals REVERSED and noted that the public policy was misapplied; of course physician noncompetes may inconvenience patients but the public policy deals with patients being deprived of specialist options, not mere inconvenience.
23. *VisionAIR, Inc. v. James* (2004)
- VisionAIR was a software company that developed software for public safety agencies; James was a software developer who wrote code.
 - The VisionAIR covenant prohibited James from “selling or developing any software products which will directly or indirectly compete with and of Employer’s software products” and “further being employed by an employer with a similar business in the Southeast” for a two year period following termination.
 - In March of 2003 James goes to work for InterACT doing the same work for a company also selling software to public safety agencies.
 - The trial court denied VisionAIR an injunction and it appealed.
 - The Court of Appeals AFFIRMED the trial court noting “James would be prevented from doing even wholly unrelated work at any firm similar to VisionAIR” and would even prohibit “indirect” ownership of a similar firm.
 - In a footnote, the Court distinguishes Precision Walls.

24. *Southeastern Outdoor Prods. v. Lawson* (2005): *North Carolina Court of Appeals reverses preliminary injunction granted through misapplication of “blue pencil” authority.*
- a. Southeastern Outdoor Products manufactured, sold and installed metal carports and storage buildings.
 - b. Henry Lawson, Jr. was its president, one of only two corporate directors, and owned 50% of its stock.
 - c. Noncompete was 3 years following termination in entire states of North Carolina and South Carolina.
 - d. Evidence was that Southeastern served customers in 60 counties in North Carolina and between 20-25 counties in South Carolina.
 - e. Lawson went to work for Newmart Builders in February of 2004 as a subcontractor; Newmart also served customers in North Carolina and South Carolina.
 - f. Trial court entered preliminary injunction but rewrote the geography to only include areas where Southeastern’s customers existed.
 - g. On appeal, Court of Appeals REVERSED saying trial court did not have “blue pencil” power to rewrite boundaries.
25. *Carolina Pride Carwash v. Kendrick* (2005): *North Carolina Court of Appeals reverses injunction finding geography was overbroad because defendant never made customer contact in some of the geography.*
- a. Carolina Pride was a car wash manufacturer and distributor of car wash equipment and supplies; they operated in North Carolina, South Carolina, and the southern half of Virginia.
 - b. Kendrick was a \$15.00 per hour service technician who signed noncompete for three years following termination from serving in the same line of business in North Carolina, South Carolina, and Virginia.
 - c. Kendrick left Carolina Pride after two years and went to work for Water Works Management Company as a manager for several of its car washes in Greensboro, Mt. Airy, Elkin, and Boone.
 - d. Carolina Pride sued and Kendrick was then discharged by Water Works; he countersued and both sides moved for summary judgment; summary judgment was granted to Carolina Pride and \$50,000.00 in liquidated damages awarded.
 - e. Court of Appeals REVERSES holding the noncompete was overbroad geographically due to inclusion of entire state of Virginia and evidence Kendrick made no customer contacts there.
 - f. Author’s Note: Could Virginia have been blue-penciled out? Would that have rendered the liquidated damages provision suspect?
26. *Okuma Am. Corp. v. Bowers* (2007): *North Carolina Court of Appeals finds Rule 12(b)(6) motion dismissing noncompete complaint was improperly granted.*
- a. Okuma America developed and sold machine tooling technology.
 - b. Bowers worked there for 17 years, the last two as VP of Customer Service.
 - c. Bowers maintained relationships with 30 distributors in 40 locations.

- d. Noncompete was 6-month prohibition on being employed with competitor in identified territories where Okuma did business.
 - e. Okuma America sought to transfer Bowers to a new role that he considered a demotion, so he resigned and three months later he became VP of Customer Service by DMG America; Okuma America sued and Bowers moved to dismiss; trial court granted 12(b)(6) motion.
 - f. Court of Appeals reversed noting “the language of the covenant not to compete” prohibiting employment with a competitor in all capacities “threads” the needle between the language of Precision Walls and VisionAIR.
 - g. Court of Appeals goes on to note “Mr. Bowers held a much more senior position than those in question in either Precision Walls or VisionAIR; the enforceability of the noncompete rests in factual questions such as whether the geographic effect of the client-based restriction is excessive in light of Mr. Bowers’ actual contacts with customer, the nature of his duties, the level of his responsibilities, the scope of his knowledge, and other issues.”
27. *Nucor Corporation v. Bell* (2007): *United States District Court in South Carolina finds that terms of a “nondisclosure agreement” should be subject to the same requirements of noncompete agreements.*
- a. Nucor manufactured steel products throughout the United States; Bell was hired in 1987 as a “melt shop manager” and was promoted over time to ultimately become General Manager of Steelmaking Technologies.
 - b. Bell signed, over time, three NDA agreements with Nucor, the third of which defined “confidential information” broadly to include virtually all information Bell had access to and had a term of 20 years.
 - c. Bell resigned in 2006 and soon thereafter joined Nucor competitor SeverCorr as an Executive Vice President and General Manager of Operations.
 - d. Nucor alleged that Bell stole a bunch of sensitive data and documents on his way out of the door and also that he was a threat of inevitable disclosure.
 - e. As to the breach of third NDA, the trial court dismissed the claim for breach finding that NDA’s are subject to the strict scrutiny of noncompete agreements and that this one failed for lack of consideration.
 - f. Author’s Note: This is a major substantive distinction in NC and SC law.
28. *Medical Staffing Network, Inc. v. Ridgway* (2009):
- a. Medical Staffing Network provided staff to hospitals and other healthcare providers for a fee; Ridgway was hired as the manager of the Raleigh branch.
 - b. Ridgway was hugely successful and had signed a covenant at the inception of his employment that prohibited competition with not only MSN but also affiliated and parent companies in a 60-mile radius of Raleigh but also prohibited activities that were “distinct” from duties actually performed by the employee during employment.
 - c. Court of Appeals, following a trial that found substantial damages against Ridgway and his new employer, REVERSED as to the enforceability of the noncompete.

- d. Author's Note: Here the Court of Appeals is again claiming to clarify its jurisprudence on the “in any capacity” area—acting as if Precision Walls and Okuma do not seem to contradict this assessment.
29. Hejl v. Hood, Hargett & Assocs. (2009): *North Carolina Court of Appeals finds that geographic territory was not limited to places where employee services customers and, importantly, there is no legitimate business interest in protecting non-customers who were quoted business but never bought.*
- a. Phillip Hejl was an account executive for Hood, Hargett & Associates which was an insurance company.
 - b. Hood, Hargett & Associates terminated Hejl after a couple years and then sued a DJ action seeking to declare the noncompete covenant unenforceable.
 - c. The covenant was for two years following termination and included a one-year look back provision—so it was effectively a 3-year period.
 - d. The covenant's territory was (i) Charlotte, North Carolina, or (ii) any other city, town, borough, township, village or other place in North Carolina or South Carolina where Hood, Hargett & Associates is engaged in selling its services.
 - e. The agreement also prohibited Hejl from offering services to any “person, firm or entity to whom Hood, Hargett & Associates has sold any product or service or quoted any product or service.”
 - f. This “quoted” language was too much for the Court of Appeals and they stated “Defendant's attempt to prevent plaintiff from obtaining clients where Defendant had failed to do so is an impermissible restraint on Plaintiff.”
 - g. AFFIRMED.
30. Milliken & Co. v. Morin (2009-2012): *South Carolina's Court of Appeal and Supreme Court address the rules for inventions assignment and “holdover” agreements.*
- a. Milliken & Co. was a multi-national textiles and chemical manufacturing company; Morin began working for Milliken as a Ph.D. research physicist assigned to developing new products.
 - b. Morin approached Milliken with an idea to create a “high modulus multifilament polypropylene fiber” but Milliken turned the idea down and it was not a product for which Milliken had equipment or any customers.
 - c. Morin resigned in 2004 and created a new company, Innegrity LLC, and thereafter sought a patent for the “high modulus multifilament polypropylene fiber” product and then started marketing his product and company in Greenville at a convention in 2005.
 - d. Soon thereafter Milliken's counsel sent him a nasty letter saying he was violating written agreements and that his invention actually belonged to Milliken; Morin responded by offering a deal to Milliken that rejected their assertions.
 - e. Milliken sued asserting nine causes of action: (i) breach of invention assignment provision; (ii) breach of covenant not to compete; (iii) breach of confidentiality provision; (iv) misappropriation of trade secrets; (v) unfair trade practices; (vi) breach of the implied covenant of good faith and fair dealing; (vii) breach of

contract accompanied by a fraudulent act; (viii) conversion; and (ix) breach of the duty of loyalty.

- f. Morin moved for summary judgment on the noncompete, inventions assignment and confidentiality provision breach claims; the motion was denied.
 - g. Shortly before trial Milliken dismissed four of its claims—including all claims against the new company.
 - h. Four claims were submitted to the jury (i) breach of inventions assignment agreement; (ii) breach of confidentiality agreement; (iii) violation of the SC Trade Secrets Act; and (iv) breach of the duty of loyalty; jury found Morin liable for breach of the assignment of inventions and nondisclosure agreements and awarded Milliken \$25,324 in actual damages; Milliken was denied an injunction by the trial court and both sides appealed.
 - i. On the denial of equitable relief, the Court of Appeals found that the verdict of \$25,324 demonstrated that legal relief was available and, in fact, awarded such that equitable relief was not needed.
 - j. The Supreme Court of South Carolina rejected Morin’s argument that the nondisclosure and assignment of inventions agreements should be analyzed under the same scrutiny that noncompete agreements are reviewed.
 - k. “The agreements under review, however, are not in restraint of trade...they merely rest ownership of an invention with the entity which ought to have it.”
 - l. The standard for these agreements is a “general reasonableness standard of enforceability.”
31. *MJM Investigations, Inc. v. Sjostedt* (2010): North Carolina Court of Appeals reverses trial court’s preliminary injunction on grounds that includes lack of clarity as to the identity of restricted customers; Judge Steelman concurs but complains.
- b. MJM was in the business of investigating claims made to insurance carriers regarding overseas work by federal contractors, including in the Middle East.
 - c. Brian Sjostedt and his company, Vetted International, were contractors for MJM after he had earlier terminated his employment with MJM.
 - d. The 2007 agreement contained a noncompete and nonsolicitation covenant and the relationship broke down on June 4, 2008.
 - e. MJM sued Sjostedt and Vetted and sought a TRO and PI against them; the TRO was denied but the PI was granted.
 - f. The PI was predicated on the nonsolicitation agreement and included as prohibited clients “any current or prospect client for MJM.”
 - g. The current and prospect client list was an exhibit to the preliminary injunction with 800 names on it, even though MJM’s first interrogatory response for the identification of clients included only 42 names.
 - h. The Court of Appeals REVERSED stating that “MJM’s failure to provide any definition for ‘current or prospect client’ renders the non-solicitation clause vague and unenforceable.”
 - i. The Court of Appeals also scrutinized the trial court’s use of the blue pencil and found that by crossing out the noncompete it had effectively eliminated the time period for the nonsolicitation provision.
 - j. Judge Steelman concurred by complaining:

“At the time our law in the area of restrictive covenants was developed, much of our commerce was local, and restrictive covenants were enforced only to protect specific local interests. Any covenants that attempted to protect broader commercial interest were held to be invalid as an improper restraint of trade. However, today’s economy is global in nature. In the instant case, plaintiff conducts a very specialized niche type of business, but its scope is worldwide, rather than being focused in one or two counties in North Carolina. The law of restrictive covenants should be re-evaluated by our Supreme Court in the context of changing economic conditions to allow restrictions upon competing business activity for a specific period of time, limited to a specific, narrow type of business, but with fewer geographic restrictions.”

32. *Beverage Systems of the Carolinas, LLC v. Associated Beverage Repair, LLC* (2014): *North Carolina Court of Appeals finds that agreement’s grant of editorial authority modified the long-standing “blue pencil” rule that limited what courts could do in the face of an overbroad noncompete.*

- a. Beverage Systems purchased most of the business and assets of two companies and the individual sellers including Ludine Dotoli gave noncompete promises to the buyer.
- b. The noncompete was a 5-year covenant that covered all of North Carolina and South Carolina and prohibited competition against the business purchased.
- c. The agreement also permitted to “substitute” the “maximum scope, period and geography” that were found reasonable if the 5-year, North Carolina and South Carolina attempt were found unreasonable.
- d. Dotoli, through a company partially owned by his wife, started competing within 2 years through a company called Associated Beverage Repair.
- e. At the injunction stage during the lawsuit, the trial judge found that the entire states of North Carolina and South Carolina were too broad because the sellers’ and buyer’s business extended to only part of the two states.
- f. The trial court also found that North Carolina’s “blue pencil” rule substantially limited what could be done to enforce the agreement—and “substituting” new geography was not permitted.
- g. Court of Appeals REVERSED and noted this case was distinguishable from others in that the parties had expressly authorized “substituting” and it was in the much less scrutinous area of sale-of-business noncompetes.
- h. “Our Supreme Court has been unwilling to adopt a more flexible approach to the ‘blue pencil doctrine’ leaving the courts with few options to enforce non-competes in a rapidly changing economy.”
- i. Judge Elmore dissented so this case is likely to be heard by the North Carolina Supreme Court.

33. *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 628, 799 S.E.2d 318, 322 (Ct. App. 2017) *South Carolina Court of Appeals reverses trial court’s grant of summary judgment to employer and agrees with departed employee that the definitions of confidential information in the employer’s nondisclosure covenants served as a de*

facto noncompete that was unlimited as to time and, therefore, violative of South Carolina public policy even though the agreement identified Ohio law as controlling.

- a. Fay hired by Total Quality Logistics as a Logistics Sales Account Executive in November and signs the company's noncompete/nondisclosure agreement
- b. TQL, based in Ohio, provides trucking and logistics services
- c. Nondisclosure provision is not limited in time
- d. Noncompete provision was nationwide in geographic scope and stated that if Fay were employed by competitive business it would result in disclosure of TQL's confidential information
- e. TQL terminates Fay only seven months later and he founded his own company and served as a broker for a TQL competitor called Brandt
- f. TQL threatened him with legal action if he continued as a broker for Brandt
- g. Fay filed a DJ action seeking to declare the restrictive covenants overbroad and illegal restraints of trade and effectively prohibited him from working in the truck shipping industry anywhere in the U.S.
- h. TQL countersued and both it and Fay moved for summary judgment
- i. Fay argued at summary judgment that the nondisclosure agreement was actually a noncompete agreement with unlimited duration because it identified "confidential information" as every piece of info he ever had access to
- j. Trial court agrees with TQL, not Fay, and finds restrictions valid under Ohio law
- k. Appeals court reverses and holds the unlimited-in-time nondisclosure covenant was an overbroad noncompete agreement and thus violated South Carolina public policy
- l. Appeals court reasons that the noncompete and nondisclosure covenants read in conjunction resulted in an unlimited noncompete that would prohibit Fay from ever working in the industry because if he did work in the industry he would "necessarily and inevitably" reveal and use TQL's confidential information
- m. Appeals court also notes that blue-penciling to add a time period was impermissible as that would re-write the agreement and result in an agreement the parties never made themselves
- n. Lastly, and importantly, the appeals court noted that Ohio law's willingness to blue-pencil an agreement is irrelevant because doing so, again, would violate South Carolina's public policy

34. *Krawiec v. Manly*, 370 N.C. 602, 609, 811 S.E.2d 542, 547-48 (2018). *North Carolina Supreme Court affirms Business Court's dismissal of various departure claims, including misappropriation of trade secrets claim. This decision establishes a heightened pleading standard for misappropriation cases, both in the requirement of detailed allegations regarding what was misappropriated but also how it was misappropriated and how it qualifies as a secret.*

- a. Krawiec's own and operate the Fred Astaire Franchised Dance Studios in Forsyth County
- b. Manly's own and operate Metropolitan Ballroom in Mecklenburg County

- c. Bogosavac and Divjak are Bosnian and Serbs, respectively, teaching dance in North Carolina on O1-B nonimmigrant work visas
- d. Krawiecs enter into a contract with Bogosavc and Divjak where the visas would be procured as long as the foreigners would work exclusively as dance instructors and performers for the Krawiecs' studios and wouldn't work for other competing studios for a year following termination for any reason
- e. But Bogosavac and Divjak break the deal and start working for Metropolitan Ballroom – and do not hide that as Metropolitan Ballroom identifies them as instructors on their website
- f. Plaintiffs even allege that Bogosavic and Divjak disclosed confidential information to Metropolitan Ballroom and that allowed the latter company to “produce and market Plaintiff's dance shows as their own original productions”
- g. Plaintiff sues alleging claims that included misappropriation of trade secrets, those being “ideas and concepts for dance productions, marketing strategies and tactics, as well as ... customer lists containing contact information”
- h. Defendants' motion to dismiss claims, including trade secret misappropriation, is mostly granted and Plaintiff appeals
- i. North Carolina Supreme Court, where appeals from Business Court judgments go, agrees with the Business Court that Plaintiff has not alleged enough regarding what secrets were misappropriated and not enough regarding how it was misappropriated or how that information was actually a secret
- j. Court notes that merely reciting “the information was shared with the defendants in confidence” is inadequate
- k. This opinion reinforces the requirements of storytelling, that to be effective a plaintiff must do more than allege generalities and suspicions – it must explain the what and the how sufficient to put the defendants on notice of what they allegedly stole and to educate the court regarding the risk of active misappropriation by explaining the how and why the information should be recognized as secret

V. HELPFUL TIPS FOR EMPLOYMENT ATTORNEYS LITIGATING THESE EMPLOYEE DEPARTURE COVENANT MATTERS – FOR BOTH EMPLOYERS AND EMPLOYEES

Tip 1: Focus the connection between the business interest being protected (confidential information, customer relationships) and the time, territory, and activities restricted in the covenant.

Tip 2: Spend more time developing the story line, less on the legal arguments.

Tip 3: If the primary risk of loss in the case is customer loss, consider obtaining affidavits from willing customers.

- Tip 4: Come to court with a prepared injunction order if you're the plaintiff and scrutinize that proposed order if you're the Defendant, particularly the factual findings.
- Tip 5: Departing employees—don't forget the possibility of a declaratory judgment action as a tool in your toolbox.
- Tip 6: Expedited discovery before the preliminary injunction should be limited and mutual.
- Tip 7: At calendar call, tell the motion judge that multiple hours are needed to develop the record and legal arguments for a contested preliminary injunction.
- Tip 8: Bring your client or a representative to the hearing/argument—personalize the story.
- Tip 9: If you're defending, make sure your affidavits establish the loss of income that would likely be suffered if an injunction issues and do not leave the courtroom without asking for a bond.
- Tip 10: Get your evidence and arguments in the record and remember the “supersedeas writ” exists to undo unjust things pending the full appeal.

IV. FIVE FORECASTS FOR POSSIBLE DEVELOPMENTS IN THE LAW OF DEPARTING EMPLOYEES – and one extra freebie

1. Continued judicial scrutiny of disfavored noncompete covenants and increasingly relaxed rules for nonsolicitation and nondisclosure covenants as a means for obtaining injunctions that limit new employment.
2. As protection of “confidential information” via the use of noncompetes becomes more prevalent, a willingness in the courts to approve more broadly defined geographies in the proper fact patterns.
3. The increasing use of “garden leave” payments or “notice provisions” or other streams of payments to the employee to inhibit their immediate departure and re-employment with the competitor—and resulting judicial approval of such provisions in light of the ability of the employee to put food on their table during the restricted period.
4. High courts and/or legislatures establishing legal presumptions for noncompete covenants—e.g., less than a year = presumptively reasonable, more than a year = presumptively unreasonable.

5. Evolution in the procedure and substantive law that relates to the injunction bond, its purpose and a change in the doctrine of mootness as it relates to the injunction bond.

FREEBIE: Litigation regarding whether an employment agreement's choice-of-law provisions select a state law that conflicts with the public policy of the state having a greater connection to the restrictions being reviewed.

APPENDIX A

[SAMPLE] EMPLOYEE CONFIDENTIALITY AND RESTRICTIVE COVENANTS AGREEMENT

I, the undersigned employee, understand that I am or will be employed by GIGANTIC DRUG RESEARCH AND DEVELOPMENT COMPANY, INC., (the “Company”) or one of its affiliated companies, directly or indirectly controlled by, controlling or under common control with the Company (an “Affiliate”) and will learn and have access to the Company’s or an Affiliate’s confidential, trade secret and proprietary information. I understand that the products and services that the Company or an Affiliate markets, provides and sells are unique and highly specialized. Further, I know that my promises in this Employee Confidentiality and Restrictive Covenant Agreement (“Agreement”) are an important way for the Company and its Affiliates to protect its proprietary interests and I understand that the terms of this Agreement are affected by the location in which I am employed, as stated in Attachment A (the “State Law Modifications”). In consideration for my employment, continued employment, certain monies, benefits and/or training or trade secrets or proprietary information of the Company or an Affiliate, to which I would not have access but for my employment with the Company or an Affiliate, I agree as follows:

1. Recognition of Company’s Rights: Nondisclosure of Confidential Information. I agree that I will not, at any time during or after my employment with the Company or an Affiliate, make any unauthorized use or disclosure of any Confidential Information (defined below), or make any use thereof at all, except in the course and scope of my employment with the Company or an Affiliate and as necessary and authorized for carrying out my employment responsibilities.

(a) I understand that the term “Confidential Information” shall mean, without limitation, any confidential or proprietary information or materials of the Company or its Affiliates, whether of a technical, business, or other nature, including information and materials which relate to operations, processes, products, promotional material, developments, patent applications, formulas, sponsor or client lists, manufacturing processes, trade secrets, basic scientific data, data systems, employment policies, formulation information, budgets, bids, proposals, study protocols, coding devices, and any other confidential data or proprietary information in connection with the Company, its Affiliates or their business affairs, including but not limited to any information relating to the operation of the Company’s and/or its Affiliates’ business which the Company or its Affiliates may from time to time designate as confidential or proprietary or that I reasonably know should be, or has been, treated by the Company and/or its Affiliates as confidential or proprietary. Confidential Information encompasses all formats in which information is preserved, whether electronic, print or in any other form, including all originals, copies, notes or other reproductions or replicas thereof. Any trade secrets of the Company and/or its Affiliates will be entitled to all of the protections and benefits under any applicable trade secrets law,

whether statutory or common law, including but not limited to the North Carolina Trade Secrets Protection Act, N.C. Gen. Stat. §§ 66-152 et seq. and the California Uniform Trade Secrets Act, Cal. Civ. Code §§ 3426 et seq. If any information that the Company deems to be a trade secret is found by a court of competent jurisdiction not to be a trade secret, such information will, nevertheless, be considered Confidential Information for purposes of this Agreement.

(b) This Agreement shall not prevent me from (i) reporting, without prior approval from the Company, possible violations of federal securities laws or regulations to any governmental agency or entity, including but not limited to, the Department of Justice, the Securities and Exchange Commission, the Congress, and any Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation; (ii) filing a charge of discrimination with the Equal Employment Opportunity Commission; (iii) cooperating with the Equal Employment Opportunity Commission in an investigation of alleged discrimination; (iv) revealing evidence of criminal wrongdoing to law enforcement; (v) testifying in any cause of action when required to do so by law, or (vi) divulging Confidential Information pursuant to an order of court or agency of competent jurisdiction. However, with respect to (v) and (vi) only, I must promptly inform the Company of any such situations and shall take such reasonable steps to prevent disclosure of the Company's Confidential Information until the Company has been informed of such requested disclosure and the Company has had an opportunity to respond to the court or agency.

Further, 18 U.S.C. § 1833(b) states: "An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—(A) is made—(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal." Accordingly, the parties to this Agreement have the right to disclose in confidence trade secrets to federal, state, and local government officials, or to an attorney, for the sole purpose of reporting or investigating a suspected violation of law. The parties also have the right to disclose trade secrets in a document filed in a lawsuit or other proceeding, but only if the filing is made under seal and protected from public disclosure. Nothing in this Agreement is intended to conflict with 18 U.S.C. § 1833(b) or create liability for disclosures of trade secrets that are expressly allowed by 18 U.S.C. § 1833(b).

2. Third Party Information. I understand that the Company and its Affiliates have received and in the future will receive from third parties confidential or proprietary information ("Third Party Information") subject to a duty on the Company's part to maintain the confidentiality of such information and to use it only for certain limited purposes. During the term of my employment and thereafter, I will hold Third Party Information in the strictest confidence and will not disclose (to anyone other than Company and/or its Affiliate personnel or designees who need to know such information in connection with their work for the Company or an Affiliate) or use, except in connection with my employment, Third Party Information unless expressly authorized by an officer of the Company in writing.

3. Restrictions on Activities of the Employee

(a) Non-Competition Restrictions During Employment

During my employment with the Company or an Affiliate, I shall not, directly or indirectly, either alone or in conjunction with any person, firm, association, company, corporation or other entity:

i. Own, manage, operate or participate in the ownership, management, operation or control of, or be employed by or provide services to, any person, business or entity which competes with the Company's Business (as defined below) if I would: (A) have responsibilities that are in any way similar to the responsibilities I have, or ever had, at any time during my employment with the Company or an Affiliate; or (B) be involved in creating, developing, modifying, accessing, utilizing or relying upon confidential information that is similar or relevant to that Confidential Information (defined above) to which I created, developed, modified, accessed, utilized or relied upon during my employment with the Company or an Affiliate; or (C) use or disclose or be reasonably expected to use or disclose any Confidential Information of the Company; or

ii. Engage in any employment or business activity that in any way interferes with my ability to fulfill my duties and responsibilities to the Company or any of its Affiliates.

Notwithstanding anything to the contrary, nothing in this Section 3(a) prohibits me from being a passive owner of not more than one percent (1%) of the outstanding stock of any class of a corporation which is publicly traded, so long as I have no active participation in the business of such corporation.

"Company Business" shall mean (A) developing, marketing, selling and/or providing services to pharmaceutical, biotechnology, life sciences, medical device and medical diagnostic companies regarding: (i) the commercialization of pharmaceuticals, medical devices or diagnostic products, including, but not limited to, outsourced sales and related operations, marketing, naming/branding, advertising, public relations, medical communications and medication adherence services for the Company's clients, (ii) the provision of clinical trials and related support services including, but not limited to, bioanalysis, data management, feasibility studies, safety, laboratory operations, project management, protocol and case report form design, quality assurance, regulatory affairs and consulting, medical oversight, risk management, site and patient recruitment, site management, strategic planning, study monitoring and late stage services for the Company's clients, and (iii) the provision of consulting services including, but not limited to, brand management, business development, clinical development, commercial strategy and organizational design, product launch planning, medical affairs, pricing and market access and risk evaluation and mitigation strategy for the Company's clients; and (B) any other business that the Company and its Affiliates engage in, or that the Company and its Affiliates have developed definitive plans to engage in, as of my termination date.

(b) Non-Solicitation of Company or Affiliate Employees

For the period of my employment by the Company or an Affiliate and for a period of twelve (12) months following my termination (the "Non-Solicit Restricted Period") regardless of the reason for termination (and regardless of whether initiated by me or the Company or an Affiliate), I will not on my own behalf, nor as an officer, director, stockholder, partner, associate, owner, employee, consultant or otherwise on behalf of any person, firm, partnership, corporation, or other entity:

i. Solicit, induce, encourage, entice or attempt to solicit, induce, encourage or entice any existing or former employee to terminate or alter his or her employment or engagement with the Company or any of its Affiliates;

ii. Solicit, induce, encourage, entice or attempt to solicit, induce, encourage or entice any existing or former employee to accept employment or engagement with any other person or entity; or

iii. Employ or hire as an officer, director, employee, agent, consultant or independent contractor any existing or former employee.

(c) Non-Solicitation of Company Customers

For the period of my employment by the Company or an Affiliate and for the Non-Solicit Restricted Period (as defined above) regardless of the reason for termination (and regardless of whether initiated by me or the Company or an Affiliate), I will not on my own behalf, nor as an officer, director, stockholder, partner, associate, owner, employee, consultant or otherwise on behalf of any person, firm, partnership, corporation, or other entity:

i. Solicit, induce, influence or attempt to solicit, induce or influence any Company Customer (as defined below) to (A) cease doing business in whole or in part with the Company and/or its Affiliates, or to otherwise limit or reduce its business with the Company and/or its Affiliate, (B) purchase or accept products or services competitive with those offered by the Company and/or its Affiliates from any person or entity (other than the Company and/or its Affiliates), or (C) do business with any other person or business which competes with the Company Business (as defined above);

ii. Solicit, induce, influence or attempt to solicit, induce or influence any Prospective Customer (as defined below) to (A) cease doing business in whole or in part with the Company and/or its Affiliates, or to otherwise limit or reduce its business with the Company and/or its Affiliates, (B) purchase or accept products or services competitive with those offered by the Company and/or its Affiliates from any person or entity (other than the Company and/or its Affiliates), or (C) do business with any other person or business which competes with the Company Business (as defined above); or

iii. Interfere with, disrupt or attempt to interfere with or disrupt the relationship, contractual or otherwise, that the Company and/or its Affiliates have with any sponsor, supplier, vendor, distributor, lessor, lessee, licensor or business partner that transacts business with the Company and/or its Affiliates.

“Company Customer” shall mean the department, function, division, brand, therapeutic area, business line and/or individual personnel within a company or other entity, with whom or for whom I was involved in marketing, soliciting the sale of, or providing products and/or services on behalf of the Company or its Affiliates either at the time of my separation from the Company or Affiliate or at any time within the twelve (12) months preceding my separation from the Company or Affiliate and with whom I had direct contact with on behalf of the Company and/or its Affiliates during said twelve (12) month time period.

“Prospective Customer” shall mean the department, function, division, brand, therapeutic area, business line and/or individual personnel within a company or other entity to whom, during the twelve (12) months preceding my separation from the Company or Affiliate, the Company and/or any Affiliate has submitted a bid or proposal for services of which I have knowledge, whether or not such bids or

proposals have yet to be executed into contracts, provided that the Company and/or its Affiliates have a legitimate expectation of doing business with such customer, and provided further that I have had contact with such customer on behalf of the Company and/or its Affiliates during said twelve (12) month time period.

(d) Non-Compete/Non-Dealing Restrictions

For the period of my employment by the Company or an Affiliate and for a period of six months (6) months following my termination (“Non-Compete Restricted Period”) regardless of the reason for termination (and regardless of whether initiated by me or the Company or an Affiliate), I will not on my own behalf, nor as an officer, director, stockholder, partner, associate, owner, employee, consultant or otherwise on behalf of any person, firm, partnership, corporation, or other entity:

i. Provide or sell any products or services competitive with those offered by the Company and/or its Affiliates to (or otherwise have any business dealings with) any Company Customer for or on behalf of any person, business or entity which competes with the Company Business; or

ii. Provide or sell any products or services competitive with those offered by the Company and/or its Affiliates to (or otherwise have any business dealings with) any Prospective Customer for or on behalf of any person, business or entity which competes with the Company Business.

(e) Non-Disparagement Restrictions

I agree that after my employment with the Company or an Affiliate, I will not make any statements, either orally or in writing, including electronic writings posted in a social media forum, or take any actions to disparage the Company or its Affiliates, place the Company or its Affiliates in a negative light, or otherwise impair the Company’s or its Affiliates’ reputation, good will, or commercial interests. This provision shall not apply to any statement made in connection with any legal proceeding, administrative hearing or investigation, or affect my rights to bring or assist any other employee in bringing any complaint, charge, or claim with any local, state or federal agency.

4. Return of Company Property and Documents. When I leave the employ of the Company or an Affiliate, or at any time upon the Company’s request, I will deliver to the Company any and all (i) property issued to me by the Company and/or its Affiliates in its normal, serviceable, and undamaged condition, and (ii) drawings, notes, memoranda, specifications, devices, formulas, and documents, together with all copies thereof, and any other material containing or disclosing any Creative Works, Confidential Information, and Third Party Information. I shall not copy, download, print or transfer any of the Confidential Information and Third-Party Information or any information stored within the Company’s computer or other property for any purposes other than for fulfilling my obligations hereunder. I further agree that any property situated on the Company’s premises and owned by the Company, including disks and other storage media, filing cabinets or other work areas, is subject to inspection by Company personnel at any time with or without notice. I further agree that if requested by the Company, I will execute an affidavit verifying that I have returned all company property and documents.

5. Injunctive Relief and Tolling. I acknowledge and agree that if I breach any of the provisions of Sections 2, 3, or 4 hereof, I will cause irreparable damage to the Company and/or its Affiliates for which

monetary damages alone will not constitute an adequate remedy. In the event of such breach or threatened breach, the Company shall be entitled as a matter of right (without being required to prove damages or furnish any bond or other security) to obtain a restraining order, an injunction, an order of specific performance or other equitable or extraordinary relief from any court of competent jurisdiction restraining any further violation of such provisions by me or requiring me to perform my obligations hereunder, and will additionally be entitled to an award of attorneys' fees incurred in connection with securing any relief hereunder. Such right to equitable or extraordinary relief shall not be exclusive but shall be in addition to all other rights and remedies to which the Company may be entitled at law or in equity, including, without limitation, the right to recover monetary damages for the breach by me of any of the provisions of this Agreement. Further, I understand that if I breach any of the provisions in Section 3 of this Agreement, the Restricted Period will be extended for a period of time equal to the period of time I spent in breach of this Agreement. If the Company is required to seek injunctive relief from such breach before any court, board or other tribunal, then the Restricted Period shall be extended for a period of time equal to the pendency of such proceedings, including all appeals.

6. Further Provisions Regarding Restrictive Covenants

(a) Covenants. I agree that the restrictive covenants contained in this Agreement are reasonably necessary to protect the Company's legitimate business interests, are reasonable with respect to scope of activities prohibited, time and geographic restrictions, do not interfere with public interest or public policy and will not deprive me of the ability to earn a reasonable living. I further agree that the descriptions of the restrictive covenants are sufficiently accurate and definite and I understand the scope and meaning of the covenants.

(b) Representations and Obligations. I represent and warrant that I am not under any obligation to any third party which prohibits, restricts or could interfere in any way with the performance of my duties as an employee of the Company or an Affiliate and that my employment with the Company or an Affiliate will not breach any agreement by which I am bound, including, without limitation, with any of my former employers. I represent and warrant that there are no legal or contractual impediments to my being able to undertake fully and work on behalf of the Company or an Affiliate, including but not limited to, agreements not to compete, agreements not to solicit customers or employees or otherwise restricting my right to conduct business with certain entities or individuals. To the greatest extent permitted under applicable law, I agree to indemnify and hold harmless the Company, its directors, officers, agents and employees, against any liabilities and expenses, including amounts paid in settlement, incurred by any of them in connection with any claim by any of my former employers that the termination of my employment with such employer, my employment by the Company, or my use of any skills or knowledge in connection with my employment with the Company or an Affiliate is a breach of contract or violation of law or otherwise violates the rights of such former employer.

(c) Consideration. I agree and acknowledge that this Agreement is supported by adequate and sufficient consideration and that in exchange for signing this Agreement and agreeing to the commitments contained herein, the Company or an Affiliate has agreed to employ me as an at-will employee and to pay me the compensation agreed upon from time to time. As additional consideration, the Company or an Affiliate will provide me with access to and training with regard to its Confidential Information which I

recognize to be of substantial value to me and which I acknowledge would not have been provided by the Company or an Affiliate if I did not agree to the terms of this Agreement.

7. Notice. I agree to provide a copy of this Agreement to any subsequent employer or prospective employer during the Non-Solicit Restricted Period and the Non-Compete Restricted Period. I specifically authorize the Company to notify any subsequent employers or prospective employers of the restrictions on me in this Agreement and of any concerns the Company may have about actual or possible conduct by me that may be in breach of this Agreement. I further agree to promptly notify the Company of any offers to perform services, any engagements to provide services, and/or actual work of any kind, whether as an officer, director, stockholder, partner, associate, owner, employee, consultant or in any other capacity whatsoever during the period of my employment by the Company or an Affiliate and during the Non-Solicit Restricted Period and the Non-Compete Restricted Period. Such notice must be provided prior to commencement of any such services or work.

8. Governing Law. This Agreement shall be construed under the laws of the United States and the State of North Carolina (exclusive of conflicts of laws principles) and supersedes all prior agreements and/or understandings between the parties relating to the subject matter hereof. I agree that because discussions in connection with this Agreement originated in North Carolina with a North Carolina resident company, that I shall be subject to the personal jurisdiction of the courts of the State of North Carolina and the United States of America for the purpose of resolving each and every dispute that might arise from this Agreement or matters related thereto and that the courts of the State of North Carolina and the courts of the United States located within the State of North Carolina shall be exclusive venue for the resolution of such disputes, even if I do not reside in North Carolina at the time of the dispute. I hereby (i) consent to the personal jurisdiction of said courts, (ii) waive any venue or inconvenient forum defense to any proceeding maintained in such courts, and (iii) agree not to bring any proceeding arising out of or relating to this Agreement or my employment by the Company or an Affiliate in any other court.

9. Amendment, Severability and Merger

(a) This Agreement is the entire agreement with the Company regarding the same subject matter. No delay or failure by the Company to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, breach, covenant, duty or condition, unless otherwise provided herein. No waiver of any breach of any provision of this Agreement by the Company shall be effective unless it is in writing, and no waiver shall be construed to be a waiver of any succeeding breach or as a modification of such provision. The Company shall not be required to give notice to enforce strict adherence to all terms of this Agreement.

(b) The provisions of this Agreement shall be severable, and in the event that any provision of this Agreement shall be found to be unenforceable, in whole or in part, the remainder of this Agreement shall be enforceable and binding on the parties. I further agree to inform all subsequent employers of this Agreement for a period of twelve (12) months following the termination or resignation of my employment with the Company. In addition, I affirmatively state that I have not, will not and cannot rely on any representations not expressly made herein. This Agreement shall not be amended by me or the Company except by the express written consent of the Company and myself.

10. Successors and Assigns. The rights and/or obligations herein may be assigned by the Company and shall bind and inure to the benefit of the Company's Affiliates, successors, assigns, heirs and representatives. If the Company makes any assignment of the rights herein, I agree that this Agreement shall remain binding upon me in any event.

11. Change of Position. I acknowledge and agree that any change in my compensation, position, title, responsibilities, work location or other condition of my employment with the Company or an Affiliate shall not cause this Agreement to terminate and shall not change any of my obligations under this Agreement.

12. Binding Effect. This Agreement and the obligations hereunder, shall be binding upon me and my successors, heirs, executors and representatives.

13. Survival. The obligations in the Agreement shall survive my termination of employment with the Company or an Affiliate and the assignment of this Agreement by the Company to any successor in interest or other assignee.

This Agreement shall be effective as of the first day of my employment with the Company.

I UNDERSTAND THAT THIS AGREEMENT RESTRICTS MY RIGHT TO DISCLOSE OR USE CONFIDENTIAL INFORMATION OR TRADE SECRETS DURING OR SUBSEQUENT TO MY EMPLOYMENT.

I HAVE READ THIS AGREEMENT CAREFULLY AND UNDERSTAND ITS TERMS.

Joseph F. Blow

CHAPTER IX-A – Part 1

North Carolina Update

*Laura J. Wetsch
Winslow Wetsch PLLC
Raleigh, NC*

NORTH CAROLINA
BAR ASSOCIATION

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North Carolina Update

Laura J. Wetsch – Raleigh

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Federal Regulations

[Employee or Independent Contractor Classification Under the FLSA, 87 Fed. Reg. 62218 \(10/13/2022\)](#) (attached)

- Jan. 2021: DOL published “Independent Contractor Status Under the FLSA”, which identified five economic reality factors, with “nature and degree of control over the work” and “worker’s opportunity for profit or loss” identified as core factors that outweighed three less probative factors: “amount of skill required for the work,” “degree of permanence of the relationship” between worker and employer, and whether work is part of an “integrated unit of production.”
- March 4, 2021: DOL delays 3/8/21 effective date for 2021 IC Rule
- May 6, 2021: DOL publishes rule withdrawing the 2021 IC Rule
- March 14, 2022: TX district court vacated delay and withdrawal rules, found 2021 IC Rule became effective on effective date (3/8/21).
- 10/13/22: DOL does not believe 2021 IC Rule comports with FLSA text and purpose, and departs from decades of legal precedent applying the economic reality test.
- Proposes to rescind 2021 IC Rule, and revise 29 CFR Parts 780, 788 and 795 to make its analysis for determining employee vs. independent contractor classification “more consistent with judicial precedent and the Act’s text and purpose.”
- Will return to “totality of circumstances” analysis of the economic reality test in which the factors do not have predetermined weight and are considered in view of the economic reality of the whole activity.
- Also returns the consideration of investment to a standalone factor, provide additional analysis of the control factor (including detailed discussions of how scheduling/supervision/price-setting/ability to work for others should be considered
- Returns to longstanding interpretation of the integral factor (whether work is integral to employer’s business)
- Comments due 12/13/2022

N.C. Statutes

[Sess. Law 2021-47 \(SB255\) \(remote proceedings, motion service, declarations\)](#) – effect. 6/18/21 - among other things, adds NCGS 7A-49.6 to authorize judicial proceedings via audio and video transmission, including allowing witnesses to testify remotely in jury trials; also clarifies that motions must be served pursuant to NCGS 1A-1, Rule 5, with certificate of service as set out in Rule 5(b1) (effective 7/1/21), enacts NCGS § 7A-98 to authorize unsworn declarations under penalty of perjury

[Sess. Law 2021-64 \(H642\) \(discrimination – organ transplants\)](#) – effect. 7/1/21 – enacts new NCGS 130A-414.1 et seq to prohibit discrimination in providing organ transplants and related services (and adds NCGS 58-3-256 et seq re insurance coverage for same) based on mental or physical disability, authorizes civil action for injunctive/equitable relief in district court, with

priority on docket and expedited review – no compensatory or punitive damages authorized, and ADA remedies remain available.

Sess. Law 2021-80 (HB 602) (UNC exempt positions) – effect. 7/8/21:

NCGS § 126-5(c1) – adds “finance professionals, business office professionals and auditor professionals” to list of UNC workers exempt from Articles 6 and 7 of the N.C. Human Resources Act.

NCGS § 116-14 amended to authorize President of UNC System to approve a RIF (including reorgs and severance payments with non-State funds) for positions subject to N.C. Human Resources Act in accordance with the RIF policies of the Office of State Human Resources, without further approval by any other State agency, and can delegate that authority to the chancellor of a constituent institution. President must submit annual information report to OSHR, and if State funds are used for severance must get preapproval from the Office of State Budget and Management

Sess. Law 2021-82 (S208) (W&H, OSH medical access) – effect. 6/30/21:

NCGS § 95-25.7 (payment to separated employees) – requires that wages to separated employees be paid through regular channels or by trackable mail if requested by the employee in writing.

NCGS § 95-25.13 (notification, posting and records) – clarifies that employers must do ALL of the itemized, that notification of wages at the time of hiring must be in writing, that employees must be notified of any changes to wages in writing (not posted notices) and at least one pay period prior to the change.

NCGS § 95-25.23A (violations) – clarifies that the \$250-\$2000 civil penalty is assessed per violation, not per investigation.

NCGS § 95-133(b)(13) identifies DOL’s OSH Division as a “health oversight agency” under 45 C.F.R. § 164-501, and authorizes HIPAA covered entities, DHHS, trauma hospitals, and EMS providers to disclose protected health information to OSH as necessary for law enforcement, judicial and administrative purposes. Such records must be kept separately from investigative file, are not public records, and may not be released to any employer under investigation except as necessary to support issuance of an OSH citation (i.e., at hearing on contested citation).

Sess. Law 2022-54 (HB 776) (electronic notaries) – effect. 7/8/22 – adds new part to NCGS chapter 10B, Art. 2 to allow remote electronic notarization

Sess. Law 2022-61 (H869) (grievance review panel, NC State Bar) – adds (c1) to NCGS § 84- 28, which creates grievance review panel to review decisions of NC State Bar Grievance Committee and allows respondent the right to appear with counsel and present oral argument.

TSERS/LGERS, etc.:

- Sess. Law 2021-57 (H160) – purchases of creditable service under TSERS, LGERS and Consolidated Judicial Retirement System
- Sess. Law 2021-60 (S277) – technical corrections, confirming and clarifying changes to TSERS, local government commission
- Sess. Law 2021-72 (S668) (eff. 7/2/21) – additional contributions from employee units, responsibility for contribution-based benefit cap liabilities and reduced retirements, one year litigation pause (tolling) ending 6/30/2022 on lawsuits re anti-pension-spiking contribution-based benefits cap established under GS 135-5(a3)until 6/30/2022)
- Sess. Law 2021-75 (H168) – admin changes to contribution-based benefit cap liabilities under LGERS and TSERS, withdrawal liabilities, written policies for special separation buyouts of law enforcement, admin fees, clawing back disability income overpayments, special retirement allowance payments upon death of designated beneficiary
- Sess. Law 2021-125 (S159) – technical, clarifying and admin changes to State Health Plan for teachers and state employees
- Sess. Law 2022-14 (H1056) – exception to irrevocable election to transfer accumulated contributions from supplemental retirement plans to TSERS or LGERS; treatment of inactive employers; default option for transfer of assets upon discontinuation of 403(b) plans; non-assignability of public safety employee line of duty death benefits; eligibility for LTD benefits under TSERS
- Sess. Law 2022-16 (H1058) – technical corrections, confirming and clarifying changes to laws governing TSERS, LGERS, Consolidated Judicial Retirement System

NC Court Cases

Appeal – Interlocutory

Button v. Level Four Orthotics & Prosthetics, Inc., 380 N.C. 459, 869 SE2d 257 (N.C. 3/11/22) (Berger, J.)(Earls, J., concurring in part, dissenting in part) (see also “Defense – Personal Jurisdiction” and “Tortious Interference”) – Button negotiated with Rebecca Irish (acting on behalf of Level Four, Level Four Holdings, and Penta Fund) and Seth Ellis (managing partner of Penta Fund) and ultimately entered into an employment agreement with Level Four (NC) to serve as its CEO, along with other agreements. Thereafter, Button was terminated “for cause” when he refused to enter into an agreement he deemed detrimental to Level Four (but which Irish and Ellis wanted), and Irish installed herself as CEO of Level Four. Button sued, alleging violation of N.C. Wage And Hour Act (severance of \$418,000), breach of contract (employment agreement and warrant agreement), seeking declaratory judgment setting out his rights under the various agreements, tortious interference against Penta Fund, Ellis, Irish and Level Four Holdings, civil conspiracy of all defendants, and a minority shareholder breach of fiduciary duty claim against Level Four Holdings and Penta Fund. The business court dismissed (without prejudice) Defendant’s declaratory judgment claim against Level Four Holdings for lack of an actual controversy, and dismissed his tortious interference claims against Penta Fund, Level Four Holdings and Ellis because it found malice of non-outsiders was insufficiently pled. It also denied Level Four Holdings’ and Ellis’ motions to dismiss for lack of personal jurisdiction. Everyone appealed and the supreme court accepted appeal of the personal jurisdiction question, but rejected Button’s appeal because no substantial right was affected (the declaratory judgment claim was dismissed without prejudice) and accordingly his interlocutory appeal was improper. Moreover, plaintiff’s alternative writ of certiorari was denied because Button failed to show that his petition had merit or that the business court erred: (1) on the declaratory judgment claim against Level 4 Holdings, the termination of his employment was a dispute between Button and Level 4, not Level 4 Holdings, and no one had attempted to exercise (or breach) rights under the agreements with Level 4 Holdings, so there accordingly was no actual controversy as to that entity; (2) on tortious interference, shareholders had a qualified privilege to interfere with contractual relations between the corporation and a 3rd party and Button failed to alleged facts specific to each defendant that showed how they each acted in their own personal interest.

Justice Earls (Hudson, Ervin) concurred in the majority’s decision regarding personal jurisdiction over Level Four Holdings and Ellis (See “Defense –Personal Jurisdiction” below) but disagreed with the majority’s “conflation of the standard for determining whether a writ of certiorari should be issued with an analysis of the ultimate merits of Button’s claims.” Specifically, because Button’s tortious interference claim against Irish survived, there was a risk of inconsistent verdicts, as Button argued. Moreover, the court had to grant certiorari in order to reach the merits of Button’s claims and could not deny cert because it found the substantive arguments would not ultimately succeed, which was essentially an impermissible advisory opinion. The minority found that judicial economy supported granting cert and addressing the legal arguments that were briefed and before them.

Arbitration

Coles v. Sugarleaf Labs, Inc., 2022-NCCOA-707 (11/01/22)(Inman, Dillon)(Murphy, concurring) – plaintiff was employed in 2018 as president of two LLCs. In 2019, a third party purchased these LLCs; the Asset Purchase Agreement required that key employees (including Plaintiff) enter into new employment agreements and specified that any disputes relating to the APA “and its Ancillary Documents” be resolved through arbitration. Defendant eventually fired plaintiff, and plaintiff sued for breach of contract, W&H violations, UDTPA, and other tort claims. On Defendant’s motion, the superior court compelled arbitration and dismissed the lawsuit with prejudice, “enter[ing] something akin to Schrodinger’s cat: an appealable unappealable order, an interlocutory final judgment,” creating a “quantum-state quandary.” Slip op. at 6. The court of appeals split the issues, ruling that the dismissal was immediately appealable and the superior court erred in granting dismissal with prejudice, as the Revised Uniform Arbitration Act required that a superior court *stay* the proceedings pending arbitration. However, the order compelling arbitration was interlocutory and not appealable, so that court vacated and remanded for entry of an order staying the action pending arbitration.

Murphy, J. – concurred in analysis and result, but wrote separately to reiterate his view that it is NOT “the policy of the People of this state to favor arbitration over jury trials.”

Attorney-Client Privilege

Buckley, LLP v. Series 1 of Oxford Ins. Co., NC, LLC, No. 219A21, 876 SE2d 248, 2022 N.C.LEXIS 780 (N.C. 8/19/22)(per curium), *aff’g* 2020 NCBC LEXIS 136 (2020) – On December 15, 2017, a Washington DC law firm’s executive committee learned that a senior partner (Sandler) was accused of sexual harassment by multiple employees, and informed both in-house and outside counsel. The Firm’s policy required an investigation, and on December 21, 2017, the firm hired another law firm (Latham & Wilkins) to conduct that “internal review of a personnel matter” and to “provide legal counsel and assistance.” On December 29, 2017, the firm purchased coverage from defendant for losses associated with the departure of key revenue-generating partners. On February 25, 2018, Sandler chose to retire rather than participate in the investigation and signed a Retirement Agreement effective February 26, 2018. On March 17, 2018, the Firm notified defendant of its claim arising from Sandler’s departure and submitted a Claim Submission stating Sandler’s departure was voluntary. On October 19, 2018. Defendant initially decided that the claim should be covered, but on October 22, 2018, received a letter from Sandler stating that it “would be inappropriate” to pay the claim because his departure was not a “voluntary retirement.” As a result, defendant did not pay the claim and the Firm sued. During discovery, the Firm sought production of communications reflecting defendant’s internal deliberations (including documents and communications of inhouse counsel who also performed claims review), and defendant sought production of documents and communications between the Firm and Latham concerning the Sandler investigation and whether the Firm believed Sandler would eventually have to leave the firm. Both sides objected and asserted attorney-client privilege. The business court reviewed the rules pertaining to privilege claims, and pointed out that business

advice is not privileged, while legal advice is, and when communications contain intertwined business and legal advice, the courts must consider whether the primary purpose of the communication was to seek or provide legal advice. Thus, “[c]orporate documents prepared for simultaneous review by legal and nonlegal personnel are often held to be not privileged because they are not shown to be communications made for the primary purpose of seeking legal advice.” The business court reviewed each set of communications in camera and concluded that Series 1’s in-house counsel’s communications were not privileged when she was acting in a business role (including routine review and processing of insurance claims). Additionally, the Firm’s communications that were solely or primarily in furtherance of its internal investigation – including investigatory reports and materials – were not privileged, even though performed by lawyers, where the investigation was required by the Firm’s policy, initiated and pursued in the ordinary course of the Firm’s business. Only those communications reflecting a primary purpose of giving or receiving legal advice are privileged and properly withheld. Finally, the business court rejected the Firm’s claim of work product since there was no evidence that the Firm anticipated litigation, or that the investigation or communications would have been done differently had litigation not been anticipated. On direct appeal to the Supreme Court, the Court affirmed, agreeing that the primary purpose of the communication was determinative, and observing, “In today’s business world, investigations of alleged violations of company policy, including policies prohibiting sexual harassment or discrimination, are ordinary business activities and, accordingly, the communications made in such investigations are not necessarily “made in the course of giving or seeking legal advice for a proper purpose.”

Business Court - Jurisdiction

Knudson v. Lenovo Inc., No. 22 CVS 1818, 2022 NCBC Lexis 11 (Wake Co. 2/15/22) – Knudson submitted several invention disclosures which were under review by Lenovo or in the patent filing office when Knudson was laid off in October 2017. Lenovo took the position that Knudson was no longer eligible for monetary awards related to the invention disclosures because he was not an active employee, and Knudson sued for constructive fraud, UDTPA, and wage and hour violation. Although the case ostensibly qualified for designation as a mandatory business case under NCGS § 7A-45.4(a)(5) (disputes involving intellectual property), the business court found that Knudson’s claims focused on Lenovo’s fraudulent conduct that induced Knudson to participate in the patent program and Lenovo’s subsequent refusal to pay monetary awards, rather than the underlying intellectual property aspects. Thus, the business court found it inappropriate to grant mandatory complex business status or assign the case to a special superior court judge for complex business cases.

Civil Procedure – Rule 4 (service)

Blaylock v. AKG N. Am., No COA21-607, 2022 N.C.App.LEXIS 557 (8/16/22) (Jackson, Stroud, Hampson) - pro se plaintiff filed a complaint in Alamance County on December 18, 2019, alleging that he was fired for repeatedly complaining of sexual harassment, hostile work environment, and absence of supervisors to attempt to resolve those issues. He gave the Summons and

Complaint to the Alamance County Sheriff's Department for service, but service failed because the address for service was in Orange County. On January 17, 2020 – before the plaintiff had effected service -- the Defendant removed the action to federal court (MDNC), stating in its notice of removal that the plaintiff had not effected service of process, and then filed two motions to extend time to Answer, again asserting the lack of service. On July 24, 2020, the federal court remanded the matter to state court because plaintiff “disavows any reliance whatsoever on federal law in his Complaint,” and on August 5, 2020, plaintiff mailed the summons and complaint to defendant’s counsel. The superior court ultimately granted Defendant’s motions to dismiss under Rules 12(b)(2), (4), (5) and (6), and the plaintiff appealed. The court of appeals affirmed the superior court’s determination that it lacked personal jurisdiction over the defendant because the defendant was never properly served, and in a case of first impression found that the defendant’s filing of a notice of removal to federal court did not constitute a general appearance that waived the defect.

Jones v. Trinity Highway Prods., LLC, No. COA20-672, 281 N.C. App. 214, 866 S.E.2d 533, 2021 N.C.App. LEXIS 741 (12/21/21) (Stroud, Hampson, Griffin) (unpub.) – plaintiffs sued the manufacturer (Trinity) and installer (Moye) of a guardrail following a horrific automobile accident in which another car hit their car, running their car into the guardrail which then detached. However, instead of serving corporate defendants via certified or registered mail as required by Rule 4(j)(6), plaintiffs mailed the summons and complaint via “Priority Mail with Tracking and Signature Confirmation.” Trinity and Moye filed a motion to dismiss for insufficiency of process under 12(b)(4) and (12)(b)(6) and the day before hearing on that motion plaintiffs filed a Rule 41(a)(1) voluntary dismissal. A year later, plaintiffs re-filed and Trinity/Moye moved to dismiss based on the SOL (which they argued was not tolled because they were not properly served in the first instance) and also moved to shorten the 5-day notice period required by Rule 6(d). The superior court granted both motions, and the plaintiffs appealed. The court of appeals rejected the plaintiff’s argument regarding the 5-day notice period, finding that plaintiffs had not demonstrated or argued prejudice resulting from the shortened period,¹ and then ruled that because Rule 4(j)(6) must be strictly construed, plaintiffs failed to achieve service of its first complaint, and the SOL was not tolled by Rule 41(a)(1).

Civil Procedure – Rule 39(b) (discretion to order jury trial)

Brown v. Caruso Homes, Inc., No. COA22-226, 2022 N.C. App. LEXIS 668 (10/4/22)(Gore, Dillon, Carpenter) (unpub.) – plaintiff sued defendant for W&H violations and demanded jury trial “as to all issues so triable.” Defendant answered and, among other things, asserted that plaintiff had waived her right to jury trial when she signed an Employee Handbook containing that waiver. The parties’ October 2020 Case Management Order specified a non-jury trial, which plaintiff asserted was a compromise due to the COVID-19 pandemic. The matter was set for bench trial a number of times and continued due to the ongoing pandemic. When the TCA set the matter for potential jury trial, defendant filed a motion for non-jury trial, which the superior court

¹ *But cf. Collins v. N.C. State Hwy. Comm’n*, 237 N.C. 277, 282 (1953)(party entitled to notice of a motion waives insufficient notice by attending the hearing and participating in it).

denied. Defendant appealed but the court of appeals affirmed the superior court, finding that the right to a jury trial was “sacred” and “highly favored,” so that waivers of this right would be strictly construed, and would not be inferred or presumed. In this case, plaintiff timely demanded jury trial in her complaint, restated this demand in her response to defendant’s motion, never expressly waived her right to a jury trial, and her email communications, motions to continue, and CMO were entered “during the height of the pandemic when jury trials were on hold for safety reasons.” Moreover, the superior court had the discretion under Rule 39(b) to order a jury trial on its own initiative, even if the plaintiff waived her right to a jury trial.

Civil Procedure - Rule 68.1 (confession of judgment)

RH CPAs, PLLC v. Sharpe Patel PLLC, No, COA21-785, 2022 N.C. App. LEXIS 509, 876 S.E.2d 784 (7/19/22) (Inman, Dietz) (Tyson, dissenting) – when a Lexington, NC accounting firm broke up, the parties entered into a settlement agreement requiring Defendant former partners to pay 25% of the gross revenue from accounting services they provided to Plaintiff’s (former) clients, calculated and paid on an annual basis, and secured by a Confession of Judgment in the amount of \$500K. Thereafter, the Defendants objected to procedures outlined by Plaintiff, failed to retain the agreed-upon firm to calculate the gross revenue percentage payments, and limited their calculation to collected fees, rather than gross revenue. In response, Plaintiff’s counsel sent a Notice of Breach of Settlement Agreement, followed by two additional notices of default (in the midst of which Defendant sent payment of \$99,842.75), and then filed the Confession of Judgment, which the clerk of court filed, decreeing that Plaintiff had judgment against Defendants in the principal amount of \$307,946.98, plus interest at 8% and the costs of filing. Defendants appealed, asked to stay the clerk’s judgment, and moved for relief from judgment under Rules 52, 58, 59, 60, and 68.1. The superior court denied the motions and appeal, and the court of appeals affirmed: the clerk entered judgment based on the Confession of Judgment Plaintiff filed, and was supported by findings that Defendant did not challenge (the plaintiff filed the document, it was signed by defendants, it did not identify on its face any preconditions to filing, it authorized entry of judgment for the amount stated and identified the parties and “concisely shows why [Defendants] may become liable to the [Plaintiff].” Having met the requirements of Rule 68.1, the trial court had no basis for granting an appeal.

Judge Tyson dissented, asserting that the Defendants had demonstrated “misrepresentation, or other misconduct of an adverse party,” and were thus entitled to relief under Rule 60(b)(3). [Judge Inman and Dietz disagreed, pointing out that the Defendants unilaterally chose an accounting firm to which Plaintiff had not agreed, limited that firm’s calculation to less than the parties had specified in their settlement agreement, and failed to cure the defect despite numerous notices. Further, the trial court’s denial of their motion for relief did not preclude Defendants from suing Plaintiff for money damages resulting from Plaintiff’s alleged breach of the Settlement Agreement.]

Defense - Immunity

Racine v. City of Raleigh, No. COA21-406, 2022 N.C.App. LEXIS 354, 872 S.E.2d 182 (5/17/22) (Jackson, Dietz, Murphy) (unpub.) – law enforcement officers were called to a BP gas station to investigate a driver unconscious behind the wheel. Officers roused the driver, found that he had a revoked license, told him to park his vehicle off to the side and not to drive. The officers left, and the driver then took off in his car, eventually veering off Hillsborough Road and striking plaintiff's decedent who was walking on the sidewalk and died 5 days later from his injuries. Plaintiff sued the City and the Police Department, alleging wrongful death, and negligent hiring/training/supervision/retention. The superior court granted Rule 12 dismissal and the court of appeals affirmed, holding that the plaintiff's claims were barred by the public duty doctrine codified at NCGS 143-299.1A, which provided an affirmative defense to injuries caused by law enforcement's alleged negligent failure to protect the claimant from others or from an act of God, unless:

- (1) there was a special relationship between the claimant and officer (which must be specifically alleged and depends on representations or conduct by police which cause the victims to detrimentally rely on the police such that the risk of harm as a result of police negligence is something more than that to which the victim was already exposed), OR
- (2) the State, through its officers, etc., has created a special duty owed to the claimant and claimant's reliance on that duty is causally related to claimant's injury, OR
- (3) the alleged failure to perform a health or safety inspection required by statute was the result of gross negligence.

In this case, none of these three exceptions applied and the officers' failure to take the driver into custody or disable his vehicle did not subject the City or Police Department to liability.

Defense – Personal Jurisdiction

Toshiba Glob. Com. Sols., Inc. v. Smart & Final Stores LLC, No. 181A21, 873 S.E.2d 542, 2022 N.C.LEXIS 585 (N.C. 6/17/22) (Barringer, J.)– California defendant contracted with Toshiba Global in Durham NC to service its point-of-sale machines, and then terminated the contract citing high failure rate of repairs. Toshiba sued, and the defendant moved to dismiss due to lack of personal jurisdiction. The business court denied the motion and the Supreme Court affirmed, finding a substantial connection with NC that supported personal jurisdiction: defendant intentionally solicited plaintiff (twice) and negotiated for ongoing services, knowing Toshiba was based in NC, ultimately entering into a 3-year+ Services Agreement with Toshiba; Toshiba performed those services from its NC depot, procuring and shipping parts, receiving and repairing defective equipment that could not be fixed on-site, averaging seven repairs and eleven shipments per day; the Agreement required written notices be delivered to Toshiba's NC office and that's where defendant sent its notice to terminate. The supreme court rejected defendant's argument that jurisdiction required some presence by defendant in the state, or contract negotiations/formation in NC: a single contract may be a sufficient basis for exercise of personal jurisdiction if the contract has a substantial connection with the State (such as performance).

[Button v. Level Four Orthotics & Prosthetics, Inc.](#), 380 N.C. 459, 869 SE2d 257 (N.C. 3/11/22) (Berger, J.)(Earls, J., concurring in part, dissenting in part) – (see also “Interlocutory Appeal” and “Tortious Interference”) -- Button was a NJ resident when he negotiated with Rebecca Irish (FL)(acting on behalf of Level Four, Level Four Holdings, and Penta Fund) and Seth Ellis (FL)(managing partner of Penta Fund) and ultimately entered into a five-year CEO employment agreement with Level Four (NC) which required that the interest rate on Level Four’s debt to Penta Fund (FL) be reduced to 2.5% and allowed termination without cause on 30-days’ notice, and no-notice termination with cause. Button’s performance was “flawless,” and he got the interest rate owed by Level Four to Penta Fund reduced to 2.5% but in November 2018 Irish conditioned additional Penta Fund funding on an 8% interest rate, which Button refused. Penta Fund wired the funds anyway and presented Button with promissory notes including the 8% interest rate, which Button refused to sign despite Irish’s and Ellis’ insistence. A month later, Button was fired for cause, and Irish installed herself as CEO of Level Four and approved Penta Fund’s higher interest rate. Button sued, alleging violation of N.C. Wage And Hour Act (severance of \$418,000), breach of contract, tortious interference against Penta Fund, Ellis, Irish and Level Four Holdings, civil conspiracy of all defendants, a minority shareholder breach of fiduciary duty claim against Level Four Holdings and Penta Fund, and seeking declaratory judgment setting out his rights under the various agreements.². Among other things, the business court denied Level Four Holdings’ and Ellis’ motions to dismiss for lack of personal jurisdiction and the supreme court affirmed, finding sufficient facts were pleaded to support personal jurisdiction of Level Four Holdings and Ellis: (a) the Level Four Holdings Agreements included NC choice of law provisions, Irish acted simultaneously as representative of Level Four, Level Four Holdings, and Penta Fund; Irish was actively involved in Level Four’s management and Button’s termination; Button regularly conducted business in NC as CEO of Level Four; Level Four Holdings was the majority shareholder of Level Four, a NC entity; the Employment Agreement required Penta Fund to maintain insurance on behalf of Button so long as Level Four Holdings owned Level Four stock, and Level Four Holdings would discuss relocating Level Four executive offices to NJ after assessing Level Four’s personnel an costs; and (b) Ellis negotiated Button’s employment with Level Four and the terms of the Employment Agreement, discussed Level Four’s performance with Button on at least 15 occasions via telephone or email, informed Button that his termination was a unanimous decision of Penta Fund, and increased the interest rate on debt owed by Level Four to Penta Fund.

Justice Earls (Hudson, Ervin) concurred in the majority’s decision regarding personal jurisdiction over Level Four Holdings and Ellis but disagreed on other issues (see “Appeal – Interlocutory,” above and “Tortious Interference,” below).

[Bartlett v. Burke](#), No. COA22-95 (N.C. App. 9/6/22) (Tyson, Collins, Gore) – Eurocopter helicopter crashed during a medevac flight from Elizabeth City to Duke University Hosp. in Durham, killing the pilot (Burke), two flight nurses (Harrison and Sollinger), and the patient (Bartlett).

² Button also entered into a Warrant Agreement with Level Four, Inc. (granting the right to purchase 30% of Level Four’s fully diluted common stock); and an Option Agreement, Stock Repurchase Agreement, Agreement for Go Shop Provision in Connection with Future Sale, and Shareholder Voting Agreement with Level Four Holdings.

The NTSB identified a potential defect in the second engine, and the FAA issued a bulletin warning of the potential defect. The decedents' estates sued for negligence and breach of warranty, naming multiple defendants including the German seller of the helicopter (AHD) and the French manufacturer of the engine (SHE), both of which only operated in the U.S. through third parties. AHD and SHE moved to dismiss for lack of personal jurisdiction, but the superior court denied their motion. On appeal, the court of appeals reversed, finding that neither AHD nor SHE had purposefully availed itself of the N.C. forum and their contacts were insufficient to support specific personal jurisdiction: there was no evidence that either entity marketed, sold, delivered or serviced its products in NC, and the mere manufacture and introduction of the product into the world's "stream of commerce" was insufficient to establish personal jurisdiction in N.C.

As of this writing, Plaintiffs are planning to file a PDR in the N.C. Supreme Court.

Miller v. LG Chem, Ltd, 281 N.C. App. 531, 868 S.E.2d 896 (N.C. App. 2/01/22) (Tyson, Stroud (Inman, dissenting) – LG Chem makes 18650 lithium-ion cell batteries; in 2016 it learned that its batteries were being sold to consumers as standalone, replaceable and rechargeable batteries in e-cigarette "vape" pens. It redesigned the battery to reduce the risk of fire and added a warning to its website cautioning against unauthorized use in vape pens, and "took steps" to limit its distributors and corporate customers from selling the batteries for use in vape pens. In 2016-2017 plaintiff purchased two vape pens with LG Chem's battery from sellers in Bahama, NC and Creedmore, NC. In 2018 the LG Chem battery in one of the two vape pens exploded in his pocket, causing severe burns. Plaintiff sued LG Chem (a South Korean company) and LG America (DE co.). Both defendants moved to dismiss for lack of personal jurisdiction, and after some preliminary discovery the superior court granted the motion. Plaintiff appealed, arguing that the superior court erred in dismissing and should have at least required that defendants respond to discovery on jurisdiction before dismissing. The majority on the court of appeals affirmed the superior court, finding that there either had to be a causal connection between the non-resident defendant's contacts with the forum state and the plaintiff's claims, or the defendant must deliberately, systematically, and extensively serve a market in the forum state for the very product that the plaintiffs allege malfunctioned. Here, LG Chem never maintained an office in NC, never registered to do business here, and had no property or employees here. Its products wound up in NC solely through the actions of unrelated 3rd parties, for uses LG Chem did not intend.

Judge Inman dissented – *Ford Motor Co. v. Montana Eight Jud. Dist. Ct.*, 141 S.Ct. 1017 (2021) specifically held that a non-resident defendant's contacts with a state need not be the direct cause of a resident plaintiff's injuries so long as there is a sufficient relationship that will support specific jurisdiction without a causal showing. Moreover, in *Mucha v. Wagner*, 378 N.C. 167 (2021), the N.C. Supreme Court clarified that a defendant need not know that its purposeful act *will* result in contacts in NC so long as it *reasonably should know* that it is establishing a connection with NC. Here, plaintiffs alleged that LG Chem knew, understood, or expected that their batteries would be purchased by consumers in NC; its actual or imputed awareness was sufficient to support personal jurisdiction.

This case is pending before the N.C. Supreme Court, docket no. 69A22-1. Deepak Gupta (plaintiff's counsel before the Supreme Court in Ford Motor Co.) and Robert Friedman have joined plaintiff's

counsel (Sara Willingham of The Paynter Law Firm, Raleigh) in briefing on behalf of Plaintiff, arguing: (1) under Ford, if a manufacturer ships a product into a state, that state's residents who are injured by the same model of that same product in that state, may sue the manufacturer in the state's courts, regardless of whether they acquired the particular item that caused the injury in the state or from an out-of-state reseller, and (2) a consumer's use of the same product in a manner that deviates from the manufacturer's specifications cannot erase the basis for specific jurisdiction. NCAJ filed an amicus brief 5/18/22.

*Schaeffer v. Singlecare Holdings, LLC, 278 N.C. App. 148, 858 S.E.2d 631, 2021 N.C. App. LEXIS 289 (6/15/21)(Griffin, Inman, Gore) (unpub.) – Plaintiff was a resident of CA when Defendants (DE corps, offices in MA) hired him in May 2017 as Senior VP of Business Development to build the Defendants' business, including "services targeted at NC residents and businesses."³ He moved to NC in July 2018, and Defendants issued a letter to a NC mortgage lender certifying his employment "outside of MA", paid NC withholding on Plaintiff's wages, paid Plaintiff's wages in NC, reimbursed for Plaintiff's NC travel and office expenses, and regularly communicated with Plaintiff in NC via telephone and email. Defendants were also registered to do business in NC, allegedly employed and recruited others who worked in NC, and had a wholly owned 3rd party administrator that operated in NC and administered the services sold by Plaintiff. In October 2018 Defendants fired Plaintiff, and in June 2019 Plaintiff sued for fraudulent inducement, negligent misrepresentation, constructive fraud, breach of contract, UDTPA and W&H violations, and wrongful discharge in violation of public policy. The superior court denied defendants' motion to dismiss for lack of personal jurisdiction but the court of appeals reversed, citing the rule that (1) NC's long-arm statute must confer jurisdiction (liberally construed), and (2) exercise of personal jurisdiction must not violate defendant's due process rights, concluding that Defendants did not have sufficient minimum contacts with NC: most contacts were created by plaintiff's unilateral move to NC, which defendants neither required nor suggested; mere acquiescence was insufficient to establish personal jurisdiction. Moreover, plaintiff's claims did not arise out of relate to the Defendants' remaining contacts (soliciting business in NC, recruiting and employing NC residents, operating a 3rd-party administrator, and registering to do business in NC). The panel specifically rejected application of *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017 (2021), reasoning that *Ford* only applies to products liability cases.*

PDR granted 6/15/22, docket no.321PA21; NCAJ filed an amicus brief on 8/17/22.

Defense – Subject Matter Jurisdiction - 1st Amendment – Ecclesiastical Doctrine

Nation Ford Baptist Church Inc. v. Davis, No. 390A21, 2022 N.C.LEXIS 773 (N.C. 8/19/22)(Earls, J.) – Pastor Davis was fired by the Church's Board after church attendance fell by 60% and numerous churchgoers complained. Nevertheless, he continued to conduct services at the Church, allegedly collected and retained tithe money, and broke the locks to access the sanctuary in order to

³ According to Plaintiff, in accepting the job offer he relied heavily upon the Defendants' promise of a fully vested equity ownership (50K shares) in Defendant Singlecare Holdings, LLC after six months employment. Plaintiff did receive the equity award, but learned that, contrary to what had been represented, they were subject to forfeit upon termination of employment.

conduct unauthorized services. The Church sought injunctive relief, and Davis filed an answer, counterclaim, and third-party complaint asserting tortious interference, breach of fiduciary duty, a constructive trust on funds the Church allegedly misappropriated and declaratory and injunctive relief, arguing that he was still the Church's Bishop and Senior Pastor as the Church's bylaws only allowed him to be fired by at 75% vote of the Church's congregation attending a "Special General Meeting." The Church argued that the bylaws upon which he relied weren't the *real* bylaws and he was actually an at-will employee who could be terminated by the Church's Board of Directors at any time. The superior court granted the Church's motion for a preliminary injunction but denied the Church's motion to dismiss the Pastor's counterclaim and third-party complaint because the core dispute was which bylaws applied, and "there is no *guarantee* that our [c]ourts will be forced to weigh ecclesiastical matters at this stage of the proceedings." A split panel of the Court of Appeals affirmed, but the Supreme Court affirmed in part and reversed in part, ruling that the analysis was not an all-or-nothing approach: the court must have jurisdiction over the "*nature* of the case and the *type* of relief sought, not over every possible fact pattern or legal issue connected to the complaint, and at this stage need only assure itself that *any* of the plaintiff's claims can possibly be adjudicated and *any* form of relief can possibly be granted. Accordingly, Pastor Davis' claim for declaratory judgment establishing which bylaws applied, whether the Church procedurally followed those bylaws, and whether there was an employment contract incorporating applicable bylaws all survived dismissal, but his other claims (injunction prohibiting Board interference, breach of fiduciary duty, tortious interference, constructive trust) which necessarily required analysis of Church doctrine and practice must be dismissed.

Defense - Res Judicata

Doe v. Roman Catholic Diocese of Charlotte, COA21-254 and COA21-255, 872 S.E.2d 815, 2022 N.C. App. LEXIS 313, 322 (5/3/22)(Carpenter, Tyson, Gore) – plaintiff sued defendant in 2011 based on alleged sexual abuse by now-deceased priest, alleging claims for constructive fraud, breach of fiduciary duty, fraud and fraudulent concealment, negligent supervision/retention, civil conspiracy, NIED, IIED and equitable estoppel. In 2014 the superior court granted summary judgment dismissing all claims, and the court of appeals affirmed. In 2019 the General Assembly passed the SAFE Child Act (codified at NCGS 1-17(d) and 1-56) which was intended to extend the SOL for claims related to sexual abuse against minors, and among other things allowed filing up to the victim's 28th birthday. In 2020 the plaintiff filed a new complaint, alleging similar, but not identical, claims as his first suit. The superior court dismissed and the court of appeals affirmed: plaintiff's claims were barred by res judicata: all of the claims were based on the same core factual allegations, so to the extent that any claims were new, they could (and should) have been raised in the earlier proceeding.

Discovery

Buckley, LLP v. Series 1 of Oxford Ins. Co., NC, LLC, No. 219A21, 876 S.E.2d 248, 2022 N.C. LEXIS 780 (N.C. 8/19/22) – see discussion under Attorney-Client Privilege, above.

Hall v. Wilmington Health, PLLC, COA 20-864, 872 S.E.2d 347, 2022 N.C.App. LEXIS 202 (N.C.App. 4/5/22)(Stroud, Tyson) (Dillon dissenting) – in July 2020, in the midst of shutdowns and quarantine orders on travelers, the superior court ordered all depositions to be taken by “remote videoconferencing in separate locations from the witness” and, despite no one asking for it, prohibited counsel from being present with a witness at any deposition, including party representatives, their own witnesses, and experts. Defendant appealed, asserting violation the due process right “to ‘retained counsel being present at critical stages of litigation’ without substantial justification.” In a case of first impression, a 2-1 majority of the court of appeals agreed that the portion of the order prohibiting counsel from being present with a witness violated the parties’ due process rights under the 14th Amendment to the U.S. Constitution and Article I, § 19 of the N.C. Constitution (“law of the land” clause):

Based on *Tropic Leisure* and the cases upon which it relied, we hold the due process right to retain and have counsel heard in civil cases extends to having the assistance of retained counsel at depositions. *Tropic Leisure* and the federal cases it relied upon emphasize the importance of having retained counsel’s assistance throughout the legal process including fact-finding phases such as discovery. [citations omitted]

As Defendant asserts, discovery is a particularly pertinent stage to ensure the right to assistance of retained counsel in civil cases because depositions can be used at trial to impeach witnesses or even in place of witness testimony in certain circumstances. ... Rule 32(a)(3) is particularly significant because it allows the deposition of an organizational representative under Rule 30(b)(6) or 31(a) to be “used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing” and Defendant here is an organization. Thus, the assistance of retained counsel at depositions supports the core right to have retained counsel at trial.

Here, while the majority observed some narrowly-tailored limits were acceptable, it found the superior court violated the parties’ due process rights – and prejudice was presumed -- when it issued a blanket order without considering the specific circumstances (including potential privileges, ability to handle potential technical glitches, applicable travel requirements and restrictions, eventual availability of vaccines and lifting of travel restrictions), and preferences of the witness and counsel.

Judge Dillon dissented, arguing that the appeal was interlocutory, did not affect a substantial right, and that while a party had a due process right to counsel at depositions, a party did not have a due process right to have counsel *physically present* at depositions. Judge Dillon pointed out that the two cases the majority relied upon were not North Carolina cases, and neither was decided on due process grounds. Moreover, the appellant had not shown that the superior court’s order risked a substantial right being lost without immediate appeal, quoting out-of-state cases describing processes/protocols that could be implemented to address concerns (witness pausing before responding, more frequent breaks, virtual breakout rooms for private conversations).

Dunhill Holdings, LLC v. Lindberg, 282 N.C.App. 36, 870 S.E.2d 636 (N.C.App. 3/1/2022)(Stroud, Tyson, Zachary) – when estranged wife Tisha Lindberg (“CEO”⁴ of plaintiff) left her husband, Greg Lindberg (founder and sole member/manager of plaintiff) in May 2017 and took money from their bank accounts, it spawned a series of claims, counterclaims and third party complaints for breach of fiduciary duty, constructive fraud, theft, embezzlement, conspiracy, conversion, unjust enrichment, accounting, abuse of process, malicious prosecution, IIED, spoliation, and constructive trust. The appellate history was complicated, with multiple appeals and withdrawals of appeals, and this case issued in March 2022 to address Rule 37(b) sanctions imposed after multiple discovery abuses including continued re-assertion of objections previously rejected by the superior court, failures to make servers, computers, etc., available for forensic examination as ordered, failure to produce documents as ordered and then delivering multiple document dumps (including 129,000 pages on eve of 30(b)(6) deposition), failure to produce knowledgeable 30(b)(6) witnesses even after ordered to do so. The appellate panel found jurisdiction appropriate as Rule 37(b) sanctions had been assessed, and reviewed the matter for abuse of discretion, finding:

- (1) The superior court’s orders amply identified the issues as to which Dunhill and Lindberg were required to respond.
- (2) The superior court specifically overruled the very objections Dunhill and Lindberg later raised.
- (3) The superior court’s provision of a procedure for renewing objections based on attorney-client privilege did not imply Dunhill and Lindberg were free to re-assert other objections that had been rejected.
- (4) A party does not waive its objections to discovery by failing to assert overruled objections; waiver only applies when the objection isn’t raised in the first place.
- (5) The superior court did not abuse its discretion when it found that producing 129,000 pages, without identifying the request to which they responded, violated its prior order to fully and completely respond to each and every Interrogatory and discovery request.
- (6) Rule 37 sanctions do not require a showing of willful violation; failure to comply due to conduct and circumstances within the party’s control is sufficient to establish lack of good faith that supports sanctions.
- (7) An order denying a motion for protective order and temporary stay (based on a pending criminal indictment and 5th amendment concerns) is a predicate order that supports sanctions for related violations.
- (8) Despite evidence raising questions about the true “separateness” of Dunhill and Mr. Lindberg, each were each sanctioned for their own misconduct, which was amply supported in the record.

⁴ Ms. Lindberg asserted that only Greg called her that, she was never an employee, and the plaintiff was just “a vehicle through which [Greg] funded the personal lifestyle of the parties and their family...” Meanwhile, Dunhill said it was a real estate holding company whose primary asset was the family home of the Lindbergs on Stagecoach Drive in Durham, NC.

- (9) Mr. Lindberg did not invoke the 5th Amendment by saying he “can’t comment on that,” and neither did counsel when he instructed Mr. Lindberg not to answer the question about whether he was invoking the 5th amendment, so the superior court could not have sanctioned him for invoking the 5th amendment, as appellant argued.
- (10) The superior court specifically identified instances where 30(b)(6) witnesses could not respond to questions, or provided vague, uncertain responses referencing some potential document somewhere in the production or did not have any information on topics for which they had been designated.
- (11) The superior court did not act as though it had unfettered discretion, specifically outlined the limits of its discretion, specifically considered other, less severe sanctions, and did not abuse its discretion by ordering sanctions authorized by Rule 37(b)(2).
- (12) The existence of contrary evidence does not prevent the superior court from establishing facts against the party who failed to follow the normal discovery process; Rule 37(b)(2)(a) specifically allows the court to designate certain facts as established as a discovery sanction.
- (13) The superior court’s sanctions order was inconsistent to the extent that it required Dunhill to sit for a 30(b)(6) deposition on previously-noticed topics that include issues relevant to liability only, and that portion would be vacated and remanded for clarification that Dunhill’s new deposition only cover damages.
- (14) The superior court’s order requiring Mr. Lindberg to sit for another deposition erred insofar as it did not account for his right to assert attorney-client privilege and that paragraph was vacated and remanded for clarification that Mr. Lindberg could assert objections not previously overruled.
- (15) A party need only have notice that sanctions may be imposed, and the grounds for imposition of sanctions; due process does not require specific prior notice of the sanctions that are ultimately imposed, especially when they are identified in Rule 37(b).
- (16) Given the sanctions imposed (resolving all liability questions in favor of Ms. Lindberg), the forensic examination issue is moot.

Negligent Hiring/Supervision/Retention

Keith v. Health-Pro Home Care Servs., 381 N.C. 442, 873 S.E.2d 567 (N.C. 6/17/22) (Barringer)–(Newby, concurring in part, dissenting in part)(Berger, dissenting) - defendant provided personal care aide for plaintiffs in their home. After plaintiffs complained of theft, and defendant narrowed down potential thieves to one aide, it nevertheless allowed that aide to continue in the home. The aide then orchestrated a home invasion and robbery. Plaintiffs sued defendant for negligently hiring, supervising and retaining the aide in their home. The superior court denied directed verdict at the close of plaintiff’s case and again at the close of all evidence. During the charge conference the court proposed using general negligence instructions (NCPI – Civil, 102.10, 102.11, 102.19, and 102.50), and overruled Defendant’s objection and request to use employer-specific instructions under NCPI-Civil 640.42. The jury ultimately returned a verdict in favor of

plaintiffs and awarded \$500,000 to Mr. Keith, and \$250,000 to Mrs. Keith. Health-Pro unsuccessfully moved for judgment n.o.v. and then appealed to the court of appeals, who reversed in a 2-1 decision, finding that the trial court erred in instructing the jury on general negligence – a claim that it found separate and distinct from a negligent hiring/supervision claim. The court of appeals then applied *Little v. Omega Meats I, Inc.*, 171 N.C.App. 583 (2005) and concluded that there was no evidence to support liability based on three *Omega Meats* requirements: (1) the employee and plaintiff had to be in places where they each had a right to be when the wrongful act occurred, (2) the plaintiff had to meet the employee, when the wrongful act occurred, as a direct result of the employment, and (3) the Defendant had to receive some benefit as a result of the meeting between the employee and plaintiff that resulted in the plaintiff's injury. Moreover, even if *Omega Meats* didn't apply, the court of appeals majority found that the trial court erred in denying the Defendant's motion for judgment n.o.v. because the Defendant had no duty to protect the plaintiffs from its employee's criminal acts, and the evidence was insufficient to demonstrate "proximate cause." Judge Dillon dissented, arguing that negligent hiring as merely a means by which a plaintiff proves ordinary negligence, and that viewed in the light most favorable to plaintiffs, the evidence was sufficient to make out an ordinary negligence claim based on the evidence that Defendant negligently hired a dishonest employee, and it was unnecessary to prove that the employee was on duty when the plaintiffs were injured since the employee used information she learned while on duty to facilitate the theft.

On appeal, the supreme court rejected the court of appeals' assertion that *Omega Meats* required application of three factors; instead, the court need only find that the plaintiff had satisfied the requirements of *Medlin v. Bass*,⁵ and a nexus between the employment and the injury, as required by *Omega Meats*. Here, Defendant not only represented that it carefully screened its employees and ran approved background checks on its employees, and state law required that it do so, it did neither and a criminal background check would have disclosed that she lied on her employment application because she had multiple charges (and some convictions) for communicating threats and possession of drug paraphernalia and marijuana, criminal contempt, driving without a license and driving while license was revoked. Even after the Keiths notified the Defendant of the theft in their home, and the Defendant promised to remove the aides from their home (which it ultimately didn't), the Defendant failed to run a criminal background check or report the theft to the police. Meanwhile, the Defendant received two notices from the Pitt County Child Support Enforcement that it was pursuing claims for nonpayment of child support against the aide. Thereafter, the aide used her knowledge of the Keiths' home; their visitors; the location of their spare key, valuables and firearm; and the schedule and identify of another aide to assist in the home invasion and robbery and deflect suspicion by suggesting to the Keiths that she participated in the home invasion. The supreme court found this evidence sufficient to support each element of the Keiths' cause of action and

⁵ *Medlin v. Bass*, 327 N.C. 587, 590 (1990)(for negligent hiring claim, plaintiff must prove (1) the specific negligent act on which the action is founded, (2) incompetency, by inherent unfitness or previous specific acts of negligence form which incompetency can be inferred, (3) either actual or constructive notice to the employer of such unfitness or bad habits, and (4) that the injury complained of resulted from the incompetency proved).

survive a motion for directed verdict or judgment n.o.v. when viewing the evidence in the light most favorable to the plaintiffs. Moreover, the trial court did not err in declining to use NCPI-Civil 640.42 because it did not accurately state the law: (1) *Omega Meats* does not require that the plaintiff prove the three factors outlined by the NCPI (and the court of appeals), and (2) the instruction regarding the employee's incompetence is inaccurate and is not limited to physical capacity, natural mental gifts, skill, training or experience, but includes any kind of unfitness which renders employment/retention of the employee dangerous to others. However, the trial courts also should not use the generic negligence instructions in negligent hiring/supervision cases because they fail to address the nexus required between the employment and the tortfeasor's bad acts.

Newby, J. – concurred in the majority's analysis, but found the trial court's failure to give a negligent hiring instruction prejudiced the defendant such that he was entitled to a new trial.

Berger, J. – dissented, arguing that employment of a tortfeasor did not create the special relationship with a third person necessary to impose a duty on the employer which would support a negligence claim. Here, the employer could not have reasonably known or anticipated that its employee was a violent individual who would engage in a home invasion and armed robbery (her prior convictions were all non-violent misdemeanors, and defendant had not received any complaints concerning her work or character [other than the theft complaints, of course]), and had no ability at the time of the robbery to exercise supervision or control over her actions since it occurred outside of normal working hours.

Racine v. City of Raleigh, No. COA21-406, 872 S.E.2d 182, 2022 N.C. App. LEXIS 354 (5/17/22) (Jackson, Dietz, Murphy) (unpub.) – city could not be responsible under negligent hiring/retention/supervision theory where the tortfeasor who caused the death of plaintiff's decedent was not a City employee. Moreover, the claim for negligent supervision/training is derivative and dependent on the existence of a viable claim against the employee, and plaintiff had no viable claim against the officers due to the public duty doctrine codified at NCGS 143-299.1A(b) (see discussion above in *Immunity*).

NC OSH

Lost Forest Dev., LLC v. N.C. Comm'r of Labor, 280 N.C.App. 174, 867 S.E.2d 338 (11/2/21) (Tyson, Stroud, Inman) – on June 19, 2017, employer received a citation for serious violation of NC OSH standards, with five subparts. Per NC procedure, he requested and participated in an informal conference on June 27, 2017, during which he stated he intended to contest the citation. On June 28, 2017, DOL followed up with a letter notifying the employer that it had fifteen days to submit a letter of contest (which the employer received on July 8, 2017) but did not explain that failure to contest the citation would result in the citation becoming final and enforceable. The employer didn't timely file a letter of contest, but DOL did nothing to collect the penalty, either, and the employer raised the question with DOL almost 15 months later, stating again that he wished to contest the citation. Instead of telling him it was too late and/or complying with its Field Operations Manual ("Once the notification is mailed to the employer, [DOL] should not

make any further contact with the employer that could be construed as extending the time limit the employer has to respond to the ISA.”), DOL instructed the employer to send an email saying he wanted to contest the citation and penalty, and then after docketing the matter with the NC OSH Review Commission, moved to dismiss. The NC OSH hearing examiner found that NCGS § 95-137(b)(1) did not require *written* notice of contest, DOL impliedly extended the time limit for filing a notice of contest when it told the employer to send an email, and DOL’s actions either operated as a waiver of the timeliness argument or as judicial estoppel to deny the motion to dismiss, concluding, “Complainant should not be permitted to resurrect a previously forfeited procedural advantage.” DOL appealed, the Review Commission reversed, and the trial court affirmed the Review Commission, as did the court of appeals: both the regulation and two notices from the Commissioner required a writing within 15 days, and the employer did not comply. Moreover, the Commission did not waive this requirement by docketing the employer’s email 15 months later as a “notice of contestment.”

Public Employees - Benefits

Moss v. N.C. Dept of State Treasurer, Retirement Sys. Div., 872 S.E.2d 113, 2022 N.C.App. LEXIS 230 (Apr. 5, 2022) (Wood, Zachary, Carpenter)— Plaintiffs Moss and Shuford were state employees who had been receiving Transitional Disability Benefits from the State for more than 25 years. Under State law, TDB payments were reduced by the gross amount of Social Security disability benefits to which the person was entitled. In 2017 the State discovered a programming error that failed to account for cost-of-living adjustments to Social Security benefits, and determined that individuals receiving TDB had been overpaid since 2006, a sum that totalled \$13,235 for Moss, and \$19,702 for Shuford. Accordingly, the State unilaterally reduced their monthly benefits by about \$100/month (Moss) and \$160/month (Shuford), to recoup the repayment over a 10-year period. Moss and Shuford filed a petition with OAH challenging the reduction of their disability payments, and at hearing offered bank account statements and a spreadsheet to demonstrate the State’s miscalculation of benefits. The ALJ found that the petitioners knew their SSD benefits were to be deducted from their TDB payments, their evidence was insufficient to prove that their *gross* Social Security Benefits differed from the State’s calculation, and they could not show that the State had substantially prejudiced their rights because the overpayments belonged to the State, and were not Plaintiffs’ personal property. The superior court affirmed the ALJ, as did the court of appeals: there was no breach of contract because benefits were subject a dollar-for-dollar offset and the State was statutorily required to recoup the money, so 12(b)(6) dismissal was appropriate; and substantial evidence supported the ALJ’s ruling that the petitioner’s evidence only established the net amount of her SSD benefits, and not the gross, and that the State did not increase its offset in years where a cost of living increase was not awarded.

Lake v. State Health Plan for Teachers & State Employees, No. 436PA13-4, 380 N.C. 502, 869 S.E.2d 292 (3/11/22) (Earls), *cert. denied* 2022 U.S.LEXIS 4336 (10/3/22) – 220,000+ retired State employees sued when the General Assembly enacted a statute eliminating their option to remain enrolled in a premium-free 80/20 preferred provider health insurance plan, asserting a contractual/constitutional obligation to provide that (or an equivalent) benefit on a

noncontributory basis, for life. The State argued that it never promised to provide this benefit for life, and even if it did, the State's new noncontributory plan provided a benefit of the same or greater value than the one available prior to the statutory change. The superior court agreed with the plaintiffs and entered partial summary judgment, but the court of appeals unanimously reversed. However, the North Carolina Supreme Court reversed the court of appeals and held that "Retirees enjoy a constitutionally protected vested right in remaining enrolled in the 80/20 PPO Plan or its substantive equivalent on a noncontributory basis," but were only entitled to receive the benefit of the bargain they struck, and not more. Thus, the Retirees were required to demonstrate that the General Assembly substantially impaired their contractual rights when it eliminated the option of enrolling in the premium-free 80/20 PPO Plan, and the State must be afforded an opportunity to show that the impairment was reasonable and necessary to serve an important state purpose, so did not violate the contracts clause of Article I, § 10 of the U.S. Constitution. The court remanded to the superior court for resolution of these factual issues.

Public Employees - Termination

Hinton v. N.C. Dept of Pub Safety, No. COA21-480, 2022 N.C.App.LEXIS 484 (7/5/22)(Inman, Stroud, Arrowood) – Hinton was a correction officer at Poke Correctional Institution, and in 2019 was instructed to conduct random searches of inmates after a shank was not recovered in a potential stabbing the previous night. Hinton selected 5-6 inmates to search, but one of the inmates walked away and joined the lunch line in the dining hall. Hinton went after the inmate and instructed him to leave the line, which the inmate did. With his hands on his head (per prison policy), the inmate turned to Hinton, who punched the inmate in the face and tackled him to the floor, knelt over the inmate and struck him 3 more times in the face and head. Two other officers directed Hinton to release the inmate, and then helped him to his feet, at which point the inmate tried to pull away from the officers (to get to Hinton) and hit one of the officers in the eye with his elbow; the officer was injured in his left knee and right shoulder as he regained control of the inmate and required 3 months of medical leave. Hinton was dismissed on April 8, 2020 for unacceptable personal conduct by excessive use of force, in violation of policy, which required officers to maintain a "reactionary distance" of six feet from all inmates, and use pepper spray before engaging an inmate with physical violence. Hinton's dismissal was upheld through internal agency appeals and by the ALJ, who entered a final decision, then an amended final decision to correct scrivener's errors, and then a second amended final decision also to correct scrivener's errors. The court of appeals found no error in the entry of the corrected orders and that there was substantial evidence to support the conclusion that Hinton violated NCDPS's use of force policy. However, the court found insufficient evidence to support the ALJ's conclusion that Hinton engaged in *excessive* force and remanded for further findings explaining why Hinton's conduct constituted excessive force and violated NC DPS's policy.

Russell v. NC Dept of Pub Safety, 871 S.E.2d 821, 2022 N.C. App. LEXIS 250 (N.C. App. 4/5/22) (Jackson, Carpenter) (Tyson, dissenting) – Russell was employed as a corrections officer at Central Prison when he suffered a work-related injury in November 2018. After he returned from leave, he was re-injured and left work on WC leave again. In January 2020 he sought help finding an available position he could perform, but on February 12, 2020, DPS sent him a Pre-Separation

letter which offered the opportunity to meet to discuss reasonable accommodations to avoid separation and stated his employment would be terminated if he remained unavailable after February 27, 2020. Russell requested that meeting, but his supervisor told him the meeting would be “pointless” if he could not return to fully duty by February 27, 2020, and rebuffed Russell’s explanation that he wanted to propose an alternative method of accommodation but needed assistance doing so. On March 3, 2020, DPS terminated Russell and advised of his 15-day deadline for appealing his termination. Russell received the letter on March 9, and timely mailed a completed grievance form to DPS on March 20, 2020, also emailing a photograph of the grievance form on April 7 and 9, 2020. On April 16, 2020, DPS rejected Russell’s appeal as untimely, and on May 26, 2020, Russell initiated a contested case in OAH. DPS unsuccessfully moved to dismiss, and renewed that motion at hearing, offering a witness who testified that she first received a copy of Russell’s grievance on April 7, but could not remember which days of the week she was in the office during March-April, 2020, a period when many State employees were working remotely due to the COVID-19 pandemic. The ALJ again denied DPS motion to dismiss and entered judgment reversing Russell’s termination and ordering retroactive reinstatement plus attorneys’ fees. DPS appealed the denial of its motion to dismiss, but the court of appeals affirmed, finding that Russell’s testimony that he completed the form, and he watched his wife mail it on March 20, 2020, coupled with evidence that DPS’ employees were working remotely and mail was not being checked daily, provided a rational basis for the ALJ’s denial of DPS’s motion, even without an express finding that his grievance was timely.

Judge Tyson dissented, pointing out that the grievance process required *receipt* of the grievance form within 15 days, there was no evidence that the mailed copy was ever received by DPS, and the emailed copies were admittedly late. Accordingly, Judge Tyson agreed with DPS that Russell failed to exhaust his administrative remedies so that his OAH appeal should have been dismissed for lack of subject matter jurisdiction.

REDA

Abernathy v. Mission Health Sys., Inc., 281 N.C. App. 721, 868 S.E.2d 176, 2022 N.C. App. LEXIS 110 (2/15/22)(Dietz, Murphy, Wood) (unpub.), *discret. review denied*, 876 S.E.2d 280 (8/17/22) – plaintiff was an energy program manager at Mission Hospital, Inc. After two small fires broke out at hospitals in Mission’s network due to improper LED light installation, plaintiff objecting to providing detailed instructions for installing and retrofitting LED lights for staff members who were not qualified to perform the expected tasks under applicable OSH standards repeating his concerns (at least 5 times over 11 months) to two supervisors and, after he was written up, complained to HR about retaliation for raising OSH concerns. Ultimately, plaintiff prepared the requested presentation but did not include the information his supervisor and others requested. He then emailed his supervisor, HR and another company official a copy of an online whistleblower complaint he claimed to have filed with US DOL. He was fired a month later and filed a REDA complaint the same day. After discovery, Mission moved for summary judgment which was granted. The court of appeals applied a burden-shifting analysis and then relied on *Pierce v. Atlantic Group, Inc.*, 219 N.C. App. 19 (2012) to find that (a) plaintiff’s expression of concerns to supervisors weren’t sufficient to satisfy REDA’s requirement of filing a claim or

complaint, or initiating an inquiry, investigation, inspection, proceeding or other action, regardless of how many times he complained, (b) his complaints to HR and others that he was being retaliated against because of his complaints didn't count because they complained about retaliation, and not the underlying safety issue; and (c) his formal complaint to US DOL also didn't count because, again, he was complaining about retaliation and not the underlying OSH issue. Additionally, the panel found that Mission Health System, Inc. wasn't liable under REDA because it wasn't plaintiff's employer; his employer was a separate entity, Mission Hospital, Inc. (as documented in his paystubs and W-2s and his supervisor's affidavit), which also employed his supervisors and had the authority to discipline or terminate him.

Restrictive Covenants

Digital Realty Trust, Inc. v. Sprygada, 2022 NCBC 31, 2022 NCBC LEXIS 71 (Wake Co. 7/1/22) (Earp) – Sprygada was a minority owner and CTO of Pureport when plaintiff purchased Pureport. Contemporaneously with that purchase, and his own hiring by DRT, Sprygada signed an Employee Confidentiality and Covenant Agreement that identified plaintiff, REIT, DLR, and their respective subsidiaries and affiliates as “the Company,” and included two noncompetes:

- (a) 3-year noncompete (conditioned on the closing) prohibiting Sprygada from “directly or indirectly, for or with a Competing Business, engage in any activity (as employee, owner, consultant, partner, or in any other capacity) that is the same as or similar to the Acquired Business as of the Closing Date” in “Competing Business” was “any individual (including Employee) or entity (in whole or in part), including any Customer or vendors, that is engaged, on behalf of itself or others, in any way, in the Business of the Company or that is taking material steps to engage in such business.” “Business of the Company” was defined as “any and all business activities of the type engaged in by the Company, including but not limited to... [any and all business or activities engaged in by [Pureport] as of the Closing Date].”
- (b) 2-year noncompete (conditioned on acceptance of employment) prohibiting Sprygada from “directly or indirectly, for or with a Competing Business, engage in any activity (as employee, owner, consultant, partner, or in any other capacity) that is the same as or similar to the business of the Company and upon which [he] worked or which related to any direct or indirect responsibilities [he] had at the company.

Both covenants applied to “(a) the Restricted Territory (NC, US, North America, South America, Europe, Asea, Australia, Africa) or (b) anywhere in the world where Employee’s activities for a Competing Business will require Employee to use and/or disclose the Company’s Confidential Information or Trade Secrets.” Six months after starting at plaintiff, Sprygada resigned and went to work as VP of Product Management with Itential, a potential competitor, and then gave a series of public presentations that indicated his work for Itential was substantially similar to his work for Pureport and Plaintiff. The business court found that plaintiff was likely to succeed on restriction (a) due to the lower standard for covenants accompanying the sale of a business, but not on restriction (b): the definition of “Company” to include unnamed affiliates and subsidiaries,

and inclusion of the phrases “relate to” and “indirect” responsibilities rendered the noncompetes too ambiguous and too broad for enforcement.

Tortious Interference

Button v. Level Four Orthotics & Prosthetics, Inc., 380 N.C. 459, 869 SE2d 257 (N.C. 3/11/22) (Berger, J.)(Earls, J., concurring in part, dissenting in part) – (see also “Appeal - Interlocutory” and “Defense – Personal Jurisdiction”) – Button was a NJ resident when he negotiated with Rebecca Irish (FL)(acting on behalf of Level Four, Level Four Holdings, and Penta Fund) and Seth Ellis (FL)(managing partner of Penta Fund) and ultimately entered into an employment agreement with Level Four (NC) to serve as its CEO, along with a Warrant Agreement with Level Four, and multiple stock-related agreements with Level Four’s majority shareholder, Level Four Holdings, under which Level Four Holdings obtained the right to buy Button’s shares. The Employment Agreement required that the interest rate on debt Level Four owed Penta Fund (FL) be reduced to 2.5% and allowed termination without cause on 30-days’ notice, and no-notice termination with cause. Button’s performance was “flawless,” and he got the interest rate owed by Level Four to Penta Fund reduced to 2.5% but in November 2018 Irish conditioned additional Penta Fund funding on an 8% interest rate, which Button refused. Penta Fund wired the funds anyway and presented Button with promissory notes including the 8% interest rate, which Button refused to sign despite Irish’s and Ellis’ insistence. A month later, Button was fired for cause, Irish installed herself as CEO of Level Four, and approved Penta Fund’s higher interest rate. Button sued, asserting claims for tortious interference (among other things) against Penta Fund, Ellis, Irish and Level Four Holdings. The business court dismissed Button’s tortious interference claim, finding that malice of non-outsiders was insufficiently pled. In its discussion denying writ of certiorari, the majority agreed, observing that shareholders (like Penta Fund and Level 4 holdings) had a qualified privilege to interfere with contractual relations between the corporation and a 3rd party and Button failed to allege facts specific to each defendant that showed how they each acted in their own personal interest.

Justice Earls (Hudson, Ervin), dissented, rejecting the majority’s “conflation of the standard for determining whether a writ of certiorari should be issued with an analysis of the ultimate merits of Button’s claims,” and observing that the court had to grant certiorari in order to reach the merits of Button’s claims and could not deny cert because it found the substantive arguments would not ultimately succeed (an impermissible advisory opinion). Additionally, the minority found the majority had suggested an unduly stringent standard inconsistent with notice pleading principles (a complaint need not affirmatively disprove the possibility that corporate non-outsiders acted in the interests of the company but need only allege facts demonstrating that their actions were not prompted by legitimate business purposes) and ignored a number of relevant factual allegations in Button’s complaint. The minority found those allegations sufficient to displace the presumption that the defendants were acting in Level Four’s interests, and sufficient to state a claim for tortious interference.

Trade Secrets

Elite Vehicles, Inc. v. Lee, No. COA21-730, 873 S.E.2d 768, 2022 N.C.App. LEXIS 479 (7/5/22) (Gore, Dietz, Wood)(unpub.) – the parties incorporated Elite Vehicles in January 2015 and for roughly 2 years worked on developing a fold-down swim platform for luxury pontoon boats, that Richards (90% shareholder and president) had worked on for roughly five years prior. Lee initially owned 10% of the shares, was a director of the company, and was responsible for funding the startup capital, making an initial contribution of \$170K. Prior to 2015, Richards did not tell anyone about his design, and prior to 2016 took no steps to file a patent or trademark, copyright or otherwise protect his idea, other than having individuals sign a confidentiality agreement. In early 2016, Lee asked Richards to send him 3D renderings of the boat design, and then asked permission to show the designs to his financial advisor, George, so that Lee could consult with him about an additional \$50,000 investment Richards had requested. Richards agreed, but George wouldn't sign the NDA and Lee showed him the 3D renderings anyway, after which George advised Lee not to make the investment. Lee contributed the additional \$50,000 anyway, in exchange for an additional 5% of the shares. A few months later Elite discontinued business due to insufficient funding. In January 2017, a Brunswick company introduced a new boat model that Richards contended featured Richards' primary design innovation. Richards claimed Lee told him George had contacted Brunswick Corporation to discuss the design, but George and Brunswick denied that he had done so. Nevertheless, Richards/Elite filed suit against Lee for misappropriation of trade secrets and unfair and deceptive trade practices. The superior court granted summary judgment in favor of Lee, and the court of appeals affirmed, finding that Richard/Elite failed to forecast evidence sufficient for a reasonable fact finder to conclude that his unique design was a trade secret within the meaning of § 66-152(3)(a), and instead admitted that various swim platform designs were prevalent in the industry – many of them patented -- and Brunswick could have independently developed its design without reference to Richard's design. Since there was no trade secret, there could be no misappropriation in violation of § 66-152(1). Since Richard's/Elite's trade secret claim, its UDTPA claim (which relied on the trade secret claim) also failed.

Unemployment Claims

In re Lennane, No. 3A21, 380 N.C. 483, 869 S.E.2d 243 (N.C. 3/11/22) (Barringer) (Earls, Hudson, Ervin, dissenting) - Lennane was a service technician working for a company providing security or business alarm systems. In 2014 he suffered a Workers Comp injury that left him permanently partially disabled in his left knee. In 2016 the employer began requiring service techs to perform installations, which Lennane could not do due to the poor condition of both knees. When no administrative positions were available in-state and the employer would not restrict him to service calls only, he gave notice of resignation and left the work. DES conceded that Lennane had good cause to leave work but found that he failed to show that the cause was attributable to his employer. A divided panel of the court of appeals affirmed, as did the supreme court, finding that the General Assembly placed the burden of proving good cause attributable to the employer on the employee, and Lennane had failed to present evidence necessary to support his

claim, such as evidence that the employer’s allocation of installation jobs was more detrimental to his health than his duties and responsibilities prior to 2016, when he sometimes did installations; or that the installations increased the amount of prolonged standing/walking by Lennane relative to service calls. Additionally, the court was required to consider the efforts of the employer to preserve the employment, including its attempts to not dispatch Lennane on the most strenuous or large installations, or assigning another service tech to assist, or offering an administrative position out-of-state.

Justices Earls, Hudson and Ervin dissented, objecting to the majority’s imposition of a new “effort to preserve the employment relationship” test, and its illogic in acknowledging that the parties conceded Lennane had good cause but then inferred from the absence of factual findings that Lennane did not have good cause to leave his employment because he refused to move out-of-state and did not take additional FMLA leave. Justice Earls also pointed out that the appeals referee’s factual findings did not suggest that the employer offered him work that complied with his medical restrictions, and instead reflect that the employer denied his request to only be assigned service “because [it] needed to keep a fair balance of work restriction among all of the service technicians.” That decision led to Lennane’s good cause to stop working, so that he should not be disqualified from benefits. Moreover, contrary to the majority’s opinion, examination of the legislative history suggests that the employer did not do enough to keep Lennane on its payroll with work he could safely perform, and case law supported a finding in Lennane’s favor.

Williams v. N.C. Dept of Commerce, DES, No. COA22-103 (11/01/22) (Dietz, Murphy, Wood) – pro se petitioner filed for Pandemic Unemployment Assistance effective June 7, 2020; on November 30, 2020, DES determined her ineligible for PUA beginning 9/13/20; she appealed and an evidentiary hearing was held, following which the Appeals Referee ruled she was ineligible for PUA benefits. The DES Board of Review affirmed and on March 30, 2021 the petitioner timely filed a petition for judicial review. Petitioner mailed copies of the petition via certified mail/return receipt requested to the employer and to DES on March 30, 2021, but did not mail copies to DES’ registered agent until April 9, 2021, who did not receive it until April 14, 2021. However, NCGS 96-15(h) required actual delivery within ten (10) days of filing and because DES’ registered agent didn’t receive the petition on time, the superior court lacked jurisdiction, did not have the authority to extend the service deadline, and properly dismissed the appeal.

Wrongful Discharge

*Woody v. Accuquest Hearing Ctr., LLC, No. COA21-563, 2022 N.C.App. LEXIS 512, 877 S.E.2d 1 (7/19/22)*⁶ (Zachary, Arrowood) (Dillon, dissenting) – after four months working as a patient care coordinator in Accuquest’s Greensboro and High Point offices plaintiff started having symptoms that caused her to go see a cardiologist, who said she needed a cardiac ablation to correct atrial fibrillation. On her last day at work before the procedure, the person who was supposed to make

⁶ Bob Hunter and Jon Wall represent Ms. Woody; Fred Sharpless represents Accuquest.

bank deposits didn't, so plaintiff took the deposits but the bank was closed when she arrived. She took them home, and the next day (March 5) had the surgical procedure. She returned to work March 13, and brought the deposits back to work with her, but the employee who was supposed to make the deposits again failed to do so. Before work on March 14, plaintiff picked up the deposits and took them to the bank. Later that day, she was fired for unidentified "procedural violations." About 6.5 months later she sued for WDPP, citing NCGS 143-422.2 and 168A-1 et seq. Accuquest moved to dismiss, arguing the Persons with Disabilities Protection Act was her exclusive remedy and her WDPP Claim was time-barred by the PDPA's 180-day statute of limitations. The superior court agreed, but a majority of the court of appeals reversed and remanded for further proceedings, ruling that the WDPP claim was not preempted by the PDPA, and the PDPA's 180-day filing requirement did not apply. Additionally, the panel found plaintiff's allegations sufficient to state a claim for relief where she alleged her symptoms, treatment, and recovery, and further alleged (a) that she suffered from a disability that affected major life activities including walking and exercising and if left untreated could cause stroke or death, and had a record of disability at the time of her termination and (b) she was retaliated against and wrongfully discharged because of her disability, because she took time off to have her disability treated, and because of defendant's discrimination and preconceived notions about her future performance based on her disability, and (c) her medical condition and status as disabled was a substantial factor in defendant's decision to terminate her employment.

Judge Dillon dissented because he found that the statutory remedy in the PDPA was exclusive and because he found the plaintiff had failed to allege a "substantial" impairment. *This case is on appeal to the N.C. Supreme Court, docket 262A22-1.*

Stevenson v. ANC Highlands Cashier Hosp., Inc., No. COA20-905, 2021 N.C. App. LEXIS 690 (12/7/21) (Gore, Hampson, Wood) (unpub.)— registered nurse worked in defendant's Emergency Department and objected to senior management when his supervisor transferred aa nursing assistant to another department, leaving him alone in the ED, which he contended violated hospital policy and was a safety issue implicating OSHA. Senior management told his manager, who was upset and (two weeks later) ordered plaintiff to submit to "random" drug testing. Plaintiff did not believe that the hospital conducted "random drug testing," and refused; his supervisor later admitted that there was no cause basis for requiring the testing, and she knew of no other case of random drug testing at the hospital. Nevertheless, plaintiff was fired because of his refusal to submit to a random drug test, and he sued for WDPP, asserting public policies in NCGS §§ 95-126 (NC OSH general safety provision.⁷) and 95-241(a) (REDA "legal right to initiate an inquiry with respect to OSHA").⁸ The superior court granted 12(b)(6) dismissal, and the court of appeals affirmed, finding that Stevenson's complaint failed to allege that the staffing policy was adopted to comply with OSHA, failed to cite an OSHA standard that was violated, failed to

⁷ The general safety provision requires that employers furnish to each employee conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to its employees. NCGS § 95-129(1).

⁸ Plaintiff did not assert a REDA claim, and although the complaint references a DOL investigator questioning the drug testing, there is no indication that a REDA complaint was ever filed.

allege any OSHA complaint to NC DOL and failed to allege any other statutory violation that would support the claim. Violation of an internal company policy was insufficient.

IN OTHER NEWS: Not WDPP cases, but the Court of Appeals was presented with several cases against out-of-state car title lenders, and specifically recognized NCGS § 53-190 (prohibiting high interest loans unless all contractual activities occur outside the state) as a fundamental public policy of North Carolina. *See, e.g., Troublefield v. AutoMoney, Inc.*, No. COA21-421, (7/19/22) (Wood, Hampson, Gore); *Leake v. Automoney, Inc.*, No. COA21-411 (7/19/22) (Wood, Hampson, Gore); *Wall v. Automoney, Inc.*, No. COA21-419 (7/19/22) (Hampson, Wood, Gore).

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DEPARTMENT OF LABOR**Wage and Hour Division****29 CFR Parts 780, 788, and 795**

RIN 1235-AA43

Employee or Independent Contractor Classification Under the Fair Labor Standards Act**AGENCY:** Wage and Hour Division, Department of Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Labor (the Department) is proposing to modify Wage and Hour Division regulations to revise its analysis for determining employee or independent contractor classification under the Fair Labor Standards Act (FLSA or Act) to be more consistent with judicial precedent and the Act's text and purpose.

DATES: Submit written comments on or before November 28, 2022.

ADDRESSES: You may submit comments, identified by Regulation Identifier Number (RIN) 1235-AA43, by either of the following methods:

- *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: Please submit only one copy of your comments by only one method. Of the two methods, the Department strongly recommends that commenters submit their comments electronically via <https://www.regulations.gov> to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. All comments must be received by 11:59 p.m. ET on November 28, 2022, for consideration in this rulemaking; comments received after the comment period closes will not be considered.

Commenters submitting file attachments on <https://www.regulations.gov> are advised that uploading text-recognized documents—*i.e.*, documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. This recommendation applies particularly to mass comment

submissions, when a single sponsoring individual or organization submits multiple comments on behalf of members or other affiliated third parties. The Wage and Hour Division (WHD) posts such comments as a group under a single document ID number on <https://www.regulations.gov>.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <https://www.regulations.gov>, including any personal information provided. Accordingly, the Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this notice of proposed rulemaking (NPRM).

Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1-866-487-9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or logging onto WHD's website for a nationwide listing of WHD district and area offices at <https://www.dol.gov/whd/america2.htm>.

SUPPLEMENTARY INFORMATION:**I. Executive Summary**

Congress enacted the FLSA in 1938 to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."¹ To this end, the FLSA generally requires covered employers to pay nonexempt employees at least the Federal minimum wage for all hours worked and at least one and one-half times the employee's regular rate of pay for every hour worked over 40 in a

workweek. The Act also requires covered employers to maintain certain records regarding employees and prohibits retaliation against employees who are discharged or discriminated against after, for example, inquiring about their pay or filing a complaint with the U.S. Department of Labor. However, the FLSA's minimum wage and overtime pay protections do not apply to independent contractors. As explained below, as used in this proposal, the term "independent contractor" refers to workers who, as a matter of economic reality, are not economically dependent on their employer for work and are in business for themselves. Such workers play an important role in the economy and are commonly referred to by different names, including independent contractor, self-employed, and freelancer. Regardless of the name or title used, the test for whether the worker is an employee or independent contractor under the FLSA remains the same. This proposed rulemaking is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves.

Determining whether an employment relationship exists under the FLSA begins with the Act's definitions. Although the FLSA does not define the term "independent contractor," it contains expansive definitions of "employer," "employee," and "employ." "Employer" is defined to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee," "employee" is defined as "any individual employed by an employer," and "employ" is defined to "include[] to suffer or permit to work."²

For more than 7 decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker is either economically dependent on the employer for work (and is thus an employee) or is in business for himself (and is thus an independent contractor). To answer this ultimate inquiry of economic dependence, the courts and the Department have historically conducted a totality-of-the-circumstances analysis, considering multiple factors to determine whether a worker is an employee or an independent contractor under the FLSA. There is significant and widespread uniformity among the circuit courts in

¹ 29 U.S.C. 202(a).

² 29 U.S.C. 203(d), (e)(1), (g).

the application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed. These factors generally include the opportunity for profit or loss, investment, permanency, the degree of control by the employer over the worker, whether the work is an integral part of the employer's business, and skill and initiative.

In January 2021, the Department published a rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (2021 IC Rule), providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.³ The 2021 IC Rule identified five economic reality factors to guide the inquiry into a worker's status as an employee or independent contractor.⁴ Two of the five identified factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—were designated as "core factors" that are the most probative and carry greater weight in the analysis. The 2021 IC Rule stated that if these two core factors point towards the same classification, there is a substantial likelihood that it is the worker's accurate classification.⁵ The 2021 IC Rule also identified three less probative non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production.⁶ The 2021 IC Rule stated that it is "highly unlikely" that these three non-core factors can outweigh the combined probative value of the two core factors.⁷ The 2021 IC Rule also limited consideration of investment and initiative to the opportunity for profit or loss factor in a way that narrows in at least some circumstances the extent to which investment and initiative are considered. The facts to be considered under other factors (such as control) were also narrowed, and the factor that considers whether the work is integral to the employer's business was limited

to whether the work is part of an integrated unit of production.⁸ Finally, the 2021 IC Rule provided that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible and provided illustrative examples demonstrating how the analysis would apply in particular factual circumstances.⁹

The effective date of the 2021 IC Rule was March 8, 2021. On March 4, 2021, the Department published a rule delaying the effective date of the 2021 IC Rule (Delay Rule) and on May 6, 2021, it published a rule withdrawing the 2021 IC Rule (Withdrawal Rule). On March 14, 2022, in a lawsuit challenging the Department's delay and withdrawal of the 2021 IC Rule, a Federal district court in the Eastern District of Texas issued a decision vacating the Delay and Withdrawal Rules.¹⁰ The district court concluded that the 2021 IC Rule became effective on the original effective date of March 8, 2021.

After further consideration, the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by courts and departs from decades of case law applying the economic reality test. The 2021 IC Rule included provisions that are in tension with this case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. These provisions narrow the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themselves.

While the Department considered waiting for a longer period of time in order to monitor the effects of the 2021 IC Rule, after careful consideration, it has decided it is appropriate to move forward with this proposed regulation. The Department believes that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic

reality test as a totality-of-the-circumstances test. Because the 2021 IC Rule departed from legal precedent, it is not clear whether courts will adopt its analysis—a question that could take years of appellate litigation in different Federal circuits to sort out and will result in more uncertainty as to the applicable test. The Department also believes that departing from the longstanding test applied by the courts may result in greater confusion among employers in applying the new analysis, which could in some situations place workers at greater risk of misclassification as independent contractors due to the new analysis being applied improperly, and thus may negatively affect both the workers and competing businesses that correctly classify their employees.

Therefore, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. While prior to the 2021 IC Rule the Department primarily issued subregulatory guidance in this area under the FLSA, it believes that its proposal to both rescind the 2021 IC Rule and replace it with detailed regulations addressing the multifactor economic reality test—in a way that more fully reflects the case law and provides the flexibility needed for application to the entire economy—would be helpful for both workers and employers. And as the 2021 IC Rule explained, workers and employers should benefit from affirmative regulatory guidance from the Department further developing the concept of economic dependence.

Accordingly, the Department is now proposing, in addition to rescinding the 2021 IC Rule, to again add part 795. Specifically, the Department proposes to modify the text of part 795 as published on January 7, 2021, at 86 FR 1246 through 1248, addressing whether workers are employees or independent contractors under the FLSA. As discussed below, the Department is not proposing the use of "core factors" but instead proposes to return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Department is further proposing to return the consideration of investment to a standalone factor, provide additional analysis of the control factor (including detailed

³ 86 FR 1168. The Office of the Federal Register did not amend the Code of Federal Regulations (CFR) to include the regulations from the 2021 IC Rule because, as explained elsewhere in this section, the Department first delayed and then withdrew the 2021 IC Rule before it became effective. A district court decision later vacated the Department's rules to delay and withdraw the 2021 IC Rule, and the Department has (since that decision) conducted enforcement in accordance with that decision.

⁴ *Id.* at 1246–47 (§ 795.105(d)).

⁵ *Id.* at 1246 (§ 795.105(c)).

⁶ *Id.* at 1247 (§ 795.105(d)(2)).

⁷ *Id.* at 1246 (§ 795.105(c)).

⁸ *Id.* at 1246–47 (§ 795.105(d)(1) and (d)(2)(iii)).

⁹ *Id.* at 1247–48 (§§ 795.110, 795.115).

¹⁰ See *Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered), and return to the longstanding interpretation of the integral factor, which considers whether the work is integral to the employer's business.

The Department recognizes that this return to a totality-of-the-circumstances analysis in which the economic reality factors are not assigned a predetermined weight and each factor is given full consideration represents a change from the 2021 IC Rule. As discussed below, however, it believes that this approach is the option that would be most beneficial for stakeholders because this proposal provides guidance that is aligned with the Department's decades-long approach (prior to the 2021 IC Rule) as well as circuit case law. The Department believes that this proposal, if finalized, will provide more consistent guidance to employers as they determine whether workers are economically dependent on the employer for work or are in business for themselves, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. Accordingly, the Department believes this proposal will help protect workers from misclassification while at the same time recognizing that independent contractors serve an important role in our economy and providing a consistent approach for those businesses that engage (or wish to engage) independent contractors.

II. Background

A. Relevant FLSA Definitions

Enacted in 1938, the FLSA generally requires that covered employers pay nonexempt employees at least the Federal minimum wage (presently \$7.25 per hour) for every hour worked,¹¹ and at least one and one-half times the employee's regular rate of pay for all hours worked beyond 40 in a workweek.¹² The FLSA also requires covered employers to "make, keep, and preserve" certain records regarding employees.¹³

The FLSA's wage and hour protections apply to employees. In relevant part, section 3(e) of the Act defines the term "employee" as "any individual employed by an employer."¹⁴ Section 3(d) defines the term "employer" to "includ[e] any person acting directly or indirectly in

the interest of an employer in relation to an employee."¹⁵ Finally, section 3(g) provides that the term "[e]mploy' includes to suffer or permit to work."¹⁶

Interpreting these provisions, the U.S. Supreme Court has stated that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame," and that "the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'" ¹⁷ In particular, the Court has noted the "striking breadth" of section 3(g)'s "suffer or permit" language, observing that it "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."¹⁸ Thus, the Court has repeatedly observed that the FLSA's scope of employment is broader than the common law standard often applied to determine employment status under other Federal laws.¹⁹

At the same time, the Supreme Court has recognized that the Act was "not intended to stamp all persons as employees."²⁰ Among other categories of workers excluded from FLSA coverage, the Court has recognized that "independent contractors" fall outside the Act's broad understanding of employment.²¹ Accordingly, the FLSA does not require covered employers to pay an independent contractor the minimum wage or overtime pay under sections 6(a) and 7(a) of the Act, or to keep records regarding an independent contractor's work under section 11(c). However, merely "putting on an 'independent contractor' label does not take [a] worker from the protection of the [FLSA]."²² Courts have thus recognized a need to delineate between employees, who fall under the

protections of the FLSA, and independent contractors, who do not.

The FLSA does not define the term "independent contractor." While it is clear that section 3(g)'s "suffer or permit" language contemplates a broader coverage of workers compared to what exists under the common law, "there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act."²³ Therefore, in articulating the distinction between FLSA-covered employees and independent contractors, courts rely on a broad, multifactor "economic reality" analysis derived from judicial precedent.²⁴ Unlike the control-focused analysis for independent contractors applied under the common law,²⁵ the economic reality test focuses more broadly on a worker's economic dependence on an employer, considering the totality of the circumstances.

B. Judicial Development of the Economic Reality Test

1. Supreme Court Development of the Economic Reality Test

In a series of cases from 1944 to 1947, the U.S. Supreme Court considered employee or independent contractor status under three different Federal statutes that were enacted during the 1930s New Deal Era—the FLSA, the National Labor Relations Act (NLRA), and the Social Security Act (SSA)—and applied an economic reality test under all three laws.

In the first of these cases, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court considered the meaning of "employee" under the NLRA, which defined the term to

²³ *Id.* at 728.

²⁴ Courts invoke the concept of "economic reality" in FLSA employment contexts beyond independent contractor status. However, as in prior rulemakings, this NPRM refers to the "economic reality" analysis or test for independent contractors as a shorthand reference to the independent contractor analysis used by courts for FLSA purposes.

²⁵ In distinguishing between employees and independent contractors under the common law, courts evaluate "the hiring party's right to control the manner and means by which the product is accomplished." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). "Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." *Id.* (footnotes omitted).

¹⁵ 29 U.S.C. 203(d).

¹⁶ 29 U.S.C. 203(g).

¹⁷ *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Hugo Black)).

¹⁸ *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992).

¹⁹ *Id.* at 326; see also, e.g., *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947) ("[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.") (citation omitted).

²⁰ *Portland Terminal*, 330 U.S. at 152.

²¹ See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (noting that "[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees").

²² *Id.*

¹¹ 29 U.S.C. 206(a).

¹² 29 U.S.C. 207(a).

¹³ 29 U.S.C. 211(c).

¹⁴ 29 U.S.C. 203(e)(1).

“include any employee.”²⁶ In relevant part, the *Hearst* Court rejected application of the common law standard,²⁷ noting that “the broad language of the [NLRA’s] definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.”²⁸

On June 16, 1947, the Supreme Court decided *United States v. Silk*, 331 U.S. 704 (1947), addressing the distinction between employees and independent contractors under the SSA. In that case, the Court favorably summarized *Hearst* as setting forth “economic reality,” as opposed to “technical concepts” of the common law standard alone, as the framework for determining workers’ classification.²⁹ But it also acknowledged that not “all who render service to an industry are employees.”³⁰ Although the Court found it to be “quite impossible to extract from the [SSA] a rule of thumb to define the limits of the employer-employee relationship,” the Court identified five factors as “important for decision”: “degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation.”³¹ The Court added that “[n]o one [factor] is controlling nor is the list complete.”³² The Court went on to note that the workers in that case were “from one standpoint an integral part of the businesses” of the employer, supporting a conclusion that some of the workers in that case were employees.³³

The same day that the Supreme Court issued its decision in *Silk*, it also issued *Rutherford Food Corp. v. McComb*, 331 U.S. 722, in which it affirmed a circuit court decision that analyzed an FLSA employment relationship based on its economic realities.³⁴ Describing the FLSA as “a part of the social legislation of the 1930s of the same general character as the [NLRA] and the [SSA],” the Court opined that “[d]ecisions that define the coverage of the employer-Employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the [FLSA].”³⁵

Accordingly, the Court rejected an approach based on “isolated factors” and again considered “the circumstances of the whole activity.”³⁶ The Court considered several of the factors that it listed in *Silk* as they related to meat boners on a slaughterhouse’s production line, ultimately determining that the boners were employees.³⁷ The Court noted, among other things, that the boners did a specialty job on the production line, had no business organization that could shift to a different slaughter-house, and were best characterized as “part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment.”³⁸

On June 23, 1947, one week after the *Silk* and *Rutherford* decisions, the Court decided *Bartels v. Birmingham*, 332 U.S. 126 (1947), another case involving employee or independent contractor status under the SSA. Here again, the Court rejected application of the common law control test, explaining that, under the SSA, employee status “was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker.”³⁹ Rather, employees under “social legislation” such as the SSA are “those who as a matter of economic reality are dependent upon the business to which they render service.”⁴⁰ Thus, in addition to control, “permanency of the relation, the skill required, the investment [in] the facilities for work and opportunities for profit or loss from the activities were also factors” to consider.⁴¹ Although the Court identified these specific factors as relevant to the analysis, it explained that “[i]t is the total situation that controls” the worker’s classification under the SSA.⁴²

Following these Supreme Court decisions, Congress responded with separate legislation to amend the NLRA and SSA’s employment definitions. First, in 1947, Congress amended the NLRA’s definition of “employee” to clarify that the term “shall not include any individual having the status of an independent contractor.”⁴³ The

following year, Congress similarly amended the SSA to exclude from employment “any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor.”⁴⁴ The Supreme Court interpreted the amendments to the NLRA as having the same effect as the explicit definition included in the SSA, which was to ensure that employment status would be determined by common law agency principles, rather than an economic reality test.⁴⁵

Despite its amendments to the NLRA and SSA in response to *Hearst* and *Silk*, Congress did not similarly amend the FLSA following the *Rutherford* decision. Thus, when the Supreme Court revisited independent contractor status under the FLSA several years later in *Goldberg v. Whitaker House Cop., Inc.*, 366 U.S. 28 (1961), the Court affirmed that “‘economic reality’ rather than ‘technical concepts’” remained “the test of employment” under the FLSA,⁴⁶ quoting from its earlier decisions in *Silk* and *Rutherford*. The Court in *Whitaker House* found that certain homeworkers were “not self-employed . . . [or] independent, selling their products on the market for whatever price they can command,” but instead were “regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.”⁴⁷ Such facts, among others, established that the homeworkers at issue were FLSA-covered employees.⁴⁸

Most recently, in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), the Court again endorsed application of the economic reality test to evaluate independent contractor status under the FLSA, citing to *Rutherford* and emphasizing the broad “suffer or permit” language codified in section 3(g) of the Act.⁴⁹

2. Application of the Economic Reality Test by Federal Courts of Appeals

Since *Rutherford*, Federal courts of appeals have applied the economic

⁴⁴ Social Security Act of 1948, Public Law 80–642, sec. 2(a), 62 Stat. 438 (1948) (codified as amended at 26 U.S.C. 3121(d)).

⁴⁵ See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (noting that “[t]he obvious purpose of” the amendment to the definition of employee under the NLRA “was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act”).

⁴⁶ 366 U.S. at 33 (quoting from *Silk*, 331 U.S. at 713, and *Rutherford*, 331 U.S. at 729).

⁴⁷ *Id.* at 32.

⁴⁸ *Id.* at 33.

⁴⁹ *Darden*, 503 U.S. at 325–26.

²⁶ 322 U.S. at 118–20; 29 U.S.C. 152(3).

²⁷ 322 U.S. at 123–25.

²⁸ *Id.* at 129.

²⁹ 331 U.S. at 712–14.

³⁰ *Id.* at 712.

³¹ *Id.* at 716.

³² *Id.*

³³ *Id.*

³⁴ 331 U.S. at 727.

³⁵ *Id.* at 723–24.

³⁶ *Id.* at 730.

³⁷ See *id.*

³⁸ *Id.* at 729–30.

³⁹ 332 U.S. at 130.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Labor Management Relations (Taft-Hartley) Act, 1947, Public Law 80–101, sec. 101, 61 Stat. 136, 137–38 (1947) (codified as amended at 29 U.S.C. 152(3)).

reality test to distinguish independent contractors from employees who are entitled to the FLSA's protections. Recognizing that the common law concept of "employee" had been rejected for FLSA purposes, courts of appeals followed the Supreme Court's instruction that "employees are those who as a matter of economic realities are dependent upon the business to which they render service."⁵⁰

When determining whether a worker is an employee under the FLSA or an independent contractor, Federal circuit courts of appeals apply an economic reality test using the factors identified in *Silk*.⁵¹ No court of appeals considers any one factor or combination of factors to predominate over the others in every case.⁵² For example, the Eleventh Circuit has explained that some of the factors "which many courts have used as guides in applying the economic reality test" are: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the worker's opportunity for profit or loss depending upon their managerial skill; (3) the worker's investment in equipment or materials required for their task, or their employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) the extent to which the service rendered is an integral part of the alleged employer's business.⁵³ Like other circuits, the

Eleventh Circuit repeats the Supreme Court's explanation from *Silk* that no one factor is controlling, nor is the list exhaustive.⁵⁴

Some courts of appeals have applied the factors with some variations. For example, the Fifth Circuit typically does not list the "integral part" factor as one of the considerations that guides the analysis.⁵⁵ Nevertheless, the Fifth Circuit, recognizing that the listed factors are not exhaustive, has considered the extent to which a worker's function is integral to a business as part of its economic realities analysis.⁵⁶ The Second and D.C. Circuits vary in that they treat the employee's opportunity for profit or loss and the employee's investment as a single factor, but they still use the same considerations as the other circuits to inform their economic realities analysis.⁵⁷

In sum, since the 1940s, Federal courts have analyzed the question of employee or independent contractor status under the FLSA by examining the economic realities of the employment relationship to determine whether the worker is economically dependent on the employer for work or is in business for himself, even if they have varied slightly in their articulations of the factors. Nevertheless, all courts have looked to the factors first articulated in *Silk* as useful guideposts while acknowledging that those factors are not exhaustive and should not be applied mechanically.⁵⁸

C. The Department's Application of the Economic Reality Test

The Department has applied a multifactor economic reality test since the Supreme Court's opinions in *Rutherford* and *Silk*. For example, on June 23, 1949, the Wage and Hour Division (WHD) issued an opinion letter distilling six "primary factors which the Court considered significant" in *Rutherford* and *Silk*: "(1) the extent to which the services in question are an integral part of the 'employer[']s' business; (2) the amount of the so-called 'contractor's' investment in facilities and equipment; (3) the nature and degree of control by the principal; (4) opportunities for profit and loss; . . . (5)

the amount of initiative judgment or foresight required for the success of the claimed independent enterprise[;] and [(6)] permanency of the relation."⁵⁹ The guidance cautioned that no single factor is controlling, and "[o]rdinarily a definite decision as to whether one is an employee or an independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal. Clearly a written contract does not always reflect the true situation."⁶⁰

Subsequent WHD opinion letters addressing employee or independent contractor status under the FLSA have provided similar recitations of the *Silk* factors, sometimes omitting one or more of the six factors described in the 1949 opinion letter,⁶¹ and sometimes adding (or substituting) a seventh factor: the worker's "degree of independent business organization and operation."⁶² Numerous opinion letters have emphasized that employment status is "not determined by the common law standards relating to master and servant,"⁶³ and that "[t]he degree of control retained by the principal has been rejected as the sole criterion to be applied."⁶⁴

In 1962, the Department revised the regulations in 29 CFR part 788,⁶⁵ which generally provides interpretive guidance on the FLSA's exemption for employees in small forestry or lumbering operations, and added a provision addressing the distinction between employees and independent contractors.⁶⁶ Citing to *Silk*, *Rutherford*, and *Bartels*, the regulation advised that "an employee, as distinguished from a person who is engaged in a business of his own, is one who 'follows the usual path of an employee' and is dependent on the business which he serves."⁶⁷ To "aid in assessing the total situation," the regulation then identified a partial list of "characteristics of the two classifications which should be considered," including "the extent to

⁵⁰ *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels*, 332 U.S. at 130).

⁵¹ See *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382–83 (3d Cir. 1985); *McFeeley v. Jackson Street Ent., LLC*, 825 F.3d 235, 241 (4th Cir. 2016); *Pilgrim Equip.*, 527 F.2d at 1311; *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019); *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987); *Walsh v. Alpha & Omega USA, Inc.*, 39 F.4th 1078, 1082 (8th Cir. 2022); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018); *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311–12 (11th Cir. 2013); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (DC Cir. 2001).

⁵² See, e.g., *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) (stating that it "is impossible to assign to each of these factors a specific and invariably applied weight") (quoting *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983) (applying economic realities test in Age Discrimination in Employment Act case)); *Martin v. Selker Bros.*, 949 F.2d 1286, 1293 (3d Cir. 1991) ("It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive."); *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor "depends on the facts of the case") (quoting *Santelices v. Cable Wiring*, 147 F. Supp. 2d 1313, 1319 (S.D. Fla. 2001)).

⁵³ *Scantland*, 721 F.3d at 1311–12.

⁵⁴ *Id.* at 1312 n.2.

⁵⁵ See *Pilgrim Equip.*, 527 F.2d at 1311.

⁵⁶ See *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020).

⁵⁷ See, e.g., *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x 74, 76 (2d Cir. 2020); *Superior Care*, 840 F.2d at 1058–59. The D.C. Circuit has adopted the Second Circuit's articulation of the factors, including treating opportunity for profit or loss and investment as one factor. See *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058–59).

⁵⁸ See, e.g., *Superior Care*, 840 F.2d at 1059.

⁵⁹ WHD Op. Ltr. (June 23, 1949).

⁶⁰ *Id.*

⁶¹ See, e.g., WHD Op. Ltr. FLSA–314 (Dec. 21, 1982) (discussing three of the *Silk* factors); WHD Op. Ltr. FLSA–164 (Jan. 18, 1990) (discussing four of the *Silk* factors).

⁶² See WHD Op. Ltr. (Oct. 12, 1965); WHD Op. Ltr. (Feb. 18, 1969).

⁶³ See, e.g., WHD Op. Ltr. (Feb. 18, 1969); WHD Op. Ltr. (Sept. 1, 1967); WHD Op. Ltr. FLSA–31 (Aug. 10, 1981); WHD Op. Ltr. (June 5, 1995).

⁶⁴ See, e.g., WHD Op. Ltr. FLSA–106 (Feb. 8, 1956); WHD Op. Ltr. (July 20, 1965); WHD Op. Ltr. FLSA–31 (Aug. 10, 1981).

⁶⁵ See 27 FR 8032.

⁶⁶ See 29 U.S.C. 213(b)(28) (previously codified at 29 U.S.C. 213(a)(15)).

⁶⁷ 27 FR 8033 (29 CFR 788.16(a)).

which the services rendered are an integral part of the principal's business; the permanency of the relationship; the opportunities for profit or loss; the initiative, judgment or foresight exercised by the one who performs the services; the amount of investment; and the degree of control which the principal has in the situation."⁶⁸ Implicitly referring to the *Bartels* decision, the regulation advised that "[t]he Court specifically rejected the degree of control retained by the principal as the sole criterion to be applied."⁶⁹

In 1972, the Department added similar guidance on independent contractor status at 29 CFR 780.330(b), in a provision addressing the employment status of sharecroppers and tenant farmers.⁷⁰ This regulation was nearly identical to the independent contractor guidance for the logging and forestry industry previously codified at 29 CFR 788.16(a), including an identical description of the same six economic reality factors.⁷¹ Both provisions—29 CFR 780.330(b) and 788.16(a)—remained unchanged until 2021.

In 1997, the Department promulgated a regulation applying a multifactor economic reality analysis for distinguishing between employees and independent contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA),⁷² which notably incorporates the FLSA's "suffer or permit" definition of employment by reference.⁷³ The regulation (which has not since been amended) advises that "[i]n determining if the farm labor contractor or worker is an employee or an independent contractor, the ultimate question is the economic reality of the relationship—whether there is economic dependence upon the agricultural employer/association or farm labor contractor, as appropriate."⁷⁴ The regulation elaborates that "[t]his determination is based upon an evaluation of all of the circumstances, including the following: (i) The nature and degree of the putative employer's control as to the manner in which the work is performed; (ii) The putative employee's opportunity for profit or loss

depending upon his/her managerial skill; (iii) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers; (iv) Whether the services rendered by the putative employee require special skill; (v) The degree of permanency and duration of the working relationship; (vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business."⁷⁵

This description of six economic reality factors was very similar to the earlier description of six economic reality factors provided in 29 CFR 780.330(b) and 788.16(a).

Also in 1997, WHD issued Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)." ⁷⁶ Like WHD opinion letters, Fact Sheet #13 advises that "an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves."⁷⁷ The fact sheet identifies the six familiar economic realities factors, as well as consideration of the worker's "degree of independent business organization and operation."⁷⁸

On July 15, 2015, WHD issued additional subregulatory guidance, 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" (AI 2015-1).⁷⁹ AI 2015-1 reiterated that the economic realities of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for him or herself. It identified six economic realities factors that followed the six factors used by most Federal courts of appeals: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skill; (3) the

extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. AI 2015-1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative. AI 2015-1 was withdrawn on June 7, 2017.⁸⁰

In 2019, WHD issued an opinion letter, FLSA2019-6, regarding whether workers who worked for companies operating self-described "virtual marketplaces" were employees covered under the FLSA or independent contractors.⁸¹ Like the Department's prior guidance, the letter stated that the determination depended on the economic realities of the relationship and that the ultimate inquiry was whether the workers depend on someone else's business or are in business for themselves.⁸² The letter identified six economic realities factors that differed slightly from the factors typically articulated by the Department previously: (1) the nature and degree of the employer's control; (2) the permanency of the worker's relationship with the employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, and foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the extent of the integration of the worker's services into the employer's business.⁸³ Opinion Letter FLSA2019-6 was withdrawn on February 19, 2021.⁸⁴

D. The Department's 2021 Independent Contractor Rule

On January 7, 2021, the Department published a final rule titled "Independent Contractor Status Under the Fair Labor Standards Act," with an effective date of March 8, 2021 (2021 IC

⁸⁰ See News Release 17-0807-NAT, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance" (June 7, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170607> (last visited June 30, 2022).

⁸¹ See WHD Op. Ltr. FLSA2019-6, 2019 WL 1977301 (Apr. 29, 2019) (withdrawn Feb. 19, 2021).

⁸² See *id.* at *3.

⁸³ See *id.* at *4. Opinion Letter FLSA2019-6's "extent of the integration" factor was a notable recharacterization of the factor traditionally considered by courts and the Department regarding the extent to which work is "an integral part" of an employer's business.

⁸⁴ See note at <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited June 30, 2022).

⁶⁸ *Id.*

⁶⁹ 27 FR 8033-34 (29 CFR 788.16(a)).

⁷⁰ See 37 FR 12084, 12102 (introducing 29 CFR 780.330(b)).

⁷¹ *Id.*

⁷² See 62 FR 11734 (amending 29 CFR 500.20(h)(4)); see also 29 U.S.C. 1861 (explicitly providing that "[t]he Secretary may issue such rules and regulations as are necessary to carry out this chapter").

⁷³ See 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under section 3(g) of the [FLSA]").

⁷⁴ 29 CFR 500.20(h)(4).

⁷⁵ *Id.*

⁷⁶ See WHD Fact Sheet #13 (1997) <https://web.archive.org/web/19970112162517/http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs13.htm>. WHD made minor revisions to Fact Sheet #13 in 2002 and 2008, before a more substantial revision in 2014. In 2018, WHD reverted back to the 2008 version of Fact Sheet #13, which remains the current version (available at <https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/whdfs13.pdf>).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ AI 2015-1 is available at 2015 WL 4449086.

Rule).⁸⁵ The 2021 IC Rule set forth regulations to be added to a new part (part 795) in title 29 of the Code of Federal Regulations titled “Employee or Independent Contractor Classification under the Fair Labor Standards Act,” providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.⁸⁶ The 2021 IC Rule also addressed the Department’s prior interpretations of independent contractor status in 29 CFR 780.330(b) and 788.16(a)—both of which applied to specific industries—by cross-referencing part 795.⁸⁷

The Department explained that the purpose of the 2021 IC Rule was to establish a “streamlined” economic reality test that improved on prior articulations described as “unclear and unwieldy.”⁸⁸ It stated that the existing economic reality test applied by the Department and courts suffered from confusion regarding the meaning of “economic dependence” because the concept is “underdeveloped,” a lack of focus in the multifactor balancing test, and confusion and inefficiency caused by overlap between the factors.⁸⁹ The 2021 IC Rule asserted that shortcomings and misconceptions associated with the economic reality test were more apparent in the modern economy and that additional clarity would promote innovation in work arrangements.⁹⁰

The 2021 IC Rule explained that independent contractors are not employees under the FLSA and are therefore not subject to the Act’s minimum wage, overtime pay, or recordkeeping requirements.⁹¹ It adopted an economic reality test under which a worker is an employee of an employer if that worker is economically dependent on the employer for work.⁹² By contrast, the worker is an independent contractor if the worker is in business for themself.

The 2021 IC Rule identified five economic realities factors to guide the inquiry into a worker’s status as an employee or independent contractor,⁹³ while acknowledging that the factors are not exhaustive, no one factor is dispositive, and additional factors may

be considered if they “in some way indicate whether the [worker] is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.”⁹⁴ But in contrast to prior guidance and contrary to case law, the 2021 IC Rule designated two of the five factors—the nature and degree of control over the work and the worker’s opportunity for profit or loss—as “core factors” that should carry greater weight in the analysis. Citing the need for greater certainty and predictability in the economic reality test, and in an effort to sharpen the concept of economic dependence, the 2021 IC Rule determined that these two factors were more probative of economic dependence than the other economic realities factors. If both of those core factors indicate the same classification, as either an employee or an independent contractor, the 2021 IC Rule stated that there is a “substantial likelihood” that the indicated classification is the worker’s correct classification.⁹⁵

The 2021 IC Rule’s first core factor is the nature and degree of control over the work, which indicates independent contractor status to the extent that the worker exercised substantial control over key aspects of the performance of the work, such as by setting their own schedule, by selecting their projects, and/or through the ability to work for others, which might include the potential employer’s competitors.⁹⁶ The 2021 IC Rule provides that requiring the worker to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control.⁹⁷

The 2021 IC Rule’s second core factor is the worker’s opportunity for profit or loss.⁹⁸ The Rule states that this factor indicates independent contractor status to the extent the worker has an opportunity to earn profits or incur losses based on either (1) their exercise of initiative (such as managerial skill or business acumen or judgment) or (2) their management of investment in or capital expenditure on, for example, helpers or equipment or material to further the work.⁹⁹ While the effects of

the worker’s exercise of initiative and management of investment are both considered under this factor, the worker does not need to have an opportunity for profit or loss based on both initiative and management of investment for this factor to weigh towards the worker being an independent contractor.¹⁰⁰ This factor indicates employment status to the extent that the worker is unable to affect his or her earnings or is only able to do so by working more hours or faster.¹⁰¹

The 2021 IC Rule also identified three other non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production (which it cautioned is “different from the concept of the importance or centrality of the individual’s work to the potential employer’s business”).¹⁰² The 2021 IC Rule provided that these other factors are “less probative and, in some cases, may not be probative at all” of economic dependence and are “highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.”¹⁰³

The 2021 IC Rule also stated that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible,¹⁰⁴ and provided five “illustrative examples” demonstrating how the analysis would apply in particular factual circumstances.¹⁰⁵ Finally, the 2021 IC Rule rescinded any “prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under the FLSA” to the extent that such items “are inconsistent or in conflict with the interpretations stated in this part,”¹⁰⁶ and explained that the 2021 IC Rule would guide WHD’s enforcement of the FLSA.¹⁰⁷

On January 19, 2021, WHD issued Opinion Letters FLSA2021–8 and FLSA2021–9 applying the Rule’s analysis to specific factual scenarios. WHD subsequently withdrew those opinion letters on January 26, 2021, explaining that the letters were issued

⁸⁵ See 86 FR 1168. The Department initially published a notice of proposed rulemaking (NPRM) soliciting public comment on September 25, 2020. See 85 FR 60600. The final rule adopted “the interpretive guidance set forth in the [NPRM] largely as proposed.” 86 FR 1168.

⁸⁶ 86 FR 1246–48.

⁸⁷ *Id.* at 1246.

⁸⁸ *Id.* at 1172, 1240.

⁸⁹ *Id.* at 1172–75.

⁹⁰ *Id.* at 1175.

⁹¹ *Id.* at 1246 (§ 795.105(a)).

⁹² *Id.* at 1168, 1246 (§ 795.105(b)).

⁹³ *Id.* at 1246 (§ 795.105(c)).

⁹⁴ *Id.* at 1246–47 (§ 795.105(c) and (d)(2)(iv)).

⁹⁵ *Id.* at 1246 (§ 795.105(c)).

⁹⁶ *Id.* at 1246–47 (§ 795.105(d)(1)(i)).

⁹⁷ *Id.* at 1247 (§ 795.105(d)(i)).

⁹⁸ *Id.* (§ 795.105(d)(1)(ii)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* (§ 795.105(d)(2)).

¹⁰³ *Id.* at 1246 (§ 795.105(c)).

¹⁰⁴ *Id.* at 1247 (§ 795.110).

¹⁰⁵ *Id.* at 1247–48 (§ 795.115).

¹⁰⁶ *Id.* at 1246 (§ 795.100).

¹⁰⁷ *Id.*

prematurely because they were based on a rule that had yet to take effect.¹⁰⁸

E. Delay and Withdrawal of the 2021 Independent Contractor Rule

On February 5, 2021, the Department published a proposal to delay the 2021 IC Rule's effective date until May 7, 2021—60 days after the Rule's original March 8, 2001, effective date.¹⁰⁹ On March 4, 2021, after considering the approximately 1,500 comments received in response to that proposal, the Department published a final rule delaying the effective date of the 2021 IC Rule as proposed (“Delay Rule”).¹¹⁰

On March 12, 2021, the Department published a notice of proposed rulemaking (NPRM) proposing to withdraw the 2021 IC Rule.¹¹¹ On May 5, 2021, after reviewing approximately 1,000 comments submitted in response to the NPRM, the Department announced a final rule withdrawing the 2021 IC Rule (“Withdrawal Rule”).¹¹² In explaining its decision to withdraw the 2021 IC Rule, the Department stated that the Rule was inconsistent with the FLSA's text and purpose and would have had a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent.¹¹³ The Withdrawal Rule stated that it took effect immediately upon its publication in the **Federal Register** on May 6, 2021.¹¹⁴

F. Litigation Over the 2021 Independent Contractor Rule

On March 14, 2022, in a lawsuit challenging the Department's Delay and Withdrawal Rules under the Administrative Procedure Act (APA), a district court in the Eastern District of Texas issued a decision vacating the Department's Delay and Withdrawal Rules.¹¹⁵ While acknowledging that the Department engaged in separate notice-and-comment rulemakings in promulgating both of these rules, the district court concluded that the Department “failed to provide a meaningful opportunity for comment in promulgating the Delay Rule,”¹¹⁶ failed

to show “good cause for making the [Delay Rule] effective immediately upon publication,”¹¹⁷ and acted in an arbitrary and capricious manner in its Withdrawal Rule by “fail[ing] to consider potential alternatives to rescinding the Independent Contractor Rule.”¹¹⁸ Accordingly, the district court vacated the Delay and Withdrawal Rules and concluded that the 2021 IC Rule “became effective as of March 8, 2021, the rule's original effective date, and remains in effect.”¹¹⁹ The district court's ruling did not address the validity of the 2021 IC Rule; rather, the case was focused solely on the validity of the Delay and Withdrawal Rules.

The Department filed a notice of appeal of the district court's decision.¹²⁰ In response to a request by the Department informing the court of this rulemaking, the Fifth Circuit Court of Appeals entered an order staying the appeal until December 7, 2022 (subject to considering a further stay at that time).

III. Need for Rulemaking

The Department recognizes that independent contractors and small businesses play an important role in our economy. It is fundamental to the Department's obligation to administer and enforce the FLSA, however, that workers who should be covered under the Act are able to receive its protections, as the misclassification of employees as independent contractors remains one of the most serious problems facing workers, businesses, and the broader economy. In the FLSA context, misclassified workers are denied basic workplace protections including rights to minimum wage and overtime pay.¹²¹ Meanwhile, employers that comply with the law are placed at a competitive disadvantage compared to other businesses that misclassify employees, contravening the FLSA's goal of eliminating “unfair method[s] of competition in commerce.”¹²²

failing to consider comments beyond its proposal to delay the 2021 IC Rule's effective date. *Id.* at *7–10.

¹¹⁷ *Id.* at *11.

¹¹⁸ *Id.* at *13.

¹¹⁹ *Id.* at *20.

¹²⁰ See Fifth Circuit No. 22–40316 (appeal filed, May 13, 2022).

¹²¹ Workers who are employees under the FLSA but are misclassified as independent contractors remain legally entitled to the Act's wage and hour protections and are protected from retaliation for attempting to assert their rights under the Act. See 29 U.S.C. 215(a)(3). However, many misclassified employees may not be aware that such rights and protections apply to them or face obstacles when asserting those rights.

¹²² 29 U.S.C. 202(a)(3); see also *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) (noting that the misclassification of

After further consideration, the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by the courts. The Department believes that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. While the 2021 IC Rule recognized the need to further develop the concept of economic dependence, the rule includes provisions that are in tension with this longstanding case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. These provisions narrow the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themselves.

The 2021 IC Rule's elevation of certain factors and its preclusion of consideration of relevant facts under several factors may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. Elevating certain factors and precluding consideration of relevant facts may increase the risk of misclassification of employees as independent contractors. The 2021 IC Rule did not address the potential risks to workers of such misclassification.

Therefore, in light of the vacatur of the Withdrawal Rule, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. While prior to the 2021 IC Rule the Department primarily issued subregulatory guidance in this area, as explained in greater detail below, it believes that rescinding the 2021 IC

employees “affect[s] many more people than those workers directly at issue . . . [because it] exert[s] a general downward pressure on wages in competing businesses”).

¹⁰⁸ See <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited June 30, 2022), noting the withdrawal of Opinion Letters FLSA2021–8 and FLSA2021–9.

¹⁰⁹ 86 FR 8326.

¹¹⁰ *Id.* at 12535.

¹¹¹ *Id.* at 14027.

¹¹² *Id.* at 24303.

¹¹³ *Id.* at 24307.

¹¹⁴ *Id.* at 24320.

¹¹⁵ *Coalition for Workforce Innovation*, 2022 WL 1073346.

¹¹⁶ *Id.* at *9. The court specifically faulted the Department's use of a shortened 19-day comment period in its proposal to delay of the 2021 IC Rule's original effective date (instead of 30 days), and for

Rule and replacing it with detailed regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—would be helpful for both workers and employers. The Department further believes that this proposal will protect workers from misclassification while at the same time providing a consistent approach for those businesses that engage (or wish to engage) with properly classified independent contractors, who the Department recognizes play an important role in the economy.

As noted in the 2021 IC Rule, the Department “without question has relevant expertise in the area of what constitutes an employment relationship under the FLSA, given its responsibility for administering and enforcing the Act and its decades of experience doing so.”¹²³ The Department continues to believe, as it stated in the 2021 IC Rule, that “a clear explanation of the test for whether a worker is an employee under the FLSA or an independent contractor not entitled to the protections of the Act in easily accessible regulatory text is valuable to potential employers, to workers, and to other stakeholders.”¹²⁴ Upon further consideration, however, the Department believes that the most valuable approach for stakeholders would be an accessible regulation that is more consistent with case law. As the 2021 IC Rule noted, rulemaking regarding employee or independent contractor status can have “great value regardless of what deference courts ultimately give to it.”¹²⁵ The Department also believes, however, that this proposal is more likely to have such value because it is better aligned with judicial precedent and longstanding principles used by circuit courts and the Department.

The Department acknowledges that it is changing the approach taken in the 2021 IC Rule, and that this warrants further discussion of the rationale used in that rule and why the Department has carefully reconsidered that reasoning and determined that modifications are necessary.¹²⁶ As noted above, the Department identified in the 2021 IC Rule four reasons underlying the need to promulgate the rule: (1) confusion regarding the meaning of “economic dependence” because the concept is “underdeveloped”; (2) lack of focus in the multifactor balancing test; (3)

confusion and inefficiency due to overlapping factors; and (4) the shortcomings of the economic reality test that are more apparent in the modern economy.¹²⁷ Moreover, the Department suggested as a fifth reason for the 2021 IC Rule that legal uncertainty based on the concerns identified with the economic reality test hindered innovation in work arrangements.¹²⁸ The Department believes that this proposed rule’s approach offers a better framework for understanding and applying the concept of economic dependence by explaining how the touchstone of whether an individual is in business for themselves is analyzed within each of the six economic realities factors. The proposal’s discussion of how courts and the Department’s previous guidance apply the factors brings the multifactor test into focus, reduces confusion as to the overlapping factors, and provides a better basis for understanding how the test has the flexibility to be applied to changes in the modern economy, such that the Department no longer views the concerns articulated in the 2021 IC Rule as impediments to using the economic reality test formulated by the courts and the Department’s longstanding guidance.

The Department continues to believe that the concept of economic dependence is underdeveloped in the case law. As noted in the 2021 IC Rule, a minority of courts have applied a “dependence-for-income” approach that considers whether the worker has other sources of income or wealth or is financially dependent on the employer instead of a “dependence-for-work” approach used by the majority of courts and the Department that appropriately considers whether the worker is dependent on the employer for work or depends on the worker’s own business for work.¹²⁹ The Department is therefore proposing to continue to include its interpretation, as it did in the 2021 IC Rule, that economic dependence is the ultimate inquiry, and that an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work—not for income.¹³⁰

¹²⁷ 86 FR 1172–75.

¹²⁸ *Id.* at 1175.

¹²⁹ *See id.* at 1172–73.

¹³⁰ *See id.* at 1246 (§ 795.105(b) (“An employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work.”)); *see also infra* section V.B.; proposed § 795.105(b) (“An ‘employee’ under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. . . . [This is] meant to encompass as employees all workers who, as a matter of economic reality, are

Rather than give primacy to only two factors as indicators of economic dependence, upon further consideration, the Department believes that developing the concept of economic dependence is better accomplished by, in addition to elaborating on the general meaning of economic dependence, sharpening the focus of each of the six factors’ probative value as to the distinction between economic dependence on the employer for work and being in business for oneself. By focusing on that distinction in its discussion of each factor, this proposal would provide the further development of the concept of economic dependence that the 2021 IC Rule indicated would be welcomed by workers and employers, but would do so in a way that is generally consistent with case law and the Department’s prior guidance.

To address what the Department viewed as a “lack of focus in the multifactor balancing test” that led to uncertainty as to how a court would balance the factors and which would be deemed more probative, the 2021 IC Rule identified two factors as more probative than the others.¹³¹ The Department now finds that giving extra weight to two factors cannot be harmonized with decades of case law and guidance from the Department explaining that the economic reality test is a multifactor test in which no one factor or set of factors automatically carries more weight and that all relevant factors must be considered. Regardless of the rationale for elevating two factors, there is no legal support for doing so.¹³² Moreover, elevating certain factors in such a predetermined fashion overlooks that each factor can be probative of the distinction between a worker who is economically dependent on the employer for work and a worker who is in business for themselves. Thus, the Department believes that refining the factors with this distinction in mind and consistent with case law is a better approach to giving the multifactor test more focus than the novel approach of elevating two factors.

The Department believes upon further consideration that any purported “confusion and inefficiency due to overlapping factors” was overstated in the 2021 IC Rule and that, in any event, when each factor is viewed under the framework of whether the worker is economically dependent or in business

economically dependent on an employer for work. . . . Economic dependence does not focus on the amount of income earned, or whether the worker has other income streams.”)

¹³¹ 86 FR 1173.

¹³² *See infra* section III.A.

¹²³ 86 FR 1176 (internal citations omitted).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

for themselves, the rationale for considering facts under more than one factor is clearer. The Department explains in more detail below why considering certain facts under more than one factor is consistent with the totality-of-the-circumstances approach of the economic realities analysis used by courts. And the Department provides guidance below regarding how to consider certain facts, such as the ability to work for others and whether the working relationship is exclusive, under more than one factor. The Department believes that this flexible approach is supported by the case law and preferable to rigidly and artificially limiting facts to only one factor, as the 2021 IC Rule did. Finally, in the 2021 IC Rule, the Department stated that “technological and social changes have made shortcomings of the economic realities test more apparent in the modern economy,” thus justifying the 2021 IC Rule’s characterization of the integral, investment, and permanence factors as less important in determining a worker’s classification.¹³³ However, upon further consideration, the Department believes that the multifactor economic reality test relied on by courts where no one factor or set of factors is presumed to carry more weight remains a helpful tool when evaluating modern work arrangements. The test’s vitality is confirmed by its application over seven decades that have seen monumental shifts in the economy. Modern work arrangements utilizing applications or other technology must be addressed, but the underlying economic reality test, which considers the totality of the circumstances in each working arrangement, offers the most flexible, comprehensive, and appropriately nuanced approach which can be adapted to disparate industries and occupations. It can also encompass continued social changes because it does not presume which aspects of the work relationship are most probative or relevant and leaves open the possibility that changed circumstances may make certain factors more important in certain cases or future scenarios.

A. The 2021 IC Rule’s Test Is Not Supported by Judicial Precedent or the Department’s Historical Position and Is Not Fully Aligned With the Act’s Text as Interpreted by the Courts

Among other reasons the Department is proposing to rescind and replace the 2021 IC Rule, the Department does not believe that the Rule is fully aligned with the FLSA’s text as interpreted by the courts or the Department’s

longstanding analysis, as well as decades of case law describing and applying the multifactor economic reality test.

1. The 2021 IC Rule’s Elevation of Control and Opportunity for Profit or Loss as the “Most Probative” Factors in Determining Employee Status Under the FLSA

The 2021 IC Rule set forth a new articulation of the economic reality test, elevating two factors (control and opportunity for profit or loss) as “core” factors above other factors, asserting that the two core factors have “greater probative value” in determining a worker’s economic dependence.¹³⁴ Notably, the 2021 IC Rule further provides that if both core factors point towards the same classification—either employee or independent contractor—then there is a “substantial likelihood” that this is the worker’s correct classification.¹³⁵ Although it identifies three other factors as additional guideposts and acknowledges that additional factors may be considered, it makes clear that non-core factors “are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.”¹³⁶ In justifying this stratified analysis, the 2021 IC Rule disagreed that, as a general matter, the economic reality test “requires factors to be unweighted or weighted equally,”¹³⁷ asserting that “[t]he Department’s review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so.”¹³⁸

Upon further review of judicial precedent, the Department is not aware of any court that has, as a general and fixed rule, elevated any one economic reality factor or subset of factors above others, and there is no statutory basis for such a predetermined weighting of the factors. To the contrary, the Supreme Court has emphasized that employment status under the economic reality test turns upon “the circumstances of the whole activity,” rather than “isolated factors.”¹³⁹ Federal appellate courts

have repeatedly cautioned against a mechanical or formulaic application of the economic reality test,¹⁴⁰ and specifically warn that it “‘is impossible to assign to each of these factors a specific and invariably applied weight.’”¹⁴¹ The 2021 IC Rule’s elevation of two “core factors” is also in tension with the position, expressed by the Supreme Court and Federal courts of appeals, that no single factor in the analysis is dispositive.¹⁴² Thus, the Department recognizes that the 2021 IC Rule’s predetermined and mechanical weighting of factors is not consistent with how courts have, for decades, applied the economic reality analysis.¹⁴³

As explained in the Withdrawal Rule, the Department believes that the review of appellate cases¹⁴⁴ relied on to support the 2021 IC Rule’s creation of “core factors” is not complete and makes assumptions about the reasoning behind the courts’ decisions that are not clear from the decisions themselves.¹⁴⁵ For example, the 2021 IC Rule’s discussion of the case law review did not provide full documentation or citations, did not make clear what the scope of the review entailed (e.g.,

employee relationship” and determining employment status based on “the total situation”).

¹⁴⁰ See, e.g., *Superior Care*, 840 F.2d at 1059 (“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.”).

¹⁴¹ *Parrish*, 917 F.3d at 380 (quoting *Hickey*, 699 F.2d at 752); see also *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor “depends on the facts of the case” (quoting *Santelices*, 147 F. Supp. 2d at 1319)).

¹⁴² See, e.g., *Silk*, 331 U.S. at 716 (explaining that “[n]o one [factor] is controlling” in the economic realities test); *Selker Bros.*, 949 F.2d at 1293 (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.”); *Morrison*, 253 F.3d at 11 (“No one factor standing alone is dispositive and courts are directed to look at the totality of the circumstances and consider any relevant evidence.”); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (“It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances.”); *Lauritzen*, 835 F.2d at 1534 (“Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.”).

¹⁴³ See *McFeeley*, 825 F.3d at 241 (“While a six-factor test may lack the virtue of providing definitive guidance to those affected, it allows for flexible application to the myriad different working relationships that exist in the national economy. In other words, the court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case.”).

¹⁴⁴ The 2021 IC Rule references on several occasions a review of appellate case law since 1975 to justify its elevation of two “core” factors. 86 FR 1196, 1198, 1202, 1240.

¹⁴⁵ See 86 FR 24309–10.

¹³⁴ 86 FR 1246 (§ 795.105(c) and (d)).

¹³⁵ *Id.* (§ 795.105(c)); see also *id.* at 1201 (advising that other factors would only outweigh the two core factors “in rare cases”).

¹³⁶ *Id.* at 1246 (§ 795.105(c)).

¹³⁷ *Id.* at 1197.

¹³⁸ *Id.* at 1198.

¹³⁹ *Rutherford*, 331 U.S. at 730; see also *Silk*, 331 U.S. at 716, 719 (denying the existence of “a rule of thumb to define the limits of the employer-

¹³³ 86 FR 1175.

whether it included only published circuit court decisions or all cases, whether it included cases that were simply remanded to the district court for any reason, etc.), and oversimplified the analysis provided by the courts because court decisions regarding classification under the FLSA generally emphasize the fact-specific nature of the totality-of-circumstances analysis. Mechanically deconstructing court decisions and considering what courts have said about only two factors—even when courts did present their analyses in this manner—ignores the broader approach that most courts have taken in determining worker classification.

In fact, many decisions explicitly deny assigning any predetermined weight to these factors, but instead state that they considered the factors as part of an analysis of the whole activity.¹⁴⁶ While there are many cases in which the classification decision made by the court aligns with the classification indicated by the control and opportunity for profit or loss factors, the 2021 IC Rule did not identify any cases stating that those two factors are “more probative” of a worker’s classification than other factors. Moreover, the 2021 IC Rule concedes that there are cases in which the classification suggested by the control factor did not align with the worker’s classification as determined by the courts.¹⁴⁷ It is necessarily the case that if any two factors of a multifactor balancing test point toward the same outcome, then that outcome becomes increasingly likely to be the ultimate outcome. However, the 2021 IC Rule did not address whether a different combination of factors would yield similar results. Particularly when viewed in the context of repeated statements from the courts that no one factor in the economic reality test is dispositive, the selective reading of an undefined set of cases to support the opposite conclusion is not persuasive.

In any event, the 2021 IC Rule significantly altered both these factors, changing what may be considered for each. For example, contrary to the approach taken by most courts, the 2021 IC Rule downplays the employer’s right to control the work and recasts the opportunity for profit or loss factor as indicating independent contractor status based on the worker’s initiative or investment. Thus, irrespective of whether control and opportunity for profit or loss were more frequently aligned with the ultimate result in prior appellate cases, the new framing of these factors, as redefined in the 2021 IC

Rule, sets forth a new standard for analysis without precedent.

Finally, the Department has concerns that prioritizing two “core factors” over other factors may not fully account for the Act’s broad definition of “employ,” as interpreted by the courts. For example, if facts relevant to the control and opportunity for profit or loss factors both point to independent contractor status for a particular worker but weakly so, those factors should not be presumed to carry more weight than stronger factual findings under other factors (e.g., the existence of a lengthy working relationship under the “permanence” factor and the performance of work that does not require specialized skills). Courts and the Department may focus on some relevant factors more than others when analyzing a particular set of facts and circumstances, but that does not mean that it is possible or permissible to derive from these fact-driven decisions universal rules regarding which factors deserve more weight than the others when the courts themselves have not set forth any such universal rules despite decades of opportunity. Numerous commenters responding to the Department’s proposed withdrawal of the 2021 IC Rule voiced similar concerns.¹⁴⁸

In sum, the Department believes that the 2021 IC Rule’s elevation of the control and opportunity for profit or loss factors is in tension with the language of the Act as well as the position, expressed by the Supreme Court and in appellate cases from across the circuits, that no single factor is determinative in the analysis of whether a worker is an employee or an independent contractor and does not better determine who is in fact economically dependent on their employer for work as opposed to being in business for themselves.

2. The Role of Control in the 2021 IC Rule’s Analysis

As explained above, the 2021 IC Rule identifies “the nature and degree of control over the work” as one of two core factors given “greater weight” in the independent contractor analysis.¹⁴⁹ The 2021 IC Rule addressed and rejected comments which opined that focusing the analysis on two core factors—one of which would be control—would narrow the analysis to a common law control test.¹⁵⁰

Although the 2021 IC Rule’s standard for determining who is an employee and

who is an independent contractor is not the same as the common law control analysis, the Department continues to believe, as expressed in the Withdrawal Rule, that elevating the importance of control in every FLSA employee or independent contractor analysis brings the Rule closer to the common law control test that courts have rejected when interpreting the Act. As previously noted, section 3(g) of the FLSA expansively defines the term “employ” to include “to suffer or permit to work.”¹⁵¹ The Supreme Court has repeatedly stated that this provision establishes a broader scope of employment for FLSA purposes than under a common law (*i.e.*, agency) analysis focused on control.¹⁵² In light of this directive, the Department remains concerned that the outsized role of control under the 2021 IC Rule’s analysis is contrary to the Act’s text and case law interpreting the Act’s definitions of employment.

3. The 2021 IC Rule Improperly Altered Several Factors by Precluding the Consideration of Relevant Facts

As previously discussed in the Withdrawal Rule, the Department remains concerned that the 2021 IC Rule’s preclusion of certain factors from being considered under the factors improperly narrows the economic reality test and does not allow for a full consideration of all facts which might be relevant to determining whether a worker is economically dependent upon an employer for work or in business for themselves. Examples include: (1) advising that “control” indicative of an employment relationship must involve an employer’s “substantial control over key aspects of the performance of the work,” excluding requirements “to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms;”¹⁵³ (2) making the “opportunity for profit or loss” factor indicate independent contractor status based on the worker’s initiative or investment (not both);¹⁵⁴ (3) disregarding the employer’s investments;¹⁵⁵ (4) disregarding the importance or

¹⁵¹ 29 U.S.C. 203(g).

¹⁵² See *Darden*, 503 U.S. at 324–26; *Portland Terminal*, 330 U.S. at 150–51; and *Rutherford*, 331 U.S. at 728.

¹⁵³ 86 FR 1246–47 (§ 795.105(d)(1)(i)).

¹⁵⁴ *Id.* at 1247 (§ 795.105(d)(1)(ii)).

¹⁵⁵ *Id.*; see also *id.* at 1188 (“[T]he Department reaffirms its position that comparing the individual worker’s investment to the potential employer’s investment should not be part of the analysis of investment.”).

¹⁴⁶ See *supra* nn. 139–142.

¹⁴⁷ See 86 FR 1197 n.45.

¹⁴⁸ *Id.* at 24307–11.

¹⁴⁹ *Id.* at 1246–47 (§ 795.105(c), (d)).

¹⁵⁰ *Id.* at 1200–01.

centrality of a worker's work to the employer's business;¹⁵⁶ and (5) downplaying the employer's reserved right or authority to control the worker.¹⁵⁷ In each of these ways—as explained in greater detail below—the 2021 IC Rule limits the scope of facts and considerations comprising the analysis of whether the worker is an employee or independent contractor.

As further explained below, the 2021 IC Rule's narrowing of certain economic realities factors by precluding consideration of certain facts provides another justification for the Rule's rescission and replacement.

B. Confusion and Uncertainty Introduced by the 2021 IC Rule

One of the 2021 IC Rule's primary goals was to “significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act.”¹⁵⁸ Although the stated intent was to provide clarity, it has introduced several concepts to the analysis that neither courts nor the Department have previously applied, as discussed above.¹⁵⁹ This rulemaking arises in part from a concern that these changes will not provide clarity because of the inconsistency with circuit court case law, and that the conflict between the 2021 IC Rule's analysis and circuit precedent will inevitably lead to greater uncertainty as well as lead to inconsistent outcomes, rather than increase clarity or certainty.

As a threshold matter, because the 2021 IC Rule departed from courts' longstanding precedent, if left in place, it is not clear whether courts would adopt its analysis—a question that could take years of appellate litigation in different Federal circuits to sort out. If some courts try to reconcile the 2021 IC Rule's analysis with their precedent and the statute and some courts do not, it will create conflicts among courts and between courts and the Department, resulting in more uncertainty as to the

applicable economic reality test. Businesses operating nationwide will have had to familiarize themselves with multiple standards for determining who is an employee under the FLSA across different jurisdictions.¹⁶⁰

In addition to uncertainty resulting from the 2021 IC Rule's reception by courts, the Rule introduces several ambiguous terms and concepts into the analysis for determining whether a worker is an employee under the FLSA or an independent contractor. For example, courts and regulated parties now must grapple with what it means in practice for two factors to be “core” factors and entitled to greater weight. In addition, they must determine, in cases where the two “core” factors point to the same classification, how “substantial” the likelihood is that they point toward the correct classification if the additional factors point toward the other classification. Additionally, the 2021 IC Rule cautions that its list of factors is “not exhaustive,”¹⁶¹ but does not specify whether the “additional factors” referenced in § 795.105(d)(2)(iv) have less probative value (or weight) than the three “other factors” listed in § 795.105(d)(2)(i) through (iii).¹⁶² Assuming that they do, the 2021 IC Rule has essentially transformed the analysis that courts and the Department have previously applied into a three-tiered multifactor balancing test, with “core” factors given more weight than enumerated “other” factors, and enumerated “other” factors given more weight than unspecified “additional” factors. Rather than weighing all factors against each other depending on the facts of a particular work arrangement, courts and the regulated community must evaluate factors within and across groups in a new hierarchical structure, which will likely cause confusion and inconsistency. Adding to the confusion, the Rule improperly collapses some factors into each other, so that investment and initiative are only considered as a part of the opportunity for profit or loss factor, requiring courts and the regulated community to reconsider how they have long applied those factors.¹⁶³

The Department believes that the 2021 IC Rule has complicated rather than simplified the analysis for determining whether a worker is an

employee or independent contractor under the FLSA and does not provide clarity behind the meaning of economic dependence or reduce confusion.¹⁶⁴ For the reasons explained above, the Department believes that the 2021 IC Rule has introduced substantial confusion and uncertainty on the topic of independent contractor status, to the detriment of workers and businesses alike.

C. Risks to Workers From the 2021 IC Rule

As part of its regulatory impact analysis, the 2021 IC Rule quantified some possible costs (regulatory familiarization) and some possible cost savings (increased clarity and reduced litigation).¹⁶⁵ It identified and discussed—but did not quantify—numerous other costs, transfers, and benefits possibly resulting from the 2021 IC Rule, including “possible transfers among workers and between workers and businesses.”¹⁶⁶ The 2021 IC Rule “acknowledge[d] that there may be transfers between employers and employees, and some of those transfers may come about as a result of changes in earnings,” but determined that these transfers cannot “be quantified with a reasonable degree of certainty for purposes of [the Rule].”¹⁶⁷ The 2021 IC Rule concluded that “workers as a whole will benefit from [the Rule], both from increased labor force participation as a result of the enhanced certainty provided by [the Rule], and from the substantial other benefits detailed [in the Rule].”¹⁶⁸

The preliminary regulatory impact analysis for this proposed rule is provided below in section VII. As a general matter, the Department notes here that it does not believe that the 2021 IC Rule fully considered the likely costs, transfers, and benefits that could result from the Rule. This concern is premised in part on WHD's role as the agency responsible for enforcing the FLSA and its experience with cases involving the misclassification of employees as independent contractors.

¹⁶⁴ The 2021 IC Rule includes several important principles from the case law, such as that economic dependence is the ultimate inquiry, that the list of economic reality factors is not exhaustive and that no single factor is determinative—principles that the Department continues to agree with and has included in this NPRM. The 2021 IC Rule, however, also incorporates provisions that are in tension with these well-established judicial principles, such as the predetermined elevating of two factors. The Department is also concerned with this internal inconsistency in the 2021 IC Rule.

¹⁶⁵ 86 FR 1211.

¹⁶⁶ *Id.* at 1214–16.

¹⁶⁷ *Id.* at 1223.

¹⁶⁸ *Id.*

¹⁵⁶ *Id.* at 1247 (§ 795.105(d)(2)(iii)); *see also id.* at 1248 (noting through an example in § 795.115(b)(6)(ii) that “[i]t is not relevant . . . that the writing of articles is an important part of producing newspapers”); *accord id.* at 1195 (responding to commenters regarding the Department's decision to shift to an “integrated unit of production” analysis).

¹⁵⁷ *See id.* at 1246–47 (advising, in § 795.105(d)(1)(i), that the control factor indicates employment status if a potential employer “exercises substantial control over key aspects of the performance of the work”) (emphasis added); *id.* at 1247 (advising, in § 795.110, that “a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority”); *see also id.* at 1203–04 (same in response to commenters).

¹⁵⁸ *Id.* at 1168.

¹⁵⁹ *See supra* section III.A.

¹⁶⁰ *See, e.g.*, 86 FR 1241 n.255 (noting, while rejecting the “ABC” test for worker classification, that companies operating “nationwide businesses[] are likely to comply with the most demanding standard if they wish to make consistent classification determinations”).

¹⁶¹ *Id.* at 1246 (§ 795.105(c)).

¹⁶² *Id.* at 1247.

¹⁶³ *Id.* (§ 795.105(d)(1)(ii)).

The consequence for a worker of being misclassified as an independent contractor is that the worker is excluded from the protections of the FLSA to which they are entitled. These protections include being paid at least the Federal minimum wage for all hours worked, overtime compensation for hours worked over 40 in a workweek, and protection against retaliation for complaining about, for example, a violation of the FLSA. The Department concludes that, to the extent the 2021 IC Rule results in the reclassification or misclassification of employees as independent contractors, the resulting denial of FLSA protections would harm the affected workers. To the extent that women and people of color are overrepresented in low-wage positions where misclassification as independent contractors is more likely, this result could have a disproportionate impact on these workers. In comments on the Withdrawal Rule, several commenters cited a study finding that seven of the eight occupations with the highest rate of misclassification were held disproportionately by women and/or workers of color, asserting that “misclassification is rampant in low-wage, labor-intensive industries where women and people of color, including Black, Latinx, and AAPI workers, are overrepresented.”¹⁶⁹ These workers already experience multiple types of economic inequities in the labor force, including gender and racial wage gaps and occupational segregation. When comparing the median wages of women who worked full-time, year-round to the wages of men who worked full-time, year-round, women were paid 83 cents to every dollar paid to men.¹⁷⁰ For women of color, this wage gap is even greater—Black women were paid 64%, and Hispanic women (of any race) were paid 57% of what white non-Hispanic men were paid. The misclassification of these workers as independent contractors deprives them of the minimum wage and overtime protections that could help alleviate some of this inequality.

In sum, the Department’s proposal to rescind and replace the 2021 IC Rule is motivated, in part, by an assessment that doing so will benefit workers as a whole, including those workers at risk of being misclassified as independent contractors as well as those who are

appropriately classified as independent contractors.

D. The Benefits of Replacing the Part 795 Regulations on Employee or Independent Contractor Status

In its rulemaking last year to withdraw the 2021 IC Rule, the Department declined to propose alternative regulations.¹⁷¹ The Department had not previously promulgated generally applicable regulations on independent contractor classification in the FLSA’s 83 years of existence.¹⁷² Particularly in light of the consistency of the economic reality test as adopted by the circuits, the Department had for decades relied on subregulatory documents to provide generally applicable guidance for the Department and the regulated community on determining employee or independent contractor status under the FLSA.¹⁷³

In its decision invalidating the Withdrawal Rule, the Eastern District of Texas faulted the Department for failing to consider “less disruptive alternatives” to withdrawal, such as “promulgat[ing] a regulation that enumerated six factors instead of five” or “adopting the seven factors that the Department previously set forth in Fact Sheet #13 as the applicable economic realities test.”¹⁷⁴ While the Department believes that its subregulatory guidance provided appropriate guidance to the regulated community, upon further consideration, it recognizes that publishing regulatory guidance on the distinction between FLSA-covered employees and independent contractors is beneficial for stakeholders, particularly because the Department published a regulation in 2021. In addition, detailed Federal regulations would be easier to locate and read for interested stakeholders than applicable circuit caselaw, potentially helping workers and businesses better understand the Department’s interpretation of their rights and responsibilities under the law. In contrast to WHD’s earlier opinion letters on independent contractor status and its prior regulations on the topic located in parts 780 and 788, new part 795 would also provide guidance to workers and businesses in any industry.

¹⁷¹ See 86 FR 24307.

¹⁷² The FLSA was enacted in 1938. 29 U.S.C. 201. Until 2021, the Department had not promulgated generally applicable regulations regarding the classification of workers as employees or independent contractors.

¹⁷³ See, e.g., 86 FR 24318–20.

¹⁷⁴ *Coalition for Workforce Innovation*, 2022 WL 1073346, at *18.

Adopting detailed regulations aligned with existing precedent that help workers and businesses to better understand their rights and responsibilities under the law could also better protect workers, who have been placed at a greater risk of misclassification as a consequence of the 2021 IC Rule. As described in sections III.A. and B., the 2021 IC Rule’s elevation of certain factors and its preclusion of consideration of relevant facts under several factors may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. Elevating certain factors and precluding consideration of relevant facts may increase the risk of misclassification of employees as independent contractors. Because the Department has serious concerns about the 2021 IC Rule, it is proposing to rescind and replace it with regulations that are fully aligned with the text of the FLSA as interpreted by the courts, the Department’s longstanding subregulatory guidance, and decades of court cases interpreting the Act while still providing additional clarity to workers and employers on the concept of economic dependence.

IV. Alternatives Considered

The Department assessed four regulatory alternatives to this proposed rule below in section VII.F. of the regulatory impact analysis. The Department previously considered and rejected, on legal viability grounds, the first two alternatives—codifying either a common law or ABC test for determining employee or independent contractor status—in the 2021 IC Rule.¹⁷⁵ The Department continues to believe that legal limitations prevent the Department from adopting either of those alternatives.

For the first alternative, the Department considered codifying the common law control test, which is used to distinguish between employees and independent contractors under other Federal laws, such as the Internal Revenue Code.¹⁷⁶ The focus of the

¹⁷⁵ See 86 FR 1238.

¹⁷⁶ See 26 U.S.C. 3121(d)(2) (generally defining the term “employee” under the Internal Revenue Code as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”). The Supreme Court has advised that the common law control test applies by default under Federal law unless a statute specifies an alternative standard. See *Darden*, 503 U.S. at 322–23 (“[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional

¹⁶⁹ *Id.* at 24312.

¹⁷⁰ U.S. Department of Labor, Women’s Bureau, *Connecting the Dots: “Women’s Work” and the Wage Gap* (2022) https://blog.dol.gov/2022/03/15/connecting-the-dots-womens-work-and-the-wage-gap?_ga=2.244962629.155756293.1655992165-662785877.1655992165.

common law control test is “the hiring party’s right to control the manner and means by which [work] is accomplished,”¹⁷⁷ but the Supreme Court has explained that “other factors relevant to the inquiry [include] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”¹⁷⁸

Although the common law control test considers some of the same factors as those identified in the proposed rule’s “economic reality” test (e.g., skill, length of the working relationship, the source of equipment and materials, etc.), courts generally recognize that, because of its focus on control, the common law test is more permissive of independent contracting arrangements than the economic reality test, which examines the economic dependence of the worker.¹⁷⁹

Codifying a common law control test for the FLSA could create a more uniform legal framework among Federal statutes, in the sense that entities would not, for example, have to understand and apply one employment classification standard for tax purposes and a different employment classification standard for FLSA purposes. However, the Department does not believe that adopting a common law control test for determining employee or independent contractor status under the FLSA would, in fact, simplify the analysis for the regulated community because courts and enforcement agencies applying a common law test for independent contractors have considered a greater number and different variation of factors than the six or so factors commonly considered under the economic reality test.¹⁸⁰

master-servant relationship as understood by common-law agency doctrine.”) (quoting *Reid*, 490 U.S. at 739–40).

¹⁷⁷ *Reid*, 490 U.S. at 751.

¹⁷⁸ *Id.* at 751–52.

¹⁷⁹ See, e.g., *Baker v. Flint Eng’g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (recognizing that the “economic realities” test is a more expansive standard for determining employee status than the common law test).

¹⁸⁰ See RESTATEMENT (THIRD) OF AGENCY sec. 7.07, Comment (f) (2006) (identifying 10 factors); IRS Tax Topic No. 762 Independent

Regardless, applying the common law test would be contrary to the “suffer or permit” language in section 3(g) of the FLSA, which the Supreme Court has interpreted as demanding a broader definition of employment than that which exists under the common law.¹⁸¹ Accordingly, the Department believes it is legally constrained from adopting the common law control test and that the common law test is not sufficiently protective in assessing worker classification under the FLSA.

For the second alternative, the Department considered codifying an ABC test to determine independent contractor status under the FLSA, similar to the ABC test recently adopted under California’s state wage and hour law.¹⁸² As described by the California Supreme Court in *Dynamex Operations W., Inc. v. Superior Court*, “[t]he ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity’s business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”¹⁸³

Contractor vs. Employee (May 19, 2022), <https://www.irs.gov/taxtopics/tc762> (explaining the common law analysis through three main categories: behavioral control, financial control, and the relationship of the parties); *Reid*, 490 U.S. at 751–52 (identifying 13 factors).

¹⁸¹ See, e.g., *Darden*, 503 U.S. at 326; *Portland Terminal*, 330 at 150–51.

¹⁸² See *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018); Assembly Bill (“A.B.”) 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (codifying the ABC test articulated in *Dynamex*); A.B. 2257, Ch. 38, 2019–2020 Reg. Sess. (Cal. 2020) (retroactively exempting certain professions, occupations, and industries from the ABC test that A.B. 5 had codified). The ABC test originated in state unemployment insurance statutes, but some state courts and legislatures have recently extended the test to govern employee/independent contractor disputes under state wage and hour laws. See Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. Ill. U. L. Rev. 379, 408–11 (2019) (discussing the origins and recent expansion of the ABC test).

¹⁸³ 416 P.3d at 34 (emphasis in original). California’s ABC test is slightly different than versions of the ABC test adopted (or presently under consideration) in other states. For example, New Jersey provides that a hiring entity may satisfy the ABC test’s “B” prong by establishing either: (1) that the work provided is outside the usual course of the business for which the work is performed, or (2) that the work performed is outside all the places

Codifying an ABC test could establish a simpler and clearer standard for determining whether workers are employees or independent contractors. The ABC test only has three criteria, and no balancing of the criteria is required; all three prongs must be satisfied for a worker to qualify as an independent contractor. However, the Department believes it is legally constrained from adopting an ABC test because the Supreme Court has held that the economic reality test is the applicable standard for determining workers’ classification under the FLSA as an employee or independent contractor.¹⁸⁴ Moreover, the Supreme Court has stated that the existence of employment relationships under the FLSA “does not depend on such isolated factors” as the three independently determinative factors in the ABC test, “but rather upon the circumstances of the whole activity.”¹⁸⁵ Because the ABC test is inconsistent with Supreme Court precedent interpreting the FLSA, the Department believes that it could only implement an ABC test if the Supreme Court revisits its precedent or if Congress passes legislation that alters the applicable analysis under the FLSA.

For the third alternative, the Department considered a proposed rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule. As the Department has noted throughout this proposal, there are multiple instances in which this NPRM is consistent or in agreement with the 2021 IC Rule. Specifically, the Department has noted its agreement with the following aspects of the 2021 IC Rule: a totality of the circumstances test should be applied to appropriately determine classification as an employee or independent contractor; the concept of economic dependence needs further

of business of the hiring entity, N.J. Stat. Ann. sec. 43:21–19(i)(6)(A–C). The Department has chosen to analyze California’s ABC test as a regulatory alternative because businesses subject to multiple standards, including nationwide businesses, are likely to comply with the most demanding standard if they wish to make consistent classification determinations.

¹⁸⁴ See *Tony & Susan Alamo*, 471 U.S. at 301 (“The test of employment under the Act is one of ‘economic reality.’”); *Whitaker House*, 366 U.S. at 33 (“‘economic reality’ rather than ‘technical concepts’ is . . . the test of employment” under the FLSA) (citing *Silk*, 331 U.S. at 713; *Rutherford*, 331 U.S. at 729). ABC tests are not the same as the FLSA economic realities test. For example, the ABC test does not consider the totality of the circumstances of the working relationship between the employer and the worker; instead, it considers three specific circumstances. In addition, the ABC test does not weigh or balance the various considerations; instead, the test results in a finding of employee status if any one factor is not met regardless how close the facts are on that factor and regardless what the other two factors indicate.

¹⁸⁵ *Rutherford*, 331 U.S. at 730.

development; and a clear explanation of the test for whether a worker is an employee or independent contractor in easily accessible regulatory text is valuable. This proposal also includes several other important principles from the case law that were included in the 2021 IC Rule: economic dependence is the ultimate inquiry; the list of economic reality factors is not exhaustive; and no single factor is determinative. Further, with respect to specific factors, this proposal reinforces certain aspects addressed in the 2021 IC Rule such as that an exclusivity requirement imposed by the employer is a strong indicator of control, and that issues related to scheduling and supervision over the performance of the work (including the ability to assign work) are relevant considerations under the control factor.

Despite these areas of agreement, the governing principle of the 2021 IC Rule is that two of the economic reality factors are predetermined to be more probative and therefore carry more weight, which may obviate the need to meaningfully consider the remaining factors. Upon further consideration, as discussed in this proposal, the Department believes that this departure from decades of case law and the Department's own longstanding position that no one factor or subset of factors should carry more or less weight would have a confusing and disruptive effect on employers and workers alike. The Department considered simply removing the problematic "core factors" analysis from the 2021 IC Rule and retaining the five factors as described in the rule. However, the Department rejected this approach because other aspects of the rule such as considering investment and initiative only in the opportunity for profit or loss factor and excluding consideration of whether the work performed is central or important to the employer's business are also in tension with judicial precedent and longstanding Department guidance. These provisions narrow the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themselves. Therefore, after considering all of the common aspects of the 2021 IC Rule and whether to retain some portions of that rule, the Department has concluded that in order to provide clear, affirmative regulatory guidance that aligns with case law and is consistent with the text and purpose of the Act as interpreted by courts, a complete

rescission and replacement of the 2021 IC Rule is needed. For these reasons, the Department is not proposing a partial rescission of the 2021 IC Rule.

For the fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance instead of through new regulations. To begin with, for the reasons set forth in this NPRM, the Department believes that rescission of the 2021 IC Rule is appropriate, regardless of the new content proposed for its replacement. Specifically, the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text as interpreted by the courts, and that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. The 2021 IC Rule's provisions—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business—are in tension with this longstanding case law.

The Department recognizes that the 2021 IC Rule sought to "clarify and sharpen the contours of the economic reality test used to determine independent contractor classification under the FLSA."¹⁸⁶ However, as noted above, although the stated intent was to provide clarity, the 2021 IC Rule introduced several concepts to the analysis that neither courts nor the Department have previously applied.¹⁸⁷ The Department believes that these changes will not provide clarity because of the inconsistency with circuit court case law, and that the conflict between the 2021 IC Rule's analysis and circuit precedent will inevitably lead to greater uncertainty as well as lead to inconsistent outcomes, rather than increase clarity or certainty.

Given the substantial uniformity among the circuit courts in the application of the economic reality test prior to the 2021 IC Rule, the Department believes that rescinding the 2021 IC Rule would provide greater clarity than retaining the 2021 IC Rule. For more than 80 years prior to the 2021 IC Rule, the Department primarily

issued subregulatory guidance in this area and did not have generally applicable regulations on the classification of workers as employees or independent contractors. This subregulatory guidance was informed by the case law and set forth a multifactor economic reality test to answer the ultimate question of economic dependence. However, as explained in section III above, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers in understanding how to apply the law in this area. Specifically, issuing regulations allows the Department to provide in-depth guidance that is more closely aligned with circuit case law, rather than the regulations set forth in the 2021 IC Rule which have created a dissonance between the Department's regulations and judicial precedent. Additionally, issuing regulations allows the Department to formally collect and consider a wide range of views from stakeholders by electing to use the notice-and-comment process. Finally, because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue. Therefore, the Department has decided not to rescind the 2021 IC Rule and provide only subregulatory guidance, but to instead propose these regulations.

V. Discussion of Proposed Rule

In view of the foregoing concerns and considerations, the Department is proposing modifications to title 29 of the Code of Federal Regulations addressing whether workers are employees or independent contractors under the FLSA. In relevant part, and as discussed in greater detail below, the Department proposes:

- Not using "core factors" and instead returning to a totality-of-the-circumstances analysis of the economic reality test that has a refined focus on whether each factor shows the worker is economically dependent upon the employer for work versus being in business for themselves, does not use predetermined weighting of factors, and that considers the factors comprehensively instead of as discrete and unrelated.

- Returning the consideration of investment to a standalone factor, focusing on whether the worker's investment is capital or entrepreneurial in nature, and considering the worker's

¹⁸⁶ 86 FR 1172.

¹⁸⁷ See *supra* sections III.A, B.

investments on a relative basis with the employer's investment.

- Providing additional analysis of the control factor, including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered when analyzing the degree of control over a worker, and not limiting control to control that is actually exerted.

- Returning to the longstanding Departmental interpretation of the integral factor, which considers whether the work is integral to the employer's business rather than whether it is exclusively part of an "integrated unit of production."

As in the 2021 IC Rule, the Department is proposing to include cross-references to the interpretations set forth in this proposed rule in 29 CFR 780.330(b) and 788.16(a); these provisions contain industry-specific guidance. Additionally, in the 2021 IC Rule, the Department declined to revise its regulation addressing employee or independent contractor status under MSPA in 29 CFR 500.20(h)(4), stating, in part, that the MSPA regulation and the 2021 IC Rule both applied an economic reality test in which the ultimate inquiry was economic dependence.¹⁸⁸ Although the Department has again considered revising the MSPA regulation, it proposes the same approach that it took in 2021—which is to not make any revisions at this time. The Department continues to recognize that MSPA adopts by reference the FLSA's definition of "employ,"¹⁸⁹ and that 29 CFR 500.20(h)(4) considers "whether or not an independent contractor or employment relationship exists under the Fair Labor Standards Act" to interpret employee or independent contractor status under MSPA.¹⁹⁰ The test contained in the MSPA regulation is substantially similar to the proposed test here, so the Department believes that there is not a need to revise the MSPA regulation at this time. The Department, however, welcomes comments regarding whether 29 CFR 500.20(h)(4) should be revised to more fully reflect the interpretation of employee or independent contractor status set forth in this proposed rule.

Finally, the Department is also proposing to formally rescind the 2021 IC Rule and to add a new part 795. In the Department's view, the operative

effects of proposing to rescind the 2021 IC Rule follow. If finalized, the proposed rule would formally rescind the 2021 IC Rule. That rescission would operate independently of the new content in any new final rule, as the Department intends it to be severable from the substantive proposal for adding a new part 795. For the reasons set forth in this NPRM, the Department believes that rescission of the 2021 IC Rule is appropriate, regardless of the new content proposed in this rulemaking. Thus, even if the substantive provisions of a new final rule were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule become operative.

Since the passage of the FLSA until the 2021 IC Rule, the Department primarily issued subregulatory guidance in this area and did not have generally applicable regulations addressing the classification of workers as employees or independent contractors. The Department's subregulatory guidance was informed by the case law and set forth a multifactor economic reality test to answer the ultimate question of economic dependence that is consistent with the analysis set forth in this proposal. Should the 2021 IC Rule be rescinded without any replacement regulations, the Department would rely on circuit case law and provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example, a Field Assistance Bulletin). As explained below, there is widespread uniformity among the circuit courts in the application of the economic reality test, with slight variation as to the number of factors considered or how the factors are framed.¹⁹¹ The well-known multifactor, totality-of-the-circumstances analysis that had been in place prior to the 2021 IC Rule has been reflected in the Department's subregulatory guidance for many years and accurately represents this case law. Thus, the Department believes reliance on this case law and subregulatory guidance, rather than the 2021 IC Rule, would be preferable due to the 2021 IC Rule's divergence from well-established precedent and potential effects on workers, as previously discussed. In sum, should a new final rule adding a new part 795 not go into effect for any reason, reverting to reliance on circuit case law and subregulatory guidance consistent with that case law for determining whether a worker is an employee or independent contractor would accurately reflect the Act's text and purpose as interpreted by the courts

and offer a standard familiar to most stakeholders.

The Department welcomes comments on all aspects of its proposal.

A. Introductory Statement (Proposed § 795.100)

Section 795.100 of the 2021 IC Rule generally explains that the interpretations in part 795 will guide WHD's enforcement of the FLSA and are intended to be used by employers, employees, workers, and courts to assess employment status under the Act.¹⁹² The Department is proposing only clarifying edits to this section.

B. Economic Reality Test (Proposed § 795.105)

Section 795.105(a) of the 2021 IC Rule states that independent contractors are not employees under the FLSA. Section 795.105(b) explains that economic dependence is the ultimate inquiry in determining whether a worker is an independent contractor or employee under the Act, and § 795.105(c) addresses how to determine economic dependence, including the elevation of two "core" economic reality factors.¹⁹³ Section 795.105(d) discusses the economic reality factors.¹⁹⁴

The Department is proposing to simplify paragraph (a) and make additional clarifying edits to paragraph (b). Proposed § 795.105(a) would continue to make clear that independent contractors are not "employees" under the Act. Proposed § 795.105(b) would affirm that economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor or an employee and makes clear that the plain language of the statute is relevant to the analysis. This section focuses the analysis on whether the worker is in business for themselves and clarifies that economic dependence does not focus on the amount the worker earns or whether the worker has other sources of income. The Department is proposing to delete § 795.105(c) because it believes, as previously discussed in section III.A.1. of this preamble, that the factors of the economic reality test should not be given a predetermined weight. The Department is also proposing to delete § 795.105(d) and move discussion of the economic reality test and the individual factors to § 795.110.

¹⁹² 86 FR 1246.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1246–47.

¹⁸⁸ See 86 FR 1177.

¹⁸⁹ 29 U.S.C. 1802(5).

¹⁹⁰ The MSPA regulations consider, for example, whether a worker is economically dependent upon an agricultural association or farm labor contractor. See 29 CFR 500.20(h)(4).

¹⁹¹ See generally *infra* section V.C.

C. Economic Reality Test and Economic Reality Test Factors (Proposed § 795.110)

The Department is proposing to replace § 795.110 of the 2021 IC Rule (Primacy of actual practice) with a provision discussing the economic reality test and the economic reality factors. Proposed § 795.110(a) introduces the economic reality test, emphasizing that the economic reality factors are guides to be used to conduct a totality-of-the-circumstances analysis. It also explains that the factors are not exhaustive, and no single factor is dispositive. The Department is proposing to address the economic reality factors in § 795.110(b). Before addressing the specific changes proposed, the Department believes that it is helpful to discuss the overarching framework of the economic reality test and how it should be considered.

Determining whether an employment relationship exists under the FLSA begins with the Act's definitions. The Act's text is expansive, defining "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee," "employee" as "any individual employed by an employer," and "employ" to "include[] to suffer or permit to work."¹⁹⁵ In its 1947 brief before the Supreme Court in *Rutherford*, the Department explained that the 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."¹⁹⁶ The Department continued, stating that "[t]he purposes of this Act require a practical, realistic construction of the employment relationship . . . and the broad language of the statutory definitions is more than adequate to support such a construction."¹⁹⁷ The Supreme Court agreed, reiterating the breadth and reach of the Act's definitions to work relationships that were not previously considered to constitute employment relationships, and emphasizing that the determination of an employment relationship under the FLSA depends not on "isolated factors but rather upon the circumstances of the whole activity."¹⁹⁸ The same need for a practical, realistic construction of the employment

relationship under the FLSA exists today. As explained below, the long-standing economic reality test, applied in view of the statutory language of the Act, is nimble enough to continue to provide a useful analysis for the broad range of potential employment relationships that exist today.

Prior to the FLSA's enactment, the phrasing "suffer or permit" was commonly used in state laws regulating child labor. As the Eleventh Circuit explained in *Antenor v. D & S Farms*, "[t]he 'suffer or permit to work' standard derives from state child-labor laws designed to reach businesses that used middlemen to illegally hire and supervise children."¹⁹⁹ In other words, the standard was designed to ensure that an employer could be covered under the labor law even if they did not directly control a worker or used an agent to provide supervision. The Supreme Court has explicitly and repeatedly recognized that this "suffer or permit" language demonstrates Congress's intent for the FLSA to apply broadly and more inclusively than the common law standard.²⁰⁰ This textual breadth reflects Congress's stated intent. Section 2 of the Act, Congress's "declaration of policy," states that the Act is intended to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."²⁰¹ Particularly relevant to misclassification, section 2 identifies "unfair method[s] of competition in commerce" as an additional condition "to correct and as rapidly as practicable . . . eliminate."²⁰²

For decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the Act. The test was developed by the Supreme Court in interpreting and applying the social legislation of the 1930s, including the Fair Labor Standards Act, which defines the employment relationship in broad and

comprehensive terms.²⁰³ In 1947, the Supreme Court issued two decisions, *Silk* and *Rutherford*, that used an economic reality test to determine employment status.²⁰⁴ As explained in *Rutherford*, the "economic reality" test is designed to bring within such legislation "persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."²⁰⁵ In applying this economic reality test, it is essential to consider the Act's statutory language. The determination of whether a worker is covered under the FLSA must be made in the context of the Act's own definitions and the courts' expansive reading of its scope.²⁰⁶ The

¹⁹⁹ *Rosenwasser*, 323 U.S. at 362.

²⁰⁴ See *Silk*, 331 U.S. at 716–18 (applying the test under the Social Security Act); *Rutherford*, 331 U.S. at 730 (same under the FLSA).

²⁰⁵ *Rutherford*, 331 U.S. at 729; see also *Whitaker House*, 366 U.S. at 31–32 (describing the same as it relates to homeworkers).

²⁰⁶ The line of cases in which the Supreme Court has repeatedly recognized that the definitions of "employ," "employee," and "employer" that establish who is entitled to the FLSA's protections were written broadly and have appropriately been interpreted broadly are premised on the statutory text itself, not on any principle of how to interpret remedial legislation. Because these cases addressing the Act's definitions do not address exemptions from the Act's pay requirements, they have not been called into question by *Encino Motorcars v. Navarro*, 138 S. Ct. 1134 (2018), which overturned a rule of interpretation based on the FLSA's remedial purpose that applied to the Act's exemptions. In *Encino*, the Supreme Court addressed an exemption from the FLSA's overtime pay requirements and ruled that the "narrow construction" principle—that FLSA exemptions should be narrowly construed in favor of employee status—should no longer be used. The Court explained that instead, such exemptions should be given a fair reading, stating "[b]ecause the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give [them] anything other than a fair (rather than a narrow) interpretation." *Encino*, 138 S. Ct. at 1142 (internal quotations and citation omitted). This decision did not apply to the Act's definitions, and, crucially, there is no need to rely on such an interpretive principle here because there is a clear textual indication in the Act's definitions, by the inclusion of the "suffer or permit" language, that broad coverage under the Act was intended. See 29 U.S.C. 203(g). Thus, the broad scope of who is an employee under the FLSA comes from the statutory text itself and not any "narrow-construction" principle. Moreover, *Encino* did not hold that the FLSA's remedial purpose may never be considered, it simply noted that it is a "flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs.'" *Id.* at 1142 (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234 (2013)) (emphasis added). To the extent that the language in the 2021 IC Rule preamble implied that the Act's remedial purpose can never be considered, including when determining whether an individual is an employee or an independent contractor under the FLSA, the Department clarifies that it believes that this would be an unwarranted extension of the Supreme Court's decision. See, e.g., 86 FR 1207–08 (discussing *Encino*'s application in response to commenters' concerns that the 2021 IC Rule conflicted with the FLSA's remedial purpose). Finally, courts have not changed their application

¹⁹⁹ 88 F.3d 925, 929 n.5 (11th Cir. 1996).

²⁰⁰ See, e.g., *Darden*, 503 U.S. at 326 (noting that "employ" is defined with "striking breadth" (citing *Rutherford*, 331 U.S. at 728)); *Rosenwasser*, 323 U.S. at 362 ("A broader or more comprehensive coverage of employees . . . would be difficult to frame."); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 665 (5th Cir. 1983) ("The term 'employee' is thus used 'in the broadest sense 'ever . . . included in any act.'" (quoting *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271 (5th Cir. 1982))).

²⁰¹ 29 U.S.C. 202(a).

²⁰² See *id.* at sec. 202(a), (b); see also *Rosenwasser*, 323 U.S. at 361–62; *Pilgrim Equip.*, 527 F.2d at 1311 ("Given the remedial purposes of the legislation, an expansive definition of 'employee' has been adopted by the courts.").

¹⁹⁵ 29 U.S.C. 203(d), (e)(1), (g).

¹⁹⁶ Brief for the Administrator at 10, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (No. 562), 1947 WL 43939, at *10 (quoting *Portland Terminal*, 330 U.S. at 152).

¹⁹⁷ *Id.*

¹⁹⁸ *Rutherford*, 331 U.S. at 728–30.

FLSA's "particularly broad" definition of "employee" encompasses all workers who are, "as a matter of economic reality, . . . economically dependent upon the alleged employer."²⁰⁷ Only a worker who "is instead in business for himself" is an independent contractor not covered by the Act.²⁰⁸ The "focus" and "ultimate concept" of the determination of whether a worker is an employee or an independent contractor, then, is "the *economic dependence* of the alleged employee."²⁰⁹ The statutory language thus frames the central question that the economic reality test asks—whether the worker is economically dependent on an employer who suffers or permits the work or whether the worker is in business for themselves.

To aid in answering this ultimate inquiry of economic dependence, several factors have been considered by courts and the Department as particularly probative when conducting a totality-of-the-circumstances analysis of whether a worker is an employee or an independent contractor under the FLSA.²¹⁰ In *Silk*, the Supreme Court suggested that "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision."²¹¹ The Court cautioned that no single factor is controlling and that the list is not exhaustive.²¹² In *Rutherford*, the Court used a similar analysis considering "the circumstances of the whole activity," and relied on the fact that the workers' work was "a part of the integrated unit of production."²¹³ Since *Silk* and *Rutherford*, Federal courts of appeals have applied the economic reality test to distinguish independent contractors from employees who are entitled to the FLSA's protections. Federal appellate

courts considering employee or independent contractor status under the FLSA generally analyze the economic realities of the work relationship using the factors identified in *Silk* and *Rutherford*.²¹⁴ There is significant and widespread uniformity among the circuit courts in the application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed (for example, whether relative investment is considered within the investment factor, or whether skill must be used with business-like initiative).²¹⁵ As the 2021 IC Rule explained, "[m]ost courts of appeals articulate a similar test," and these courts consistently caution against the "mechanical application" of the economic reality factors, view the factors as tools to "gauge . . . economic dependence," and "make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself."²¹⁶ All of the circuit courts that have addressed employee or independent contractor status consider five of the same factors.²¹⁷ Briefly, these factors include the degree of control exercised by the employer over the worker, skill, permanency, opportunity for profit or loss, and investment, although the Second Circuit and the D.C. Circuit treat the worker's opportunity for profit or loss and the worker's investment as a single factor.²¹⁸ Nearly all circuit courts expressly consider a sixth factor, whether the work is an integral part of the employer's business. The Fifth Circuit has not adopted the integral factor but has at times assessed integrality as an additional relevant factor.²¹⁹

Because the 2021 IC Rule focused on these slight variations among some of the factors or how to apply certain factors, it overlooked both the broader fact that the ultimate inquiry has

remained unchanged as well as the extent of the consistency in use of the economic reality test among the courts of appeals. The economic reality test, the case law, and the Department's position have remained remarkably consistent since the 1940's—the test's focus has remained on whether the worker is in business for themselves, with the inquiry directed toward the question of economic dependence. It is not surprising that some courts and the Department may have used slightly different iterations of the factors over the last several decades, as the factors "are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected."²²⁰ These factors are only guideposts, and "[i]t is dependence that indicates employee status. Each [factor] must be applied with that ultimate notion in mind."²²¹ This is why most courts, and the Department, have long made clear that additional factors may be relevant when applying the test to a particular case. It is also expected that outcomes may vary somewhat among workers in the same profession, for example, because the test demands a fact-specific analysis and facts like job titles may not be probative of the economic realities of the relationship. In undertaking this analysis, each factor is examined and analyzed in relation to one another and to the Act's definitions. The test should not be approached in a formulaic manner, neglecting to consider the statutory framework upon which the test is based. Importantly, "[n]one of these factors is determinative on its own, and each must be considered with an eye toward the ultimate question—the worker's economic dependence on or independence from the alleged employer."²²²

With this proposed rulemaking, the Department describes the economic reality factors that reflect the totality-of-the-circumstances approach that courts have taken for decades, and provides an analysis as to how the Department considers each factor in today's workplaces, based on case law and the Department's enforcement expertise in this area. For example, the proposed investment factor is returned to being a standalone factor, considers facts such as whether the investment is capital or entrepreneurial in nature, and considers the worker's investments relative to the employer's investments. Significant additional guidance is provided for the

of the economic reality test to determine employee status based on *Encino*.

²⁰⁷ *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) (citing *Darden*, 503 U.S. at 326; *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998)).

²⁰⁸ *Id.* (citing *Express Sixty-Minutes*, 161 F.3d at 303).

²⁰⁹ *Id.* (emphasis in the original); see also *Pilgrim Equip.*, 527 F.2d at 1311–12 ("[T]he final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of [the] FLSA or are sufficiently independent to lie outside its ambit.").

²¹⁰ See, e.g., *Flint Eng'g*, 137 F.3d at 1441 (explaining that "[n]one of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach").

²¹¹ 331 U.S. at 716.

²¹² See *id.*

²¹³ *Rutherford*, 331 U.S. at 729–30.

²¹⁴ See generally *supra* nn. 51–52.

²¹⁵ See, e.g., *Cornerstone Am.*, 545 F.3d at 344 (discussing relative investments); *Superior Care*, 840 F.2d at 1060 (discussing the use of skill as it relates to business-like initiative).

²¹⁶ 86 FR 1170; see also *Saleem v. Corporate Transp. Grp., Ltd.*, 854 F.3d 131, 139–40 (2d Cir. 2020); *Cornerstone Am.*, 545 F.3d at 343; *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Flint Eng'g*, 137 F.3d at 1440–41.

²¹⁷ *Superior Care, Inc.*, 840 F.2d at 1058–59; *DialAmerica*, 757 F.2d at 1382–83; *McFeeley*, 825 F.3d at 241; *Off Duty Police*, 915 F.3d at 1055; *Lauritzen*, 835 F.2d at 1534–35; *Alpha & Omega*, 39 F.4th at 1082; *Driscoll*, 603 F.2d at 754–55; *Paragon*, 884 F.3d at 1235; *Scantland*, 721 F.3d at 1311–12; *Morrison*, 253 F.3d at 11.

²¹⁸ See, e.g., *Superior Care*, 840 F.2d at 1058–59; *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058–59).

²¹⁹ See, e.g., *Hobbs*, 946 F.3d at 836.

²²⁰ *Pilgrim Equip.*, 527 F.2d at 1311.

²²¹ *Id.*

²²² *Off Duty Police*, 915 F.3d at 1055 (alterations and internal quotations omitted).

proposed control factor, including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered when analyzing the degree of control exerted over a worker. And the proposed integral factor is returned to its longstanding Departmental and judicial interpretation, rather than the “integrated unit of production” approach that was included in the 2021 IC Rule.

This totality-of-the-circumstances analysis considers all factors that may be relevant and, in accordance with the case law, does not assign any of the factors a predetermined weight. While the 2021 IC Rule aspired to provide a clearer test, the Department believes, upon further consideration, that the weighted analysis in the 2021 IC Rule, which could have the effect of winnowing the test to two “core” factors—control and opportunity for profit or loss—sits in tension with decades of instruction from the Supreme Court and the circuit courts of appeals, as well as the Department’s own longstanding position that no factor or subset of factors should carry more or less weight in all cases. The 2021 IC Rule also errs in bringing the test closer to the common law test, which is inconsistent with the plain text of the Act and the case law interpreting it.²²³ Limiting and weighting the factors in such a predetermined manner undermines the very purpose of the test, which is to consider—based on the economic realities—whether a worker is economically dependent on the employer for work or is in business for themselves.²²⁴ Importantly, each factor, considered in isolation, does not determine whether a worker is economically dependent on an employer for work or in business for themselves. Rather, the factors are merely tools or indicators and must be analyzed together in order to answer this ultimate inquiry.²²⁵

This is not to say that in a particular case one factor may not be more or less probative than others—this is to be expected in each fact-specific analysis.

²²³ See *supra* section III.A.2.

²²⁴ See, e.g., *Scantland*, 721 F.3d at 1312 (quoting *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301–02 (5th Cir. 1975)); see also *Saleem*, 854 F.3d at 139–140; *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1054–55 (5th Cir. 1987).

²²⁵ See, e.g., *Scantland*, 721 F.3d at 1312 (the economic reality factors “serve as guides, [and] the overarching focus of the inquiry is economic dependence”); *Pilgrim Equip.*, 527 F.2d at 1311 (The economic reality factors “are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.”).

One or more factors may be more probative than the other factors depending on the facts and circumstances of a case; the analysis, however, cannot be conducted like a scorecard or a checklist. For example, two factors that strongly indicate employment status in a particular case could possibly outweigh other factors that indicate independent contractor status. But to assign a predetermined and immutable weight to certain factors ignores the totality-of-the-circumstances, fact-specific nature of the inquiry that is intended to reach a multitude of employment relationships across occupations and industries and over time. Similarly, it is possible that not every factor will be particularly relevant in each case and that is also to be expected.²²⁶

Thus, the economic reality factors help determine whether a worker is in business for themselves or is instead economically dependent on the employer for work.²²⁷ “Ultimately, in considering economic dependence, the court focuses on whether an individual is ‘in business for himself’ or is ‘dependent upon finding employment in the business of others.’”²²⁸ Economic dependence, however, “does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life Rather, it examines whether the workers are dependent on a particular business or organization for their continued employment.”²²⁹ Additionally, consistent with the 2021 IC Rule, economic dependence does not mean that a worker who works for other employers, earns a very limited income from a particular employer, or is independently wealthy, cannot nevertheless be economically dependent on that employer for purposes of the

²²⁶ See, e.g., *Lauritzen*, 835 F.2d at 1534 (referring to the economic reality factors and stating that “[c]ertain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.”).

²²⁷ See, e.g., *Cornerstone Am.*, 545 F.3d at 343 (“To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.”); *Flint Eng’g*, 137 F.3d at 1440 (noting that the economic realities of the relationship govern, and the focal point is 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); *Superior Care*, 840 F.2d at 1059 (“The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else’s business . . . or are in business for themselves.”).

²²⁸ *Scantland*, 721 F.3d at 1312 (quoting *Mednick*, 508 F.2d at 301–02).

²²⁹ *DialAmerica*, 757 F.2d at 1385.

FLSA.²³⁰ As the Fifth Circuit has explained, “it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment.”²³¹

The 2021 IC Rule stated that one of the reasons for that rulemaking was to reduce “overlap” between factors.²³² In the effort to eliminate redundancy, the 2021 IC Rule limits full consideration of how the factors may interrelate or be more relevant in certain factual scenarios than others. Upon further consideration, the Department believes that emphasizing the discrete nature of each particular factor and evaluating each factor in a vacuum fails to analyze potential employment relationships in the manner demanded by the Act’s text and accompanying case law. The Act’s definitions envision a broad range of potential employment relationships—defining “employer” as including “any person acting directly or indirectly in the interest of an employer in relation to an employee” and using the “suffer or permit” standard—and the test needs to be applicable to all of those potential relationships.²³³ The Department recognizes that there are a variety of bona fide independent contractor relationships that need to be adequately addressed by the test as well.²³⁴

Applying a formulaic or rote analysis that isolates each factor is contrary to decades of case law, decreases the utility of the economic reality test, and makes it harder to analyze the ultimate inquiry of economic dependence. Rather, the analysis needs to be flexible enough to work for all kinds of jobs, all kinds of workers, from traditional economy jobs to jobs in emerging business models. A multifactor, totality-of-the-circumstances test provides that flexibility, which is why it has been used for more than 75 years to determine which workers receive the Act’s basic labor protections. Making the test facially simpler by, for example, limiting consideration of the employment relationship to only two “core” factors (as the 2021 IC Rule in

²³⁰ See 86 FR 1173; see also *McLaughlin v. Seafood, Inc.*, 861 F.2d 450, 452–53 (5th Cir. 1988) (reasoning that “[l]aborers who work for two different employers on alternate days are no less economically dependent than laborers who work for a single employer”); *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 267–68 (5th Cir. 1987) (rejecting the employer’s argument that the worker’s wages were too little to constitute dependence).

²³¹ See *Halferty*, 821 F.2d at 268.

²³² 86 FR 1202.

²³³ See 29 U.S.C. 203(d), (g).

²³⁴ Independent contractors are not “employees” for purposes of the FLSA. See generally *Portland Terminal*, 330 U.S. at 152 (stating that the “definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees”).

effect does in some cases), ranking all of the factors, or creating a checklist, is unfaithful to the text of the Act and decades of case law. It also ignores what the test is required to do, which is to provide a totality-of-the-circumstances analysis to determine, in a wide variety of settings, which workers are economically dependent on their employers for work and should receive the basic labor protections of the Act. The FLSA applies to an extremely broad scope of employment relationships, and only workers who are in business for themselves are excluded from its coverage as independent contractors. The economic reality test, applied in view of the Act's definitions and with a focus on economic dependence, is able to assess that scope of potential employment relationships.

The Department is providing a detailed analysis about the application of each factor in this NPRM based on case law and the Department's enforcement experience as a guide for employers and workers in determining whether a worker is an employee or an independent contractor. Each factor is reviewed with the ultimate inquiry in mind: whether the worker is economically dependent on the employer for work or in business for themselves. The following discussion addresses each of the economic reality factors, including proposed revisions made to each to better reflect the weight of legal authority throughout the country.

1. Opportunity for Profit or Loss Depending on Managerial Skill (Proposed § 795.110(b)(1))

Section 795.105(d)(1)(ii) of the 2021 IC Rule states that the opportunity for profit or loss factor “weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work.”²³⁵ The provision also states that, “[w]hile the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor.”²³⁶ Finally, the provision provides that “[t]his factor

weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster.”²³⁷

Proposed § 795.110(b)(1) focuses the opportunity for profit or loss factor on whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. The 2021 IC Rule similarly considered managerial skill, as noted above. As discussed below, however, the Department is proposing to consider investment as a separate factor in the analysis, unlike the approach in the 2021 IC Rule. The proposed provision provides guidance on the application of this factor, including a non-exhaustive list of relevant facts to consider. And the proposed provision states that if a worker has no opportunity for a profit or loss, then that fact suggests that the worker is an employee. Similar to the 2021 IC Rule, the proposal states that 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, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor. Compared to the 2021 IC Rule, proposed § 795.110(b)(1) more accurately reflects the consideration of the profit or loss factor in the case law and reflects the ultimate inquiry into the worker's economic dependence or independence.

Many circuit courts of appeals apply this factor with an eye to whether the worker is using managerial skill to affect the worker's opportunity for profit or loss. For example, the Third Circuit describes the factor as the opportunity for profit or loss depending on managerial skill.²³⁸ In *Razak v. Uber Technologies, Inc.*, the Third Circuit reversed the district court's ruling that this factor indicated independent contractor status, holding that, because the employer “decides (1) the fare[,] (2) which driver receives a trip request[,] (3) whether to refund or cancel a passenger's fare[,] and (4) a driver's territory,” “a reasonable fact-finder” could “rule in favor of” employee status on this factor.²³⁹ In *Verma v. 3001 Castor, Inc.*, the Third Circuit acknowledged that each exotic dancer “had some degree of control over her profits and losses” by attracting

followers to the club, but explained that managerial skill is “the relevant factor here.”²⁴⁰ After cataloguing the numerous ways in which the employer determined and managed the dancers' opportunity for profit or loss (such as determining the hours of operation, deciding whether to charge an admission fee, setting the length and price of dances on stage and in private rooms, and managing the club's atmosphere, operations, and advertising), the court ultimately found that any managerial skills exercised by the dancers had “minimal influence,” and ruled that this factor weighed in favor of employee status.²⁴¹

Other courts likewise consider whether the workers' opportunities for profit or loss depend on their managerial skill.²⁴² In *McFeeley v. Jackson Street Entertainment, LLC*, the Fourth Circuit found that the dancers' “opportunities for profit or loss depended far more on [the employer's] management and decision-making than on their own” because the employer controlled the client base, handled all advertising, managed the club's atmosphere, and determined pricing.²⁴³ And in *Schultz v. Capital International Security, Inc.*, the court concluded that “[t]here is no evidence the agents could exercise or hone their managerial skill to increase their pay.”²⁴⁴ The Sixth Circuit likewise assesses whether the workers' opportunities for profit or loss depend on their managerial skill.²⁴⁵ For example, in *Acosta v. Off Duty Police Services, Inc.*, the Sixth Circuit ruled that this factor favored employee status because the workers “earned a set hourly wage regardless of” the managerial skill they exercised, and the employer required them to work fixed hourly shifts “regardless of what skills they exercised, so workers could not complete jobs more or less efficiently than their counterparts.”²⁴⁶ The Seventh, Ninth, and Eleventh Circuits also describe this factor as the worker's

²⁴⁰ 937 F.3d at 230–31.

²⁴¹ *Id.* at 231.

²⁴² See, e.g., *McFeeley*, 825 F.3d at 241 (citing *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006)).

²⁴³ 825 F.3d at 243.

²⁴⁴ 466 F.3d at 308.

²⁴⁵ See, e.g., *Off Duty Police*, 915 F.3d at 1059; *Keller*, 781 F.3d at 812 (describing this factor as whether the worker “had an opportunity for greater profits based on his management and technical skills”).

²⁴⁶ 915 F.3d at 1059. In response to the employer's argument that the workers could accept or reject shifts, the court explained that “[w]hile the decision to accept or reject work is a type of managerial action, the relevant question is whether workers could increase profits through managerial skill.” *Id.* (emphases in original).

²³⁷ *Id.*

²³⁸ See, e.g., *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 146 (3d Cir.), amended, 979 F.3d 192 (3d Cir. 2020), and cert. denied, 141 S. Ct. 2629 (2021); *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 229 (3d Cir. 2019) (citing *Selker Bros.*, 949 F.2d at 1293).

²³⁹ 951 F.3d at 146–47.

²³⁵ 86 FR 1247.

²³⁶ *Id.*

opportunity for profit or loss depending on the worker's managerial skill.²⁴⁷

Other circuits do not articulate this factor by expressly using the words "managerial skill," but they nonetheless apply the factor in a very similar way by focusing on whether the worker has an opportunity to use "initiative" or "judgment" to affect profits or losses. For example, the Tenth Circuit has found that this factor favored employee status because the workers' "earnings did not depend upon their judgment or initiative, but on the [employer's] need for their work."²⁴⁸ And when affirming a ruling that this factor indicated employee status in another case, the Tenth Circuit explained that the workers "exercise independent initiative only in locating new work assignments," and "[w]hile working on a particular assignment, there is little or no room for initiative (certainly none related to profit or loss)."²⁴⁹ The Second Circuit, although it considers the workers' opportunities for profit or loss along with their investment as one factor,²⁵⁰ similarly evaluates the extent to which the workers' business judgment or acumen affects their opportunity for profit or loss. In *Franze v. Bimbo Bakeries USA, Inc.*, the Second Circuit found this factor to favor independent contractor status because the workers purchased delivery territories that could ultimately be sold again and the overall value of their territories "primarily depended on their own business judgment and foresight in modifying their territories and managing day-to-day costs, suggesting that they bore the risks of their decisions."²⁵¹ And in *Saleem v. Corporate Transportation Group, Ltd.*, the Second Circuit found that the workers "possessed considerable independence in maximizing their income through a variety of means" and their profits increased through their initiative, judgment, and foresight—indicating independent contractor status.²⁵²

By concentrating on the degree to which the worker's opportunity for

profit or loss is determined by the employer,²⁵³ the Fifth Circuit focuses on whether the worker exercises judgment or initiative vis-a-vis the employer to affect profit or loss and thus takes a related approach to this factor. In *Hobbs v. Petroplex Pipe & Construction, Inc.*, for example, the Fifth Circuit relied on the facts that the workers never negotiated their rates of pay (the employer set a fixed hourly rate) and "the work schedule imposed by [the employer] severely limited the [workers'] opportunity for profit or loss" (meaning that "it would have been unrealistic for them to have worked for other companies") to affirm a finding that this factor indicated employee status.²⁵⁴ In *Hopkins v. Cornerstone America*, the Fifth Circuit found that this factor weighed in favor of employee status because "[t]he major determinants of the Sales Leaders' profit or loss were controlled almost exclusively by [the employer]," including "the hiring, firing, and assignment of subordinate agents," the "overwrite commissions," the "distribution of sales leads," which products they could sell, and their territories.²⁵⁵ In *Parrish v. Premier Directional Drilling, L.P.*, the Fifth Circuit found that the workers had "enough control over their profits and losses to have this factor support [independent contractor] status," including by making "decisions affecting their expenses."²⁵⁶ And in *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, the Fifth Circuit affirmed the district court's finding that this factor favored independent contractor status because "a driver's profit or loss is determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business."²⁵⁷

In AI 2015–1, the Department described this factor as whether the worker's managerial skill affects the worker's opportunity for profit or loss and explained that this factor focuses "on whether the worker has the ability to make decisions and use his or her managerial skill and initiative to affect opportunity for profit or loss."²⁵⁸ Section 795.105(d)(1)(ii) of the 2021 IC Rule similarly considers the impact of the worker's initiative and managerial

skill on the opportunity for profits or losses, discussing the worker's "exercise of initiative (such as managerial skill or business acumen or judgment)."²⁵⁹ It also considers the impact of the worker's "management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work" on the worker's opportunity for profit or loss.²⁶⁰ For the reasons explained below, however, the Department is proposing that investment be a separate, standalone factor in the analysis.²⁶¹

Focusing on managerial skill, proposed § 795.110(b)(1) sets forth the following facts, which among others, can be relevant to assessing the degree to which the worker's managerial skill affects the worker's economic success or failure in performing the work: whether the worker determines the charge or pay for the work provided (or at least can meaningfully negotiate it); whether the worker accepts or declines jobs or chooses or can meaningfully negotiate 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 (as opposed to the amount and nature of the worker's investment).

In addition to those facts, whether the worker actually has an opportunity for a loss should be considered. Consistent with the overall inquiry of determining whether a worker is economically dependent on the employer or in business for themselves, the fact that a worker has no opportunity for a loss indicates employee status. On the other hand, workers who are in business for themselves face the possibility of experiencing a loss, and the risk of a loss as a possible result of the worker's managerial decisions indicates independent contractor status. Workers who incur little or no costs or expenses, simply provide their labor, and/or are paid an hourly or flat rate are unlikely to possibly experience a loss, and this factor may suggest employee status in those circumstances. The fact that workers may earn more or less at times (and their earnings may decline)

²⁵⁹ 86 FR 1247.

²⁶⁰ *Id.*

²⁶¹ See *infra*, section V.C.2. In addition to the explanation set forth *infra*, the Department is concerned by situations where workers are required to make a significant upfront payment in order to be allowed to perform work as non-employees but they exercise little, if any, managerial skill. In those situations, application of the opportunity for profit or loss factor should indicate employee status because of the lack of managerial skills affecting the opportunity for profit or loss.

²⁴⁷ See, e.g., *Lauritzen*, 835 F.2d at 1535; *Iontchev v. AAA Cab Serv., Inc.*, 685 F. App'x 548, 550 (9th Cir. 2017) (finding that the workers' "opportunity for profit or loss depended upon their managerial skill"); *Driscoll*, 603 F.2d at 754–55; *Scantland*, 721 F.3d at 1312. And the Eighth Circuit recently described this factor as "whether workers had control over profits and losses depending on their 'managerial skill.'" *Alpha & Omega*, 39 F.4th at 1084.

²⁴⁸ *Snell*, 875 F.2d at 810.

²⁴⁹ *Flint Eng'g*, 137 F.3d at 1441.

²⁵⁰ See, e.g., *Franze*, 826 F. App'x at 76; *Superior Care*, 840 F.2d at 1058–59.

²⁵¹ 826 F. App'x at 77–78 (internal quotations omitted).

²⁵² 854 F.3d at 143–44.

²⁵³ See, e.g., *Hobbs*, 946 F.3d at 832–34; *Parrish*, 917 F.3d at 384–85.

²⁵⁴ 946 F.3d at 833–34.

²⁵⁵ 545 F.3d 338, 344–45 (5th Cir. 2008).

²⁵⁶ 917 F.3d at 384–85. The workers could also turn down work and negotiate their pay. See *id.* at 376.

²⁵⁷ 161 F.3d at 304.

²⁵⁸ AI 2015–1, 2015 WL 4449086, at *6 & n.7 (withdrawn June 7, 2017).

depending on how much they work is not the equivalent of experiencing a financial loss.

For example, the Third Circuit has explained that certain workers whose earnings “derived primarily from their fixed commission” from the employer and “were not tied to price levels and resale profit margins” had “no meaningful opportunities for profit *nor any significant risk of financial loss*,” indicating employee status.²⁶² Yet, a finding that workers “risked financial loss” indicates independent contractor status.²⁶³ The Tenth Circuit has explained, in a case finding that this factor favored employee status, that the workers “did not undertake the risks usually associated with an independent business,” “there was no way that [they] could experience a business loss,” and “[a] reduction in money earned by the [workers] is not a ‘loss’ sufficient to satisfy the criteria for independent contractor status.”²⁶⁴ The Seventh Circuit has explained, in a case involving migrant farm workers, that they had no possibility of a loss and that “[a]ny reduction in earnings due to a poor pickle crop is a loss of wages, and not of an investment.”²⁶⁵ And the Sixth Circuit has explained in a case involving workers paid by the hour that they did not “appear to have been at risk of a loss based on their decision to work or not” and that “[d]ecreased pay from working fewer hours does not qualify as a loss.”²⁶⁶ Relatedly, the fact that an employer may impose fines, penalties, or chargebacks on a worker for faulty performance does not mean that the worker may experience a loss. The Eleventh Circuit has explained that the “argument that plaintiffs could control losses by avoiding chargebacks is unpersuasive,” elaborating that “[c]hargebacks relate to the quality of a technician’s skill, not his managerial or entrepreneurial prowess.”²⁶⁷

Some decisions by a worker that may affect the worker’s earnings do not necessarily reflect managerial skill. Accordingly, proposed § 795.110(b)(1) explains that a worker’s decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls

assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill.

The Eleventh Circuit explained in a case involving cable installers that their “opportunity for profit was largely limited to their ability to complete more jobs than assigned, which is analogous to an employee’s ability to take on overtime work or an efficient piece-rate worker’s ability to produce more pieces.”²⁶⁸ The court further explained that a worker’s “ability to earn more by being more technically proficient is unrelated to [the worker’s] ability to earn or lose profit via his managerial skill, and it does not indicate that he operates his own business.”²⁶⁹ The Fourth Circuit similarly explained in a case involving security guards that the guards could not “exercise or hone their managerial skill to increase their pay” because the employer “paid [them] a set rate for each shift worked” and the customer’s “schedule and security needs dictated the number of shifts available and the hours worked.”²⁷⁰ And the Sixth Circuit explained in a case involving workers paid by the hour that they “earned a set hourly wage regardless of the skill they exercised.”²⁷¹ By comparison, the Eighth Circuit found in a case involving a process server that, because the worker decided where and how often to work and “decided which assignments he was willing to accept” based on the worker’s own decisions regarding which jobs were more or less profitable and without any negative consequences imposed by the employer, this factor indicated independent contractor status.²⁷² Thus, where a worker is paid

²⁶⁸ *Id.* at 1316–17.

²⁶⁹ *Id.* at 1317.

²⁷⁰ *Capital Int’l*, 466 F.3d at 308.

²⁷¹ *Off Duty Police*, 915 F.3d at 1059. *See also Snell*, 875 F.2d at 810 (cake decorators’ “earnings did not depend upon their judgment or initiative, but on the [employer’s] need for their work”); *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-cv-00824 JWS, 2015 WL 1299369, at *4–5 (D. Ariz. Mar. 23, 2015) (workers could not increase profit by taking on more work, noting that “a worker’s ability to simply work more is irrelevant” because “[m]ore work may lead to more revenue, but not necessarily more profit”); *Solis v. Kansas City Transp. Grp.*, No. 10–0887–CV–W–REL, 2012 WL 3753736, at *9 (W.D. Mo. Aug. 28, 2012) (“The driver’s ability to make more money by driving additional routes is akin to a waiter making more money by taking another shift.”); *Solis v. Cascom*, No. 3:09-cv-257, 2011 WL 10501391, at *6 (S.D. Ohio Sept. 21, 2011) (explaining that there was no opportunity for increased profit based on the workers’ managerial skills; although they could work additional hours to increase their income, they made no decisions regarding routes, acquisition of materials, “or any facet normally associated with operating an independent business”).

²⁷² *See Karlson v. Action Process Serv. & Priv. Investigation, LLC*, 860 F.3d 1089, 1095 (8th Cir.

by the job, the worker’s decision to work more jobs and the worker’s technical proficiency in completing each job are not the type of managerial skill that would indicate independent contractor status under this factor.

Proposed § 795.110(b)(1) is consistent on this point with 2021 IC Rule § 795.105(d)(1)(ii), which states that the opportunity for profit or loss factor “weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster.”²⁷³ The Department likewise stated in AI 2015–1 that a “worker’s ability to work more hours and the amount of work available from the employer have nothing to do with the worker’s managerial skill and do little to separate employees from independent contractors—both of whom are likely to earn more if they work more and if there is more work available.”²⁷⁴ Thus, the Department’s proposed regulation on this point is consistent with its prior guidance in addition to being supported by case law.²⁷⁵

The Department welcomes comments on all aspects of this factor.

Example: Opportunity for Profit or Loss Depending on Managerial Skill²⁷⁶

A worker for a landscaping company performs assignments only as determined by the company for its corporate clients. The worker does not independently choose assignments, solicit additional work from other clients, advertise their services, or endeavor to reduce costs. The worker regularly agrees to work additional hours in order to earn more. In this scenario, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may fluctuate based on the work available and their willingness to work more.

2017). *See also Express Sixty-Minutes*, 161 F.3d at 304 (opportunity for profit or loss factor indicated independent contractor status because the drivers could choose among “which jobs were most profitable”).

²⁷³ 86 FR 1247.

²⁷⁴ 2015 WL 4449086, at *6 (withdrawn June 7, 2017).

²⁷⁵ The Department notes, as it explains elsewhere in this proposal, that the fact that a worker has a business in an industry separate from the business in which the worker is working for the employer has little relevance when applying this factor.

²⁷⁶ The Department is providing examples at the end of the discussion of each factor for the benefit of the public, and the addition or alteration of any of the facts in any of the examples may change the resulting analysis. Additionally, while the examples help illustrate the application of particular factors of the economic reality test, no one factor is determinative of whether a worker is an employee or independent contractor.

²⁶² *Selker Bros.*, 949 F.2d at 1294 (emphasis added).

²⁶³ *DialAmerica*, 757 F.2d at 1386.

²⁶⁴ *Snell*, 875 F.2d at 810. *See also Flint Eng’g*, 137 F.3d at 1441 (“[P]laintiffs are hired on a per-hour basis rather than on a flat-rate-per-job basis. There is no incentive for plaintiffs to work faster or more efficiently in order to increase their opportunity for profit. Moreover, there is absolutely no risk of loss on plaintiffs’ part.”).

²⁶⁵ *Lauritzen*, 835 F.2d at 1536.

²⁶⁶ *Off Duty Police*, 915 F.3d at 1059.

²⁶⁷ *Scantland*, 721 F.3d at 1317.

Because of this lack of managerial skill affecting opportunity for profit or loss, this factor indicates employee status.

In contrast, a worker provides landscaping services directly to corporate clients, including Company A. The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work. This worker exercises managerial skill that affects their opportunity for profit or loss, indicating independent contractor status.

2. Investments by the Worker and the Employer (Proposed § 795.110(b)(2))

The Department is proposing to treat investment as a standalone factor in the economic reality analysis (consistent with the Department's approach prior to the 2021 IC Rule and with the approach of most courts) instead of considering investment within the opportunity for profit or loss factor (as § 795.105(d)(1)(ii) in the 2021 IC Rule does). Proposed § 795.110(b)(2) states that an investment borne by the worker must be capital or entrepreneurial in nature to indicate independent contractor status. Such investments, for example, generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach, thus suggesting that the worker is in business for themselves. Proposed § 795.110(b)(2) further notes that costs borne by the worker simply to perform their job (e.g., tools and equipment to perform a specific job and the worker's labor) are not evidence of capital or entrepreneurial investment. Finally, proposed § 795.110(b)(2) provides that the worker's investments should be evaluated on a relative basis with the employer's investments, a position taken by many circuit courts of appeals.

From its earliest applications of the economic reality analysis until the 2021 IC Rule, the Department consistently identified the worker's investment as a separate factor in the analysis.²⁷⁷

²⁷⁷ See, e.g., WHD Op. Ltr. (Aug. 13, 1954); WHD Op. Ltr. FLSA-795 (Sept. 30, 1964); WHD Op. Ltr. (Oct. 12, 1965); WHD Op. Ltr. (Sept. 12, 1969); WHD Op. Ltr. WH-476, 1978 WL 51437, at *1 (Oct. 19, 1978); WHD Op. Ltr., 1986 WL 1171083, at *1 (Jan. 14, 1986); WHD Op. Ltr., 1986 WL 740454, at *1 (June 23, 1986); WHD Op. Ltr., 1995 WL 1032469, at *1 (Mar. 2, 1995); WHD Op. Ltr., 1995 WL 1032489, at *1 (June 5, 1995); WHD Op. Ltr., 1999 WL 1788137, at *1 (July 12, 1999); WHD Op. Ltr., 2000 WL 34444352, at *1 (July 5, 2000); WHD Op. Ltr., 2000 WL 34444342, at *3 (Dec. 7, 2000); WHD Op. Ltr., 2002 WL 32406602, at *2 (Sept. 5,

Beginning with the Supreme Court's decision in *Silk*,²⁷⁸ courts with the exception of the Second and D.C. Circuits have almost universally identified the worker's investment as a separate factor.²⁷⁹ Breaking from this longstanding approach, the 2021 IC Rule stated that investment is considered as part of the opportunity for profit or loss factor: "[T]he Department adopts its proposal, consistent with Second Circuit caselaw, to consider investment as part of the opportunity factor."²⁸⁰ The Department further stated in the 2021 IC Rule that courts consider opportunity for profit or loss and investment to be related and combining them into one factor eliminates duplicative analyses.²⁸¹

The Department believes that the 2021 IC Rule's approach of considering investment "as part of" the opportunity for profit or loss factor is flawed. Section 795.105(d)(1)(ii) of the 2021 IC Rule states that the opportunity for profit or loss factor indicates independent contractor status if the worker exercises initiative or if the worker manages their investment in the business.²⁸² Under the provision, the worker "does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor."²⁸³ Thus, if either initiative or investment suggests independent contractor status, the other cannot change that outcome even if it suggests employee status. For example, under the 2021 IC Rule, if the worker makes no investment in the work but exercises initiative, then the opportunity for profit or loss factor indicates independent contractor status. In effect, that the

2002); WHD Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)" (July 2008); AI 2015-1 (available at 2015 WL 4449086) (withdrawn June 7, 2017).

²⁷⁸ 331 U.S. 704 (1947).
²⁷⁹ See, e.g., *DialAmerica*, 757 F.2d at 1382; *McFeeley*, 825 F.3d at 241; *Hobbs*, 946 F.3d at 829; *Off Duty Police*, 915 F.3d at 1055; *Lauritzen*, 835 F.2d at 1534-35; *Alpha & Omega*, 39 F.4th at 1082; *Driscoll*, 603 F.2d at 754; *Paragon*, 884 F.3d at 1235; *Scantland*, 721 F.3d at 1311. The Second Circuit and the D.C. Circuit are alone among the circuit courts of appeals in treating the worker's opportunity for profit or loss and the worker's investment as a single factor. See, e.g., *Franze*, 826 F. App'x at 76; *Superior Care*, 840 F.2d at 1058-59; *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058-59).

²⁸⁰ 86 FR 1186.

²⁸¹ *Id.* The 2021 IC Rule also cited *Silk*. *Id.* (citing *Silk*, 331 U.S. at 719). However, the Court in *Silk* merely decided that case based on its facts, 331 U.S. at 716-19, and in no way indicated that "opportunities for profit or loss" and "investment in facilities" must be combined into one factor when reciting each of the relevant factors separately, *id.* at 716.

²⁸² 86 FR 1247.

²⁸³ *Id.*

worker makes no capital or entrepreneurial investment (a fact that indicates employee status) is eliminated from the analysis under that rule. Put another way, if a worker has an opportunity for profit or loss based on initiative, the opportunity for profit or loss factor under the 2021 IC Rule indicates independent contractor status, and the investment factor cannot reverse or weigh against that finding even if it indicates employee status as a matter of economic reality because, for example, the worker makes no investment. The Department believes that the way in which 2021 IC Rule § 795.105(d)(1)(ii) considers investment as part of the opportunity for profit or loss factor may incorrectly tilt the analysis in favor of independent contractor outcomes. Moreover, although the 2021 IC Rule purported to adopt the Second Circuit's approach of considering investment as part of opportunity for profit or loss, Second Circuit case law does not support the Rule's position that this factor indicates independent contractor status if either investment or initiative indicates an opportunity for profit or loss even if the other indicates employee status.²⁸⁴

There is little basis for an approach that always considers the worker's investment within the worker's opportunity for profit or loss factor, which can have the effect in some cases of preventing investment from affecting the analysis. The worker's investment may be relevant to whether the worker is economically dependent on the employer separate and apart from the worker's opportunity for profit or loss. This is consistent with various circuit court decisions which have found both opportunity for profit or loss and investment to be independently probative. For example, the Fifth Circuit found in *Parrish* that the investment factor favored employee status (although it merited "little weight" given the nature of the work) and that the opportunity for profit or loss factor favored independent contractor status.²⁸⁵ In *Cromwell v. Driftwood Electrical Contractors, Inc.*, the Fifth Circuit conversely found that the investment factor indicated independent contractor status because the workers "invested a relatively substantial amount in their trucks, equipment, and tools" but that their opportunity for profit or loss was "severely limit[ed]." ²⁸⁶ In *Nieman v. National Claims Adjusters, Inc.*, the Eleventh Circuit found that the

²⁸⁴ See generally *Saleem*, 854 F.3d at 141-46.

²⁸⁵ 917 F.3d at 382-85.

²⁸⁶ 348 F. App'x 57, 60-61 (5th Cir. 2009).

investment factor weighed in favor of independent contractor status while the opportunity for profit or loss factor did “not weigh in favor of either” independent contractor or employee status.²⁸⁷ And in *Scantland v. Jeffrey Knight, Inc.*, the Eleventh Circuit found that the opportunity for profit or loss factor “point[ed] strongly toward employee status” although the investment factor weighed slightly in favor of independent contractor status.²⁸⁸ Thus, investment is relevant to the ultimate economic dependence inquiry separate and apart from opportunity for profit or loss.

For these reasons, the Department is proposing to return to treating the worker’s investment as a separate factor from the opportunity for profit or loss factor.

The Department is also proposing, in addition to considering the amount and value of the worker’s investment, that the nature of and reason for the investment should be considered. Specifically, proposed § 795.110(b)(2) states that for a worker’s investment to indicate independent contractor status, the investment must be capital or entrepreneurial in nature. The Department believes that the worker’s investment should generally support an independent business or serve a business-like function, such as increasing the worker’s ability to do different types of or more work, reducing costs, or extending market reach, to indicate independent contractor status.²⁸⁹ On the other hand, as proposed § 795.110(b)(2) notes, costs borne by a worker to perform a particular job are not the type of capital/entrepreneurial investments that suggest independent contractor status. The Department believes that considering the investment factor in this manner is consistent with the overall inquiry of determining whether the worker is economically dependent on the employer for work or is in business for themselves. The nature of the worker’s investment illuminates that distinction: an investment that is capital in nature indicates that the worker is operating as

an independent business. Yet, an investment that is expedient to perform a particular job (such as tools or equipment purchased to perform the job and that have no broader use for the worker) does not indicate independence. The Department understands that independent contractors make both capital investments to generally support their business and investments to perform particular jobs; therefore, the existence of expenses to perform jobs will not prevent this factor from indicating independent contractor status so long as there are also investments that are capital in nature indicating an independent business.

Consistent with the proposed approach, many appellate court decisions have emphasized how the worker’s investment must be capital in nature for it to indicate independent contractor status. For example, in *Secretary of Labor v. Lauritzen*, the Seventh Circuit found that migrant farm workers were not independent contractors, but employees, due in part to the lack of capital investments made by the workers.²⁹⁰ As the court noted, investments that establish a worker’s status as an independent contractor should “be large expenditures, such as risk capital, capital investments, and not negligible items or labor itself. . . . The workers here are responsible only for providing their own gloves [which] do not constitute a capital investment.”²⁹¹ In *Acosta v. Paragon Contractors Corp.*, the Tenth Circuit explained that “[t]he mere fact that workers supply their own tools or equipment does not establish status as independent contractors; rather, the relevant ‘investment’ is ‘the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.’ ”²⁹²

²⁹⁰ See 835 F.2d at 1537.

²⁹¹ *Id.*

²⁹² 884 F.3d at 1236 (quoting *Snell*, 875 F.2d at 810). See also, e.g., *Off Duty Police*, 915 F.3d at 1056 (“The capital investment factor is most significant if it reveals that the worker performs a specialized service that requires a tool or application which he has mastered.”) (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1118–19 (6th Cir. 1984)); *Mr. W Fireworks*, 814 F.2d at 1052 (“The fact that a few [workers] engage in minimal investments has little legal relevance, when the overwhelming majority of the risk capital is supplied by [the employer].”); *Pilgrim Equip.*, 527 F.2d at 1314 (The employer’s provision of “[a]ll investment or risk capital” and “all costly necessities” that the workers need to operate confirms the workers’ “total dependency” on the employer.); cf. *Nieman*, 775 F. App’x at 625 (investment factor indicated independent contractor status because the worker “had his own home office, a laptop, and iPad for field work and was equipped with a vehicle, ladder, measuring tools,

Relatedly, the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature. For example, in *Scantland*, the Eleventh Circuit explained that the “fact that most technicians will already own a vehicle suitable for the work” suggests that there is “little need for significant independent capital.”²⁹³ In *Off Duty Police*, the Sixth Circuit found that, because the workers’ vehicles “could be used for any purpose, not just on the job,” they did not indicate independent contractor status.²⁹⁴ The Fifth Circuit likewise considers the purpose of the vehicle and how the worker uses it. For example, in *Express Sixty-Minutes*, it explained that, “[a]lthough the driver’s investment of a vehicle is no small matter, that investment is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes.”²⁹⁵ And in *Brock v. Mr. W Fireworks*, it noted that most of the workers in that case purchased vehicles for personal and family reasons, not business reasons.²⁹⁶ This approach to considering a worker’s use of a personal vehicle that the worker already owns to perform work is consistent with the overarching inquiry of examining the economic realities of the worker’s relationship with the employer.

Proposed § 795.110(b)(2) additionally provides that the worker’s investment be evaluated in relation to the employer’s investment in its business. This approach is not only consistent with the totality-of-the-circumstances analysis that is at the heart of the economic reality test, but it would also provide factfinders with an additional tool to differentiate between a worker’s economic dependence and independence based on the particular

digital voice and photographic equipment, and ‘other similar tools of the trade.’ ”).

²⁹³ 781 F.2d at 1318.

²⁹⁴ 915 F.3d at 1056. See also *Keller*, 781 F.3d at 810–11 (fact that equipment could be used “for both personal and professional tasks” weakens the indication of independent contractor status).

²⁹⁵ 161 F.3d at 304.

²⁹⁶ 814 F.2d at 1052; see also *Sigui v. M + M Commc’ns, Inc.*, 484 F. Supp. 3d 29, 39 (D.R.I. 2020) (discounting relevance of workers’ investment in vehicles because they could be used for other purposes), *jury verdict for plaintiffs*, 1:14–CV–00442, Dckt. No. 172 (June 13, 2022); *Roeder v. DirecTV, Inc.*, No. C14–4091–LTS, 2017 WL 151401, at *17 (N.D. Iowa Jan. 13, 2017) (rejecting argument that “plaintiffs’ purchase and/or use of personal vehicles [weighs] in favor of finding plaintiffs were independent contractors” because the “vehicles had been purchased prior to taking DIRECTV work orders” and the record does not indicate that the vehicles were purchased for any business purpose).

²⁸⁷ 775 F. App’x 622, 624–25 (11th Cir. 2019).

²⁸⁸ 721 F.3d at 1316–18.

²⁸⁹ The 2021 IC Rule suggested that a shift to a “knowledge-based economy” reduced the probative value of the investment factor because these types of workers can be in business for themselves “with minimal physical capital” investment. 86 FR 1175. That rule’s suggestion would be addressed by this proposal’s approach to the investment factor. By focusing on the capital or entrepreneurial nature of the worker’s investment, the proposed investment factor would not be limited to considering investments in physical capital but would also consider entrepreneurial investments by a worker to develop marketable knowledge.

facts of the case. Comparing the worker's investment to the employer's investment can be a gauge of the worker's independence or dependence. If the worker's investment compares favorably to the employer's investment, then that fact suggests independence on the worker's part and the existence of a business-to-business relationship between the worker and the employer. If the worker's investment does not compare favorably to the employer's investment, then that fact suggests that the worker is economically dependent and an employee of the employer. The Department understands that a worker's investment need not be (and rarely ever is) of the same magnitude and scope as the employer's investment to indicate that the worker is an independent contractor. Thus, although a worker's investment need not be on par with the employer's investment, it should support an independent business for this factor to indicate independent contractor status.

The Department has previously, but not consistently, explained that a worker's investment should be considered in relation to the employer's investment in its business. For example, in the Withdrawal Rule, the Department questioned the 2021 IC Rule's preclusion of consideration of the employer's investment.²⁹⁷ In AI 2015–1, the Department explained that a worker's investment “should not be considered in isolation” because “it is the relative investments that matter.”²⁹⁸ AI 2015–1 further explained that, in addition to “the nature of the investment,” “comparing the worker's investment to the employer's investment helps determine whether the worker is an independent business.”²⁹⁹ The Department also compared the worker's and the employer's relative investments in opinion letters issued by the Wage and Hour Division.³⁰⁰ However, in the 2021 IC Rule, the Department rejected any comparison of the worker's investment to the employer's investment in its

²⁹⁷ See 86 FR 24313–24314 (as explained in section II.E. *supra*, the Withdrawal Rule was vacated by a district court decision that is currently on appeal before the Fifth Circuit).

²⁹⁸ 2015 WL 4449086, at *8 (withdrawn June 7, 2017).

²⁹⁹ *Id.*

³⁰⁰ See WHD Op. Ltr., 2002 WL 32406602, at *1–2 (Sept. 5, 2002) (workers' “hand tools, which can cost between \$5,000 and \$10,000,” were “small in comparison to [the employer's] investment,” but the “amount is none the less substantial” and “thus indicative of an independent contractor relationship”); WHD Op. Ltr., 2000 WL 34444342, at *4 (Dec. 7, 2000) (comparing “the relative investments” of the worker and the employer is the correct approach).

business.³⁰¹ Because of the Department's inconsistency on this point, it is important for the Department to address this point in this rulemaking.

Numerous circuit courts of appeals consider the worker's investment in the work in comparison to the employer's investment in its business. For example, the Fifth Circuit has explained that it “consider[s] the relative investments” and that, “[i]n considering this factor, ‘we compare each worker's *individual* investment to that of the alleged employer.’”³⁰² The Tenth Circuit has similarly explained that, “[t]o analyze this factor, we compare the investments of the worker and the alleged employer.”³⁰³ The Sixth Circuit has explained that “[t]his factor requires comparison of the worker's total investment to the ‘company's total investment, including office rental space, advertising, software, phone systems, or insurance.’”³⁰⁴ And the Fourth Circuit has compared the employers' payment of rent, bills, insurance, and advertising expenses to the workers' “limited” investment in their work.³⁰⁵

A few circuits do not compare the worker's investment in the work to the employer's investment in its business. For example, the Second Circuit has recently focused on whether the worker

³⁰¹ See 86 FR 1188 (“comparing the individual worker's investment to the potential employer's investment should not be part of the analysis of investment”). See also WHD Fact Sheet #13 (July 2008) (describing the factor as “[t]he amount of the [worker's] investment in facilities and equipment” without any further discussion).

³⁰² *Hobbs*, 946 F.3d at 831–32 (quoting *Cornerstone Am.*, 545 F.3d at 344) (emphasis in quoted language).

³⁰³ *Paragon*, 884 F.3d at 1236; see also *Flint Eng'g*, 137 F.3d at 1442 (“In making a finding on this factor, it is appropriate to compare the worker's individual investment to the employer's investment in the overall operation.”).

³⁰⁴ *Off Duty Police*, 915 F.3d at 1056 (quoting *Keller*, 781 F.3d at 810).

³⁰⁵ *McFeeley*, 825 F.3d at 243. See also *Verma*, 937 F.3d at 231 (summarizing how courts have viewed this factor in cases examining the employment status of exotic dancers: “all concluded that ‘a dancer's investment is minor when compared to the club's investment’”) (quoting the district court's decision); *Lauritzen*, 835 F.2d at 1537 (disagreeing that “the overall size of the investment by the employer relative to that by the worker is irrelevant” and finding that “that the migrant workers' disproportionately small stake in the pickle-farming operation is an indication that their work is not independent of the defendants”); *Driscoll*, 603 F.2d at 755 (strawberry growers' investment in light equipment, including hoes, shovels, and picking carts was “minimal in comparison” with employer's total investment in land and heavy machinery); see also *Iontchev*, 685 F. App'x at 550 (noting that the drivers “invested in equipment or materials and employed helpers to perform their work” but concluding that the investment factor was “neutral” because the cab company “leased taxicabs and credit card machines to most of the [drivers]”).

has made a significant investment, irrespective of the employer's investment. In *Saleem*, the Second Circuit stated (like many other courts) that under “the economic reality test, ‘large capital expenditures’—as opposed to ‘negligible items, or labor itself’—are highly relevant to determining whether an individual is an employee or an independent contractor.”³⁰⁶ The Second Circuit elaborated that the key is whether the worker's financial investment was made in order to generate a return on the investment.³⁰⁷ The Eleventh Circuit has likewise focused on the nature of the worker's investment without comparing it to the employer's investment.³⁰⁸ Neither the Second Circuit nor the Eleventh Circuit have expressly rejected comparing the investments, and as explained herein, the Department believes that comparing investments is consistent with the totality-of-the-circumstances analysis and is helpful in distinguishing between a worker's economic dependence and independence.

The usefulness of comparing the worker's investment to the employer's investment is not undermined because certain decisions from the Fifth and Eighth Circuits gave little weight to the comparison based on the facts and circumstances of the particular cases before them.³⁰⁹ The Fifth Circuit decisions (*Parrish* and *Cornerstone America*) compared the relative investments as part of their analyses.³¹⁰ Although the *Parrish* decision accorded the relative investment factor “little weight in the light of the other summary-judgment evidence supporting IC-status,”³¹¹ this does not support the conclusion that this factor is not useful. Instead, it simply reflects the Fifth Circuit's faithful application in that case of a totality-of-the-

³⁰⁶ 854 F.3d at 144 (quoting *Snell*, 875 F.2d at 810).

³⁰⁷ *Id.* at 144–46; see also *Franze*, 826 F. App'x at 77–78 (purchasing delivery routes “without any financial assistance from Bimbo” constitutes a substantial financial outlay that weighs in favor of independent contractor status).

³⁰⁸ *Scantland*, 721 F.3d at 1317–18; see also *Nieman*, 775 F. App'x at 625.

³⁰⁹ The 2021 IC Rule cited these decisions from the Fifth and Eighth Circuits in rejecting the relative investments approach. See 86 FR 1188.

³¹⁰ See *Parrish*, 917 F.3d at 382–83 (explaining that “[o]ur court uses a side-by-side comparison method in evaluating this factor” and determining that the relative investments factor favors employee status); *Cornerstone Am.*, 545 F.3d at 344 (explaining that “we compare each worker's *individual* investment to that of the alleged employer” and determining that the employer's “greater overall investment in the business scheme convinces us that the relative-investment factor weighs in favor of employee status”) (emphasis in original).

³¹¹ 917 F.3d at 383.

circumstances approach considering many factors—no one of which was dispositive. Moreover, that the *Cornerstone America* decision “did not even mention the [employer’s] larger investment” when “summing up the entirety of the facts and analyzing whether the workers were economically dependent on the [employer] as a matter of economic reality” as stated in the 2021 IC Rule,³¹² likewise does not support the conclusion that the relative investment factor is not useful, but instead simply reflects the overwhelming evidence of employee status in that case. Indeed, the Fifth Circuit’s recent decisions reflect a continued commitment to considering the worker’s investment in relation to the employer’s investment.³¹³

In *Karlson v. Action Process Service & Private Investigations, LLC*, the Eighth Circuit affirmed the district court’s decision to allow evidence of the worker’s and the employer’s relative investments but not allow the worker to ask the employer about the dollar amount of its investment because “allowing [the worker] to ‘billboard large numbers’ . . . would create the danger of unfair prejudice.”³¹⁴ Thus, the Eighth Circuit simply affirmed a nuanced district court decision regarding how much evidence of the employer’s investment to allow but did not preclude consideration of the worker’s and the employer’s relative investments. Moreover, the Eighth Circuit recently issued a decision articulating, as the jury instruction in *Karlson* had, the investment factor as “the relative investments of the alleged employer and the employee.”³¹⁵

For all of these reasons, the Department believes that the proposal to consider the worker’s investment in relation to the employer’s investment in its business is supported by prior WHD guidance and many appellate court decisions, is consistent with the overall totality-of-the-circumstances inquiry whether the worker is economically dependent on the employer or operating as an independent business and would

³¹² 86 FR 1188 (citing *Cornerstone Am.*, 545 F.3d at 346).

³¹³ See, e.g., *Sanchez Oil & Gas Corp. v. Crescent Drilling & Prod., Inc.*, 7 F.4th 301, 313 n.17 (5th Cir. 2021); *Hobbs*, 946 F.3d at 829 (describing the investment factor as “the extent of the relative investments of the worker and the alleged employer”) (quoting *Cornerstone Am.*, 545 F.3d at 343). Thus, the Fifth Circuit routinely considers the relative investments of the worker and the employer even if the factor may ultimately be accorded less weight in some cases depending on the facts and circumstances of the case.

³¹⁴ 860 F.3d at 1096.

³¹⁵ *Alpha & Omega*, 39 F.4th at 1082 (citing *Karlson*, 860 F.3d at 1093).

aid factfinders’ analyses when applying that inquiry.

The Department welcomes comments on all aspects of this factor.

Example: Investments by the Worker and the Employer

A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker’s relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing certain jobs. Thus, this factor indicates employee status.

A graphic designer occasionally completes design projects for a local design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents an office in a shared workspace. The worker also spends money to market their services. These types of investments support an independent business and are capital in nature (e.g., they allow the worker to do more work and extend their market reach). Thus, these facts indicate that the worker is in business for themselves and may be a freelance graphic designer (i.e., an independent contractor), not an employee of the local design firm.

3. Degree of Permanence of the Work Relationship (§ 795.110(b)(3))

The Department is proposing to modify § 795.105(d)(2)(ii) of the 2021 IC Rule, which describes the “degree of permanence of the working relationship between the individual and the potential employer,” and address the permanency factor in proposed § 795.110(b)(3). This provision in the 2021 IC Rule states that this factor weighs in favor of the worker being an independent contractor where the work relationship is “by design definite in duration or sporadic” and that it weighs in favor of the worker being an employee where the work relationship is “by design indefinite in duration or continuous.”³¹⁶ The 2021 IC Rule provision also recognizes that “the provisional nature of work by itself would not necessarily indicate independent contractor classification.”³¹⁷

As the Department noted in the 2021 IC Rule, “courts and the Department

routinely consider this factor when applying the economic reality analysis under the FLSA to determine employee or independent contractor status.”³¹⁸ Consistent with case law analyzing this factor, the Department is proposing to provide further specificity by noting that an indefinite or continuous relationship is consistent with an employment relationship, but that a worker’s lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker’s own independent business initiative.³¹⁹ The Department is also proposing to continue to recognize that a lack of permanence may be inherent in certain jobs—such as temporary and seasonal work—and that this is not necessarily an indicator of independent contractor status because a lack of permanence does not necessarily mean that the worker is in business for themselves instead of being economically dependent on the employer for work.

Courts typically describe this factor’s relevance as follows: “‘Independent contractors’ often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas ‘employees’ usually work for only one employer and such relationship is continuous and of indefinite duration.”³²⁰ For example, a typical employee often has an at-will work relationship with the employer and works indefinitely until either party decides to end that work relationship. Conversely, an independent contractor does not seek such a permanent or indefinite engagement with one entity. Because of these general characteristics of work relationships, the length of time or duration of the work relationship has long been considered under the “permanence” factor as an indicator of employee or independent contractor status.³²¹

³¹⁸ 86 FR 1192 (citing a variety of circuit case law: *Razak*, 951 F.3d at 142; *Hobbs*, 946 F.3d at 829; *Karlson*, 860 F.3d at 1092–93; *McFeeley*, 825 F.3d at 241; *Keller*, 781 F.3d at 807; *Scantland*, 721 F.3d at 1312).

³¹⁹ See, e.g., *Superior Care*, 840 F.2d at 1060–61.

³²⁰ *Snell*, 875 F.2d at 811 (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1372 (9th Cir. 1981)); see also *Keller*, 781 F.3d at 807 (same); WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (same).

³²¹ See, e.g., *Parrish.*, 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is the total length of the working relationship between the parties); *Capital Int’l*, 466 F.3d at 308–09 (in analyzing the degree of permanency of the working relationship, the “more permanent the relationship, the more likely the worker is to be an employee”); *DialAmerica*, 757 F.2d at 1385 (finding that “the permanence-of-

³¹⁶ 86 FR 1247.

³¹⁷ *Id.*

However, the analysis under the “permanence” factor is not limited solely to the length or definiteness of the work relationship. Courts have also recognized that the temporary or seasonal nature of some jobs may result in a “lack of permanence . . . due to operational characteristics intrinsic to the industry rather than to the workers’ own business initiative.”³²² In such instances, a lack of permanence alone is not an indicator of independent contractor status. One industry where courts have recognized that the lack of permanence or indefiniteness in the work relationship does not preclude employee status is seasonal agricultural work, where workers often work solely for the duration of a harvest season and may return the following year.³²³ Another seasonal example is the Fifth Circuit’s analysis of the working relationship between a fireworks business that operated during specific periods of the year and the fireworks stand operators who sold the company’s goods, where the district court found the relationship to be impermanent due to the 80 percent turnover rate between seasons.³²⁴ The Fifth Circuit noted that “in applying the *Silk* factors courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ.”³²⁵ The Fifth Circuit held that the “proper test for determining the

working-relationship factor indicates that the home researchers were ‘employees’ because they ‘worked continuously for the defendant, and many did so for long periods of time’; *Pilgrim Equip.*, 527 F.2d at 1314 (“the permanent nature of the relations between [the employer] and these operators indicates dependence”); see also *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007) (describing an independent contractor as an individual who “appears, does a discrete job, and leaves again”); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) (“[a]lthough not determinative, the impermanent relationship between the dancers and the [employer] indicates non-employee status”).

³²² *Superior Care*, 840 F.2d at 1061 (citing *Mr. W Fireworks*, 814 F.2d at 1053–54); see also *Flint Eng’g*, 137 F.3d at 1442 (finding short duration of work relationships in oil and gas pipeline construction work to be intrinsic to the industry rather than a “choice or decision” on the part of the workers).

³²³ See *Paragon*, 884 F.3d at 1235 (permanence factor favored employee status because the worker was hired temporarily for the harvest season “[b]ut his employment was permanent for the duration of each harvest season”); *Lauritzen*, 835 F.2d at 1537 (agricultural harvesters’ relationship with employer was “permanent and exclusive for the duration of that harvest season” and permanency was also indicated by the fact that many of the same migrant workers returned for the harvest each year; the court noted that “[m]any seasonal businesses necessarily hire only seasonal employees, but that fact alone does not convert seasonal employees into seasonal independent contractors”).

³²⁴ *Mr. W Fireworks*, 814 F.2d at 1053.

³²⁵ *Id.* at 1054.

permanency of the relationship” in such a seasonal industry is “not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season.”³²⁶

Courts have also recognized that non-seasonal temporary work is common in some industries, and that a lack of permanence in these work relationships is also not indicative of independent contractor status. For example, in *Brock v. Superior Care, Inc.*, the Second Circuit found that nurses who were referred by a temporary health-care staffing agency to work for patients, hospitals, and nursing homes on a short-term basis were “transient” workers who did not have continuous or permanent work relationships with the staffing agency.³²⁷ Citing the discussion in *Mr. W Fireworks* regarding operational characteristics that may be unique to certain industries and the workers they employ, the Second Circuit determined that the lack of permanence did not preclude the nurses from being employees because this reflected “the nature of their profession and not their success in marketing their skills independently.”³²⁸ Similarly, in *Baker v. Flint Engineering & Construction Co.*, the Tenth Circuit determined that temporary rig welders who worked no more than two months at a time for a gas pipeline contractor exhibited sufficient permanency in their work relationship to indicate employee status because such temporary work was intrinsic in the industry rather than a “choice or decision” by the workers.³²⁹ Therefore, consistent with the applicable case law, the Department is proposing to revise the 2021 IC Rule provision’s acknowledgement that the seasonal nature of work alone would not necessarily indicate independent contractor status to acknowledge more broadly that a lack of permanence may be due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ rather than the workers’ business initiative, in which case this factor would not weigh in favor of independent contractor classification.³³⁰

³²⁶ *Id.*

³²⁷ *Superior Care*, 840 F.2d at 1060.

³²⁸ *Id.* at 1061.

³²⁹ *Flint Eng’g*, 137 F.3d at 1442.

³³⁰ The 2021 IC Rule suggested that a trend in the modern economy that reduces the probative value of the permanence factor is that workers have shorter job tenures. See 86 FR 1175. However, as explained above, courts have developed ways to consider permanency that take into account the fact that some jobs and industries have shorter job

Case law discussing the permanence factor also commonly addresses whether the work relationship is exclusive and the extent to which the workers work for others.³³¹ The Department believes this analytical approach is appropriate, because working exclusively for a particular employer speaks to the permanence of the work relationship.³³² However, although an exclusive relationship is often associated with an employment relationship and a sporadic or project-based non-exclusive relationship is more frequently associated with independent contractor classification,³³³ courts have explained that simply having more than one job or working irregularly does not remove a worker from employee status and the protections of the FLSA. For example, in *Silk*, the “unloaders” came to the coal yard “when and as they please[d] . . . work[ing] when they wish and work[ing] for others at will.”³³⁴ The Court determined that the unloaders were employees even though they had the ability to work for others: “That the unloaders did not work regularly is not significant. They did work in the course of the employer’s trade or business. This brings them under the coverage of the Act.”³³⁵ Similarly, as the Second Circuit explained in *Superior Care*, the fact that the temporary nurses “typically work for several employers,” was “not dispositive of independent contractor status” as “employees may work for more than one employer without losing their benefits under the FLSA.”³³⁶

tenures, yet can evidence the regularity consistent with an employment relationship.

³³¹ See, e.g., *Parrish*, 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanence factor is whether any plaintiff worked exclusively for the potential employer); *Keller*, 781 F.3d at 807 (noting that “even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship”); *Scantland*, 721 F.3d at 1319 (noting that “[e]xclusivity is relevant” to the permanency of the work relationship).

³³² See, e.g., WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (considering exclusivity under permanence factor); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000) (same).

³³³ See, e.g., *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir. 1993) (finding welders to be independent contractors where they worked for multiple employers on a project-by-project basis rather than exclusively for one employer).

³³⁴ 331 U.S. at 706.

³³⁵ *Id.* at 718.

³³⁶ *Superior Care*, 814 F.2d at 1060; see also *Saleem*, 854 F.3d at 142 n.24 (“It is certainly not unheard of for an individual to maintain two jobs at the same time, and to be an ‘employee’ in each capacity.”); *Keller*, 781 F.3d at 808 (agreeing with the Second Circuit that “employees may work for more than one employer without losing their benefits under the FLSA”); *Circle C Invs.*, 998 F.2d at 328–29 (noting that “[t]he transient nature of the work force is not enough here to remove the dancers from the protections of the FLSA”); *Seafood Inc.*, 867 F.2d at 877 (“The only question,

Relatedly, courts have also determined that the fact that a worker does not rely on the employer as their exclusive or primary source of income is not indicative of whether an employment relationship exists.³³⁷ For example, the Sixth Circuit explained: “[W]hether a worker has more than one source of income says little about that worker’s employment status. Many workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet.”³³⁸

Thus, the Department is proposing in § 795.110(b)(3) to include exclusivity as an additional consideration under the permanency factor while noting that working for others and having multiple jobs in which workers are economically dependent on each employer for work—as compared to a worker who is in business for themselves and chooses to market their independent services or labor to multiple entities—does not weigh in favor of independent contractor status. While the 2021 IC Rule did not include exclusivity as part of the permanence analysis, this was not based on a view that exclusivity was inconsistent with circuit case law but, rather, was primarily based on the view that concepts should not apply to more than one factor. Including consideration of exclusivity under permanence is consistent with the case law, as the 2021 IC Rule acknowledged.³³⁹ Because the

therefore, is whether the fact that the workers moved frequently from plant to plant and from employer to employer removed them from the protections of the FLSA. We hold that it did not.”); *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 921 (S.D.N.Y. 2013) (noting that “countless workers . . . who are undeniably employees under the FLSA—for example, waiters, ushers, and bartenders”—work for multiple employers).

³³⁷ *Superior Care*, 814 F.2d at 1060; *see also Halferty*, 821 F.2d at 267–68 (“it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment”); *DialAmerica*, 757 F.2d at 1385 (noting that “[t]here is no legal basis” to say that work that constitutes a second source of income indicates a worker’s lack of economic dependence on a job because the proper analysis is “whether the workers are dependent on a particular business or organization for their continued employment”).

³³⁸ *Off Duty Police*, 915 F.3d at 1058. The 2021 IC Rule correctly noted that a handful of cases improperly conflate having multiple sources of income with a lack of economic dependence on the potential employer. *See* 86 FR 1173, 1178. The 2021 IC Rule characterized such a “dependence-for-income” analysis as incorrect and a “dependence-for-work” analysis as correct. *Id.* at 1173. This critique continues to be valid, as is the observation that “[i]t is possible for a worker to be an employee in one line of business and an independent contractor in another.” *Id.* at 1178 n.19.

³³⁹ The 2021 IC Rule recognized that courts often analyze the exclusivity of the work relationship as part of the permanence factor, and the Department

2021 IC Rule sought to avoid duplicating consideration of certain facts or concepts under more than one factor, however, it confined exclusivity and the ability to work for others under the control factor and excluded it from the permanence factor.³⁴⁰

The Department continues to believe that an exclusivity requirement imposed by the employer is a strong indicator of control, as discussed under the control factor. However, in this proposed rulemaking, the Department is prioritizing consideration of all facts that may be relevant to a particular factor, consistent with a totality-of-the-circumstances approach and the way courts analyze the factors. While some courts have focused on exclusivity (or the lack thereof) under the control factor rather than the permanence factor,³⁴¹ others have considered whether workers were able to work for other employers under both the control and permanency factors.³⁴² However, the weight of circuit authority appears to consider exclusivity and ability to work for others primarily under permanence, though it is certainly not the only relevant consideration under this factor.³⁴³ As such, the Department believes it is appropriate to include

considered in its NPRM for that rule to include exclusivity under the permanence factor “to be more accurate.” 85 FR 60616.

³⁴⁰ 86 FR 1192–93.

³⁴¹ *See, e.g., Saleem*, 854 F.3d at 141.

³⁴² *See, e.g., 86 FR 1192* (noting the analysis in *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App’x 782, 783–84 (11th Cir. 2006), where the court found that “Hi-Tech exerted very little control over Mr. Freund,” in part, because “Freund was free to perform installations for other companies” and that “Freund’s relationship with Hi-Tech was not one with a significant degree of permanence . . . [because] Freund was able to take jobs from other installation brokers.”).

³⁴³ *See, e.g., Parrish*, 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is whether any plaintiff worked exclusively for the potential employer); *Keller*, 781 F.3d at 808 (noting under permanency whether satellite-dish installer could work for other companies but that working for more than one employer does not necessarily result in independent contractor status); *Scantland*, 721 F.3d at 1319 (length of relationship and exclusivity was relevant insofar as workers’ schedules and inability to refuse work prohibited them from actually working for other companies); *Cornerstone Am.*, 545 F.3d at 346 (permanency factor weighed in favor of employee status because sales leaders worked exclusively for the potential employer, often for significant periods of time); *Superior Care*, 840 F.2d at 1060–61 (noting under permanency that nurses typically worked for several employers but that this did not weigh in favor of independent contractor status because it was inherent in the profession); *Lauritzen*, 835 F.2d at 1537 (“however temporary the relationship may be it is permanent and exclusive for the duration of that harvest season”); *DialAmerica*, 757 F.2d at 1384 (noting under permanency that home researchers generally did not perform services for other organizations and therefore did not “transfer their services from place to place, as do independent contractors”).

exclusivity under this factor as well as the control factor.³⁴⁴

Finally, the Department notes that where workers provide services under a contract that is routinely or automatically renewed, courts have determined that this indicates permanence and an indefinite working arrangement associated with employment.³⁴⁵ The proposed regulation noting that work relationships that are indefinite in duration or continuous favor employee status is consistent with that case law.

The Department welcomes comments on all aspects of this factor.

Example: Degree of Permanence of the Work Relationship

A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as directed by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity. The permanence factor indicates employee status.

A cook has prepared specialty meals intermittently for an entertainment venue over the past 3 years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down

³⁴⁴ The 2021 IC Rule also supported its decision to reject consideration of exclusivity under permanence by referring to a dictionary definition of “permanent” that does not include exclusivity. 86 FR 1193 n.39. However, a dictionary definition should not override the longstanding case law applying exclusivity to the permanence factor. Additionally, the 2021 IC Rule viewed such case law as inconsistent with the Supreme Court’s *Silk* decision. 86 FR 1192–93. However, upon further consideration, the decision does not clearly identify which factor the Court associated with the truck drivers’ ability to work for others (leading to a decision that they were independent contractors, among other reasons), nor does it clearly identify which factor the Court associated with the coal unloaders’ ability to work for others (leading to a decision that they were employees, among other reasons). *See Silk*, 331 U.S. at 717–19. Therefore, reliance on *Silk* for this proposition is not warranted.

³⁴⁵ *See, e.g., Scantland*, 721 F.3d at 1318 (finding one-year contracts that were automatically renewed to “suggest substantial permanence of relationship”); *Pilgrim Equip.*, 527 F.2d at 1314 (finding laundry operators’ one-year contracts that were routinely renewed indicated employee status); *Acosta v. Senvoy, LLC*, No. 3:16–CV–2293–PK, 2018 WL 3722210, at *9 (D. Or. July 31, 2018) (noting that one-year contracts that automatically renew are “evidence that a worker is an employee”); *Solis v. Velocity Exp., Inc.*, No. CV 09–864–MO, 2010 WL 3259917, at *9 (D. Or. Aug. 12, 2010) (the fact that package delivery drivers understood their contracts to be of indefinite duration and that contracts were routinely renewed without renegotiation indicated employee status).

work for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based non-exclusive relationship with the entertainment venue. These facts indicate independent contractor status.

4. Nature and Degree of Control (Proposed § 795.110(b)(4))

The Department is proposing to modify 2021 IC Rule § 795.105(d)(1)(i), which considers control as a “core” factor in the economic reality test. This provision in the 2021 IC Rule assesses the employer’s and the worker’s “substantial control over key aspects of the performance of the work,” which include setting schedules, selecting projects, controlling workloads, and affecting the worker’s ability to work for others.³⁴⁶ This 2021 IC Rule provision also states that “[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses . . . does not constitute control” for purposes of the economic reality test.³⁴⁷

As reflected in proposed § 795.110(b)(4), the Department continues to believe that issues related to scheduling, supervision over the performance of the work (including the ability to assign work), and the worker’s ability to work for others are relevant considerations. The Department’s proposal would also consider additional aspects of control in the workplace that have been identified in the case law or through the Department’s enforcement experience—such as control mediated by technology or control over the economic aspects of the work relationship. However, as noted above, the Department’s proposal would not elevate control as a “core” factor in the analysis.³⁴⁸ For decades, courts and the Department have taken the view that the control factor represents one facet of the economic reality test.³⁴⁹ As such, control should be analyzed in the same manner as every other factor, rather than take an outsized role when analyzing

whether a worker is an employee or independent contractor. As the Fifth Circuit noted in 2019, it “is impossible to assign to each of these factors a specific and invariably applied weight.”³⁵⁰

In addition, as described in more detail below, and after taking relevant case law into account, an employer’s compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, may in some cases indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer. What follows is an overview of the Department’s proposal regarding control as well as detailed descriptions of certain aspects of control such as scheduling, supervision, price setting, and the ability to work for others.

a. Overview of Control Factor

When analyzing this factor for purposes of applying the economic reality test, the control factor is one of several factors used to reach the ultimate determination of whether a worker is economically dependent on an employer or is in business for themselves.³⁵¹ Control can be exerted directly in the workplace by an employer, such as when it sets a worker’s schedule, compels attendance, or directs or supervises the work.³⁵² However, the absence of these more

apparent forms of control does not invariably lead to the conclusion that the factor weighs in favor of independent contractor status.³⁵³ Employers may also exercise control in other ways, such as by relying on technology to supervise a workforce, setting prices for services, or restricting a worker’s ability to work for others—actions that can exert control without the traditional use of direct supervision, assignment, or scheduling.

The analysis focuses on whether the employer still retains control over meaningful economic aspects of the work relationship such that the control indicates that the worker does not stand apart as their own business, not simply whether the employer lacks control over discrete working conditions (e.g., scheduling) or whether the employer failed to exercise physical control over the workplace.³⁵⁴ For example, even though dancers had some scheduling flexibility, the Third Circuit concluded that the control factor weighed in favor of employee status because the employer, and not the workers, controlled the economic aspects of the dancers’ work, such as the price of services, the clientele to be served, and the operations of the club in which they worked.³⁵⁵

This analytical approach was applied by the Fifth Circuit in a case where an insurance sales firm not only “controlled the hiring, firing, assignment, and promotion of the [workers’ subordinates],” but also

³⁵⁰ *Parrish*, 917 F.3d at 380 (internal citation omitted). The circuit courts have taken this position for decades. See also, e.g., *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor “depends on the facts of the case”) (citation omitted); *Selker Bros.*, 949 F.2d at 1293 (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . [, and] neither the presence nor the absence of any particular factor is dispositive.”).

³⁵¹ The control factor has its roots in the common law, where the inquiry was whether the “employer” had the “right to control the manner and means by which [work] is accomplished.” *Reid*, 490 U.S. at 751. Employers that exercise such control could be held responsible for (or be in the best position to prevent) negligent actions affecting their workers. See *Lauritzen*, 835 F.2d at 1544 (describing how common law notions of control relate to findings of vicarious liability). Yet, the scope of employment under the FLSA is broader than the common law and is not concerned with assigning responsibility for negligent acts imputed to the employer. Rather, employment under the FLSA is determined by applying an economic reality analysis, which “does not depend on the common-law understanding of employment, which was based on limiting concepts of control.” *Antenor v. D & S Farms*, 88 F.3d 925, 933 (11th Cir. 1996) (drawing this conclusion, in the context of evaluating possible joint employment, by relying on the FLSA’s broad definition of employ which uses the term “suffer or permit to work”).

³⁵² See, e.g., *Scantland*, 721 F.3d at 1314 (finding workers to be employees, in part, because they “were subject to meaningful supervision and monitoring by” their employer).

³⁵³ See, e.g., *Mr. W Fireworks*, 814 F.2d at 1049 (“[T]he lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence.”) (citation omitted); *Antenor*, 88 F.3d at 934 (noting in FLSA joint employment case that the Act reaches even those employers who “[do] not directly supervise the activities of putative employees”) (emphasis in original). Indeed, this has been the perspective of the Department for almost six decades. See WHD Op. Ltr., FLSA–795, at 3 (Sept. 30, 1964) (determining that professional divers were employees of a diving corporation, despite the lack of control over their work, by noting “that persons may be employees within the meaning of the Act even though they are unsupervised in their work, are not required to devote any particular amount of time to their work, [and] are under no restriction not to work for competitors of the employer”).

³⁵⁴ See, e.g., *Cornerstone Am.*, 545 F.3d at 343–44 (finding that control weighs in favor of employee status even where the employer disclaims control over “day-to-day affairs” of the workers because the employer controlled the meaningful economic aspects of the work). Other elements may also be included in this examination of control, such as those identified by the Supreme Court in *Whitaker House*. They include whether the worker could sell their products or services “on the market for whatever price they can command,” whether the worker’s compensation was dictated by the employer; and whether management could fire the worker for failure to obey its regulations. 366 U.S. at 32–33.

³⁵⁵ *Verma*, 937 F.3d at 230.

³⁴⁶ See 86 FR 1246–47.

³⁴⁷ *Id.* at 1247.

³⁴⁸ See *supra* section V.B.

³⁴⁹ See, e.g., WHD Op. Ltr. (Aug. 13, 1954) (applying six factors, of which control was one, that are very similar to the six economic reality factors currently used by almost all courts of appeals); *Shultz v. Hinojosa*, 432 F.2d 259, 265 (5th Cir. 1970) (affirming judgment in favor of Secretary of Labor that slaughterhouse worker was an employee under the FLSA under a multifactor economic reality test of which control was one of the factors).

controlled how the workers priced the insurance products, received leads for sales, and defined the territory in which the agents could sell products.³⁵⁶ These actions made it clear that the employer, and not the workers, retained meaningful control over the “economic aspects of the business,” suggesting that the workers were employees.³⁵⁷

Finally, 2021 IC Rule § 795.105(d)(1)(i) states that an employer requiring a worker to “comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms . . . does not constitute control that makes the [worker] more or less likely to be an employee.”³⁵⁸ In the 2021 IC Rule, however, the Department acknowledged “that some courts have found requirements that workers comply with specific legal obligations or meet quality control standards to be indicative of employee status.”³⁵⁹ Upon further consideration and a thorough review of relevant case law, the Department believes, as reflected in proposed § 795.110(b)(4), that certain instances of control should not be excluded as irrelevant to the economic reality analysis only because they are required by business needs, contractual requirements, quality control standards, or legal obligations. As the Eleventh Circuit explained in *Scantland*:

The economic reality inquiry requires us to examine the nature and degree of the alleged employer’s control, *not why* the alleged employer exercised such control. . . . If the nature of a business requires a company to exert control over workers . . . then that company must hire employees, not independent contractors.³⁶⁰

The Department believes that the nature and degree of the employer’s control should be fully assessed, and this assessment may, in some cases, include consideration of control that is due to an employer’s compliance with legal, safety, or quality control obligations. As with all the economic reality factors, this control should be examined in view of the ultimate inquiry: is it probative of whether the worker is in business for themselves or

economically dependent on the employer for work. For example, when an employer, rather than a worker, controls compliance with legal, safety, or other obligations, it may be evidence that the worker is not in fact in business for themselves because they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to the legal and other requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance.³⁶¹

While the case law is not uniform on this issue, the Department finds cases such as *Scantland* and others—which recognize that compliance with legal obligations or quality control may be relevant evidence of control—more persuasive and consistent with the totality-of-the-circumstances, economic reality analysis than the 2021 IC Rule’s approach. For example, in *Badon v. Berry’s Reliable Resources, LLC*, a district court, in granting the worker’s summary judgment motion, rejected a home healthcare employer’s argument that a state’s plan of care for each consumer dictated the work performed by the workers.³⁶² In finding that the control factor weighed in favor of employee status, the court credited testimony that the employer had, in fact, hired, trained, supervised, and directed the work of the caregivers to ensure compliance with the state’s requirements.³⁶³ After taking these facts into consideration, the court found that the control factor weighed in favor of employee status.³⁶⁴ Similarly, in *Molina v. South Florida Express Bankserv, Inc.*, a district court rejected the employer’s argument that its monitoring of workers was at customers’ behest and therefore

was not relevant to control, explaining that “[t]he Defendant’s reasoning is circular” since “[a]ny employer’s business is, in essence, directed by the needs of its customers.”³⁶⁵

Among the FLSA cases cited by the 2021 IC Rule to support the provision excluding facts about compliance with specific legal, contractual, or quality control obligations from consideration—such as *Parrish, Iontchev v. AAA Cab Service, Inc., Mr. W Fireworks, and Chao v. Mid-Atlantic Installation Services, Inc.*³⁶⁶—none support the conclusion drawn by the 2021 IC Rule that the requirement to comply with, for example, legal obligations is never probative of employee status. In *Parrish*, for example, the Fifth Circuit concluded that “[a]lthough requiring safety training and drug testing is an exercise of control in the most basic sense of the word,” the safety training and drug testing in this particular case was not dispositive of control “because of the nature of the employment” at an oil-drilling site.³⁶⁷ There, the employer was responsible for providing a place of employment free from certain recognized hazards and ensuring that all people working at an oil-drilling site comply with relatively minimal safety training and drug testing as “required for safe operations,” generally.³⁶⁸ Thus, workers were not made more economically dependent on the employer because of these safety

³⁶⁵ 420 F. Supp. 2d 1276, 1284 n.24 (M.D. Fla. 2006); see also *Amponsah v. DirecTV, LLC*, 278 F. Supp. 3d 1352, 1360 (N.D. Ga. 2017) (applying *Scantland* and finding genuine issues of material fact regarding control despite defendant’s argument that “strict installation standards and quality metrics” were not indicative of control because such requirements “were aimed at customer satisfaction, not control of Plaintiffs”); *Crouch v. Guardian Angel Nursing, Inc.*, Civil Action No. 3:07-cv-00541, 2009 WL 3737887, at *18–20 (M.D. Tenn. Nov. 4, 2009) (finding a state law that required licensed practical nurses to work under the supervision and direction of doctors or registered nurses was strong evidence of control by the employer under the FLSA and rejecting defendants’ argument “that because a certain amount of supervision is mandated by the state or by the home health agencies with which they contract, it . . . does not count toward the quantification of the degree of control exercised”); *Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468, 484 (N.D. Cal. 2017) (“undisputed indicia of control” included completing a Department of Transportation–required road rest; obtaining certain insurance or enrolling in employer’s insurance program and undergoing a criminal history background check); see also *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101–02 (9th Cir. 2014) (evaluating control for the purpose of applying state wage and hour laws and rejecting the employer’s assertion that control that is “driven by a need to comply with federal regulations or [customer] requirements”).

³⁶⁶ See 86 FR 1183.

³⁶⁷ 917 F.3d at 382.

³⁶⁸ *Id.*

³⁶¹ Case law further demonstrates that legal obligations imposed by the government can provide evidence of control. For example, in *Chao v. First National Lending Corp.*, loan officers were prohibited by state licensing requirements from working for more than one mortgage company at a time. 516 F. Supp. 2d 895, 900 (N.D. Ohio 2006), *aff’d*, 249 F. App’x 441 (6th Cir. 2007). This inability to work for others—albeit in compliance with state requirements—was determined to be further evidence that the loan officers “were economically dependent on [the employer] and, therefore, were employees and not independent contractors for purposes of the FLSA.” *Id.* The Fifth Circuit reached a similar conclusion when it rejected an insurance sales company’s argument that it “exerted little control beyond what insurance-industry regulations required.” *Hopkins*, 545 F.3d at 343. Instead, the court found that the employer exerted significant control over the economics of the insurance sales work performed by the workers, which was dispositive on this factor. *Id.*

³⁶² Civil Action Nos. 19–12317 c/w 20–584 & 21–596, 2022 WL 2111341, at *3–4 (E.D. La. June 10, 2022).

³⁶³ *Id.*

³⁶⁴ *Id.* at *4.

³⁵⁶ *Cornerstone Am.*, 545 F.3d at 343–44.

³⁵⁷ *Id.* at 343.

³⁵⁸ 86 FR 1247.

³⁵⁹ 86 FR 1183.

³⁶⁰ 721 F.3d at 1316 (emphasis added); see also *Schultz v. Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1271 (10th Cir. 1970) (noting that “arguments that an independent contractor relationship is shown by . . . the need to comply with the regulations of federal and state agencies do not persuade us” before affirming the conclusion that workers were employees under the FLSA).

requirements.³⁶⁹ Moreover, in *Iontchev*, the Ninth Circuit determined that the employer had “relatively little control over the manner in which” the work was performed in part because “its disciplinary policy primarily enforced the Airport’s rules and regulations” governing drivers; it did not say that the fact that government regulations applied to the work was not relevant at all to control.³⁷⁰

These cases are thus not inconsistent with the Department’s proposed regulation that compliance with safety standards, for example, may be relevant in assessing the control factor, depending on the facts of the individual case, and that a complete bar to considering such facts is inappropriate under the economic reality test. The facts and circumstances of each case must be assessed, and the manner in which the employer chooses to implement such obligations will be highly relevant to the analysis. For example, if an employer requires all individuals to wear hard hats at a construction site for safety reasons, that is less probative of control; if an employer chooses a specific time and location for weekly safety briefings and requires all workers to attend, that is more probative of control. Similarly, if an employer requires workers to provide proof of insurance required by state law, that is less probative of control; if an employer mandates what insurance carrier workers must use, that is more probative of control.

Control exerted by the employer to achieve these ends therefore may be relevant to the underlying analysis of whether the worker is economically dependent on the employer, particularly where the employer dictates and enforces the manner and circumstances of compliance. Of course, such control may not be determinative of the worker’s employee or independent contractor status (given the other factors included in the economic reality test) or probative of whether the control factor itself weighs in favor of employee status. This is merely one aspect of a multifactor test. Even if compliance with specific legal obligations or safety requirements is indicative of control in a specific case, this does not compel a particular conclusion as to that worker’s

status under the Act.³⁷¹ Thus, the Department’s proposal would not preclude a finding that a worker is an independent contractor where an employer obligates workers, for example, to comply with safety standards, after also considering other relevant factors in the economic reality analysis.

With these general principles in mind, the next sections address the Department’s proposals regarding several aspects of control to be considered in determining whether the nature and degree of control indicates that the worker is an employee or an independent contractor. This discussion is intended to be an aid in assessing common aspects of control—including scheduling, supervision, price setting, and ability to work for others—but should not be considered an exhaustive list, given the various ways in which an employer may control a worker or the economic aspects of the work relationship.

b. Scheduling

As noted above, an employer’s direct control over a worker’s schedule can be evidence of employee status. For example, the Fifth Circuit, in *Cromwell*, concluded that workers were employees even though the workers “controlled the details of how they performed their work [and] were not closely supervised” because, in part, the employer had “complete control over [workers’] schedule[s].”³⁷² Yet the absence of direct scheduling control is not necessarily strong evidence that the employer lacks control for purposes of the economic reality test, particularly where other evidence demonstrates control.³⁷³

Independent contractor arrangements can include the ability to work at any time the contractor decides it is appropriate to begin and end work. Some courts have found such scheduling control by the worker to be indicative of an independent contractor relationship.³⁷⁴ For example, the Eighth

Circuit affirmed a jury verdict finding a process server to be an independent contractor, in part, because the worker “was not required to report for work[,] . . . did not punch a time clock,” and did not have a set schedule, report a daily schedule to the employer, or face discipline for not working.³⁷⁵ Section 795.105(d)(1)(i) of the 2021 IC Rule suggests as much, noting that the ability to set their own schedule is evidence that weighs towards a worker being an independent contractor.³⁷⁶

However, after further consideration and review of the case law, the Department considers this framing to be too narrow because it does not take into account actions the employer may take that would limit the significance of the worker setting their own schedule. In fact, courts have concluded that the ability to set one’s own schedule provides only minimal evidence that the worker is an independent contractor when considered in relation to other forms of control by the employer in the workplace.³⁷⁷ If the ability to pick one’s shift is offset by the limited hours provided by the employer,³⁷⁸ or the employer purports to allow a worker an accommodating schedule, but arranges the work in a way that makes finding other clients impossible,³⁷⁹ then meaningful scheduling flexibility may not exist. Moreover, employers may also exert so much control over the amount or pace of the work as to negate any meaningful scheduling flexibility.³⁸⁰

favor of independent contractor status”); *Express Sixty-Minutes*, 161 F.3d at 303 (determining that the employer “had minimal control” over the delivery drivers in part because the drivers “set their own hours and days of work” which was evidence that the worker was an independent contractor).

³⁷⁵ *Karlson*, 860 F.3d at 1095–96.

³⁷⁶ 86 FR 1246–47.

³⁷⁷ See, e.g., *Verma*, 937 F.3d at 230 (finding the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be, in truth, “narrow choices” when evaluated against other types of control exerted by the employer); *DialAmerica*, 757 F.2d at 1384–86 (finding telephone survey workers who set their own hours and were free from supervision to be employees); *Sureway*, 656 F.2d at 1371 (“circumstances of the whole activity” show that laundry company “exercises control over the meaningful aspects of the cleaning [work]” despite the fact that workers could set their own hours).

³⁷⁸ *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (“Since plaintiffs could wait tables only during the restaurant’s business hours, [the employer] essentially established plaintiffs’ work schedules.”).

³⁷⁹ See, e.g., *Keller*, 781 F.3d at 814 (“[A] reasonable jury could find that the way that [the employer] scheduled [the worker’s] installation appointments made it impossible for [the worker] to provide installation services for other companies.”).

³⁸⁰ See, e.g., *Flint Eng’g*, 137 F.3d at 1441 (“The record indicates rig welders cannot perform their work on their own schedule; rather, pipeline work has assembly line qualities in that it requires orderly and sequential coordination of various crafts and workers to construct a pipeline.”).

³⁷¹ Additionally, even in cases in which a court did not consider control exerted over workers to comply with safety obligations as indicative of control, the court nevertheless concluded that such workers were employees under the FLSA. See, e.g., *Rick’s Cabaret*, 967 F. Supp. 2d at 916, 922.

³⁷² 348 F. App’x 57, 61 (5th Cir. 2009); see also *Mr. W Fireworks*, 814 F.2d at 1048 (noting that compelled work schedules were evidence of control and thus employee status).

³⁷³ See, e.g., *Pilgrim Equip.*, 527 F.2d at 1312 (“In the total context of the relationship neither the [worker’s] right to hire employees nor the right to set hours indicates such lack of control by [the employer] as would show these operators are independent from it.”) (emphasis added).

³⁷⁴ See, e.g., *Franze*, 826 F. App’x at 77 (emphasizing that schedule flexibility “weigh[s] in

³⁶⁹ See *id.* at 376.

³⁷⁰ See 685 F. App’x at 550. Additionally, in *Mr. W Fireworks*, the Fifth Circuit found that a defendant company’s requirement that plaintiffs work after ordinary business hours favored plaintiffs’ employee status notwithstanding the company’s attempt to link plaintiffs’ work schedules to state regulatory requirements (finding, however, that state regulations did not require such after-hours work). See 814 F.2d at 1048.

As the Tenth Circuit observed in *Dole v. Snell*, “flexibility in work schedules is common to many businesses and is not significant in and of itself.”³⁸¹ Thus, scheduling flexibility should not supplant a full evaluation of the control factor, with the ultimate question of economic dependence guiding the analysis. For example, the Third Circuit reversed summary judgment in favor of the employer and found disputed issues of material fact about drivers’ classification even where it was undisputed that drivers were free to choose their work schedules.³⁸² The Fifth Circuit has also found that the employer had “significant control” indicating employee status over dancers even though they had “input . . . as to the days that they wish to work.”³⁸³

In fact, circuit courts have often evaluated scheduling flexibility relative to other forms of control by the employer; where the employer has more control in other ways, scheduling flexibility becomes less relevant. In *Verma*, the Third Circuit found the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be “narrow choices” when evaluated against other types of control by the employer, such as setting the price for services.³⁸⁴ And multiple district courts have concluded that scheduling flexibility—including picking when to work or having the freedom to decline work—was not necessarily indicative of the overall control by an employer nor dispositive of a worker’s independent contractor status.³⁸⁵ Conversely, as the Second Circuit noted, where workers have greater scheduling flexibility and can use that flexibility to further their independent business, then that

flexibility may be probative of their independent contractor status.³⁸⁶

Flexibility may also be an inherent component of a business model, which allows some workers the freedom to use time between tasks or jobs in any fashion, providing some evidence of the employer’s lack of control. But flexible work arrangements that allow workers to, among other things, work for others, are not exclusive to independent contractors³⁸⁷ and do not preclude a finding that an employer has sufficient control over a worker in other ways such that this factor weighs in favor of employee status.³⁸⁸ Moreover, the power to decline work, and thus maintain a flexible schedule, is not alone persuasive evidence of independent contractor status when the employer can discipline a worker for doing so.³⁸⁹

In sum, case law on this issue demonstrates that scheduling control must be assessed in view of the total amount of control exerted by an

³⁸⁶ See *Saleem*, 854 F.3d at 146 (finding drivers that were able to set schedules that “were entirely of their making” were properly found to be independent contractors where, among other factors, drivers could select routes, turn down jobs without penalty, and exercise business-like initiative); see also *Alpha & Omega*, 39 F.4th at 1083–84 (finding genuine disputes of fact under control regarding whether drivers could set their own hours and whether drivers were allowed to decline trips without penalization).

³⁸⁷ Employers continue to offer even more flexibility in work arrangements while retaining workers as employees. See, e.g., *Andrè Dua et al., Americans are Embracing Flexible Work—and They Want More of It*, McKinsey & Company (June 23, 2022), <https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it> (finding, for example, that 58 percent of surveyed workers have the option to work remotely, either on a full-time or part-time basis; a flexibility that spans industries and occupations); Alicia Adamczyk, *Say Goodbye To 9-To-5: More and More, Corporate America is Letting People Work Whenever They Want*, *Fortune* (March 21, 2022, 10:36 a.m.), <https://fortune.com/2022/03/21/9-to-5-dead-flexible-schedules-more-popular/> (noting the shift in corporate culture that is allowing more workers to remain employees while also obtaining flexible working schedules).

³⁸⁸ For example, in *Collinge*, the employer contended that the on-demand drivers were properly independent contractors because of the flexible nature of their work despite exercising significant control including training the drivers, disciplining them for violations of procedure, dispatching pick-ups, and setting schedules. 2015 WL 1299369, at *2–4. Importantly, the fact that on-demand “[d]rivers are free to wait at home for their first delivery of the day, and . . . are free to ‘kill time’ on a computer or run personal errands” in between jobs was “unavailing because they merely show that [the employer] is unable to control its drivers when they are not working, an irrelevant point.” *Id.* at *4 (footnotes omitted).

³⁸⁹ *Off Duty Police*, 915 F.3d at 1060 (“Although workers could accept or reject assignments, multiple workers testified that [the employer] would discipline them if they declined a job,” which was evidence of the employer’s ultimate control).

employer. This is consistent with the economic realities, totality-of-the-circumstances approach. Thus, scheduling flexibility is not necessarily indicative of independent contractor status where other aspects of control are present, such as where an employer asserts that workers can work when and where they want but retains authority to discipline workers for declining work or imposes other methods of control that limit flexibility.

c. Supervision

Like the presence of a pre-defined work schedule, an employer’s close supervision of a worker on the job may be evidence of employee status.³⁹⁰ Conversely, the ability to work independently without close supervision may be evidence that a worker is an independent contractor.³⁹¹ However, traditional forms of in-person, continuous supervision are not required for a court to determine that this factor weighs in favor of employee status.³⁹² The form supervision takes can vary by type and method, and this should be part of any consideration of supervision under the control factor.

While it may be indicative of independent contractor status if a worker is free to work without close supervision, the lack of supervision is not alone indicative of independent contractor status.³⁹³ For instance, the nature of an employer’s business or the nature of the work may make direct supervision unnecessary. A lack of supervision in those circumstances, without further inquiry, does not compel a finding that the control factor

³⁹⁰ See, e.g., *Scantland*, 721 F.3d at 1314 (finding “meaningful supervision and monitoring” in part because the employer required cable installers to log in and out of a service on their cell phones to record when they arrived on a job and when they completed a job).

³⁹¹ See, e.g., *Chao v. Mid-Atlantic Installation Servs., Inc.*, 16 F. App’x 104, 106–08 (4th Cir. 2001) (agreeing with the district court’s analysis that the ability to complete jobs in any order, conduct personal affairs, and work independently is evidence that leans toward identifying a worker as an independent contractor).

³⁹² See, e.g., *Superior Care*, 840 F.2d at 1060 (“An employer does not need to look over his workers’ shoulders every day in order to exercise control.”); *Driscoll*, 603 F.2d at 756 (farmworkers could be employees of a strawberry farming company even where the employer exercised little direct supervision over them); *Twyeffort*, 158 F.2d at 947 (rejecting an employer’s contentions that its tailors are independent contractors because they are “free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish”).

³⁹³ The legislative history of the FLSA also supports this point directly, since the definition of “employ” was explicitly intended to cover as employment relationships those relationships where the employer turned a blind eye to labor performed for its benefit. *Antenor*, 88 F.3d at 934; see *supra* section V.C.4.a.

³⁸¹ 875 F.2d at 806; see also *Doty*, 733 F.2d at 723 (“A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee.”); *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992) (noting that even though a worker could “set [their] own hours and vacation schedule, such flexibility is not sufficient to negate control”); *Walling v. Twyeffort, Inc.*, 158 F.2d 944, 947 (2d Cir. 1946) (holding that workers who “are at liberty to work or not as they choose” were employees under FLSA).

³⁸² *Razak*, 951 F.3d at 146.

³⁸³ *Circle C. Invs.*, 998 F.2d at 327.

³⁸⁴ 937 F.3d at 230; see also *Paragon*, 884 F.3d at 1235–38 (finding that even though a worker could set his own schedule, he was an employee, in part, because his flat rate of pay did not allow him profit based on his performance).

³⁸⁵ See, e.g., *Hill v. Cobb*, No. 3:13–CV–045–SA–SAA, 2014 WL 3810226, at *4–8 (N.D. Miss. Aug. 1, 2014) (holding that workers were employees even though they had no specific hours or schedule and could “come and go as [they] pleased”); *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07–0069, 2008 WL 2944661, at *12–17 (M.D. Tenn. July 31, 2008) (holding that nurses were employees, even though they could accept or reject shifts).

weighs in favor of independent contractor status. For example, the Sixth Circuit found that security officers were employees although they were “rarely if ever supervised” on the job, noting that “the actual exercise of control requires only such supervision as the nature of the work requires.”³⁹⁴ More directly, “the level of supervision necessary in a given case is in part a function of the skills required to complete the work at issue,” and the officers in that case “had far more experience and training than necessary to perform the work assigned.”³⁹⁵ Moreover, an employer may develop training and hiring systems that make direct supervision unnecessary. This was the case in *Keller v. Miri Microsystems LLC*, where an employer relied on pre-hire certification programs and installation instructions when hiring their satellite dish installers.³⁹⁶ The employer argued that it had little day-to-day control over the workers and did not supervise the performance of their work. Yet the court noted that a factfinder could “find that [the employer] controlled [the installer’s] job performance through its initial training and hiring practices” in a way that would suggest that the workers were employees.³⁹⁷ Conversely, the Eleventh Circuit affirmed a district court’s conclusion that an insurance claims investigator was properly classified as an independent contractor, in part, because the investigator worked largely without supervision when setting up appointments, deciding where to work, and how and when to complete his assignments.³⁹⁸

In addition, the right of the employer to supervise at its discretion is evidence of control, even if the employer rarely

³⁹⁴ *Off Duty Police*, 915 F.3d at 1061–62 (citation omitted). This dynamic is also present in cases where the work can be performed away from a single work site and without supervision. This was the precise situation faced by the Third Circuit in *DialAmerica*. There, the fact that the workers could control the hours during which they worked and that they were subject to little direct supervision was unsurprising given that such facts are typical of homeworkers and thus largely insignificant in determining their status. 757 F.2d at 1383–84; see also *McComb v. Homeworkers’ Handicraft Coop.*, 176 F.2d 633, 636 (4th Cir. 1949) (“It is true that there is no supervision of [homeworkers’] work; but it is so simple that it requires no supervision.”).

³⁹⁵ *Off Duty Police*, 915 F.3d at 1061–62; see also *Antenor* 88 F.3d at 933 n.10 (explaining in an FLSA joint employment case that “courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees”); *Superior Care*, 840 F.2d at 1060 (“An employer does not need to look over his workers’ shoulders every day in order to exercise control.”).

³⁹⁶ 781 F.3d at 814.

³⁹⁷ *Id.*

³⁹⁸ *Nieman*, 775 F. App’x at 624–25.

exerts supervision.³⁹⁹ The Second Circuit, for example, affirmed a district court’s rejection of a nursing referral company’s argument that they did not supervise the nursing staff directly where the employer, in the court’s judgment, “unequivocally expressed *the right* to supervise the nurses’ work,” even though the supervision “occurred only once or twice a month.”⁴⁰⁰

Finally, the Department notes that supervision can also come in many different forms, which may not be immediately apparent. For example, supervision can be maintained remotely through technology instead of, or in addition to, being performed in person. For instance, employers may implement monitoring systems that can track a worker’s location and productivity, and even generate automated reminders to check in with supervisors.⁴⁰¹ Additionally, an employer can remotely supervise its workforce, for instance, by using electronic systems to verify attendance, manage tasks, or assess performance.⁴⁰²

³⁹⁹ See *infra* section V.D. (discussing this proposed rule’s approach to the primacy of actual practice); see also *Herman v. RSR Security Servs.*, 172 F.3d 132, 139 (2d Cir. 1999) (noting, in a joint employment case, that supervisory control “may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA”).

⁴⁰⁰ *Superior Care*, 840 F.2d at 1060 (emphasis added); see also *Off Duty Police*, 915 F.3d at 1060 (describing the control analysis as an inquiry into “whether the company *retains the right* to dictate the manner of the worker’s performance”) (emphasis added and internal quotations omitted).

⁴⁰¹ See, e.g., *Ruiz*, 754 F.3d at 1102–03 (finding in a state wage-and-hour case that direct monitoring techniques used by an employer to monitor its furniture delivery drivers were a form of supervision that made it more likely that the worker was an employee; as the court noted, the employer supervised the drivers by “conducting ‘follow-alongs;’ requiring that drivers call their . . . supervisor after every two or three stops; monitoring the progress of each driver on the ‘route monitoring screen;’ and contacting drivers if . . . [they] were running late or off course”—all of which supported the conclusion that the workers were employees under state law). For a general discussion of trends regarding remote supervision accomplished via technological means, see Matthew Finnegan, *Rise in Employee Monitoring Prompts Calls for New Rules to Protect Workers*, Computerworld (Nov. 30, 2021, 3:01 a.m.), <https://www.computerworld.com/article/3642712/rise-in-employee-monitoring-prompts-calls-for-new-rules-to-protect-workers.html>; and Rakeen Mabud, *When the Real Threat Is Worker Surveillance—Not The Robot Apocalypse*, Forbes (Jan. 22, 2019, 9:28 a.m.), <https://www.forbes.com/sites/rakeenmabud/2019/01/22/when-the-real-threat-is-worker-surveillance-not-the-robot-apocalypse/?sh=11fdfe046a2f>.

⁴⁰² The Department’s enforcement experience in this area is informative. An employer’s use of electronic visitor verification (“EVV”) systems can be evidence of an employment relationship, especially in those instances where the employer uses the systems to set schedules, discipline staff, or run payroll systems, for example. See *Domestic Service Final Rule Frequently Asked Questions (FAQs)*, U.S. Department of Labor (May 24, 2022,

Simply put, consistent with a totality-of-the-circumstances analysis, the ways in which supervision can be accomplished without traditional in-person techniques requires thorough consideration. As the Fifth Circuit recently reiterated, the “‘lack of supervision [of the individual] over minor regular tasks cannot be bootstrapped into an appearance of real independence.’”⁴⁰³ Control may be exercised through nontraditional means such as automated systems that monitor performance, but it can be found to be control nonetheless. Employers may also eliminate the need for close supervision because the structure of the job or the fact that little skill or discretion is envisioned or allowed. Thus, the lack of apparent in-person supervision (or even the lack of any in-person supervision) is not necessarily indicative of independent contractor status and additional consideration must be given to the ways in which an employer can implement supervision over a worker.

d. Setting a Price or Rate for Goods or Services

The ability to set a price or rate for the goods or services provided by the worker, or influence the price or rate, is relevant when examining the control factor under the economic realities analysis. This fact relates directly to whether the worker is economically dependent on the employer for work and helps answer the question whether the worker is in business for themselves.

There is substantial case law supporting the relevance of price setting to the economic realities analysis under the FLSA, and workers in business for themselves are generally able to set (or at least negotiate) their own prices for services rendered. As the Supreme Court explained in *Whitaker House*, in concluding that workers for a cooperative were employees under the Act, such workers “are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.”⁴⁰⁴ Circuit courts have similarly made clear that the employer’s setting a price for goods or services provided by the worker is a form of

10:30 a.m.), <https://www.dol.gov/agencies/whd/direct-care/faq#g11> (discussing EVV systems at question #10 in relation to an FLSA joint employment analysis).

⁴⁰³ *Parrish*, 917 F.3d at 381 (quoting *Pilgrim Equip.*, 527 F.2d at 1312) (alteration in original).

⁴⁰⁴ 366 U.S. at 32.

control indicative of an employment relationship. For example, in *Martin v. Selker Bros.*, the court noted that, among other things, the fact that the employer set the price of cash sales of gasoline reflected the employer's "pervasive control" over the workers.⁴⁰⁵ In *Off Duty Police*, the Sixth Circuit concluded that certain security guards were employees, in part, because "[the employer] set the rate at which the workers were paid."⁴⁰⁶ The Fourth Circuit in *McFeeley*, affirmed that a nightclub owner was exercising significant control because, among other things, they set the fees for private dances.⁴⁰⁷ And in *Verma*, the court identified, among other things, the employer's setting the price and duration of private dances as indicative of "overwhelming control" over the performance of the work.⁴⁰⁸ Consistently, when a worker negotiates or sets prices, those facts weigh in favor of independent contractor status. For example, in *Eberline v. Media Net, LLC*, the court found that a jury had sufficient evidence to conclude that a worker exerted independent control over meaningful aspects of his business in part due to "testimony that installers could negotiate prices for custom work directly with the customer and keep that money without consequence."⁴⁰⁹ The price of goods and services may sometimes be included in contracts between a business and an independent

⁴⁰⁵ 949 F.2d at 1294.

⁴⁰⁶ 915 F.3d at 1060.

⁴⁰⁷ 825 F.3d at 241–42.

⁴⁰⁸ 937 F.3d at 230. Similarly, the Second Circuit in *Agerbrink v. Model Service, LLC*, 787 F. App'x 22, 25 (2d Cir. 2019), determined that there were material facts in dispute regarding the worker's "ability to negotiate her pay rate," which related to the degree of control exerted by the employer. The court also rejected the employer's contention that the worker had control over her pay rate simply because she could either work for the amount offered or not work for that amount, stating that this "says nothing of the power to negotiate a rate of pay." *Id.* at 26. See also *Cornerstone Am.*, 545 F.3d at 343–44 (finding employment where employer controlled "meaningful" aspects of the work, including pricing); *Karnes v. Happy Trails RV Park, LLC*, 361 F. Supp. 3d 921, 929 (W.D. Mo. 2019) (finding park managers to be employees in part because the park owners "set all the prices"); *Hurst v. Youngelson*, 354 F. Supp. 3d 1362, 1370 (N.D. Ga. 2019) (finding relevant to the control analysis that the plaintiff was not free to set the prices she charged customers and had no ability to waive or alter cover charges for her customers).

⁴⁰⁹ 636 F. App'x 225, 227 (5th Cir. 2016); see also *Nelson v. Texas Sugars, Inc.*, 838 F. App'x 39, 42 (5th Cir. 2020) (concluding that because the dancers set their own schedule, worked for other clubs, chose their costume and routine, decided where to perform (onstage or offstage), kept all the money that they earned, and even chose how much to charge customers for dances, a reasonable jury could conclude that the Club did not exercise significant control over them") (emphasis added).

contractor.⁴¹⁰ Such a contract, however, does not automatically alleviate the need for a full analysis of this factor in order to consider whether and if the employer has control over the economic realities of the job; for example, whether the worker had the opportunity to negotiate and alter the terms of the contract. As with the other economic reality factors, the particular facts and circumstances of each case must be examined and considered in the context of the totality of the circumstances. Accordingly, setting a price or rate for goods provided or services rendered is a form of control that must be carefully considered when undertaking an economic realities analysis. It is evidence of employee status when an entity other than the worker sets a price or rate for the goods or services offered by the worker, or where the worker simply accepts a predetermined price or rate without meaningfully being able to negotiate it.⁴¹¹

e. Ability To Work for Others

Another aspect of the control factor is the ability to work for others, which is reflected in 2021 IC Rule § 795.105(d)(1)(i). This provision states that the control factor weighs in favor of independent contractor status when the worker, as opposed to the employer, exercises substantial control, such as "through the ability to work for others, which might include the potential employer's competitors." The provision also states that the control factor weighs in favor of employee status where the employer, as opposed to the worker, exercises substantial control, such as "by directly or indirectly requiring the individual to work exclusively for the potential employer."

The Department continues to believe that where a worker has an exclusive work relationship with one employer and does not have the ability to work for others, this indicates employee status. Where the employer exercises control over a worker's ability to work for others—either by directly prohibiting other work, for example, through a contractual provision,⁴¹² or indirectly

⁴¹⁰ *McFeeley*, 825 F.3d at 242–43 (observing that a worker doesn't "automatically become[] an employee covered by the FLSA the moment a company exercises any control over him. After all, a company that engages an independent contractor seeks to exert some control, whether expressed orally or in writing, over the performance of the contractor's duties . . .").

⁴¹¹ See, e.g., *Scantland*, 721 F.3d at 1315 (reversing summary judgment for the employer based in part on evidence that the workers "could not bid for jobs or negotiate the prices for jobs").

⁴¹² See *Parrish*, 917 F.3d at 382 (noting that the non-disclosure agreement did not require exclusive employment, and was therefore not an element of

by, for example, making demands on workers' time such that they are not able to work for other employers⁴¹³—this is indicative of the type of control over economic aspects of the work associated with an employment relationship. For example, in *Scantland*, the Eleventh Circuit determined that even if the workers were not prohibited from working for others, the workers essentially had an exclusive work relationship with the employer because they were required to work five to seven days a week and could not decline work.⁴¹⁴ Thus, the employer controlled whether they could work for others, which suggested that they were economically dependent on the employer.⁴¹⁵

The Department also recognizes that some courts find that less control is exercised by an employer where the worker can work for others, particularly competitors, and that this is indicative of an independent contractor relationship.⁴¹⁶ For example, in *Saleem*,

control that indicated employee status); *Off Duty Police*, 915 F.3d at 1060–61 (non-compete clause preventing workers from working for employer's customers for two years after leaving employment was among evidence supporting finding that control factor indicated employee status); *Express Sixty-Minutes*, 161 F.3d at 303 ("Independent Contractor Agreement" did not contain a "covenant-not-to-compete" and drivers could work for other courier delivery providers, which indicated independent contractor status); see also WHD Op. Ltr., 2000 WL 34444342, at *1, 4 (Dec. 7, 2000) (workers were required to sign an agreement that prohibited them from working for other companies while driving for the employer, which suggested employee status).

⁴¹³ See, e.g., *Keller*, 781 F.3d at 813–14 (although worker was not prohibited from working for other companies, "a reasonable jury could find that the way that [the employer] scheduled [the worker's] installation appointments made it impossible for [the worker] to provide installation services for other companies"); *Scantland*, 721 F.3d at 1313–15 (finding even if workers were not prohibited from working for other installation contractors their long hours and inability to turn down work suggested that the employer controlled whether they could work for others, which was in part why the control factor favored employee status); *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 F. App'x 57, 61 (5th Cir. 2009) ("Although it does not appear that [the workers] were actually prohibited from taking other jobs while working for [the employers], as a practical matter the work schedule established by [the employers] precluded significant extra work."); *Flint Eng'g*, 137 F.3d at 1441–42 (finding the hours the company required of the workers, coupled with driving time between home and remote work sites every day, made it "practically impossible for them to offer services to other employers").

⁴¹⁴ 721 F.3d at 1314–15.

⁴¹⁵ *Id.* at 1315.

⁴¹⁶ See, e.g., *Razak*, 951 F.3d at 145–46 (discussing disputed facts regarding the control factor, including whether drivers could drive for other services); *Paragon*, 884 F.3d at 1235 (finding control factor favored independent contractor status in part because worker could and did work for other employers); *Saleem*, 854 F.3d at 141–43 (drivers' ability to work for business rivals and transport

Continued

the Second Circuit determined that black car drivers' ability to work for business rivals and transport personal clients showed less control by and economic dependence on the employer.⁴¹⁷ The Second Circuit distinguished the black car drivers' ability to shift their business operations from one entity to another in order to maximize their profits through the exercise of "initiative, judgment, or foresight" from the nurses in *Superior Care* who were dependent on the employer for referrals to job assignments with multiple health care entities.⁴¹⁸ The Second Circuit also noted that the black car drivers were able to seek out multiple sources of income by building their own long-term business relationships, creating business cards, and advertising their services.⁴¹⁹

Consistent with the case law, the Department is proposing to address the ability to work for others in the control factor. The proposed regulation explains that where an employer either explicitly limits a worker's ability to work for others or places demands on a worker's time that effectively preclude them from working for others, these facts are relevant to the employer's control over the worker. The proposed regulation also states that more indicia of employer control favors employee status and more indicia of worker control favors independent contractor status. However, the regulation does not state that the ability to work for others is a form of control exercised by the worker. The Department is concerned that this framing, as reflected in the 2021 IC Rule, fails to distinguish between work relationships where a worker has multiple jobs in which they are dependent on each employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business. For example, if one worker holds multiple lower-paying jobs for which they are dependent on each employer for work in order to earn a living, and a different worker services multiple clients due to their business acumen and entrepreneurial skills, there are qualitative and legally significant

personal clients showed less control by and economic dependence on the employer); *Express Sixty-Minutes*, 161 F.3d at 303 (control factor "point[ed] toward independent contractor status" in part because of drivers' ability to work for other courier delivery providers).

⁴¹⁷ 854 F.3d at 141–43.

⁴¹⁸ *Id.* at 143–44 (citing *Superior Care*, 840 F.2d at 1060 and *Keller*, 781 F.3d at 809) (internal quotation marks omitted).

⁴¹⁹ *Id.* at 143.

differences in how these two scenarios should be evaluated under the economic reality test. Thus, the mere fact that an employer allows workers to work for others does not transform an employee into an independent contractor. As the Fifth Circuit stated, "[the] purposes [of the FLSA] are not defeated merely because essentially fungible piece workers work from time to time for neighboring competitors."⁴²⁰

Ultimately, "the question [a] court must resolve is whether a [worker's] freedom to work when she wants and for whom she wants reflects economic independence, or whether those freedoms merely mask the economic reality of dependence."⁴²¹ For example, in *McLaughlin v. Seafood, Inc.*, the Fifth Circuit examined whether piece-rate workers who peeled and picked crabmeat and crawfish for a seafood processor, and who were allowed "to come and go as they please . . . and even to work for competitors on a regular basis" were, as a matter of economic reality, dependent on their employers and therefore employees under the Act.⁴²² The court determined that the workers' ability to work for others was not dispositive, and that "[l]aborers 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" because "that freedom is hardly the same as true economic independence."⁴²³

Finally, the Department notes that courts frequently consider the exclusivity of the work relationship and workers' ability to work for others under the permanence factor as well, as discussed above in section V.C.3. The 2021 IC Rule elected to consider exclusivity and ability to work for others only under the control factor.⁴²⁴ Upon further consideration, however, the Department is proposing to retain consideration of these issues under the control factor as well as considering exclusivity under the permanency factor. The Department does not believe that this leads to confusion, however, because courts often analyze workers' ability to work for others under both the control and permanence factors, demonstrating that these facts are relevant to both factors and aid factfinders' analyses when determining

⁴²⁰ *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 877 (5th Cir. 1989) (per curiam).

⁴²¹ *Reich v. Priba Corp.*, 890 F. Supp. 586, 592 (N.D. Tex. 1995) (citing *Mednick*, 508 F.2d at 300, 301–02).

⁴²² 861 F.2d 450, 451–53 (5th Cir. 1988), modified on reh'g, 867 F.2d 875 (5th Cir. 1989).

⁴²³ *Seafood Inc.*, 867 F.2d at 877.

⁴²⁴ 86 FR 1192–93.

whether the worker is economically dependent on the employer or operating as an independent business as part of the overall economic realities inquiry. Specifically, the case law reflects and the Department believes that exclusivity can be considered as it relates to the degree of control exercised by the employer—such as what an employer's actions allow a worker to do vis-à-vis other employers—and that it speaks to the permanency of the work relationship. While permanency is often associated with an exclusive work relationship, it may or may not be due to the employer's control.⁴²⁵

The Department welcomes comments on all aspects of this factor.

Example: Nature and Degree of Control

A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines where in the nursing home each nurse will work. Alpha House's internal policies prohibit nurses from working for other nursing homes while employed with Alpha House in order to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts related to the control factor indicate employee status.

Another registered nurse provides specialty movement therapy to residents at Beta House. The nurse maintains a website and was contacted by Beta House to assist its residents. The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website. In addition, the nurse simultaneously provides therapy sessions to residents at Beta House as well as other nursing homes in the community. The facts related to the control factor—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by

⁴²⁵ The Department noted in the 2021 IC Rule that it "disagree[d] with the interpretation suggested by various business commenters that only worker practices which are affirmatively coerced by a potential employer may indicate employee status." *Id.* at 1205. As noted, "[s]uch a reading conflicts with the definition of 'employ' in section 3(g) of the Act, which makes clear that the FLSA was intended to cover employers who passively 'suffer or permit' work from individuals." *Id.*

Beta House, sets their own prices, and has the flexibility to select a work schedule—indicate independent contractor status.

5. Extent to Which the Work Performed is an Integral Part of the Employer's Business (Proposed § 795.110(b)(5))

Section 795.105(d)(2)(iii) of the 2021 IC Rule addresses whether the worker's work "is part of an integrated unit of production" of the employer's business.⁴²⁶ The 2021 IC Rule explained that "the relevant facts are the integration of the worker into the potential employer's production processes" because "[w]hat matters is the extent of such integration rather than the importance or centrality of the functions performed" by the worker.⁴²⁷ Thus, § 795.105(d)(2)(iii) expressly rejects as irrelevant to this factor whether the work is important or central to the employer's business, and § 795.115(b)(6)(ii) similarly advises in an illustrative example involving a freelance journalist that "[i]t is not relevant . . . that the writing of articles is an important part of producing newspapers."⁴²⁸

In proposed § 795.110(b)(5), the Department returns to the framing of this factor as whether the worker's work is an "integral part" of the employer's business. The Department believes that this return to considering whether the work is critical, necessary, or central to the employer's business better reflects the economic reality case law and is more consistent with the totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor.⁴²⁹ For decades, courts have repeatedly found a worker's performance of work that is integral to the employer's business to be an indicator of employee status.⁴³⁰ This judicial treatment reflects the understanding that a worker who performs work that is integral to an employer's business is more likely to be employed by the business, whereas a worker who performs work that is more peripheral to the employer's business is

more likely to be independent from the employer.⁴³¹

The 2021 IC Rule suggested that, in the modern economy, this assumption "may not always be valid," because lower transaction costs make it easier for companies to contract for products and services.⁴³² Yet, a firm's economic decision to contract for more essential functions is not synonymous with their workers' proper classification as employees or independent contractors. Practices that lead to efficiency or cost savings for the employer do not diminish the role of a factor in the economic reality test. Of course, it is not always true that workers whose work is integral are employees.⁴³³ The integral factor is just one part of the analysis. However, courts continue to find the factor useful for evaluating economic dependence or independence because of the insight it provides into whether a worker is in business for themselves or is a part of the employer's business.⁴³⁴

Most courts adopt a common-sense approach to whether the work or service performed by the worker is an integral part of the employer's business. For

⁴³¹ See, e.g., *Keller*, 781 F.3d 799 at 815 ("The more integral the worker's services are to the business, then the more likely it is that the parties have an employer-employee relationship."); *DialAmerica*, 757 F.2d at 1385 ("workers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer").

⁴³² 86 FR 1194. The 2021 IC Rule's rejection of the "integral" factor relied in part on a criticism articulated by Judge Easterbrook in a concurring opinion. *Id.* (citing *Lauritzen*, 835 F.2d at 1541 (Easterbrook, J., concurring)). Judge Easterbrook argued that the factor was not useful, because "[e]verything the employer does is 'integral' to its business—why else do it?" *Id.* He argued that the cucumber-pickers in *Lauritzen* may be crucial to the employer's pickle business, but so would architects be to a building firm, or tires to Chrysler—but that does not imply the firms employ the architects or Chrysler employs tire makers. 835 F.2d at 1541. The Department believes, however, that although other factors may indicate that workers who provide important or central services are independent contractors, it is nevertheless the case that such workers are more likely to be employees. Like any other factor, the integral factor provides only part of the analysis.

⁴³³ See, e.g., *Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121, 123 (2d Cir. 2015) ("Although tennis umpires are an integral part of the U.S. Open," other factors supported determination that umpires were independent contractors); *Perdomo v. Ask 4 Realty & Mgmt., Inc.*, No. 07–20089, 2007 WL 9706364, at *4 (S.D. Fla. Dec. 19, 2007) (construction worker's work was integral to remodeling business, but economic reality factors as a whole indicated independent contractor status).

⁴³⁴ See, e.g., *Sigui*, 484 F. Supp. 3d at 41 (finding that this factor indicated employee status for cable installers after acknowledging that not all courts consider this factor but rejecting employer's argument that the factor "is not particularly important in the analysis" because, in this case, it "gives a complete picture of the business relationship") (quoting *Pizzarelli v. Cadillac Lounge, LLC*, No. 15–254, 2018 WL 2971114, at *6 (D.R.I. Apr. 13, 2018)).

example, if the employer could not function without the service performed by the workers, then the service they provide is integral.⁴³⁵ Such workers are more likely to be economically dependent on the employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer.⁴³⁶ Courts also look at whether the work is important, critical, primary, or necessary to the employer's business.⁴³⁷ In most cases, if an employer's primary business is to make a product or provide a service, then the workers who are involved in making the product or providing the service are integral.⁴³⁸

The focus of the integral factor is on the work performed, not the individual worker.⁴³⁹ This approach evaluates

⁴³⁵ See, e.g., *Off Duty Police*, 915 F.3d at 1055 (rejecting employer's argument that it was merely an agent between its customers and the officers because the company "could not function without the services its workers provide"); *McFeeley*, 825 F.3d at 244 ("[E]ven the clubs had to concede the point that an 'exotic dance club could [not] function, much less be profitable, without exotic dancers.'") (quoting Secretary of Labor's Amicus Br. in Supp. of Appellees at 24); *Capital Int'l*, 466 F.3d at 309 (finding security guards were integral to a business where company "was formed specifically for the purpose of supplying" private security); cf. *Johnson v. Unified Gov't of Wyandotte Cnty./Kansas City*, 371 F.3d 723, 730 (10th Cir. 2004) (upholding jury verdict finding independent contractor status for security guards working for government housing authority and noting, with regard to integral factor, that the housing authority "had functioned for years before and after the program" under which security guards were hired).

⁴³⁶ See, e.g., *Brock v. Lauritzen*, 624 F. Supp. 966, 969 (E.D. Wis. 1985), *aff'd*, 835 F.2d 1529 (7th Cir. 1987) (finding that cucumber harvesters were integral to cucumber farmer's business and were "economically dependent upon Lauritzen's business for their work during the cucumber harvest season").

⁴³⁷ See, e.g., *Alpha & Omega*, 39 F.4th at 1085 (noting that this factor "turns 'on whether workers' services are a necessary component of the business'") (quoting *Paragon*, 884 F.3d at 1237); *Flint Eng'g*, 137 F.3d at 1443 (finding rig welders' work to be "an important, and indeed integral, component of oil and gas pipeline construction work" because their work is a critical step on every transmission system construction project); *Lauritzen*, 835 F.2d at 1537–38 ("It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business[.]"); cf. *Paragon*, 884 F.3d at 1237 ("Because [the worker]'s management of the pecan grove was not integral to the bulk of Paragon's [construction] business, this factor supports consideration of [the worker] as an independent contractor").

⁴³⁸ See, e.g., *Superior Care*, 840 F.2d at 1059 (for business that provided on-demand health care personnel, the nurses provided were themselves integral to the business).

⁴³⁹ See, e.g., *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 581 (D. Md. 2008) (explaining that "this factor does not turn on whether the individual worker was integral to the business; rather, it depends on whether the service

⁴²⁶ 86 FR 1247.

⁴²⁷ 86 FR 1195.

⁴²⁸ 86 FR 1247–48.

⁴²⁹ In addition, the common law test considers "whether the work is part of the regular business of the hiring party" in distinguishing between employees and independent contractors. *Reid*, 490 U.S. at 752.

⁴³⁰ See *Silk*, 331 U.S. at 716 (unloaders were "an integral part of the business[] of retailing coal"); see also *Off Duty Police*, 915 F.3d at 1055; *McFeeley*, 825 F.3d at 244; *Scantland*, 721 F.3d at 1319; *Flint Eng'g*, 137 F.3d at 1443; *Superior Care*, 840 F.2d at 1060–61; *Lauritzen*, 835 F.2d at 1537–38; *DialAmerica*, 757 F.2d at 1385; *Driscoll*, 603 F.2d at 755.

whether the worker performs work that is central to the employer's business, not whether the worker possesses some unique qualities that render them indispensable as an individual. An individual worker who performs the work that an employer is in business to provide but is just one of hundreds or thousands who perform the work (such as one operator among many at a call center) is nonetheless an integral part of the employer's business even if that one worker makes a minimal contribution to the business when considered among the workers as a whole.

As with the other components of the economic reality test, the integral part factor is just one area of inquiry and must be considered in relation to the other factors and to the extent that it contributes to the determination of economic dependence or independence. As such, it is unsurprising that, as noted in the 2021 IC Rule, there will be instances in which this factor "misaligns" with the ultimate result.⁴⁴⁰ It is to be expected that not every factor will "align" with the ultimate result in many cases. With a multifactor analysis, it is common that some factors will indicate one result while others will indicate another. This difference shows that courts correctly weigh the factors against each other. A factor pointing in a different direction from other factors in any one case is not evidence that a factor is not useful in the run of situations.

In support of its rejection of the integral factor in favor of an "integrated unit" factor, the 2021 IC Rule relied on a rigid reading of *Rutherford* (which noted that the work was "part of an integrated unit of production" of the employer).⁴⁴¹ Upon further consideration, the Department finds that this rigid approach to the specific phrasing of *Rutherford* does not reflect Supreme Court or circuit court precedent. As the 2021 IC Rule acknowledged, the Supreme Court's contemporaneous decision in *Silk* determined that coal "unloaders" were employees of a retail coal company as a matter of economic reality in part because they were "an integral part of the business[] of retailing coal."⁴⁴² This language was interpreted in the 2021 IC

the worker performed was integral to the business").

⁴⁴⁰ 86 FR 1194. Although it asserted a "higher rate of misalignment" when the ultimate classification was independent contractor status, the 2021 IC Rule did not identify any cases where the "integral part" factor led to a result that was contrary to the totality of the evidence. See *id.*

⁴⁴¹ 86 FR 1193–94 (citing *Rutherford*, 331 U.S. at 729).

⁴⁴² 331 U.S. at 716 (emphasis added).

Rule as being part of the overall inquiry rather than a factor that is useful to guide the inquiry.⁴⁴³ The Supreme Court's list of factors in *Silk* was not intended to be exhaustive, but instead consisted of factors the Court believed would be useful to courts and agencies applying the economic reality test in the future.⁴⁴⁴ The Court noted that the workers were an "integral part" of the business, and later courts have likewise found this to be useful to the economic reality analysis—so much so that most circuit courts routinely list it as an enumerated factor, but no court uses "integrated unit" for this factor.⁴⁴⁵

For these reasons, the Department is proposing to eliminate the "integrated unit" factor as an enumerated factor and instead to restore the integral factor, understood by courts as being focused on whether the work is critical, necessary, or central to the employer's business.⁴⁴⁶ The Department used this approach for decades prior to the 2021 IC Rule and found it a useful factor in the economic reality analysis.⁴⁴⁷ No court has applied the "integrated unit" approach adopted by the 2021 IC Rule. Restoring the integral factor would avoid confusion and provide greater consistency with existing case law—the overwhelming majority of which includes an analysis of the integral factor as set forth in this proposed rule.

The Department welcomes comments on all aspects of this factor.

Example: Extent To Which the Work Performed Is An Integral Part of the Employer's Business

A large farm grows tomatoes that it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because picking tomatoes is an integral part of farming tomatoes, and the company is in the business of farming tomatoes, the tomato pickers are integral to the company's business. The integral factor indicates employee status.

Alternatively, the same farm pays an accountant to provide non-payroll

⁴⁴³ 86 FR 1194.

⁴⁴⁴ 331 U.S. at 716.

⁴⁴⁵ *Id.*; see *supra* n. 430.

⁴⁴⁶ Of course, if it is somehow relevant to the question of economic dependence or independence, the extent to which a worker is integrated into a business's production processes may be considered under any relevant factor or as an additional factor. For example, indicators that a worker is integrated into an employer's main production processes, such as whether the worker is required to work at the employer's main workplace or wear the employer's uniform, may be indicators of an employer's control over the work.

⁴⁴⁷ See, e.g., WHD Fact Sheet #13 (July 2008) (listing "[t]he extent to which the services rendered are an integral part of the principal's business" as a factor).

accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm, thus the accountant is not integral to the business. Therefore, the integral factor indicates independent contractor status.

6. Skill and Initiative (Proposed § 795.110(b)(6))

The 2021 IC Rule includes an "amount of skill required for the work" factor and § 795.105(d)(2)(i) states that this factor "weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide."⁴⁴⁸ That regulation further states that this factor "weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job."⁴⁴⁹

The Department is proposing that this factor be described as the "skill and initiative" factor and consider whether a worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative that is consistent with the worker being in business for themselves instead of being economically dependent on the employer. The Department is proposing to reaffirm the longstanding principle that this factor indicates employee status where the worker lacks specialized skills. Proposed § 795.110(b)(6) states that where the worker brings specialized skills to the work relationship, 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 instead of an employee. The Department believes that the application of initiative in connection with specialized skills is useful in answering the overarching inquiry of whether the worker is economically dependent on the employer for work or is in business for themselves, and is therefore proposing to reintegrate initiative into this factor and no longer exclude consideration of initiative when applying this factor, as provided in the 2021 IC Rule.

When applying this factor, many courts have recognized that a worker's lack of specialized skills to perform the work indicates that the worker is an employee. For example, courts have

⁴⁴⁸ 86 FR 1247.

⁴⁴⁹ *Id.*

found that where the work of security guards and traffic control officers requires little skill, this lack of specialized skills indicates that the workers are employees instead of independent contractors.⁴⁵⁰ Numerous courts have found that driving is not a specialized skill, indicating employee status.⁴⁵¹ Other courts have found that the skill factor favors employee status where janitorial work does not require specialized skills.⁴⁵² Courts have reached similar conclusions in cases involving landscape workers and call center workers, among other workers.⁴⁵³

As these cases make clear, the worker's lack of specialized skills when

⁴⁵⁰ See, e.g., *Off Duty Police*, 915 F.3d at 1055–56 (noting that “[t]he skills required to work for ODPS are far more limited than those of a typical independent contractor” in finding that the skill factor weighed in favor of employee status for security guards and traffic control workers); *Walsh v. EM Protective Servs. LLC*, No. 3:19–cv–00700, 2021 WL 3490040, at *7 (M.D. Tenn. Aug. 9, 2021) (traffic control officers require “relatively little skill” and security guards require “minimal skill,” indicating employee status); *Solis v. Int'l Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740, 752 (N.D. Ill. 2011) (finding that the “vast majority of the Guards’ work . . . did not require any special skills”).

⁴⁵¹ See, e.g., *Razak*, 951 F.3d at 147 (noting that it “is generally accepted that ‘driving’ is not itself a ‘special skill’” in determining that the skill factor weighs in favor of employee status); *Iontchev*, 685 F. App'x at 550 (“The service rendered by the [taxi drivers] did not require a special skill.”); *Campos v. Zopounidis*, No. 3:09–cv–1138 (VLB), 2011 WL 2971298, at *7 (D. Conn. July 20, 2011) (“There is no evidence that Campos’s job as a delivery person required him to possess any particular degree of skill. Campos did not need education or experience to perform his job. Although he needed a driver’s license in order to legally drive his vehicle for deliveries, the possession of a driver’s license and the ability to drive an automobile is properly characterized as a ‘routine life skill’ that other courts have found to be indicative of employment status rather than independent contractor status.”).

⁴⁵² See, e.g., *Perez v. Super Maid, LLC*, 55 F. Supp. 3d 1065, 1077–78 (N.D. Ill. 2014) (noting, in finding that skill factor favored employee status, that “[m]aintenance work, such as cleaning, sweeping floors, mowing grass, unclogging toilets, changing light fixtures, and cleaning gutters, does not necessarily involve such specialized skills as would support independent contractor status,” and that “cleaning services, although difficult and demanding, were even less complex than those maintenance services”) (internal quotation marks omitted); *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013 WL 3506149, at *8 (N.D. Ill. July 11, 2013) (“The maids’ work may be difficult and demanding, but it does not require special skill,” indicating employee status).

⁴⁵³ See, e.g., *Acosta v. New Image Landscaping, LLC*, No. 1:18–cv–429, 2019 WL 6463512, at *6 (W.D. Mich. Dec. 2, 2019) (facts that “little or no skill was required” and “prior landscaping experience” was not required meant that skill factor favored employee status for landscapers); *Acosta v. Wellfleet Commc'ns, LLC*, No. 2:16–cv–02353–GMN–GWF, 2018 WL 4682316, at *7 (D. Nev. Sept. 29, 2018) (explaining that skill factor favored employee status for call center workers because “all that Defendants required was the ability to communicate well and read a script”), *aff'd sub nom. Walsh v. Wellfleet Commc'ns*, No. 20–16385, 2021 WL 4796537 (9th Cir. Oct. 14, 2021).

performing the work generally indicates employee status.⁴⁵⁴ This is consistent with 2021 IC Rule § 795.105(d)(2)(i),⁴⁵⁵ as noted above. It is also consistent with the position taken in an opinion letter issued by WHD in 2000, which stated that the fact that “the drivers appear to perform routine work that requires no prior experience” indicates employee status.⁴⁵⁶

That the work does not require prior experience, that the worker is dependent on training from the employer to perform the work, or that the work requires no training are indicators that the worker lacks specialized skills. Even if the worker possesses specialized skills, this factor may indicate employee status if the work does not require those skills. The Sixth Circuit explained that the skill factor favored employee status in a case because, although a subset of the workers possessed skill and prior experience, the work did not require skill and prior experience and the “workers [we]re required to attend only a four-hour training session before they begin work.”⁴⁵⁷ The Tenth Circuit has similarly explained in a case that, even if some workers had prior experience and training, the workers were not required “to have any specialized skills or prior experience when they start to work,” indicating employee status.⁴⁵⁸

Consistent with the principle that no one factor is dispositive, however, workers who lack specialized skills may be independent contractors even if this factor is very unlikely to point in that direction in their circumstances. A landscaper, for example, may perform work that does not require specialized skills, but application of the other factors may demonstrate that the landscaper is an independent contractor (for example, the landscaper may have a meaningful role in determining the price charged for the work, make decisions affecting opportunity for profit or loss, determine the extent of capital investment, work for many clients, and/or perform work for clients for which landscaping is not integral).

Where a worker brings specialized skills to the work relationship, further

analysis will determine whether this factor indicates employee or independent contractor status. Consistent with the approach of evaluating each factor in the context of the ultimate inquiry of whether the worker is economically dependent on the employer or in business for themselves, proposed § 795.110(b)(6) states that the worker should use the specialized skills in connection with business-like initiative for this factor to suggest independent contractor status. Many circuit courts of appeals have expressly recognized that business-like initiative is at least part of the inquiry. For example, the Second Circuit has explained that “the fact that workers are skilled is not itself indicative of independent contractor status.”⁴⁵⁹ Although the workers in that case “possess[ed] technical skills,” the court noted that “nothing in the record reveal[ed] that they used these skills in any independent way,” which indicated that the workers’ skill did not “weigh significantly in favor of independent contractor status.”⁴⁶⁰ The Third Circuit agreed that “the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way.”⁴⁶¹ The Third Circuit has further explained that if the workers use their skills in connection with “business-like initiative,” the factor indicates independent contractor status: “Some distributors benefitted from their skill in persuading others to become distributees, and they certainly exercised business-like initiative in this regard.”⁴⁶²

The Fifth Circuit describes this factor as evaluating the skill and initiative required in performing the work and considers initiative along with skill.⁴⁶³ The Fifth Circuit has explained that, generally, “we look for some unique skill set, or some ability to exercise significant initiative within the business.”⁴⁶⁴ It has noted that “[g]reater skill and more demonstrated initiative counsel in favor of [independent contractor] status.”⁴⁶⁵ When the

⁴⁵⁹ *Superior Care*, 840 F.2d at 1060.

⁴⁶⁰ *Id.*

⁴⁶¹ *Selker Bros.*, 949 F.2d at 1295.

⁴⁶² *DialAmerica*, 757 F.2d at 1387.

⁴⁶³ See, e.g., *Hobbs*, 946 F.3d at 834; *Parrish*, 917 F.3d at 385.

⁴⁶⁴ *Cornerstone Am.*, 545 F.3d at 345 (citations omitted).

⁴⁶⁵ *Parrish*, 917 F.3d at 385; see also, e.g., *Express Sixty-Minutes*, 161 F.3d at 305 (“The district court did not discuss initiative during its evaluation of this factor. We agree with the Secretary that the skill and initiative factor points toward employee status.”); *Circle C. Invs.*, 998 F.2d at 328 (“The

⁴⁵⁴ As the Tenth Circuit, for example, has explained, “the lack of the requirement of specialized skills is indicative of employee status.” *Flint Eng'g*, 137 F.3d at 1443 (quoting *Snell*, 875 F.2d at 811) (alteration omitted).

⁴⁵⁵ 86 FR 1247.

⁴⁵⁶ WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000).

⁴⁵⁷ *Off Duty Police*, 915 F.3d at 1056 (citing *Keller*, 781 F.3d at 807, 809).

⁴⁵⁸ *Snell*, 875 F.2d at 811; see also *McFeeley*, 825 F.3d at 244 (“As to the degree of skill required, the Clubs conceded that they did not require dancers to have prior dancing experience.”).

worker's specialized skills are coupled with initiative, the Fifth Circuit has found that this factor indicates independent contractor status.⁴⁶⁶

Similarly, in a case involving workers on a pickle farm, the Seventh Circuit explained that employees are skilled workers too, noting that although the workers in that case had "develop[ed] some specialized skill," "this development of occupational skills is no different from what any good employee in any line of work must do," and concluding that "[s]kills are not the monopoly of independent contractors."⁴⁶⁷ The Tenth Circuit has explained that although the lack of specialized skills indicates employee status, "the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way."⁴⁶⁸ And the Eleventh Circuit has explained in a case where the workers were "clearly skilled workers" that "[t]he meaningfulness of this skill as indicating that plaintiffs were in business for themselves or economically independent, however, is undermined by the fact that [the employer] provided most technicians with their skills."⁴⁶⁹

The Department has previously stated in guidance that specialized skills should be coupled with business-like initiative for this factor to indicate independent contractor status. In AI 2015-1, the Department explained that "specialized skills do not indicate that workers are in business for themselves, especially if those skills are technical

dancers do not exhibit the skill or initiative indicative of persons in business for themselves.").

⁴⁶⁶ See, e.g., *Thibault v. BellSouth Telecommc'ns, Inc.*, 612 F.3d 843, 847 (5th Cir. 2010) (noting when considering this factor that "the splicers' success depended on their ability to find consistent work by moving from job-to-job"); *Carrell*, 998 F.2d at 333 (welders' work "requires specialized skills" and, although they exercised "limited" initiative "once on a job," a welder's "success depended on his ability to find consistent work by moving from job to job and from company to company"); cf. *Hobbs*, 946 F.3d at 834 (agreeing with the district court's finding that this factor was neutral because, although the workers "were highly skilled workers" and their work "required specialized skills," their work "did not require them to demonstrate significant initiative"); but see *Parrish*, 917 F.3d at 386 (although the employer's evidence that the workers showed initiative was not very compelling, the workers' "specialized skill weighs heavily in our analysis and persuades us to hold this factor leans in favor of [independent contractor] status").

⁴⁶⁷ *Lauritzen*, 835 F.2d at 1537; see also *Super Maid*, 55 F. Supp. 3d at 1077 (noting that "all jobs require some modicum of skill") (citing *Lauritzen*, 835 F.2d at 1537); *Keller*, 781 F.3d at 809 (noting that, "[t]o a certain extent, . . . every worker has and uses relevant skills to perform his or her job, but not everyone is an independent contractor").

⁴⁶⁸ *Flint Eng'g*, 137 F.3d at 1443 (quoting *Selker Bros.*, 949 F.2d at 1295).

⁴⁶⁹ *Scantland*, 721 F.3d at 1318.

and used to perform the work."⁴⁷⁰ For that reason, application of this factor should not "overlook[] whether the worker is exercising business skills, judgment, or initiative."⁴⁷¹ The July 2008 version of WHD Fact Sheet #13 describes the factor as "[t]he amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor."⁴⁷² The Department's May 2014 version of Fact Sheet #13 explained:

Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

For all these reasons, there is strong support in the case law and the Department's prior guidance for not limiting this factor to an evaluation of whether the worker has specialized skills and for also considering whether the worker is exercising business-like initiative in relation to any specialized skills. Moreover, considering initiative in this manner would be consistent with evaluating each factor in the context of the ultimate inquiry of whether the worker is economically dependent on the employer or is an independent business. Considering only whether the worker has technical or specialized skills is not necessarily probative of the ultimate inquiry of economic dependence or independence because, as explained above, employees and independent contractors often both have specialized skills, and thus evaluating those skills is not particularly distinguishing. Whether a worker uses those specialized skills to exercise business-like initiative or in some other way that suggests that the worker is operating as an independent business is

⁴⁷⁰ 2015 WL 4449086, at *9 (citing *Superior Care*, 840 F.2d at 1060) (withdrawn June 7, 2017).

⁴⁷¹ *Id.*

⁴⁷² WHD Fact Sheet #13 (July 2008). This language from the July 2008 version of Fact Sheet #13 comes from *Rutherford*, which noted that the workers in that case did not exercise "the initiative, judgment or foresight of the typical independent contractor." 331 U.S. at 730.

more probative, as a matter of economic reality, of that distinction between economic dependence and independence.⁴⁷³

The 2021 IC Rule does not consider initiative in the context of this factor.⁴⁷⁴ The 2021 IC Rule limited this factor to "focus solely on skill" to "clarif[y] the analysis"; the 2021 IC Rule acknowledged that initiative is an important consideration, but it confined consideration of initiative to the control and opportunity for profit or loss factors because, for purposes of that rule, those factors are the more probative factors.⁴⁷⁵

Upon further consideration, the Department believes that it is appropriate to consider initiative under the skill factor to the extent that workers exercise business-like initiative in the use of their specialized skills. For the reasons explained above, the worker's use of initiative in connection with any specialized skills is more probative of the ultimate inquiry of whether the worker is economically dependent on the employer or is an independent business. Both employees and independent contractors can be highly skilled,⁴⁷⁶ so consideration of the worker's specialized skills alone can be less probative of that inquiry. On the other hand, consideration of the worker's initiative in connection with any specialized skills better assesses the economic realities of the work relationship and is more helpful in distinguishing between employees and independent contractors.

As explained above in this NPRM, types of initiative by a worker may also

⁴⁷³ Some circuit court decisions have not considered the worker's initiative when evaluating the skill factor. See, e.g., *Keller*, 781 F.3d at 809-10 (focusing on the workers' skill and how they acquired it and contrasting carpenters, who have "unique skill, craftsmanship, and artistic flourish," with cable technicians, who do not need "unique skills" but rather are selected on the basis of availability and location); *Mid-Atlantic Installation*, 16 F. App'x at 107 (affirming district court's conclusion that the skills of installing cable are indicative of independent contractor status because the skills are "akin to those of carpenters, construction workers, and electricians, who are usually considered independent contractors"). For the reasons explained above, however, whether workers use those specialized skills to exercise business-like initiative is what makes this factor probative of the ultimate inquiry of whether the workers are in business for themselves. Thus, the skills of cable installers, carpenters, construction workers, and electricians, for example, even assuming that they are specialized, are not themselves indicative of independent contractor status. Carpenters, construction workers, electricians, and other workers who operate as independent businesses, instead of being economically dependent on their employer, are independent contractors. See generally AI 2015-1, 2015 WL 4449086, at *9-10.

⁴⁷⁴ See 86 FR 1247 (§ 795.105(d)(2)(i)).

⁴⁷⁵ 86 FR 1191.

⁴⁷⁶ See, e.g., *supra* n. 467 and accompanying text.

be relevant when applying the control factor or the opportunity for profit or loss factor.⁴⁷⁷ When evaluating the skill factor, the focus should be whether the worker uses any specialized skills to exercise business-like initiative. When applying the opportunity for profit or loss factor, for example, the focus is whether the worker uses managerial skill—a type of initiative—to affect the worker's opportunity for profit or loss. Thus, the focus of each factor is different, but some facts showing an exercise of initiative can nonetheless be relevant under the skill factor and another factor. Considering facts showing an exercise of initiative under more than one factor to the extent appropriate depending on the facts of a case is consistent with and furthers the totality-of-the-circumstances approach to assessing the economic realities of the work relationship.⁴⁷⁸

The Department welcomes comments on all aspects of this factor.

Example: Skill and Initiative

A highly skilled welder provides welding services for a construction firm. The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. The skill and initiative factor indicates employee status.

A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. The skill and initiative factor indicates independent contractor status.

7. Additional Factors (Proposed § 795.110(b)(7))

Section 795.105(d)(2)(iv) of the 2021 IC Rule states that additional factors may be considered if they are relevant to the ultimate question of whether the

workers are economically dependent on the employer for work or in business for themselves.⁴⁷⁹ This reflects the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the enumerated factors. This approach is consistent with the Supreme Court's guidance in *Silk*, where it cautioned that its suggested factors are not intended to be exhaustive.⁴⁸⁰ It is also consistent with the approach that courts and the Department have used in the decades since to determine whether workers are employees or independent contractors under the FLSA. The Department is proposing to move this provision to proposed § 795.110(b)(7) with minor editorial changes.

The 2021 IC Rule states that its list of factors is “not exhaustive.”⁴⁸¹ In order to emphasize that point, the Department included an explicit provision recognizing that other potentially relevant factors may exist in some circumstances.⁴⁸² The 2021 IC Rule thus states that “[a]dditional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA[.]”⁴⁸³ The regulation further cautions that such additional factors are only relevant “if the factors in some way indicate whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.”⁴⁸⁴ The preamble to the Rule explained that “[f]actors that do not bear on this question, such as whether an individual has alternate sources of wealth or income and the size of the hiring company, are not relevant.”⁴⁸⁵

The Department is proposing to retain § 795.105(d)(2)(iv) with only minor editorial changes. Retaining this provision reiterates that the enumerated factors are not to be applied mechanically but should be viewed along with any other relevant facts in light of whether they indicate economic dependence or independence. Retaining the provision also preserves the caution that only factors that are relevant to the overall question of economic dependence or independence should be considered. This language stresses that the economic reality is what matters, and not labels or formalities.

⁴⁷⁹ 86 FR 1247.

⁴⁸⁰ *Silk*, 331 U.S. at 716 (“No one [factor] is controlling nor is the list complete.”).

⁴⁸¹ 86 FR 1246 (§ 795.105(c)).

⁴⁸² 86 FR 1196.

⁴⁸³ 86 FR 1247 (§ 795.105(d)(2)(iv)).

⁴⁸⁴ *Id.*

⁴⁸⁵ 86 FR 1196.

The Department is not proposing to identify any particular additional factors that may be relevant. The Department previously identified the “degree of independent business organization and operation” as a seventh factor that it considered in its analysis.⁴⁸⁶ However, given the Department's focus in this proposed rulemaking on reflecting the economic reality factors commonly used by the circuit courts of appeals, the Department is not proposing to include the worker's “degree of independent business organization and operation” as a seventh factor. The Department is not aware of any court that has used this as a standalone factor. Moreover, the Department is concerned that facts that may relate to whether a worker has an independent business organization—such as whether the worker has incorporated or receives an Internal Revenue Service (IRS) Form 1099 from an employer—reflect mere labels rather than the economic realities and are thus not relevant. To the extent facts such as the worker having a business license or being incorporated may suggest that the worker is in business for themselves, they may be considered either as an additional factor or under any enumerated factor to which they are relevant. However, consistent with an economic reality analysis, it is important to inquire into whether the worker's license or incorporation are reflective of the worker being in business for themselves as a matter of economic reality. For example, if an employer requires a worker to obtain a certain license or adopt a certain form of business in order to perform work for it, this may be evidence of the employer's control, rather than a worker who is independently operating a business. Indeed, even where “the parties structure[] the relationship as an independent contractor, . . . the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities.”⁴⁸⁷

The Department welcomes comments on this provision.

D. Primacy of Actual Practice (2021 IC Rule § 795.110)

The Department is proposing to delete 2021 IC Rule § 795.110 and use this section for the discussion of the economic reality factors.

Section 795.110 of the 2021 IC Rule provides that in determining economic dependence “the actual practice of the parties involved is more relevant than

⁴⁸⁶ WHD Fact Sheet #13 (July 2008).

⁴⁸⁷ *Safarian v. American DG Energy Inc.*, 622 F. App'x 149, 151 (3d Cir. 2015).

⁴⁷⁷ See *supra* sections V.C.1. and 4., discussions of opportunity for profit or loss and control.

⁴⁷⁸ See *supra* section V.C., discussion of economic reality test.

what may be contractually or theoretically possible.”⁴⁸⁸ This absolute rule, elevating actual practice over contractual authority that the employer may have reserved for exercise in the future, is overly mechanical and does not allow for appropriate weight to be given to contractual provisions in situations in which they are crucial to understanding the economic realities of a relationship. Instead, the Department believes that a less prescriptive approach is more faithful to the totality-of-circumstances economic reality analysis, such that contractual or other reserved rights should be considered like any other fact under each factor to the extent they indicate economic dependence.

The 2021 IC Rule stressed that “unexercised powers, rights, and freedoms” are “less relevant” than those that are actually exercised.⁴⁸⁹ Section 795.110 of the 2021 IC Rule states that a worker’s theoretical ability to control aspects of the work are less meaningful if the worker is prevented from exercising those rights, and that a business’ contractual authority to exercise control may be of little relevance if it is never exercised.⁴⁹⁰ Though it is true that contractual authority may in some instances be less relevant, the 2021 IC Rule’s blanket statement that actual practice is always more relevant is incompatible with an approach that does not apply the factors mechanically but looks to the totality of the circumstances in evaluating the economic realities.⁴⁹¹ The focus is always on the economic realities rather than mere labels,⁴⁹² but contractual provisions are not always mere labels. They sometimes reflect and influence the economic realities of the relationship.

Every fact that is relevant to economic dependence should be considered in the analysis. Because the entirety of the economic reality must be considered, both the actual practices of the parties and the contractual possibilities must be considered. Within each factor of the test, there may be actual practices that

are relevant, and there may also be contractual provisions that are relevant. The significance of each in the overall analysis should be informed by their relevance to the economic realities. This examination will be specific to the facts of each economic relationship and cannot be predetermined.

It is often the case that the actual practice of the parties is more relevant to the economic dependence inquiry than contractual or theoretical possibilities. For example, where an employer theoretically permits its workers to decline work assignments, but in practice disciplines workers who decline assignments, the actual practice of the parties outweighs the theoretical rights of the workers.⁴⁹³ However, in other cases the contractual possibilities may reveal more about the economic reality than the parties’ practices. For example, a company may reserve the right to supervise workers despite rarely making supervisory visits.⁴⁹⁴ Such reserved rights to control the worker may strongly influence the behavior of the worker in their performance of the work even without the company exercising its contractual rights. As a result, this contractual possibility may be more indicative of the reality of the economic relationship between the worker and the company than the company’s apparent hands-off practice. That courts often refer to the control factor as the “right to control” the work suggests that even rarely exercised or unexercised rights can be informative in evaluating economic dependence.⁴⁹⁵

In response to comments asserting that prioritizing actual practice would make the economic reality test impermissibly narrower than the common law control test, the 2021 IC Rule asserted that “the common law control test does not establish an irreducible baseline of worker coverage for the broader economic reality test applied under the FLSA.”⁴⁹⁶ This understanding of the FLSA’s scope of employment is inconsistent with the Supreme Court’s observations that “[a]

broader or more comprehensive coverage of employees” than that contemplated under the FLSA “would be difficult to frame,”⁴⁹⁷ and that the FLSA “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”⁴⁹⁸ The 2021 IC Rule’s blanket diminishment of the relevance of the right to control is inconsistent with the Supreme Court’s observations that the FLSA’s scope of employee coverage is exceedingly broad and broader than what exists under the common law. That the employer’s right to control is part of the common law test shows that it is a useful indicator of employee status.⁴⁹⁹ The 2021 IC Rule’s dismissal of contractual rights as always less relevant than actual practice is inconsistent with the need to consider all facts relevant to the economic realities.⁵⁰⁰

In sum, the declaration in 2021 IC Rule § 795.110 that the parties’ actual practices are invariably more relevant is inconsistent with how courts have evaluated employment relationships. It lacks the flexibility required by the economic reality test and is inconsistent with the FLSA’s broad definition of employment. For these reasons, the Department is proposing to strike § 795.110, so that all facts relevant to the economic realities of a potential employment relationship may be evaluated according to their relevance to the question of economic dependence.

⁴⁹⁷ *Rosenwasser*, 323 U.S. at 362–63.

⁴⁹⁸ *Darden*, 503 U.S. at 326.

⁴⁹⁹ *Id.* at 323 (common-law employment test considers “the hiring party’s right to control the manner and means by which the product is accomplished”) (quoting *Reid*, 490 U.S. at 751–52); Restatement (Third) of Agency, sec. 7.07, Comment (f) (2006) (“For purposes of respondeat superior, an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work.”).

⁵⁰⁰ Though the economic reality test requires consideration of all relevant facts, and upon further consideration, the Department does not believe it is appropriate to maintain a regulatory provision that dismisses consideration of reserved rights that are not exercised where relevant to economic dependence, the Department does not intend to minimize or disregard the longstanding case law that looks to the actual behavior of the parties. See, e.g., *Parrish*, 917 F.3d at 387 (“[T]he analysis is focused on economic reality, not economic hypotheticals.”); *Saleem*, 854 F.3d at 142 (“[P]ursuant to the economic reality test, it is not what [workers] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.”) (internal quotation marks and citation omitted); *Sureway*, 656 F.2d at 1371 (“[T]he fact that Sureway’s ‘agents’ possess, in theory, the power to set prices, determine their own hours, and advertise to a limited extent on their own is overshadowed by the fact that in reality the ‘agents’ work the same hours, charge the same prices, and rely in the main on Sureway for advertising.”).

⁴⁸⁸ 86 FR 1247.

⁴⁸⁹ *Id.* at 1204.

⁴⁹⁰ *Id.* at 1247.

⁴⁹¹ See *Flint Eng’g*, 137 F.3d at 1441 (“None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.”); *Superior Care*, 840 F.2d at 1059 (“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.”).

⁴⁹² *Rutherford*, 331 U.S. at 729 (“Where the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”).

⁴⁹³ See *Off Duty Police*, 915 F.3d at 1060–61 (finding that, among other things, officers’ testimony that they were disciplined for turning down assignments, despite having the right to do so, supported employee status).

⁴⁹⁴ See *Superior Care*, 840 F.2d at 1060 (“Though visits to the job sites occurred only once or twice a month, Superior Care unequivocally expressed the right to supervise the nurses’ work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes. An employer does not need to look over his workers’ shoulders every day in order to exercise control.”).

⁴⁹⁵ See, e.g., *Off Duty Police*, 915 F.3d at 1060; *DialAmerica*, 757 F.2d at 1386; *Driscoll*, 603 F.2d at 754.

⁴⁹⁶ 86 FR 1205.

The Department welcomes comments on the removal of this provision.

E. Examples of Analyzing Economic Reality Factors (2021 IC Rule § 795.115)

Section 795.115 of the 2021 IC Rule provides examples of factors in the economic reality test. The Department is proposing to delete this section and instead include examples in the preamble. Real-world examples provide valuable information to the general public and regulated parties and help succinctly explain relevant issues in the analysis. The Department believes, however, that the examples best serve this explanatory function in preamble text, particularly considering how fact-dependent the analysis of each economic reality factor is. The preamble contains the most detailed description of each factor along with the case law and rationale for each interpretation proposed by the Department. Providing the examples after the discussion of each factor in the economic reality test thus provides an immediate application of the relevant interpretation.

The Department cautions that the examples are specific to the included facts and the addition or alteration of any of the facts in any of the examples may change the resulting analysis. Additionally, while the examples help illustrate the application of particular factors of the economic reality test, no one factor is determinative of whether a worker is an employee or an independent contractor.

F. Severability (Proposed § 795.115)

Section 795.120 of the 2021 IC Rule contains a severability provision. The Department is proposing to move this provision to § 795.115 and is not proposing any edits to this section.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. This NPRM does not contain a collection of information subject to OMB approval under the Paperwork Reduction Act. The Department welcomes comments on this determination.

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

Under Executive Order 12866, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.⁵⁰¹ Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has determined that this proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866 and is economically significant.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.⁵⁰² Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned executive orders.

A. Introduction

In this NPRM, the Department is proposing to modify the regulations addressing the classification of workers as employees or independent contractors under the Fair Labor Standards Act (FLSA or Act) to be more consistent with judicial precedent and the Act's text and purpose as interpreted by the courts. For decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themself (and is thus an independent contractor). To answer this ultimate inquiry of economic dependence, the courts and the Department have historically conducted a totality-of-the-circumstances analysis, considering multiple factors to determine whether a worker is an employee or an independent contractor under the FLSA.

In January 2021, the Department published a rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (2021 IC Rule) that provided guidance on the classification of independent contractors under the FLSA.⁵⁰³ As explained in sections III, IV, and V above, the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by the courts and will have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. The 2021 IC Rule included provisions that are in tension with this longstanding case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. These and other provisions in the 2021 IC Rule narrow the application of the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself. The Department believes that retaining the 2021 IC Rule would have

⁵⁰¹ *See* 58 FR 51735, 51741 (Oct. 4, 1993).

⁵⁰² *See* 76 FR 3821 (Jan. 21, 2011).

⁵⁰³ *See* 86 FR 1168.

a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. Departing from the longstanding test applied by the courts also increases the risk of misapplication of the economic reality test, which the Department believes may result in increased misclassification of workers as independent contractors.

Therefore, the Department is proposing to rescind the 2021 IC Rule and replace it with an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. Specifically, the Department is not proposing the use of "core factors" and instead proposes to return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Department is further proposing to return the consideration of investment to a standalone factor, provide additional analysis of the control factor (including detailed discussions of how scheduling, remote supervision, price-setting, and the ability to work for others should be considered), and return to the longstanding interpretation of the integral factor, which considers whether the work is integral to the employer's business. The Department believes this proposed rule is more grounded in the ultimate inquiry of whether a worker is in business for themself or is economically dependent on the employer for work. Workers, employers, and independent businesses should benefit from affirmative regulatory guidance from the Department further developing the concept of economic dependence and how each economic reality factor is probative of whether the worker is economically dependent on the employer for work or is in business for themself.

When evaluating the economic impact of this proposed rule, the Department has considered the appropriate baseline with which to compare changes. As discussed in section II.E., on March 14, 2022, in a lawsuit challenging the Department's delay and withdrawal of the 2021 IC Rule, a Federal district court in the Eastern District of Texas issued a decision vacating the delay and withdrawal of the 2021 IC Rule and concluded that the 2021 IC Rule became

effective on March 8, 2021.⁵⁰⁴ Because the 2021 IC Rule is currently in effect, is being enforced and would continue to be in effect in the absence of this proposed rule, the Department believes that the 2021 IC Rule is the official baseline to compare against when estimating the economic impact of this proposed rule.⁵⁰⁵ Compared to the 2021 IC Rule, the Department anticipates that this proposed rule would reduce misclassification of employees as independent contractors, because this rule is more consistent with existing judicial precedent and the Department's longstanding guidance. The 2021 IC Rule could increase misclassification because its elevation of certain factors and its preclusion of consideration of relevant facts under several factors may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. The issuance of this proposed rule could reduce or prevent this misclassification from occurring.

Because the Department does not have data on the number of misclassified workers and because there are inherent challenges in determining the extent to which the rule would reduce this misclassification, much of the analysis is presented qualitatively, aside from rule familiarization costs, which are quantified.⁵⁰⁶ The Department has therefore provided a qualitative analysis of the transfers and benefits that could occur because of this reduced misclassification.

As discussed above, the 2021 IC Rule is the appropriate baseline to represent what the world could look like going forward in the absence of this proposed rule. However, this baseline may not reflect what the world looked like prior to this NPRM. Until March of 2022, the Department had not been using the framework for analysis from that rule when assessing independent contractor status in its enforcement and

⁵⁰⁴ See *Coalition for Workforce Innovation*, 2022 WL 1073346.

⁵⁰⁵ OMB Circular A-4 notes that when agencies are developing a baseline, "[it] should be the best assessment of the way the world would look absent the proposed action."

⁵⁰⁶ The Department uses the term "misclassification" throughout this analysis to refer to workers who have been classified as independent contractors but who, as a matter of economic reality, are economically dependent on their employer for work. These workers' legal status would not change under the 2021 IC Rule or this proposed rule—they would properly be classified as employees under both rules. The Department notes that sources cited in this analysis may use other misclassification standards which may not align fully with the Department's use of the term.

compliance assistance activities. The 2021 IC Rule baseline also may not reflect the current economic landscape, because the Department is not aware of any Federal district or appellate court that has relied on the substance of the 2021 IC Rule so far to resolve a dispute regarding the proper classification of a worker as an employee or independent contractor. Therefore, if the Department were to instead compare the proposed rule to the current economic and legal landscape, the economic impact would be much smaller, because this proposed rule is consistent with the longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022. The Department still believes that the 2021 IC Rule is the appropriate baseline, but notes that the current economic landscape may not be the same as a future situation without this proposed rule.

The Department does not believe, as reflected in this analysis, that this proposed rule would result in widespread reclassification of workers. That is, for workers who are properly classified as independent contractors, the Department does not, for the most part, anticipate that this rule would result in these workers being reclassified as employees. Especially compared to the guidance that was in effect before the 2021 IC Rule, the test proposed in this NPRM would not make independent contractor status significantly less likely. Rather, impacts resulting from this rule would mainly be due to a reduction in misclassification. If the 2021 IC Rule is retained, the risk of misclassification could be increased. As noted previously, the 2021 IC Rule's elevation of certain factors and its preclusion of consideration of relevant facts under several factors, which is a departure from judicial precedent applying the economic reality test, may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. This NPRM could therefore help prevent this misclassification by providing employers with guidance that is more consistent with longstanding precedent. The Department welcomes comments and data on all of the analysis presented here.

B. Estimated Number of Independent Contractors

To provide some context on the prevalence of independent contracting, the Department first estimated the number of independent contractors. There are a variety of estimates of the

number of independent contractors spanning a wide range depending on methodologies and how the population is defined.⁵⁰⁷ There is no data source on independent contractors that perfectly mirrors the definition of independent contractor in the Department's regulations. There is also no regularly published data source on the number of independent contractors and data from the current year does not exist, making it difficult to examine trends in independent contracting or to measure how regulatory changes impact the number of independent contractors.

The Department believes that the Current Population Survey (CPS) Contingent Worker Supplement (CWS) offers an appropriate lower bound for the number of independent contractors; however, there are potential biases in these data that will be noted. This is the estimation method used in the 2021 IC Rule, and the Department has not found any new data or analyses to indicate a need for any changes. Some recent data sources provide an indication of how COVID-19 may have impacted the number of independent contractors, but this is inconclusive. Additionally, estimates from other sources will be presented to demonstrate the potential range.

The U.S. Census Bureau conducts the CPS, and it is published monthly by the Bureau of Labor Statistics (BLS). The sample includes approximately 60,000 households and is nationally representative. Periodically since 1995, and most recently in 2017, the CPS included a supplement to the May survey to collect data on contingent and alternative employment arrangements. Based on the CWS, there were 10.6 million independent contractors in 2017, amounting to 6.9 percent of workers.⁵⁰⁸ The CWS measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week.

The BLS's estimate of independent contractors includes "[w]orkers who are identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are

self-employed or wage and salary workers." BLS asks two questions to identify independent contractors:⁵⁰⁹

- Workers reporting that they are self-employed are asked: "Are you self-employed as an independent contractor, independent consultant, freelance worker, or something else (such as a shop or restaurant owner)?" (9.0 million independent contractors.) We refer to these workers as "self-employed independent contractors" in the remainder of the analysis.

- Workers reporting that they are wage and salary workers are asked: "Last week, were you working as an independent contractor, an independent consultant, or a freelance worker? That is, someone who obtains customers on their own to provide a product or service." (1.6 million independent contractors.) We refer to these workers as "other independent contractors" in the remainder of the analysis.

It is important to note that independent contractors are identified in the CWS in the context of the respondent's "main" job (*i.e.*, the job with the most hours).⁵¹⁰ Therefore, the estimate of independent contractors does not include those who may be an employee for their primary job, but may also work as an independent contractor.⁵¹¹ For example, Lim et al. (2019) estimate that independent contracting work is the primary source of income for 48 percent of independent contractors.⁵¹² Applying this estimate to

⁵⁰⁹ The variables used are PES8IC=1 for self-employed and PES7=1 for other workers.

⁵¹⁰ While self-employed independent contractors are identified by the worker's main job, other independent contractors answered yes to the CWS question about working as an independent contractor last week. Although the survey question does not ask explicitly about the respondent's main job, it follows questions asked in reference to the respondent's main job.

⁵¹¹ Even among independent contractors, failure to report multiple jobs in response to survey questions is common. For example, Katz and Krueger (2019) asked Amazon Mechanical Turk participants the CPS-style question "Last week did you have more than one job or business, including part time, evening, or weekend work?" In total, 39 percent of respondents responded affirmatively. However, these participants were asked the follow-up question "Did you work on any gigs, HITs or other small paid jobs last week that you did not include in your response to the previous question?" After this question, which differs from the CPS, 61 percent of those who indicated that they did not hold multiple jobs on the CPS-style question acknowledged that they failed to report other work in the previous week. As Katz and Krueger write, "If these workers are added to the multiple job holders, the percent of workers who are multiple job holders would almost double from 39 percent to 77 percent." See L. Katz and A. Krueger, "Understanding Trends in Alternative Work Arrangements in the United States," RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5), p. 132–46 (2019).

⁵¹² K. Lim, A. Miller, M. Risch, and E. Wilking, "Independent Contractors in the U.S.: New Trends

the 10.6 million independent contractors estimated from the CWS, results in 22.1 million independent contractors (10.6 million ÷ 0.48). Alternatively, a survey of independent contractors in Washington found that 68 percent of respondents reported that independent contract work was their primary source of income.⁵¹³ However, because this survey only includes independent contractors in one state, the Department has not used this data to adjust its estimate of independent contractors.

The CWS's large sample size results in small sampling error. However, the questionnaire's design may result in some non-sampling error. For example, one potential source of bias is that the CWS only considers independent contractors during a single point in time—the survey week (generally the week prior to the interview).

These numbers will thus underestimate the prevalence of independent contracting over a longer timeframe, which may better capture the size of the population.⁵¹⁴ For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy.⁵¹⁵ They found that "[a]lthough 1 percent of adults earned income from the Online

from 15 years of Administrative Tax Data," Department of Treasury, p. 61 (Jul. 2019), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>. From table 5, the total number of independent contractors across all categories is 13.81 million. The number of independent contractors in the categories where these workers earn the majority of their labor income from independent contractor earnings is 6.63 million. 6.63 million ÷ 13.81 million = 0.48.

⁵¹³ Washington Department of Commerce, "Independent Contractor Study," p. 21 (Jul. 2019), <https://deptofcommerce.app.box.com/v/independent-contractor-study>.

⁵¹⁴ In any given week, the total number of independent contractors would have been roughly the same, but the identity of the individuals who do it for less than the full year would likely vary. Thus, the number of unique individuals who work at some point in a year as independent contractors would exceed the number of independent contractors who work within any one-week period as independent contractors.

⁵¹⁵ D. Farrell and F. Greig, "Paychecks, Paydays, and the Online Platform," JPMorgan Chase Institute (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911293. The authors define the Online Platform Economy as "economic activities involving online intermediaries." This includes "labor platforms" that "connect customers with freelance or contingent workers" and "capital platforms" that "connect customers with individuals who rent assets or sell goods peer-to-peer." As such, this study encompasses data on income sources that the Department acknowledges might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship. However, the Department believes that including data on income earned through online platforms is useful when discussing the potential magnitude of independent contracting.

⁵⁰⁷ The Department uses the term "independent contractor" throughout this analysis to refer to workers who, as a matter of economic reality, are not economically dependent on their employer for work and are in business for themselves. The Department notes that sources cited in this analysis may use other definitions of independent contractors that may not align fully with the Department's use of the term.

⁵⁰⁸ Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements—May 2017," USDL-18-0942 (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf>.

Platform Economy in a given month, more than 4 percent participated over the three-year period.” Additionally, Collins et al. (2019) examined tax data from 2000 through 2016 and found that the number of workers who filed a form 1099 grew substantially over that period, and that fewer than half of these workers earned more than \$2,500 from 1099 work in 2016. The prevalence of lower annual earnings implies that most workers who received a 1099 did not work as an independent contractor every week.⁵¹⁶

The CWS also uses proxy responses, which may underestimate the number of independent contractors. The RAND American Life Panel (ALP) survey conducted a supplement in 2015 to mimic the CWS questionnaire but used self-responses only. The results of the survey were summarized by Katz and Krueger (2018).⁵¹⁷ This survey found that independent contractors comprise 7.2 percent of workers.⁵¹⁸ Katz and Krueger identified that the 0.5 percentage point difference in magnitude between the CWS and the ALP was due to both cyclical conditions, and the lack of proxy responses in the ALP.⁵¹⁹ Therefore, the Department believes a reasonable upper-bound on the potential bias due to the use of proxy responses in the CWS is 0.5 percentage points (7.2 versus 6.7).^{520 521}

Another potential source of bias in the CWS is that some respondents may not self-identify as independent contractors. For example, Abraham et al. (2020) estimated that 6.6 percent of workers in

their study initially respond that they are employees but were then determined (by the researcher) to be independent contractors based on their answers to follow-up questions.⁵²² Additionally, individuals who do what some researchers refer to as “informal work” may in fact be independent contractors though they may not characterize themselves as such.⁵²³ This population could be substantial. Abraham and Houseman (2019) confirmed this in their examination of the Survey of Household Economics and Decision-making. They found that 28 percent of respondents reported doing “informal work” for money over the past month.⁵²⁴

Conversely, another source of bias in the CWS is that some workers who self-identify as independent contractors may misunderstand their status or may be misclassified by their employer. These workers may answer the survey in the affirmative, despite not truly being independent contractors. While precise and representative estimates of nationwide misclassification are unavailable, multiple studies suggest its prevalence in numerous sectors in the economy.⁵²⁵ See section VII.D.2. for a more thorough discussion of the prevalence of misclassification.

Because reliable data on the potential magnitude of the biases discussed above

are unavailable, and so the net direction of the biases is unknown, the Department has not attempted to calculate how these biases may impact the estimated number of independent contractors.

Because the CWS estimate represents only the number of workers who worked as independent contractors on their primary job during the survey reference week, the Department applied the research literature and adjusted this measure to include workers who are independent contractors in a secondary job or who were excluded from the CWS estimate due to other factors. As noted above, integrating the estimated proportions of workers who are independent contractors on secondary or otherwise excluded jobs produces an estimate of 22.1 million, representing the total number of workers working as independent contractors in any job at a given time. Given the prevalence of independent contractors who work sporadically and earn minimal income, adjusting the estimate according to these sources captures some of this population. It is likely that this figure is still an underestimate of the true independent contractor pool.

1. COVID-19 Adjustment to the Estimated Number of Independent Contractors

The Department’s estimate of the number of independent contractors, 22.1 million, is based primarily on 2017 data. Because COVID-19 has had a substantial impact on the labor market, it is possible that this estimate is not currently appropriate. The Department conducted a search for more recent data to indicate any trends in the number of independent contractors since 2017. The findings are inconclusive but generally do not indicate an increase.

The Federal Reserve Board’s annual Survey of Household Economics and Decisionmaking (SHED) provides measures of the economic well-being of U.S. households. The Federal Reserve Board publishes a report “Economic Well-Being of U.S. Households” summarizing the findings of each survey.⁵²⁶ One subsection of the Employment section describes the results of the questions related to “The Gig Economy.” While the survey questions about work in the “gig economy” include more types of work

⁵¹⁶ B. Collins, A. Garin, E. Jackson, D. Koustas, and M. Payne, “Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns,” IRS SOI Joint Statistical Research Program (2019) (unpublished paper), <https://www.irs.gov/pub/irs-soi/19rpgigworkreplacingtraditionalemployment.pdf>.

⁵¹⁷ See L. Katz and A. Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,” (2018).

⁵¹⁸ *Id.* at 49. The estimate is 9.6 percent without correcting for overrepresentation of self-employed workers or multiple job holders. *Id.* at 31.

⁵¹⁹ *Id.* at Addendum (“Reconciling the 2017 BLS Contingent Worker Survey”).

⁵²⁰ Note that they estimate 6.7 percent of employed workers are independent contractors using the CWS, as opposed to 6.9 percent as estimated by the BLS. This difference is attributable to changes to the sample to create consistency.

⁵²¹ In addition to the use of proxy responses, this difference is also due to cyclical conditions. The impacts of these two are not disaggregated for independent contractors, but if we applied the relative sizes reported for all alternative work arrangements, we would get 0.36 percentage point difference due to proxy responses. Additionally, it should be noted that this may not entirely be a bias. It stems from differences in independent contracting reported by proxy respondents and actual respondents. As Katz and Krueger explain, this difference may be due to a “mode” bias or proxy respondents may be less likely to be independent contractors. *Id.* at Addendum p. 4.

⁵²² K. Abraham, B. Hershbein, and S. Houseman, “Contract Work at Older Ages,” NBER Working Paper 26612 (2020), <http://www.nber.org/papers/w26612>.

⁵²³ The Department believes that including data on what is referred to in some studies as “informal work” is useful when discussing the magnitude of independent contracting, although not all informal work is done by independent contractors. The Survey of Household Economics and Decision-making asked respondents whether they engaged in informal work sometime in the prior month. It categorized informal work into three broad categories: personal services, on-line activities, and off-line sales and other activities, which is broader than the scope of independent contractors. These categories include activities like house sitting, selling goods online through sites like eBay or craigslist, or selling goods at a garage sale. The Department acknowledges that the data discussed in this study might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship, but it nonetheless provides some useful data for this purpose.

⁵²⁴ K. Abraham, and S. Houseman, “Making Ends Meet: The Role of Informal Work in Supplementing Americans’ Income,” RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), <https://www.aeaweb.org/conference/2019/preliminary/paper/QreAaS2h>.

⁵²⁵ See, e.g., U.S. Gov’t Accountability Off., GAO–09–717, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* 10 (2008) (“Although the national extent of employee misclassification is unknown, earlier national studies and more recent, though not comprehensive, studies suggest that employee misclassification could be a significant problem with adverse consequences.”).

⁵²⁶ Consumer and Community Research Section of the Federal Reserve Board’s Division of Consumer and Community Affairs, “Economic Well-Being of U.S. Households in 2021,” Board of Governors of the Federal Reserve System (2022). Reports from all years available at <https://www.federalreserve.gov/publications/report-economic-well-being-us-households.htm>.

scenarios than just independent contracting, a decrease from 30 percent to 20 percent of adults answering “yes” from 2017 to 2020 may indicate that the number of independent contractors in this industry also decreased during that time period.⁵²⁷ The report summarizing the 2021 data is available, but unfortunately the gig economy questions were revised substantially, so a comparable value is not available for 2021. Moreover, trends of potential independent contractors in one industry are not necessarily indicative of trends across the economy.

MBO Partners, a company with the goal of connecting enterprise organizations and top independent professionals, also conducts an annual survey and prepares a research report of the findings.⁵²⁸ In all groups of “independent workers,” MBO Partners similarly found a decrease in the number from 2017 to 2020. Conversely, in total, the 2021 report shows a large increase from 2020, enough that the number of independent workers in 2021 is larger than the 2017 number. However, this increase occurs only in the “occasional independent” workers category, described as those who work

part-time and regularly, but without set hours. Comparing the number of part-time and full-time independent workers yields similar values in 2017 and 2021, so the Department believes that no adjustments are needed to the 2017 estimate of 22.1 million independent contractors.

2. Range of Estimates in the Literature

To further consider the range of estimates available, the Department conducted a literature review, the findings of which are presented in Table 1. Other studies were also considered but are excluded from this table because the study populations were broader than just independent contractors, limited to one state, or include workers outside of the United States.⁵²⁹ The RAND ALP,⁵³⁰ the Gallup Survey,⁵³¹ and the General Social Survey’s (GSS’s) Quality of Worklife (QWL)⁵³² supplement are widely cited alternative estimates. However, the Department chose to use sources with significantly larger sample sizes and/or more recent data for the primary estimate.

Jackson et al. (2017)⁵³³ and Lim et al. (2019)⁵³⁴ use tax information to estimate the prevalence of independent contracting. In general, studies using tax

data tend to show an increase in prevalence of independent contracting over time. The use of tax data has some advantages and disadvantages over survey data. Advantages include large sample sizes, the ability to link information reported on different records, the reduction in certain biases such as reporting bias, records of all activity throughout the calendar year (the CWS only references one week), and inclusion of both primary and secondary independent contractors. Disadvantages are that independent contractor status needs to be inferred; there is likely an underreporting bias (*i.e.*, some workers do not file taxes); researchers are generally trying to match the IRS definition of independent contractor, which does not mirror the scope of independent contractors under the FLSA; and the estimates include misclassified independent contractors.⁵³⁵ A major disadvantage of using tax data for this analysis is that the detailed source data are not publicly available and thus the analyses cannot be directly verified or adjusted as necessary (*e.g.*, to describe characteristics of independent contractors, etc.).

TABLE 1—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING

Source	Method [a]	Definition [b]	Percent of workers	Sample size	Year
CPS CWS	Survey	Independent contractor, consultant or freelance worker (main only).	6.9%	50,392	2017
ALP	Survey	Independent contractor, consultant or freelance worker (main only).	7.2%	6,028	2015
Gallup	Survey	Independent contractor	14.7%	5,025	2017
GSS QWL	Survey	Independent contractor, consultant or freelancer (main only) ..	14.1%	2,538	2014
Jackson et al.	Tax data	Independent contractor, household worker	6.1% [c]	~5.9 million [d].	2014

⁵²⁷ The report defines gig work as including “three types of non-traditional activities: offline service activities, such as child care or house cleaning; offline sales, such as selling items at flea markets or thrift stores; and online services or sales, such as driving using a ride-sharing app or selling items online.” Consumer and Community Research Section of the Federal Reserve Board’s Division of Consumer and Community Affairs, “Economic Well-Being of U.S. Households in 2017,” Board of Governors of the Federal Reserve System (May 2018).

⁵²⁸ MBO partners, “The Great Realization: 11th Annual State of Independence,” (2021). Annual reports are available at <https://www.mbopartners.com/state-of-independence/previous-reports/>.

⁵²⁹ Including, but not limited to: McKinsey Global Institute, “Independent Work: Choice, Necessity, and the Gig Economy” (2016), <https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>; Kelly Services, “Agents of Change” (2015), <https://www.kellyservices.com/>

global/siteassets/3-kelly-global-services/uploadedfiles/3-kelly_global_services/content/sectionless_pages/kocg1047720freeagent20whitepaper20210x21020final2.pdf; Robles and McGee, “Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey” (2016); Upwork, “Freelancing in America” (2019); Washington Department of Commerce, *supra* n. 513; Farrell and Greig, *supra* n. 515; MBO Partners, “State of Independence in America” (2016); Abraham et al., “Measuring the Gig Economy: Current Knowledge and Open Issues” (2018), <https://www.nber.org/papers/w24950>; Collins et al. (2019), *supra* n. 516; Gitis et al., “The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends,” American Action Forum (2017), <https://www.americanactionforum.org/research/gig-economy-research-policy-implications-regional-economic-demographic-trends/#ixzz51pbj79a>; Dourado and Koopman, “Evaluating the Growth of the 1099 Workforce,” Mercatus Center (2015), <https://www.mercatus.org/publication/evaluating-growth-1099-workforce>.

⁵³⁰ See Katz and Krueger (2018), *supra* n. 517.

⁵³¹ “Gallup’s Perspective on The Gig Economy and Alternative Work Arrangements,” Gallup (2018), <https://www.gallup.com/workplace/240878/gig-economy-paper-2018.aspx>.

⁵³² See Abraham et al. (2018), *supra* n. 529, Table 4.

⁵³³ E. Jackson, A. Looney, and S. Ramnath, “The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,” OTA Working Paper 114 (2017), <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf>.

⁵³⁴ Lim et al., *supra* n. 512.

⁵³⁵ In comparison to household survey data, tax data may reduce certain types of biases (such as recall bias) while increasing other types (such as underreporting bias). Because the Department is unable to quantify this tradeoff, it could not determine whether, on balance, survey or tax data are more reliable.

TABLE 1—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING—Continued

Source	Method [a]	Definition [b]	Percent of workers	Sample size	Year
Lim et al.	Tax data	Independent contractor	8.1%	1% of 1099–MISC and 5% of 1099–K.	2016

[a] The CPS CWS and the GSS QWL are nationally representative, and the ALP CWS is approximately nationally representative. The Gallup poll is demographically representative but does not explicitly claim to be nationally representative. Lastly, the two tax data sets are very large random samples and consequently are likely to be nationally representative, although the authors do not explicitly claim so.

[b] The survey data only identify independent contractors on their main job. Jackson et al. include independent contractors as long as at least 15 percent of their earnings were from self-employment income; thus, this population is broader. If Jackson et al.'s estimate is adjusted to exclude those who are primary wage earners, the rate is 4.0 percent. Lim et al. include independent contractors on all jobs. If Lim et al.'s estimate is adjusted to only those who receive a majority of their labor income from independent contracting, the rate is 3.9 percent.

[c] Summation of (1) 2,132,800 filers with earnings from both wages and sole proprietorships and expenses less than \$5,000, (2) 4,125,200 primarily sole proprietorships and with less than \$5,000 in expenses, and (3) 3,416,300 primarily wage earners.

[d] Estimate based on a 10 percent sample of self-employed workers and a 1 percent sample of W–2 recipients.

3. Demographics of Independent Contractors

The Department reviewed demographic information on independent contractors using the CWS, which, as stated above, only measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey’s reference week. According to the CWS, these primary independent contractors are most prevalent in the construction and professional and business services industries. These two industries comprise 44 percent of primary independent contractors. Independent contractors tend to be older and predominately male (64 percent). Millennials (defined as those born 1981–1996) have a significantly lower prevalence of primary independent contracting than older generations: 4.2 percent for Millennials compared to 7.2 percent for Generation X (defined as those born 1965–1980) and 10.2 percent for Baby Boomers and Matures (defined as individuals born before 1965).⁵³⁶ However, other surveys that capture secondary independent contractors, or those who did informal work as

⁵³⁶ The Department used the generational breakdown used in the MBO Partners 2017 report, “The State of Independence in America.” “Millennials” were defined as individuals born 1981–1996, “Generation X” were defined as individuals born 1965–1980, and “Baby Boomers and Matures” were defined as individuals born before 1965.

independent contractors show that the prevalence of informal work is lower among older workers. Abraham and Houseman (2019), find that among 18- to 24-year-olds, 41.3 percent did informal work over the past month. The rate fell to 25.7 percent for 45- to 54-year-olds, and 13.4 percent for those 75 years and older.⁵³⁷ According to MBO partners, the COVID–19 pandemic may have accelerated this trend; when accounting for both primary and secondary independent work, 2021 marked the first year that Millennials and members of Generation Z (34 percent and 17 percent of independent workers respectively) outnumbered members of Generation X and Baby Boomers (23 percent and 26 percent respectively) as part of the independent workforce.⁵³⁸

According to the CWS, 64 percent of primary independent contractors are men. Additionally, Garin and Koustas (2021) find that men comprise both a larger share of independent contractors

⁵³⁷ Abraham and Houseman (2019), *supra* n. 524. Note that this informal work may be broader than what would be considered independent contracting and includes activities like babysitting/housesitting and selling goods online through sites like eBay and Craigslist. *See also* Upwork (2019), *supra* n. 529.

⁵³⁸ This data comes from the 2021 edition of the MBO Partners report, “The State of Independence in America.” While maintaining the generational breakdown used in the 2017 edition, “Generation Z” was additionally defined as individuals born 1997–2012. https://info.mbopartners.com/rs/mbo/images/MBO_2021_State_of_Independence_Research_Report.pdf.

who perform work through traditional contracting arrangements and those who secure work through online platforms.⁵³⁹ This study also found that a greater share of men than women who earn income in this way are primarily self-employed; women who perform online platform work are more likely to use that work to supplement other income.⁵⁴⁰

According to the CWS, white workers are somewhat overrepresented among primary independent contractors; they comprise 85 percent of this population but only 79 percent of the population of workers. Conversely, Black workers are somewhat underrepresented (comprising 8 percent and 13 percent, respectively).⁵⁴¹ The opposite trends emerge when evaluating the broader category of “informal work”, where racial minorities participate at a higher rate than white workers.⁵⁴² Primary independent contractors are spread across the educational spectrum, with no group especially overrepresented. The same trend in education attainment holds for workers who participate in informal work.⁵⁴³

⁵³⁹ Garin, A. and Koustas, D., “The Distribution of Independent Contractor Activity in the United States: Evidence from Tax Filings,” (2021).

⁵⁴⁰ *Id.*

⁵⁴¹ These numbers are calculated by the Department and based on the CWS respondents who state that their race is “white only” or “black only” as opposed to identifying as multi-racial.

⁵⁴² Abraham and Houseman (2019), *supra* n. 524.

⁵⁴³ *Id.*

TABLE 2—CHARACTERISTICS OF WORKERS, ALL WORKERS AND INDEPENDENT CONTRACTORS

Demographic	Number of workers (millions)	Percent of workers	Number of independent contractors (primary job) (millions)	Percent of independent contractors
Total	158.9	100	10.6	100
By Age				
16–20 (Generation Z)	8.2	5.1	0.1	0.7
21–37 (Millennials)	59.2	37.3	2.5	23.4
38–52 (Generation X)	49.8	31.3	3.6	33.8
53+ (Baby Boomers and Matures)	43.6	27.5	4.5	42.1
By Sex				
Female	75.4	47.4	3.8	35.7
Male	85.4	53.7	6.8	64.3
By Race				
White only	125.6	79.1	9.0	84.6
Black only	20.3	12.8	0.9	8.3
All other races	14.9	9.4	0.8	7.1
By Ethnicity				
Hispanic	27.0	17.0	1.6	14.8
Not Hispanic	133.8	84.2	9.0	85.2
By Industry				
Agr, forestry, fishing, and hunting	2.6	1.6	0.2	2.0
Mining	0.8	0.5	0.0	0.1
Construction	11.0	6.9	2.0	19.3
Manufacturing	16.5	10.4	0.2	2.2
Wholesale and retail trade	20.5	12.9	0.8	7.9
Transportation and utilities	8.0	5.1	0.6	5.7
Information	3.0	1.9	0.2	2.2
Financial activities	10.9	6.9	1.0	9.6
Professional and business services	19.3	12.2	2.7	25.1
Educational and health services	36.2	22.8	1.0	9.6
Leisure and hospitality	15.1	9.5	0.7	6.2
Other services	7.8	4.9	1.0	9.7
Public administration	7.2	4.6	0.0	0.4
By Education				
Less than high school diploma	14.3	9.0	1.0	9.3
High school diploma or equivalent	41.9	26.4	2.6	24.4
Less than Bachelor's degree	45.3	28.5	2.8	26.5
Bachelor's degree	37.3	23.5	2.7	25.5
Master's degree or higher	21.9	13.8	1.5	14.5

Note: Estimates based on the 2017 CPS Contingent Worker Survey.

C. Costs

1. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses and current independent contractors associated with reviewing the new regulation. To estimate the total regulatory familiarization costs, the Department used (1) the number of establishments and government entities using independent contractors, and the current number of independent contractors; (2) the wage rates for the employees and for the independent

contractors reviewing the rule; and (3) the number of hours that it estimates employers and independent contractors will spend reviewing the rule. This section presents the calculation for establishments first and then the calculation for independent contractors.

Regulatory familiarization costs may be a function of the number of establishments or the number of firms.⁵⁴⁴ Presumably, the headquarters

⁵⁴⁴ An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical

of a firm will conduct the regulatory review for businesses with multiple locations and may require some locations to familiarize themselves with the regulation at the establishment level. Other firms may either review the rule to consolidate key takeaways for their affiliates or they may rely entirely on

location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment contrasts with a firm, or a company, which is a business and may consist of one or more establishments. See BLS, "Quarterly Census of Employment and Wages: Concepts," <https://www.bls.gov/opub/hom/cew/concepts.htm>.

outside experts to evaluate the rule and relay the relevant information to their organization (e.g., a chamber of commerce). The Department used the number of establishments to estimate the fundamental pool of regulated entities—which is larger than the number of firms. This assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

To estimate the number of establishments incurring regulatory familiarization costs, the Department began by using the Statistics of U.S. Businesses (SUSB) to define the total pool of establishments in the United States.⁵⁴⁵ In 2019, the most recent year available, there were 7.96 million establishments. These data were supplemented with the 2017 Census of Government that reports 90,075 local government entities, and 51 state and Federal government entities.⁵⁴⁶ The total number of establishments and governments in the universe used for this analysis is 8,049,229.

This universe is then restricted to the subset of establishments that engage independent contractors. In 2019, Lim et al. used extensive IRS data to model the independent contractor market and found that 34.7 percent of firms hire independent contractors.⁵⁴⁷ These data are based on annual tax filings, so the dataset includes firms that may contract for only parts of a year. Multiplying the universe of establishments and governments by 35 percent results in 2.8 million entities.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule.⁵⁴⁸ According to the Occupational Employment and Wage Statistics (OEWS), these workers had a median wage of \$30.83 per hour in 2021 (most recent data available).⁵⁴⁹

⁵⁴⁵ U.S. Census Bureau, 2019 SUSB Annual Datasets by Establishment Industry. <https://www.census.gov/data/datasets/2019/econ/susb/2019-susb.html>.

⁵⁴⁶ U.S. Census Bureau, 2017 Census of Governments. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

⁵⁴⁷ Lim et al., *supra* n. 512, Table 10: Firm sample summary statistics by year (2001–2015), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>.

⁵⁴⁸ A Compensation/Benefits Specialist ensures company compliance with Federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. See BLS, “13–1141 Compensation, Benefits, and Job Analysis Specialists,” <https://www.bls.gov/oes/current/oes131141.htm>.

⁵⁴⁹ The 2021 IC Rule used the mean wage rate to calculate rule familiarization costs, but the

Assuming benefits are paid at a rate of 45 percent of the base wage,⁵⁵⁰ and overhead costs are 17 percent of the base wage, the reviewer’s effective hourly rate is \$49.94. The Department assumes that it will take on average about 30 minutes to review the rule as proposed. The Department believes that 30 minutes, on average, is appropriate, because while some establishments will spend longer to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Furthermore, the analysis outlined in this rule aligns with existing judicial precedent and previous guidance released by the Department, with which much of the regulated community is already familiar. Total regulatory familiarization costs to businesses in Year 1 are estimated to be \$70.3 million ($\$49.94 \times 0.5 \text{ hour} \times 2,817,230$) in 2021 dollars.

For regulatory familiarization costs for independent contractors, the Department used its estimate of 22.1 million independent contractors and assumed each independent contractor will spend 15 minutes to review the regulation. The average time spent by independent contractors is estimated to be smaller than for establishments and governments. This difference is in part because the Department believes independent contractors are likely to rely on summaries of the key elements of the rule change published by the Department, worker advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings. This time is valued at \$21.35, which is the median hourly wage rate for independent contractors in the CWS of \$19.45 updated to 2021 dollars using the gross domestic product (GDP) deflator.^{551 552} Therefore,

Department has used the median wage rate here, because it is more consistent with cost analyses in other Wage and Hour Division rulemakings. The Department used the median wage rate in the Withdrawal Rule. Generally, the Department uses median wage rates to calculate costs, because the mean wage rate has the potential to be biased upward by high-earning outlier wage observations.

⁵⁵⁰ Employer Costs for Employee Compensation, 2021 Annual Averages. <https://www.bls.gov/ncs/data.htm>.

⁵⁵¹ Based on Department calculations using the individual level data. The Department also calculated the mean hourly wage for independent contractors using the CWS data and found that the mean wage in 2017 was \$27.29, which would be \$29.97 updated to 2021 dollars using the GDP deflator.

⁵⁵² In the 2021 IC Rule the Department included an additional 45 percent for benefits and 17 percent for overhead. These adjustments have been removed here, because independent contractors do not usually receive employer provided benefits and generally have overhead costs built into their hourly rate.

regulatory familiarization costs to independent contractors in Year 1 are estimated to be \$118 million ($\$21.35 \times 0.25 \text{ hour} \times 22.1 \text{ million}$).

The total one-time regulatory familiarization costs for establishments, governments, and independent contractors are estimated to be \$188.3 million. Regulatory familiarization costs in future years are assumed to be *de minimis*. Employers and independent contractors would continue to familiarize themselves with the applicable legal framework in the absence of the rule, so this rulemaking is not expected to impose costs after the first year. This amounts to a 10-year annualized cost of \$26.0 million at a discount rate of 3 percent or \$25.1 million at a discount rate of 7 percent.

D. Benefits

1. Increased Consistency

This proposed rule presents a detailed analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department’s longstanding guidance prior to the 2021 IC Rule. This analysis will provide more consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. The analysis will provide a consistent approach for those businesses that engage (or wish to engage) independent contractors, who the Department recognizes play an important role in the economy. The proposed rule’s consistency with judicial precedent could also help to reduce legal disputes.

2. Reduced Misclassification

This proposed rule would provide consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. This clear guidance could help reduce the occurrence of misclassification.

The prevalence of misclassification of employees as independent contractors is unclear, but the literature indicates it is substantial. A 2020 National Employment Law Project (NELP) report, for example, reviewed state audits and concluded that “these state reports show that 10 to 30 percent of employers (or more) misclassify their employees as independent contractors.”⁵⁵³ Similarly,

⁵⁵³ NELP, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, (Oct. 2020),

a 2000 Department of Labor study also found that “between 10 percent and 30 percent of employers audited in 9 states misclassified workers as independent contractors.”⁵⁵⁴ This same report found that depending on the state, between 1 percent and 9 percent of workers are misclassified as independent contractors.

Misclassification disproportionately affects Black, indigenous, and people of color (BIPOC) because of the disparity in occupations affected by misclassification.⁵⁵⁵ High incidence of misclassification of employees as independent contractors has been documented in agriculture, construction, trucking, housecleaning, in-home care, stagecraft, and ‘sharing economy’ companies.⁵⁵⁶

Misclassification violates one of the purposes of the FLSA: eliminating “unfair method[s] of competition in commerce.”⁵⁵⁷ When employers misclassify employees as independent contractors, they illegally cut labor costs, undermining law-abiding competitors.⁵⁵⁸ While the services offered may be comparable at face value, the employer engaging in misclassification is able to offer lower estimates and employers following the rules are left at a disadvantage.

E. Transfers

1. Employer-Provided Fringe Benefits

Misclassification of independent contractors culminates in a reduced social safety net starting with the individual and cascading out through the local, state, and Federal programs.

Employees who are misclassified as independent contractors generally do not receive employer-sponsored health and retirement benefits, potentially resulting in or contributing to long-term financial insecurity.

Employees are more likely than independent contractors to have health insurance. According to the CWS, 75.4 percent of independent contractors have health insurance, compared to 84.0 percent of employees. This gap between independent contractors and employees is also true for low-income workers. Using CWS data, the Department compared health insurance rates for workers earning less than \$15 per hour and found that 71.0 percent of independent contractors have health insurance compared with 78.5 percent of employees. Lastly, the Department considered whether this gap could be larger for traditionally underserved groups or minorities. Considering the subsets of independent contractors who are female, Hispanic, or Black, only the Hispanic independent contractors have a statistically significant difference in the percentage of workers with health insurance (estimated to be about 18 percentage points lower).⁵⁵⁹

Additionally, a major source of retirement savings is employer-sponsored retirement accounts. According to the CWS, 55.5 percent of employees have a retirement account with their current employer; in addition, the BLS Employer Costs for Employee Compensation (ECEC) found that in 2021 employers pay 5.1 percent of employees’ total compensation in

retirement benefits on average (\$2.03/\$39.46). A 2017 Treasury study found that in 2014, while forty two percent of wage earners made contributions to an individual retirement account (IRA) or employer plan, only eight percent of self-employed individuals made any retirement contribution.⁵⁶⁰ Smaller retirement savings could result in a long-term tax burden to all Americans due to increased reliance upon social assistance programs.

To the extent that this proposed rule would reduce misclassification, it could result in transfers to workers in the form of employer-provided benefits like health care and retirement benefits. As shown in Table 3 below, using from BLS Employer Costs for Employee Compensation, the Department has calculated the average cost to employers for various benefits as a percentage of the average cost to employers for wages and salaries. This share was then applied to the median weekly wage of both full-time and part-time independent contractors to estimate the value of these benefits to an average independent contractor if they were to begin receiving these benefits. The Department estimated that the value of these benefits could average more than \$15,000 annually for full-time independent contractors and almost \$6,000 annually for part-time independent contractors. This example transfer estimate could be reduced if there is a downward adjustment in the worker’s wage rate to offset a portion of the employer’s cost associated with these new benefits.

TABLE 3—POTENTIAL TRANSFERS ASSOCIATED WITH EMPLOYER-PROVIDED FRINGE BENEFITS

Employer-provided fringe benefit	Employer cost for benefit as a share of employer cost for wages and salaries (Q1 2022) [a]	Value of benefit for the median weekly wage of a full-time independent contractor (\$980) [d]	Value of benefit for the median weekly Wage of a part-time independent contractor (\$383) [d]
Health Insurance	11.5%	\$112.70	\$44.05
Retirement [b]	7.5%	73.50	28.73
Paid Leave [c]	10.8%	105.84	41.36

<https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020>.

⁵⁵⁴ Lalith de Silva, Adrian Millett, Dominic Rotondi, and William F. Sullivan, “Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs” Report of Planmatics, Inc., for U.S. Department of Labor Employment and Training Administration (2000), <https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

⁵⁵⁵ See NELP, *supra* n. 553.

⁵⁵⁶ Carré, F. (2015). *(In)dependent contractor misclassification*. Economic Policy Institute. Briefing Paper #403, <https://www.epi.org/publication/independent-contractor-misclassification/>.

⁵⁵⁷ 29 U.S.C. 202(a), (b).

⁵⁵⁸ *Id.*

⁵⁵⁹ To measure if the difference between these proportions is statistically significant, the Department used the replicate weights for the CWS. At a 0.05 significance level, the proportion of Hispanic independent contractors with any health

insurance is lower than the proportion for all independent contractors.

⁵⁶⁰ Jackson, E., Looney, A., & Ramnath, S., Department of Treasury, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage*, Working Paper #114 (Jan. 2017), <https://home.treasury.gov/system/files/131/WP-114.pdf>. As discussed in the 2021 IC Rule, this study defines retirement accounts as “employer-sponsored plans,” which may not encompass all of the possible long-term saving methods.

TABLE 3—POTENTIAL TRANSFERS ASSOCIATED WITH EMPLOYER-PROVIDED FRINGE BENEFITS—Continued

Employer-provided fringe benefit	Employer cost for benefit as a share of employer cost for wages and salaries (Q1 2022) [a]	Value of benefit for the median weekly wage of a full-time independent contractor (\$980) [d]	Value of benefit for the median weekly Wage of a part-time independent contractor (\$383) [d]
Total Annual Value of Fringe Benefits	15,186.08	5,934.97

[a] The share for each benefit is calculated as the cost per hour for civilian workers divided by the wages and salaries cost per hour for civilian workers. Series IDs CMU115000000000D, CMU118000000000D, and CMU104000000000D divided by Series ID 102000000000D
 [b] Includes defined benefit and defined contribution retirement plans
 [c] Includes vacation, holiday, sick and personal leave
 [d] Earnings data from the 2017 CWS (<https://www.bls.gov/news.release/conemp.t13.htm>) were inflated to Q1 2022 using GDP Deflator

2. Tax Liabilities

As self-employed workers, independent contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes. Thus, if workers’ classifications change from independent contractors to employees, there could be a transfer in Federal tax liabilities from workers to employers.⁵⁶¹ Although this proposed rule only addresses whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax purposes.⁵⁶² These payroll taxes include the 6.2 percent employer component of the Social Security tax and the 1.45 percent employer component of the Medicare tax.⁵⁶³ In sum, independent contractors are legally responsible for an additional 7.65 percent of their earnings in FICA taxes (less the applicable tax deduction for this additional payment). Some of this increased tax liability may be partially or wholly paid for by the individuals and companies that engage independent contractors, to the extent that the compensation paid to independent contractors accounts for

this added tax liability. However, changes in compensation are discussed separately below. Changes in benefits, tax liability, and earnings must be considered in tandem to identify how the standard of living may change. In addition to affecting tax liabilities for workers, this proposed rule could have an impact on state tax revenue and budgets. Misclassification results in lost revenue and increased costs for states, because states receive less tax revenue than they otherwise would from payroll taxes, and they have reduced funds to unemployment insurance, workers’ compensation, and paid leave programs.⁵⁶⁴ Although it has not been updated more recently, the IRS conducted a comprehensive worker misclassification estimate in 1984. At the time, the IRS found misclassification resulted in an estimated total tax loss of \$1.6 billion in Social Security taxes, Medicare taxes, Federal unemployment taxes, and Federal income taxes (for Tax Year 1984).⁵⁶⁵ To the extent workers were incorrectly classified due to misapplication of the 2021 IC Rule, that could lead to reduced tax revenues. Generally, employers are only required to contribute to unemployment insurance, disability insurance, or worker’s compensation on behalf of employees therefore independent contractors do not have access to those benefits. Reduced unemployment insurance, disability insurance, and worker’s compensation contributions result in reduced disbursement

capabilities. Misclassification of employees as independent contractors thus impacts the funds paid into such state programs. Even if the misclassified worker is unaffected and needs no assistance, the state has diminished funds for those who require the benefits. In Tennessee, from September 2017 to October 2018, the Uninsured Employers Fund unit “assessed 234 penalties against employers for not maintaining workers’ compensation insurance, for a total assessment amount of \$2,730,269.60.”⁵⁶⁶ This amount represents only what was discovered by the taskforce in thirteen months and in just one state. By rescinding the 2021 IC Rule, this proposed rule could prevent this increased burden on government entities.

3. FLSA-Protections

When workers are properly classified as independent contractors, the minimum wage, overtime pay, and other requirements of the FLSA no longer apply. The 2017 CWS data indicate that independent contractors are more likely than employees to report earning less than the FLSA minimum wage of \$7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors, and 2 percent for employees). Concerning overtime pay, not only do independent contractors not receive the overtime pay premium, but the number of overtime hours worked by independent contractors is also higher. Analysis of the CWS data indicated that, before conditioning on covariates, primary self-employed independent contractors are more likely to work overtime (more than 40 hours in a workweek) at their main job than employees, as 29 percent of self-employed independent contractors reported working overtime versus just 17 percent for employees.⁵⁶⁷

⁵⁶¹ See 86 FR 1218.
⁵⁶² Courts have noted that the FLSA has the broadest conception of employment under Federal law. See, e.g., *Darden*, 503 U.S. at 326. To the extent that businesses making employment status determinations base their decisions on the most demanding Federal standard, a rulemaking addressing the standard for determining classification of worker as an employee or an independent contractor under the FLSA may affect the businesses’ classification decisions for purposes of benefits and legal requirements under other Federal laws.
⁵⁶³ Internal Revenue Service, “Publication 15, (Circular E), Employer’s Tax Guide” (Dec 16, 2021), <https://www.irs.gov/pub/irs-pdf/p15.pdf>. The social security tax has a wage base limit of \$137,700 in 2020. An additional Medicare Tax of 0.9 percent applies to wages paid in excess of \$200,000 in a calendar year for individual filers.

⁵⁶⁴ See, e.g., Lisa Xu and Mark Erlich, Economic Consequence of Misclassification in the State of Washington, Harvard Labor and Worklife Program, 2 (2019), https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf; Karl A. Racine, Issue Brief and Economic Report, *Illegal Worker Misclassification: Payroll Fraud in the District’s Construction Industry*, 13 (September 2019), <https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf>.
⁵⁶⁵ Treasury Inspector General for Tax Inspection 2013, *Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings*, <https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf>.

⁵⁶⁶ NELP, *supra* n. 553.
⁵⁶⁷ The Department based this calculation on the percentage of workers in the CWS data who

Additionally, independent contractors who work overtime tend to work more hours of overtime than employees. According to the Department's analysis of CWS data, among those who usually work overtime, the mean usual number of overtime hours for independent contractors is 15.4 and the mean for employees is 11.8 hours. Independent contractors are also not protected by other provisions in the FLSA that are centered on ensuring that women are treated fairly at work, including employer-provided accommodations for breastfeeding workers and protections against pay discrimination.

As discussed above, compared to the 2021 IC Rule, this proposed rule could result in reduced misclassification of employees as independent contractors. Any reduction in misclassification that occurs as a result of this proposed rule would lead to an increase in the applicability of these FLSA protections for workers and subsequently may result in transfers relating to minimum wage and overtime. Specifically, to the extent misclassified workers were not earning the minimum wage, reduced misclassification would increase hourly wages for these workers to the Federal minimum wage. Similarly, to the extent misclassified workers were not receiving the applicable overtime pay, reduced misclassification would increase overtime pay for any overtime hours they continued to work. However, compared to the economic landscape prior to the Department's enforcement of the 2021 IC Rule in March 2022, these transfers would be less likely to occur.

4. Hourly Wages, Bonuses, and Related Compensation

In addition to increased compliance with minimum wage and overtime requirements, potential transfers may also result from this rulemaking as a consequence of differences in earnings between employees and independent contractors.⁵⁶⁸ Independent contractors are generally expected to earn a wage premium relative to employees who perform similar work to compensate for

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

⁵⁶⁸ The discussion of data on the differences in earnings between employees and independent contractors in the 2021 IC Rule was potentially confusing and included some evidence that was not statistically significant, so the findings and methodology are discussed again here.

their reduced access to benefits and increased tax liability. However, this may not always be the case in practice. The Department compared the average hourly wages of current employees and independent contractors to provide some indication of the impact on wages of a worker who is reclassified from an independent contractor to an employee.

The Department used an approach similar to Katz and Krueger (2018).⁵⁶⁹ Both regressed hourly wages on independent contractor status⁵⁷⁰ and observable differences between independent contractors and employees (e.g., occupation, sex, potential experience, education, race, and ethnicity) to help isolate the impact of independent contractor status on hourly wages. Katz and Krueger used the 2005 CWS and the 2015 RAND American Life Panel (ALP) (the 2017 CWS was not available at the time of their analysis). The Department used the 2017 CWS.⁵⁷¹

Both analyses found similar results. A simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees (e.g., \$27.29 per hour for all independent contractors versus \$24.07 per hour for employees using the 2017 CWS). However, when controlling for observable differences between workers, Katz and Krueger found no statistically significant difference between independent contractors' and employees' hourly wages in the 2005 CWS data. Although their analysis of the 2015 ALP data found that primary independent contractors earned more per hour than traditional employees, they recommended caution in interpreting these results due to the imprecision of the estimates.⁵⁷² The Department found no statistically significant difference between independent contractors' and employees' hourly wages in the 2017 CWS data.

Based on these inconclusive results, the Department believes it is

⁵⁶⁹ Katz and Krueger (2018), *supra* n. 517.

⁵⁷⁰ On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of "traditional" employees.

⁵⁷¹ In both Katz and Krueger's regression results and the Department's calculations, the following outlying values were removed: workers reporting earning less than \$50 per week, less than \$1 per hour, or more than \$1,000 per hour. Choice of exclusionary criteria from Katz and Krueger (2018), *supra* n. 517.

⁵⁷² See top of page 20, "Given the imprecision of the estimates, we recommend caution in interpreting the estimates from the [ALP]." The standard error on the estimated coefficient on the independent contractor variable in Katz and Krueger's regression based on the 2015 ALP is more than 2.5 times larger than the standard error of the coefficient using the 2017 CWS.

inappropriate to conclude independent contractors generally earn a higher hourly wage than employees. The Department ran another hourly wage rate regression including additional variables to determine if independent contractors in underserved groups are impacted differently by including interaction terms for female independent contractors, Hispanic independent contractors, and Black independent contractors. The results indicate that in addition to the lower wages earned by Black workers in general, Black independent contractors also earn less per hour than independent contractors of other races; however, this is not statistically significant at the most commonly used significance level.⁵⁷³

In addition to the potential transfers discussed above, the Department welcomes comments on how the interaction of these transfer dynamics may be realized by workers and businesses.

F. Analysis of Regulatory Alternatives

Pursuant to its obligations under Executive Order 12866,⁵⁷⁴ the Department assessed four regulatory alternatives to this proposed rule. The Department welcomes comments on these regulatory alternatives, as well as suggestions regarding any other potential alternatives.

The Department previously considered and rejected the first two alternatives described below—codifying either a common law or ABC test for determining employee or independent contractor status—in the 2021 IC Rule.⁵⁷⁵ Although the Department continues to believe that legal limitations prevent the Department from adopting either of those alternatives, the Department nonetheless presents them as regulatory alternatives, which is permissible under OMB guidance.⁵⁷⁶

For the first alternative, the Department considered codifying the common law control test, which is used to distinguish between employees and independent contractors under other Federal laws, such as the Internal

⁵⁷³ The coefficient for Black independent contractors was negative and statistically significant at a 0.10 level (with a p-value of 0.067). However, a significance level of 0.05 is more commonly used.

⁵⁷⁴ E.O. 12866, section 6(a)(3)(C)(iii), 58 FR 51741.

⁵⁷⁵ See 86 FR 1238.

⁵⁷⁶ OMB Circular A-4 advises that agencies "should discuss the statutory requirements that affect the selection of regulatory Approach. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act."

Revenue Code.⁵⁷⁷ The focus of the common law control test is “the hiring party’s right to control the manner and means by which [work] is accomplished,”⁵⁷⁸ but the Supreme Court has explained that “other factors relevant to the inquiry [include] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”⁵⁷⁹

Although the common law control test considers some of the same factors as those identified in the proposed rule’s “economic reality” test (e.g., skill, length of the working relationship, the source of equipment and materials, etc.), courts generally recognize that, because of its focus on control, the common law test is more permissive of independent contracting arrangements than the economic reality test, which examines the economic dependence of the worker.⁵⁸⁰

Codifying a common law control test for the FLSA may create a more uniform legal framework among Federal statutes, in the sense that entities would not, for example, have to understand and apply one employment classification standard for tax purposes and a different employment classification standard for

⁵⁷⁷ See 26 U.S.C. 3121(d)(2) (generally defining the term “employee” under the Internal Revenue Code as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”); 42 U.S.C. 410(f)(2) (similarly defining “employee” under the Social Security Act); see also, e.g., *Darden*, 503 U.S. 318 (holding that “a common-law test” should resolve employee/independent contractor disputes under ERISA); *Reid*, 490 U.S. at 751 (applying “principles of general common law of agency” to determine “whether . . . work was prepared by an employee or an independent contractor” under the Copyright Act of 1976). The Supreme Court has advised that the common law control test applies by default under Federal law unless a statute specifies an alternative standard. See *Darden*, 503 U.S. at 322–23 (“[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”) (quoting *Reid*, 490 U.S. at 739–40).

⁵⁷⁸ *Reid*, 490 U.S. at 751.

⁵⁷⁹ *Id.* at 751–52.

⁵⁸⁰ See, e.g., *Flint Eng’g*, 137 F.3d at 1440 (recognizing that the “economic realities” test is a more expansive standard for determining employee status than the common law test).

FLSA purposes. However, the Department does not believe that adopting a common law control test for determining employee or independent contractor status under the FLSA would otherwise simplify the analysis for the regulated community because courts and enforcement agencies applying a common law test for independent contractors have considered a greater number and different variation of factors than the six or so factors commonly considered under the economic reality test.⁵⁸¹ And as with the economic reality test, the Supreme Court has cautioned that “the common-law test contains ‘no shorthand formula or magic phrase that can be applied to find the answer, [as] all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’”⁵⁸²

With respect to workers, replacing the FLSA’s economic reality test with a common law control test would jeopardize the employment status of some economically dependent workers who have traditionally qualified as FLSA-covered employees. The Department believes that depriving economically dependent workers of the FLSA’s wage and hour protections would be detrimental to such workers, for reasons explained earlier. Moreover, applying the common law test would be contrary to the “suffer or permit” language in section 3(g) of the FLSA, which the Supreme Court has interpreted as demanding a broader definition of employment than that which exists under the common law.⁵⁸³ Accordingly, the Department believes it is legally constrained from adopting the common law control test absent Congressional legislation to amend the FLSA.

For the second alternative, the Department considered codifying an “ABC” test to determine independent contractor status under the FLSA, similar to the ABC test recently adopted under California’s state wage and hour law.⁵⁸⁴ As described by the California

⁵⁸¹ See RESTATEMENT (THIRD) OF AGENCY sec. 7.07, Comment (f) (2006) (identifying 10 factors); IRS Tax Topic No. 762 Independent Contractor vs. Employee (May 19, 2022), <https://www.irs.gov/taxtopics/tc762> (explaining the common law analysis through three main categories: behavioral control, financial control, and the relationship of the parties); *Reid*, 490 U.S. at 751–52 (identifying 13 factors).

⁵⁸² *Darden*, 503 U.S. at 324 (quoting *United Ins. Co. of America*, 390 U.S. at 258).

⁵⁸³ See, e.g., *Darden*, 503 U.S. at 326; *Portland Terminal*, 330 at 150–51.

⁵⁸⁴ See *Dynamex*, 416 P.3d 1; Assembly Bill (“A.B.”) 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (codifying the ABC test articulated in *Dynamex*); A.B. 2257, Ch. 38, 2019–2020 Reg. Sess. (Cal. 2020) (retroactively exempting certain

Supreme Court in *Dynamex*, “[t]he ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity’s business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”⁵⁸⁵ In justifying the adoption of this test for independent contractors, the *Dynamex* court noted the existence of an “exceptionally broad suffer or permit to work standard” in California’s wage and hour statute,⁵⁸⁶ as well as “the more general principle that wage orders are the type of remedial legislation that must be liberally construed in a manner that serves its remedial purposes.”⁵⁸⁷

Compared to either the common law or economic reality tests, codifying an ABC test would establish a far simpler and clearer standard for determining whether workers are employees or independent contractors. The ABC test only has three criteria, and no balancing of the criteria is required; all three prongs must be satisfied for a worker to

professions, occupations, and industries from the ABC test that A.B. 5 had codified). The ABC test originated in state unemployment insurance statutes, but some state courts and legislatures have recently extended the test to govern employee/independent contractor disputes under state wage and hour laws. See Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. Ill. U. L. Rev. 379, 408–11 (2019) (discussing the origins and recent expansion of the ABC test).

⁵⁸⁵ 416 P.3d at 34 (emphasis in original). California’s ABC test is slightly different than versions of the ABC test adopted (or presently under consideration) in other states. For example, New Jersey provides that a hiring entity may satisfy the ABC test’s “B” prong by establishing either: (1) that the work provided is outside the usual course of the business for which the work is performed, or (2) that the work performed is outside all the places of business of the hiring entity. N.J. Stat. Ann. sec. 43:21–19(i)(6)(A–C). The Department has chosen to analyze California’s ABC test as a regulatory alternative because businesses subject to multiple standards, including nationwide businesses, are likely to comply with the most demanding standard if they wish to make consistent classification determinations.

⁵⁸⁶ 416 P.3d at 31; see also Cal. Code Regs., tit. 8, sec. 11090, subd. 2(D) (“‘Employ’ means to engage, suffer, or permit to work.”). The *Dynamex* court noted that California’s adoption of the “suffer or permit to work” standard predated the enactment of the FLSA and was therefore “not intended to embrace the federal economic reality test” that subsequently developed. 416 P.3d at 35.

⁵⁸⁷ *Id.* at 32.

qualify as an independent contractor. For this reason, adopting an ABC test may eliminate some of the uncertainty related to independent contracting under laws which apply different standards, and substantially reduce the risk of worker misclassification.⁵⁸⁸ Though an ABC test would be clear and simple to use for regulated entities who use (or wish to use) independent contractors, it would also be more restrictive of independent contracting arrangements compared to the proposed rule.

In any event, the Department believes it is legally constrained from adopting an ABC test because the Supreme Court has held that the economic reality test is the applicable standard for determining workers' classification under the FLSA as an employee or independent contractor.⁵⁸⁹ Moreover, the Supreme Court has stated that the existence of employment relationships under the FLSA "does not depend on such isolated factors" as the three independently determinative factors in the ABC test, "but rather upon the circumstances of the whole activity."⁵⁹⁰ Because the ABC test is inconsistent with Supreme Court precedent interpreting the FLSA, the Department believes that it could only implement an ABC test if the Supreme Court revisits its precedent or if Congress passes legislation to amend the FLSA.

For the third alternative, the Department considered a proposed rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule. As the Department has noted throughout this proposal, there are multiple instances in which this NPRM is consistent or in agreement with the 2021 IC Rule. Specifically, the Department has noted its agreement with the following aspects of the 2021 IC Rule: a totality of the circumstances test should be applied to appropriately determine classification as an employee or independent contractor; the concept of economic dependence needs further development; and a clear explanation of the test for whether a worker is an employee or independent contractor in easily accessible regulatory text is

valuable. This proposal also includes several other important principles from the case law that were included in the 2021 IC Rule: economic dependence is the ultimate inquiry; the list of economic reality factors is not exhaustive; and no single factor is determinative. Further, with respect to specific factors, this proposal reinforces certain aspects addressed in the 2021 IC Rule such as that an exclusivity requirement imposed by the employer is a strong indicator of control, and that issues related to scheduling and supervision over the performance of the work (including the ability to assign work) are relevant considerations under the control factor.

Despite these areas of agreement, the governing principle of the 2021 IC Rule is that two of the economic reality factors are predetermined to be more probative and therefore carry more weight, which may obviate the need to meaningfully consider the remaining factors. Upon further consideration, as discussed in this proposal, the Department believes that this departure from decades of case law and the Department's own longstanding position that no one factor or subset of factors should carry more or less weight would have a confusing and disruptive effect on employers and workers alike. The Department considered simply removing the problematic "core factors" analysis from the 2021 IC Rule and retaining the five factors as described in the rule. However, the Department rejected this approach because other aspects of the rule such as considering investment and initiative only in the opportunity for profit or loss factor and excluding consideration of whether the work performed is central or important to the employer's business are also in tension with judicial precedent and longstanding Department guidance. These provisions narrow the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themselves. Therefore, after considering all of the common aspects of the 2021 IC Rule and whether to retain some portions of that rule, the Department has concluded that in order to provide clear, affirmative regulatory guidance that aligns with case law and is consistent with the text and purpose of the Act as interpreted by courts, a complete rescission and replacement of the 2021 IC Rule is needed. For these reasons, the Department is not proposing a partial rescission of the 2021 IC Rule.

For the fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance. For more than 80 years prior to the 2021 IC Rule, the Department primarily issued subregulatory guidance in this area and did not have generally applicable regulations on the classification of workers as employees or independent contractors. This subregulatory guidance was informed by the case law and set forth a multifactor economic reality test to answer the ultimate question of economic dependence. The Department considered rescinding the 2021 IC Rule and continuing to provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example a Field Assistance Bulletin). Rescinding the 2021 IC Rule without issuing a new regulation would lower the regulatory familiarity costs associated with the proposal. As explained in sections III, IV, and V above, however, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflects the case law and continues to be relevant to the modern economy will be helpful for both workers and employers. Specifically, issuing regulations allows the Department to provide in-depth guidance that is more closely aligned with circuit case law, rather than the regulations set forth in the 2021 IC Rule which have created a dissonance between the Department's regulations and judicial precedent. Additionally, issuing regulations allows the Department to formally collect and consider a wide range of views from stakeholders by electing to use the notice-and-comment process. Finally, because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue. Therefore, the Department is not proposing to rescind the 2021 IC Rule and provide only subregulatory guidance but welcomes comments on the costs and benefits of this alternative.

VIII. Initial Regulatory Flexibility Act (IRFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities,

⁵⁸⁸ See *id.* at 48 (observing that the ABC test "will provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis").

⁵⁸⁹ See *Tony & Susan Alamo*, 471 U.S. at 301 ("The test of employment under the Act is one of 'economic reality.'"); *Whitaker House*, 366 U.S. at 33 ("'economic reality' rather than 'technical concepts' is . . . the test of employment" under the FLSA) (citing *Silk*, 331 U.S. at 713; *Rutherford*, 331 U.S. at 729).

⁵⁹⁰ *Rutherford*, 331 U.S. at 730.

consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities.

A. Why the Department Is Considering Action

As discussed in section II.E., on March 14, 2022, a district court in the Eastern District of Texas issued a decision vacating the Department's delay and withdrawal of the 2021 IC Rule and concluding that the 2021 IC Rule became effective on March 8, 2021.⁵⁹¹ The Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by the courts and will have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test. Therefore, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.

B. Objectives of and the Legal Basis for the Proposed Rule

The Department is proposing to modify the regulations addressing whether workers are employees or independent contractors under the FLSA. Specifically, the Department is proposing to discontinue the use of "core factors" and instead proposing to return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Department is further proposing to return the consideration of investment to a standalone factor, provide additional analysis of the control factor (including detailed discussions of how scheduling, remote supervision, price-setting, and the ability to work for others should be considered), and return to the longstanding interpretation of the integral factor, which considers whether the work is integral to the employer's

business. The Department is also proposing to formally rescind the 2021 IC Rule.

The Department believes that rescinding the 2021 IC Rule and replacing it with regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—would be helpful for both workers and employers. The Department believes this proposal will help protect workers from misclassification while at the same time providing a consistent approach for those businesses that engage (or wish to engage) independent contractors.

The Department's authority to interpret the Act comes with its authority to administer and enforce the Act. See *Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 592–93 & n.8 (6th Cir. 2002) (noting that "[t]he Wage and Hour Division of the Department of Labor was created to administer the Act" while agreeing with the Department's interpretation of one of the Act's provisions); *Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 267 (5th Cir. 2000) ("By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret."); *Condo v. Sysco Corp.*, 1 F.3d 599, 603 (7th Cir. 1993) (same).

C. Estimating the Number of Small Businesses Affected by the Rulemaking

The Department used the Small Business Administration (SBA) size standards, which determine whether a business qualifies for small-business status, to estimate the number of small entities.⁵⁹² The Department then applied these thresholds to the U.S. Census Bureau's 2017 Economic Census to obtain the number of establishments with employment or sales/receipts below the small business threshold in the industry.⁵⁹⁴ These ratios of small to large establishments were then applied to the more recent 2019 Statistics of United States Businesses (SUSB) data on number of establishments.⁵⁹⁵ Next, the Department estimated the number of small governments, defined as having

⁵⁹² SBA, Summary of Size Standards by Industry Sector, 2017, https://www.sba.gov/sites/default/files/2018-05/Size_Standards_Table_2017.xlsx.

⁵⁹³ The most recent size standards were issued in 2022. However, the Department used the 2017 standards for consistency with the older Economic Census data.

⁵⁹⁴ The 2017 data are the most recently available with revenue data.

⁵⁹⁵ For this analysis, the Department excluded independent contractors who are not registered as small businesses, and who are generally not captured in the Economic Census, from the calculation of small establishments.

population less than 50,000, from the 2017 Census of Governments.⁵⁹⁶ In total, the Department estimated there are 6.5 million small establishments or governments who could potentially have independent contractors, and who could be affected by this rulemaking. However, not all of these establishments will have independent contractors, and so only a share of this number will actually be affected. The impact of this rule could also differ by industry. As shown in Table 2 of the regulatory impact analysis, the industries with the highest number of independent contractors are the professional and business services and construction industries.

Additionally, as discussed in section VII.B., the Department estimates that there are 22.1 million independent contractors. Some of these independent contractors may be considered small businesses and may also be impacted by this rule.

The Department welcomes comments and data on any costs to small businesses.

D. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

This proposed rule lays out the framework for assessing employee or independent contractor status under the FLSA. It does not create any new reporting or recordkeeping requirements for businesses.

In the Regulatory Impact Analysis, the Department estimated regulatory familiarization to be one hour per entity and one-quarter hour per independent contractor. The per-entity cost for small business employers is the regulatory familiarization cost of \$24.97, or the fully loaded median hourly wage of a Compensation, Benefits, and Job Analysis Specialist multiplied by 0.5 hour. The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, is \$5.34, or the median hourly wage of independent contractors in the CWS multiplied by 0.25 hour. The Department welcomes comments and data on any costs to small businesses.

E. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Proposed Rule

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

⁵⁹⁶ 2017 Census of Governments. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

⁵⁹¹ See *Coalition for Workforce Innovation*, 2022 WL 1073346.

F. Alternatives to the Proposed Rule

The RFA requires agencies to discuss “any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.”⁵⁹⁷ As discussed earlier in section VII.F., the Department does not believe that it has the legal authority to adopt either a common law or “ABC” test to determine employee or independent contractor status under the FLSA, foreclosing the consideration of these alternatives for purposes of the RFA.

As explained in section VII.F., the Department considered two other regulatory alternatives: proposing a rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule in the new proposal; and completely rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance, as the Department had done for over 80 years prior to the 2021 IC Rule. The Department believes that the overall economic impact of retaining some portions of the 2021 IC Rule while issuing a proposed rule to revise other portions of the rule would not minimize the economic impact on small entities as they would incur costs to familiarize themselves with the new regulation. Similarly, the Department believes that the overall economic impact of fully rescinding the 2021 IC Rule and providing subregulatory guidance, would not necessarily minimize the economic impact on small entities as they would incur some costs to familiarize themselves with any subregulatory guidance. Moreover, as explained in sections III, IV, and V above, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers, particularly over the long term.

In addition to the alternatives discussed above, Section 603(c) of the RFA describes four categories of regulatory alternatives that might be appropriate for consideration in an IRFA analysis. The Department does not believe that the FLSA is best interpreted to encompass these categories of regulatory alternatives or that they are necessarily applicable to this proposal.

1. Differing Compliance or Reporting Requirements That Take Into Account the Resources Available to Small Entities

Nothing in the FLSA or the decades of court decisions interpreting it suggest that a worker’s status as an employee or independent contractor should turn on the size of the entity that benefits from their labor. As described earlier, one of the primary goals of the FLSA is to curtail “unfair method[s] of competition in commerce” by establishing minimum labor standards that all covered employers must observe.⁵⁹⁸ Providing differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance and, if this proposed rule is finalized, will prepare a small entity compliance guide, as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).⁵⁹⁹ Therefore, the Department has not proposed differing compliance or reporting requirements for small businesses.

2. The Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements for Small Entities

This proposed rule does not impose any new reporting requirements, and the Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

3. The Use of Performance Rather Than Design Standards

This proposed rule provides guidance regarding the factors that should be considered regarding a worker’s employment status under the FLSA where no one factor is, in a pre-determined manner, given more weight than the others and the weight given to the various factors may depend on the particular circumstances of the case.

4. An Exemption From Coverage of the Rule, or Any Part Thereof, for Such Small Entities

Creating an exemption from coverage of this proposed rule for businesses with as many as 500 employees, those defined as small businesses under SBA’s size standards, would be inconsistent with the FLSA, which applies to all employers that satisfy the enterprise coverage threshold or employ

individually covered employees, regardless of the employer’s number of employees. Further, as described above, case law interpreting the distinction between employees and independent contractors under the FLSA does not support such an exemption.

The Department welcomes comments on this IRFA’s analysis of regulatory alternatives.

IX. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate, or by the private sector. Adjusting the threshold for inflation using the GDP deflator, using the most recent annual result (2021), yields a threshold of \$165 million. Therefore, this rulemaking is expected to create unfunded mandates that exceed that threshold. See section VII for an assessment of anticipated costs and benefits.

X. Executive Order 13132, Federalism

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

XI. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

29 CFR Part 780

Agriculture, Child labor, Wages.

29 CFR Part 788

Forests and forest products, Wages.

⁵⁹⁷ 5 U.S.C. 603(c).

⁵⁹⁸ 29 U.S.C. 202(a)(3).

⁵⁹⁹ Small Business Regulatory Enforcement Fairness Act, Public Law 104–121, sec. 212.

29 CFR Part 795

Employment, Wages.

For the reasons set out in the preamble, the Department of Labor proposes to amend 29 CFR chapter V 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.

* * * * *

(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.

* * * * *

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

■ 3. 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. 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.

* * * * *

■ 5. Add part 795 to read as follows:

PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT.

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 or independent contractors under the Act focuses on the economic realities of the workers’ relationship with the employer and whether the workers are either economically dependent on the employer for work or in business for 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). 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 himself. Economic dependence does not focus on the amount of income earned, or whether the worker has other 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 employer for work or is in business for himself.

(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. 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 managerial skill that affects 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, generally do not reflect the

exercise of managerial skill indicating independent contractor status under this factor.

(2) *Investments by the worker and the employer.* This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) 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 ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker's investments should be considered on a relative basis with the employer's investments in its overall business. The worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to 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 exclusive working relationships. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities. 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 indicative of independent contractor status.

(4) *Nature and degree of control.* This factor considers the 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 control over the worker include whether the employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the employer's control over the worker include whether the employer uses technological means of supervision (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands on workers' time that do not allow them to work for others or work when they choose. Whether the 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 by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control. More indicia of control by the 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 business.* This factor considers whether the work performed is an integral part of the 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. 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 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 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 employer to perform the work. Where the worker brings specialized skills to the work relationship, 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 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.

Martin J. Walsh,
Secretary of Labor.

[FR Doc. 2022-21454 Filed 10-11-22; 8:45 am]

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CHAPTER IX-A – Part 2

North Carolina Update

North Carolina Federal District Court Opinions – The
Year in Review – October 1, 2021 to October 1, 2022

*Jonathan “Jon” Wall
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NORTH CAROLINA
BAR ASSOCIATION

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CHAPTER IX-A – PART 2
North Carolina Update
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The Year in Review – October 1, 2021 to October 1, 2022

Jonathan “Jon” Wall – Greensboro

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CHAPTER IX-A - Part 2

**NORTH CAROLINA FEDERAL DISTRICT COURT OPINIONS
THE YEAR IN REVIEW – OCTOBER 1, 2021 TO OCTOBER 1, 2022**

BY: JONATHAN WALL¹

CLASS ACTION ISSUES

CIRILLO V. CITRIX SYS., NO. 5:21-CV-88, 2022 U.S. DIST. LEXIS 49911, 2022 WL 841327 (E.D.N.C. MAR. 21, 2022).

[see discussion of class notice under Wage & Hour]

WILLIAMS V. CHARLOTTE-MECKLENBURG HOSP. AUTH., NO. 3:20-CV-242, 2022 U.S. DIST. LEXIS 63428 (W.D.N.C. APR. 5, 2022).

The United States District Court for the Western District of North Carolina GRANTS in part, DENIES in part, Plaintiff's motion to approve notice of collective action lawsuit.

¹ Jon Wall is a partner with Higgins Benjamin, PLLC in Greensboro, NC, and a former Chair of the NCBA Labor Law Council. He primarily practices employment law and may be contacted by email at jwall@greensborolaw.com.

Previously, the Court conditionally certified a class under the Age Discrimination on Employment Act (ADEA) consisting of the employees over age 40 who worked under supervisor Bratcher from April 23, 2017 to the present. Pursuant to § 626(b) of the ADEA, claims may be brought as collective actions under § 216 of the FLSA, which provides for opt-in class actions.

Here, while the Court would generally approve the notice to prospective class members, it refused Plaintiff’s request to post the notice in employee-only areas. Defendant asserted posting the notice was unnecessary and would cause disruption and distraction to employees. The Court agreed, and reasoned such notice was unnecessary because the Court was allowing notice through U.S. mail, email, and text messaging (as needed).

The Court also permitted discovery of prospective class members’ telephone numbers for the purpose of sending the notice by text message, but only for those potential plaintiffs whose initial notice by mail and email were returned as undeliverable. In an effort to protect the privacy of potential plaintiffs, courts require a special need for telephone numbers, the Court said.

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780, 2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

The United States District Court for Middle District of North Carolina GRANTS Plaintiffs’ Motion for Summary Judgment, DENIES Defendants’ Motion for Summary Judgment, and GRANTS Plaintiffs’ Motion for Permanent Injunction.

Plaintiffs are transgender individuals or parents of transgender individuals who receive health insurance through the North Carolina State Health Plan for Teachers and State Employees (“NCSHP”). They allege the Plan’s categorical exclusion of coverage for treatments “leading to or in connection with sex changes or modifications” discriminates against them on the basis of sex and transgender status in violation of the Equal Protection Clause and the Affordable Care Act (ACA). Plaintiff Caraway also sued NCSHP and her employer, the North Carolina Department of Public Safety (DPS), under Title VII alleging they discriminated against her on the basis of her sex by offering the health plan in violation of Title VII. Plaintiffs also sought to permanently enjoin Defendants from enforcing the Plan’s exclusion and to order them to reinstate coverage for “medically necessary services for the treatment of gender dysphoria.

The Court first reviewed in depth expert witness testimony proffered by Defendants and ruled that under *Daubert* and Rule 702 of the Federal Rules of Evidence, much of the testimony would be disallowed. Although the experts would be permitted to testify on matters within their field of expertise, several of the witnesses were not qualified to testify on various matters outside their fields. Further, much of the proffered testimony was not based on scientific, technical, or other specialized knowledge, and was instead unreliable and inadmissible, including where the expert developed the opinions expressly for the purpose of testifying in the case.

Turning to the Constitutional claims, the Court observed that the Fourteenth Amendment to the U.S. Constitution prohibits states from denying “to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. When considering an equal protection claim, a court must determine (1) "what level of scrutiny applies" and (2) "whether the law or policy at issue survives such scrutiny." In the Fourth Circuit, laws that discriminate based on sex or transgender status receive intermediate scrutiny. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608, 610 (4th Cir.), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021). Such policies are unconstitutional "unless [they are] substantially related to a sufficiently important governmental interest." *Id.* at 608 (quoting *Cleburne*, 473 U.S. at 441).

To show that a policy discriminates based on sex or transgender status, a plaintiff must show discriminatory intent and disproportionate impact. "No inquiry into legislative purpose is necessary," however, when the suspect classification "appears on the face" of the policy. *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993). Apply the reasoning of *Grimm*, the Court concluded the exclusions facially discriminate based on sex and transgender status. First, the exclusion "necessarily rests on a sex classification" because it cannot be stated or effectuated "without referencing sex." As reasoned by the U.S. Supreme Court, "try writing out instructions" for which treatments are excluded "without using the words man, woman, or sex (or some synonym). It can't be done." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1746, 207 L. Ed. 2d 218 (2020).

The Court observed that many of the treatments – for example, testosterone treatment, hormone therapy, and mastectomies – are deemed medically necessary and provided under the Plan to cisgender patients. These same procedures – even when deemed medically necessary by treating physicians for treatment of gender dysphoria – however, are categorically denied to transgender persons. Thus, the Plan facially discriminated based on sex and transgender status, thus justifying the application of intermediate scrutiny.

To survive intermediate scrutiny, the state bears the burden to "provide an 'exceedingly persuasive justification' for its classification" (citations omitted). The Court rejected Defendants' rationale that the exclusions limit health care costs. The Court noted that the state may not "protect the public fisc by drawing an invidious distinction between classes of its citizens" under heightened scrutiny, *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974). Here, the exclusion would save an estimated \$300,000 to \$900,000 per year, which is insignificant given the Plan's \$1 billion cash balance. "Such a paltry limit on healthcare costs is not an important government interest," the Court concluded. *Kadel* at *73.

The Court also rejected Defendant's rationale that the exclusion protected Plan participants from ineffective medical treatments. It is undisputed that gender dysphoria is

serious diagnosis that, if left untreated, can result in depression, anxiety, self-mutilation, and suicide. Defendants' admissible expert testimony simply does not support Defendants' proposition that the treatments are ineffective, the Court reasoned. Further, the Plan could more narrowly address ineffective treatments by excluding *medically unnecessary* treatments for gender dysphoria, rather than categorically excluding the treatments. Thus, Defendants could not meet burden under intermediate scrutiny, and Plaintiffs were entitled to summary judgment on their 14th Amendment Equal Protection claims.

Turning to Plaintiff Caraway's Title VII, the Court concluded that NCSHP is not Caraway's employer, and therefore cannot be sued under Title VII. NCSHP has no control over Caraway's employment, does not act as DPS's agent, and is not a joint employer. Accordingly, NCSHP was entitled to summary judgment on Caraway's Title VII claims.

The Court, however, rejected DPS's argument that Caraway lacked standing because her injury was not "fairly traceable" to DPS's conduct. DPS hired Plaintiff Caraway and was involved in providing and administering the Plan, particularly in enrolling participants and collecting employee contributions. It was inconsequential that DPS "did not make the decision to exclude gender-confirming healthcare coverage" from the Plan. Even if the Court agreed that DPS's duties were largely ministerial duties dictated by statute, there is no "ministerial" exception to the standing doctrine. Thus, Caraway sufficiently established standing to sue DPS.

The Court concluded that Plaintiff Caraway was denied coverage because of her sex, and that Caraway's birth-assigned sex was a "but-for" cause of her injury. Even though the state law required DPS to provide Plaintiff with insurance under the Plan, compliance with state law is no defense to a federal violation, the Court held. Thus, Caraway was entitled to summary judgment on her Title VII sex discrimination claims.

A plaintiff seeking a permanent injunction must satisfy a four-factor test: "Plaintiffs must demonstrate: (1) irreparable injury; (2) inadequacy of available remedies at law, such as monetary damages; (3) an injunction is warranted after "considering the

balance of hardships between the plaintiff and defendant"; and (4) "that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-157, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010). Permanent injunctions are particularly appropriate in discrimination cases to prevent continued discrimination, the Court observed.

Here, Plaintiffs have shown that they will require continued medical care to treat gender dysphoria, while NCSHP has avowed to maintain the exclusion until ordered otherwise. The significant hardships to Plaintiffs outweigh the minimal hardships on Defendants. Accordingly, the Court permanently enjoined Defendants from enforcing the Plan's exclusion and ordered Defendants to reinstate coverage for "medically necessary services for the treatment of gender dysphoria." *Kadel* at *99.

DISABILITY DISCRIMINATION

CHISHOLM V. MOUNTAIRE FARMS CORP., ___ F. SUPP.3D ___, NO. 1:21-CV-832, 2022 U.S. DIST. LEXIS 170273 (M.D.N.C. SEPT. 21, 2022).

The United States District Court for the Middle District of North Carolina GRANTS Defendant's motion to dismiss.

Chisholm was employed on November 11, 2019, by Mountaire Farms as a line operator. In May 2022, Chisholm injured his shoulder while at home, causing a period of chronic pain and limited mobility. He applied for and received short-term disability benefits and was out of work from May 14, 2020, through Sept. 3, 2020. On September 3, 2020, Chisholm was released by his doctor for light-duty work. He took the note to his employer and informed his employer that he was ready to go back to work. That same day, however, Mountaire Farms terminated his employment and did not provide a reason.

Chisholm sued alleging (1) disability discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*; (2) retaliation under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*; and (3) retaliation in violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*

Regarding disability discrimination, there was some question whether Plaintiff failed to exhaust his administrative remedies. In his Complaint, Chisholm did not state the date he filed his charge of discrimination, only stating he filed a charge with the EEOC within 180 days of his termination. Defendant requested that the Court consider the actual charge, which it attached to its motion, that was signed and filed by Chisholm on March 28, 2021. Plaintiff, in turn, attached a complete EEOC file to its response, indicating Chisholm had been communicating with the EEOC well before the charge date. The Court refused to consider either party's submissions and held that, based on the allegations in the Complaint, Plaintiff survived the motion to dismiss on those grounds.

Turning to the merits of the claim, the Court noted that a plaintiff must show that "(1) he 'was a qualified individual with a disability'; (2) he 'was discharged'; (3) he 'was fulfilling h[is] employer's legitimate expectations at the time of discharge'; and (4) 'the circumstances of h[is] discharge raise a reasonable inference of unlawful discrimination.'" *Id.* (citations omitted). The Court rejected Defendant's argument that Plaintiff had not established that he suffered from a disability, noting that in 2008, Congress had broadened the definition of disability to make it easier for people with disabilities to obtain ADA protection. Here, Plaintiff had alleged he hurt his shoulder, starting an extended period of limited mobility, and resulting in him being out of work. Given the broadened definitions, Plaintiff had alleged a condition that substantially limited major life activities, like working, and that was sufficient at this stage, the Court reasoned.

The Complaint, however, does not articulate the essential functions of Plaintiff's job, or allege that he could perform the essential functions of the job. Thus, Plaintiff has not plausibly alleged that he is a "qualified individual" under the ADA. Further, the Complaint is devoid of any factual allegations suggesting Defendant fired Plaintiff because of his disability, only making a conclusory statement that "the circumstances of

his discharge raise a reasonable inference of unlawful discrimination.” While Defendant did not provide any reason for the termination, that alone does not raise a reasonable inference of discrimination, and Plaintiff’s ADA claim consequently fails.

Regarding the FMLA claim, the Complaint on its face establishes that Plaintiff had not worked for Defendant for 12 months, and consequently was not protected by the FMLA. Likewise, Plaintiff’s ERISA retaliation claim fails because Plaintiff provides no factual allegations that he was qualified for his job, and no factual allegations supporting a causal connection between Plaintiff’s protected activity and his termination. Consequently, the Court dismissed the Complaint without prejudice.

NONCOMPETITION AGREEMENTS

WILLIS TOWERS WATSON SE, INC. V. ALLIANT INS. SERVS., NO. 3:22-CV-277, 2022 U.S. DIST. LEXIS 119425, 2022 WL 2555108 (W.D.N.C. JULY 7, 2022).

The United States District Court for the Western District of North Carolina GRANTS in part, DENIES in part, Plaintiff’s Motion for Preliminary Injunction.

Thomas, Bennett, and Gullet each entered employment agreements with restrictive covenants before working for Willis Towers Watson SE, Inc. (“WTW SE”) in the insurance brokerage business, specifically WTW SE’s surety practice. The agreements prohibited the three employees, for 24 months after termination, from soliciting (1) WTW SE employees and (2) WTW SE customers serviced by the employee in the year before termination or prospective customers with whom the employee had contact within 6 months of the termination.

Thomas and Bennett resigned from WTW SE in mid-June 2022, and both started working for Alliant Insurance Services almost immediately. Although Gullett maintained

a relationship with WTW SE until October 29, 2020, she also began employment with Alliant on June 20, 2022.

On or about June 13, 2022, Thomas, Bennett, and Gullett began soliciting WTW SE employees to come join them at Alliant. Between June 14 and 24, 2022, circumstantial evidence indicated Thomas, Bennett, and Gullett solicited at least 16 long-standing clients of WTW SE serviced by them. That evidence included the clients' changing their broker of record to Alliant.

WTW SE sued Thomas, Bennett, Gullett, and Alliant and sought a preliminary injunction prohibiting alleged (1) further breaches of the restrictive covenants and (2) misuse of WTW SE's confidential information by Defendants.

To obtain a preliminary injunction, Plaintiff must establish four prongs with a clear showing that: "(1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm without the preliminary injunction; (3) the balance of equities tips in its favor; and (4) the injunction is in the public interest." The Court found the client-based limitations were reasonable as to terms, time, and territory. The Court noted the restrictions did not prevent all employment with a competitor, but only prohibited Defendants servicing their former clients. The Court also found Plaintiff had presented sufficient evidence that the individual Defendants had violated their restrictive covenants, and as a result, Plaintiff would likely suffer irreparable harm.

The Court also determined that the public interest would be served by issuing the injunctions. The public interest is served by "ensuring that contracts are enforced" and preventing "unethical business behavior." *Philips Elecs. N. Am. Corp. v. Hope*, 631 F. Supp. 2d 705, 724 (M.D.N.C. 2009) (citation omitted). Thus, the Court concluded injunctions should issue against the individual Defendants prohibiting them from (1) soliciting WTW SE employees, (2) soliciting, accepting business from, or servicing their former WTW SE clients, and (3) misappropriating or using any of Plaintiff's confidential information.

The Court refused to issue any injunction against Alliant, finding Plaintiff had not presented sufficient evidence that Alliant "intentionally induced" the individual

Defendants to violate their restrictive covenants, as is required for a claim for tortious interference with contract. Last, the Court required Plaintiff to post \$100,000 surety bond.

TITLE VII DISCRIMINATION

ALTAWEEL V. LONGENT, LLC, NO. 5:19-CV-573, 2022 U.S. DIST. LEXIS 82919, 2022 WL 1463059 (E.D.N.C. MAY 9, 2022).

*The United States District Court for the Eastern District of North Carolina
GRANTS Defendant’s Motion for Summary Judgment.*

Altaweel, a practicing Muslim, immigrated from Iraq and is a U.S. citizen. Longent, LLC, which designs and installs wireless systems, hired Altaweel in August 2015 as a project manager. Altaweel received positive performance reviews over his first 18 months of employment while being supervised by Craft. Craft resigned in July 2018, and Longent’s owner Youngbar became Altaweel’s supervisor.

Sometime in August 2018, Altaweel verbally requested leave for August 23-24, to celebrate Eid al-Adha, a Muslim holiday based on the lunar calendar. Youngbar allegedly said, “what if it is cloudy?” and “we have holidays in this country, and those holidays aren’t enough for you?” The leave was subsequently approved August 27, 2018. Altaweel also alleged that after he had advised that he had religious-based dietary restrictions, Youngbar offered to share his pork-based lunch, saying that it tastes good and Altaweel should try it. Youngbar also offered Altaweel pizza with pork toppings in July 2018. Altaweel also contended that Youngbar stated at some point that the government should not provide benefits to non-Americans.

Youngbar believed Altaweel had trouble getting to work on time and submitting leave requests, and on November 30, 2018, placed Altaweel on a performance improvement plan (PIP). On December 21, 2018, Youngbar provided an annual review that rated Altaweel “satisfactory,” but lower than his coworkers. On May, 10, 2019, after Altaweel was absent from work for 2 days while spending time with his hospitalized daughter, Youngbar terminated his employment.

Altaweel sued, alleging Longent discriminated against him on the basis of his religion and national origin in violation of Title VII, 42 U.S.C. § 2000e-2. "Courts have recognized that employees may utilize two theories in asserting religious discrimination claims." *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1017 (4th Cir. 1996). "These theories are denominated as the 'disparate treatment' and 'failure to accommodate' theories." *Id.*

Here, Plaintiff could not establish a discriminatory adverse employment action. In regard to the PIP, the Court noted that there was no loss of pay or other detriment. Although termination is an adverse employment action, Plaintiff could not demonstrate his religion or national origin motivated Defendant’s decision. Although Plaintiff asserted various comments by Youngbar were direct evidence of discrimination, the Court found the comments were isolated and too far removed from the termination, which occurred nine months after the most recent comment.

Applying the *McDonnell-Douglas* framework, the Court noted it was undisputed that Youngbar believed Plaintiff had attendance and other performance issues. Plaintiff’s final performance review established that from Defendant’s perspective, Plaintiff was not meeting legitimate performance expectations. The Court rejected Plaintiff’s assertion that Defendant’s beliefs were insincere, noting an "employee's mere demonstration that his employer's belief may be incorrect is not sufficient to prove discrimination."

The Court also rejected the claims based on failure-to-accommodate under Title VII, finding the accommodation request too removed in time from Plaintiff’s termination, such that no reasonable jury could find it to be a motivating factor.

Last, the Court also rejected Plaintiff’s Title VII hostile work environment claim based on religion or national origin, finding the comments were neither severe nor pervasive. “Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Some rolling with the punches is a fact of workplace life.” *Id.* (citations omitted).

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780, 2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

[see discussion under Constitutional Claims]

WILKES V. BUNCOMBE OPERATIONS, LLC, NO. 1:20-CV-00376, 2022 U.S. DIST. LEXIS 46899, 2022 WL 812384 (W.D.N.C. MAR. 16, 2022); ADOPTING 2021 U.S. DIST. LEXIS 255058 (NOV. 4, 2021).

The United States District Court for the Western District of North Carolina adopts the recommendation of the Magistrate Judge and GRANTS in part, DENIES in part, Defendant’s Motion to Dismiss.

Wilkes, a black woman, began working as the only Black manager at a senior living facility in May 2018. Once Watts, a white woman, became Wilkes’s supervisor, Wilkes experienced a series of allegedly discriminatory acts, including unwarranted write-ups, disparate vacation-day approval, and disparate enforcement of a dress code. Wilkes was also allegedly told not eat with a white co-worker because “it did not look right.” Watts repeatedly issued “Final Warnings” to Black employees despite there being no previous disciplinary incidents.

In December 2018 and February 2019, Wilkes complained to Human Resources Analyst Halsey, and Wilkes followed up with a written letter and an internal written

complaint on March 27, 2019. In April 2019, Defendant began an investigation into Watts's conduct, and in August 2019, Watts was asked to resign, but she was refused and was instead placed on "Final Warning." Watts continued writing up Wilkes for insubordination and misconduct in August and September 2019, and on September 19, 2019, Watts filed a charge of discrimination with the EEOC. Watts was terminated October 2, 2019. On October 8, 2019, Wilkes gave a two-week notice, and worked through November 13, 2019.

After receiving a right-to-sue letter, Wilkes sued her former employer, alleging race discrimination based on constructive discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), and the Civil Rights Act of 1866, 42 U.S.C. § 1981, as well as alleging a hostile work environment. Defendant moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Court first recognized that constructive discharge may constitute an adverse employment action. In regard to her Title VII claim, however, Plaintiff's original charge did not assert constructive discharge because at the time of filing, Plaintiff had still been employed. The Court concluded that Plaintiff had failed to exhaust her administrative remedies, foreclosing a claim under Title VII based on constructive termination.

The Court also struck the § 1981 claim based on constructive discharge, finding the timing of the resignation problematic. Courts use an objective standard to determine whether working conditions were intolerable, and in addition to the frequency of conduct, Courts consider the totality of circumstances when determining whether a resignation was, in fact, a constructive discharge. Here, the resignation occurred a week after the perpetrator was terminated, and Plaintiff kept working several weeks after that. Thus, there was little evidence that working conditions were intolerable at the time of the alleged constructive discharge.

Turning to the hostile environment claims, the Court found that Plaintiff adequately alleged severe or pervasive conduct and also that the mistreatment was because of her race. Further, liability could be imputed to the employer because Plaintiff complained several times to human resources before any action was undertaken.

WAGE & HOUR

CAIN V. TOWN OF YADKINVILLE, NO. 1:21-CV-81, 2022 U.S. DIST. LEXIS 77854, 2022 WL 1289669 (M.D.N.C. APR. 29, 2002).

The United States District Court for the Middle District of North Carolina DENIES Defendant's Motion to Amend.

Four police officers sued their employer, the Town of Yadkinville, alleging that since 2004, the Town had incorrectly calculated their benefits like holiday pay, vacation pay, sick leave, and compensatory time. Plaintiffs claimed that under the Policy Manual, their benefits should have accrued taking into consideration their usual 12-hour workdays, rather than other municipal employees' 8-hour days. Plaintiffs asserted the Town was in breach of its contracts with Plaintiffs and also in violation of the Fair Labor Standards Act (FLSA), and the federal and state Constitutions.

After Defendant filed an Answer to Plaintiff's First Amended Complaint, pursuant to Fed. R. Civ. P. 16, the parties entered a scheduling order with the approval of the Court, with a deadline to request leave to amend the pleadings of June 11, 2021. Four months after that deadline, on October 11, 2021, Defendant moved under Fed. R. Civ. P. 15(a)(2) for leave to file an Amended Answer to include an affirmative defense based on the statute of limitations.

Denying the motion, the Court first noted that tension exists between "Rule 15(a), which "provides that leave to amend shall be freely given when justice so requires," and Rule 16(b), which "provides that a schedule shall not be modified except upon a showing of good cause and by leave of the district judge." *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008) (internal quotation marks omitted). The Court noted that the Amended Complaint clearly put Defendant on notice that Plaintiffs were claiming

damages since 2004. The Court observed that “good cause” requires the party seeking relief to show that the deadlines could not reasonably be met despite the party's diligence. In its briefing, Defendant focused all of its arguments on Rule 15, but failed to offer an explanation how it satisfied the “good cause” requirement of Rule 16. The Court concluded that “Defendant's lack of diligence in pursuing this amendment warrants denial of the Motion.”

Moreover, the Court stated that even if good cause had been demonstrated, the Court would deny the motion to amend as futile. The Court explained that “Plaintiffs assert that the ‘continuing wrong’ doctrine, which ‘allows plaintiffs to litigate matters that would otherwise be barred by the statute of limitations if they were part of an ongoing practice or pattern of behavior,’ applies to their claims.” *Id.* Defendant did not respond to Plaintiff’s argument based on the “continuing wrong” theory, and thus conceded that issue. Consequently, the Court would deny any motion to amend as being futile.

CIRILLO V. CITRIX SYS., NO. 5:21-CV-88, 2022 U.S. DIST. LEXIS 49911, 2022 WL 841327 (E.D.N.C. MAR. 21, 2022)

The United States District Court for the Eastern District of North Carolina GRANTS Plaintiffs’ Motion for Conditional Certification and Notice to Class, and GRANTS Defendant’s Motion for Partial Judgment on the Pleadings.

Cirillo was one of over 2,000 inside sales representatives working at Citrix Systems, Inc.’s Raleigh office. She and other representatives allegedly worked 50 to 65 hours per to meet Citrix’s expectations, even though they were only scheduled for 40 hours, by working through lunch and staying late. In January 2019, she and other employees transitioned from salaried to hourly employees. They were allegedly instructed only record their scheduled shift hours. When they advised that by only documenting scheduled shifts, they would omit many worked hours, the manager

responded, “You will figure it out.” Citrix also omitted non-discretionary commissions from the workers’ regular rates of pay, allegedly to avoid overtime liabilities. Despite being a top performer, Cirillo was terminated on Jan. 30, 2020.

Cirillo, on behalf of herself and similarly situated employees, sued her former employer under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*, alleging she was not paid at least \$28,936.54 for hourly work she performed outside of her shift. Plaintiff also sued under the North Carolina Wage and Hour Act (NCWHA), N.C.G.S. §§ 95-25.6 and -.13.

Plaintiff moved to conditionally certify the FLSA putative collective action, and requested notice by first class mail, email, and text message as well as via radio and/or social media postings to all putative plaintiffs, and additionally sought to send a reminder 45 days after the initial contact to all non-responding putative plaintiffs.

To bring a collective action under the FLSA, the putative plaintiffs must satisfy two requirements: (1) they must establish they are "similarly situated" and (2) they must affirmatively consent to the named plaintiff's class representation. As to whether the putative plaintiffs are "similarly situated," the Court applies a two-step approach. *See Cameron-Grant v. Maxim Health Care Servs., Inc.*, 347 F.3d 1240, 1243 (11th Cir. 2003). At the first "notice" step of the process, the Court determines whether the plaintiff and potential opt-in plaintiffs are sufficiently "similarly situated" to warrant notice being given to allow potential plaintiffs to opt-in and to proceed as a collective action through discovery; at this initial stage, a lenient standard applies. *Choimbol v. Fairfield Resorts, Inc.*, 475 F. Supp. 2d 557, 562 (E.D. Va. 2006) ("Because the court has minimal evidence, this determination is made using a fairly lenient standard.") (internal quotation and citation omitted). After discovery, the Court then takes a more critical look at whether the plaintiffs are, in fact, similarly situated.

The Court observed that conditional certification and notice to all individuals in the same job category is warranted when employers make across-the-board decisions to treat a category of employees in a manner violative of the FLSA. Because Plaintiff had alleged such a common policy, conditional certification was warranted.

Regarding the requested notice, district courts have discretion to facilitate notice to putative class members, who must obtain accurate and timely notice of the collective action so that they can make an informed decision whether to participate. While notice by first-class mail is sufficient in some cases, it is not sufficient in this case, the Court determined. “Social media has become a primary method of communication and organization for many individuals and is therefore an effective means of informing potential plaintiffs of the collective action in a timely manner.” Consequently, the Court approved Plaintiff’s requested methods of notice.

In Defendant’s motion for judgment on the pleadings, Defendant asserted Plaintiff’s class NCWHA allegation should be dismissed pursuant to Rule 23 because it is barred due to Citrix’s coverage by the FLSA. “[I]n order to bring a claim under the NCWHA payday provision, the claim must be separate and distinct from the plaintiff’s FLSA minimum wage and overtime claims.” *DeHoll v. Eckerd Corp.*, No. 1:18CV280, 2018 U.S. Dist. LEXIS 186524, 2018 WL 5624150, at *5 (M.D.N.C. Oct. 30, 2018). Courts routinely dismiss NCWHA payday claims that rely on the very same allegations that support plaintiffs’ overtime claims. Here, the Court discerned no distinction between Plaintiff’s FLSA claims and the NCWHA claims, and therefore dismissed the state claims.

- END -

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CHAPTER IX-B

South Carolina State Update

*George A. Reeves III
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**There are no written materials for this chapter.
Please refer to the Appendix for a copy of the PowerPoint presentation slides.**

NORTH CAROLINA

BAR ASSOCIATION
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APPENDIX

PowerPoint Presentations

NORTH CAROLINA

BAR ASSOCIATION

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The views and opinions expressed are those of the individuals and do not necessarily represent official policy, position or views of the North Carolina Bar Association.

CHAPTER II

Continuing to Pivot

Thomas M. Colclough
EEOC
Washington, DC

NORTH CAROLINA
BAR ASSOCIATION

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COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC Update



Thomas M. Colclough,
Director – Field Management Programs

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
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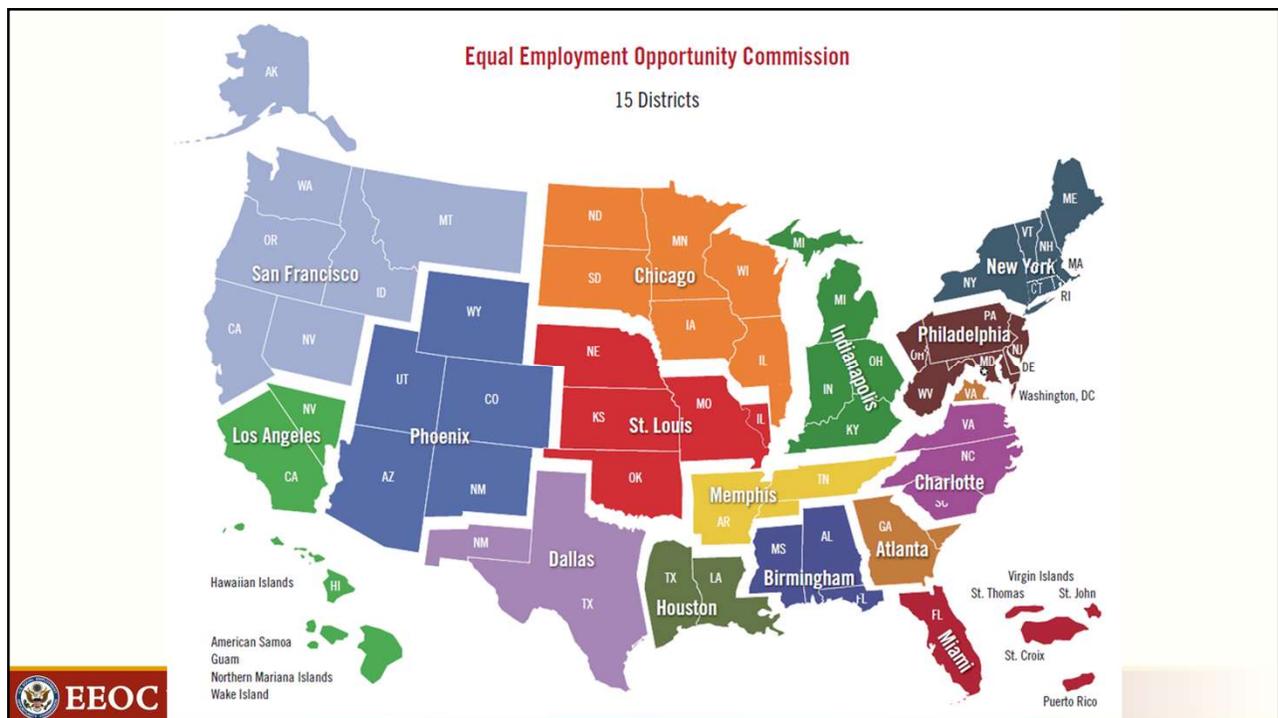
EEOC: who we are and what we do



- ▶ EEOC is a federal civil rights law enforcement agency.
- ▶ EEOC enforces federal laws that prohibits workplace discrimination, harassment, and retaliation.
- ▶ EEOC provides outreach education and training about the federal laws it enforces.

COVID-19: Impacting Women for Years

Katrina Grider, EEOC Associate Director – Curriculum, Education and Training



COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC: National EEOC Leadership



- ▶ Charlotte A. Burrows – Chair
- ▶ Jocelyn Samuels – Vice Chair
- ▶ Janet Dhillon – Commissioner
- ▶ Andrea R. Lucas – Commissioner
- ▶ Keith E. Sonderling – Commissioner
- ▶ Gwendolyn Young Reams – Acting General Counsel
- ▶ Delner Franklin-Thomas – Acting Director of Field Programs
- ▶ Thomas M. Colclough – Director of Field Management Programs

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC: Your NC/SC EEOC Leadership



- ▶ Carmen Whaling – Acting District Director
- ▶ Melinda Dugas – Regional Attorney
- ▶ Ylda Kopka – Deputy Regional Attorney
- ▶ Anita Richardson – Supervisory Admin Judge - Fed Sector Programs
- ▶ Michael Kirkland – Area Director - Raleigh
- ▶ Ingrid Waden-Wynn – Local Director – Greensboro
- ▶ Patricia Bynum-Fuller – Local Director - Greenville

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC: CHAIR GOALS



- ▶ Combatting systemic racial discrimination to include a target outreach, along with the Department of Labor, to Veteran's facing discrimination.
- ▶ Dealing with the impact of COVID-19 on our country as not just a health crisis, but also a civil rights crisis and how it effects women, women of color and women with children.
- ▶ Combatting pay discrimination and unjustified pay gaps.
- ▶ Combatting gender/transgender and sexual orientation discrimination in the workplace and as a whole.
- ▶ Combatting discrimination within the Agency.

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

Vulnerable Populations



Migrant Workers	Hispanic Community	AANHPI Community	Native American Community
Disabled Community	Victims of Racial Harassment	Victims of Sexual Harassment	Victims of Religious Harassment

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC: Looking Back – FY2022



- ▶ Deployed our new digital charge database –
 - ARC (Agency Records Center)

- ▶ Increased our staffing levels (private sector and federal sector)

- ▶ Continued using technological advances to propel our mission, i.e., (investigation, hearings and outreach)

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC: Looking Back – FY2022



- ▶ Increase in Charge Receipts (over 73,000 charges – 19% increase from FY2021)
- ▶ Pending yearend inventory – 49,000 charges
- ▶ Received over 9000 vaccine mandate charges contributed to inventory increase

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC: Looking Back – FY2022



- ▶ Vaccine Mandate Charge Issues
- ▶ Accommodation (religious and disability)
 - Reminder you can't just say no
 - You have to consider accommodation
 - The standard for accommodation under religion vs disability is different
 - The Interactive Process – It Is Still Viable and Works
 - Preliminary Data shows \$22,000,000 recovered in 2022 cases where accommodations were not given

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC: Looking Back – FY2022



- ▶ Charge Resolution: We resolved over 65,000 charges
- ▶ Monetary Benefits Received: Over \$400,000,000.00
- ▶ Merit Factor Rate slightly decreased
- ▶ Resolved over 340 systemic cases
- ▶ Recovered over \$24,000,000 in relief for systemic cases
- ▶ 11 lawsuits filed in systemic investigations
- ▶ Litigation: Preliminary Data shows over 90 lawsuits filed.

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

EEOC: Looking Back – FY2022



- ▶ Federal Hearings – 24% decrease in pending inventory
- ▶ Recovered over \$119 million dollars in monetary benefits over a 45% increase from FY2021.
- ▶ Mediation Program remains an effective tool to resolve charges and federal sector complaints. Conducted over 7400 mediations in FY2022.
- ▶ Outreach, Education and Training continued to be a major focus. Conducted over 240 events to aid management/lawyer groups and small businesses.

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

Going Forward – FY2023



Continue to Refine
Our Digital Charge
System "ARC"

Greater Use of
Technology

Focused Outreach
Efforts

Quicker and More
Focused Conciliation
and Negotiation
Conferences

Increased
Participation In Our
Mediation Programs

Inventory Alignment
and continue to
adapt to COVID
challenges

Seeking
Opportunities to
Provide Employer
Training

Improving Our
Customer
Experience in Intake

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
Training

“When you can’t control what’s happening, challenge yourself to control the way you respond to what’s happening. That’s where your real power is.”



Questions?



EEOC Training Institute

COVID-19: Impacting Women for Years
Katrina Grider, EEOC Associate Director – Curriculum, Education and
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Thank You!!!



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EEOC Training Institute

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CHAPTER III

Fourth Circuit Update

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NORTH CAROLINA
BAR ASSOCIATION

The views and opinions expressed are those of the individuals and do not necessarily represent official policy, position or views of the North Carolina Bar Association.



4th Circuit Update

Sean F. Herrmann

4th Circuit Make-Up

- **Biden (D) Nominee:** [1] Judge Toby J. Heytens
- **Trump (R) Nominees:** [3] Judge Richardson (SC), Judge Quattlebaum (SC), and Judge Rushing (NC)
- **Obama (D) Nominees:** [4] Judge Wynn (NC), Judge Diaz (NC), Judge Thacker (WVa), and Judge Harris (Md)
- **G.W. Bush (R) Nominee:** [1] Judge Agee (Va)
- **Clinton [D] Nominees:** [2], Judge King (WVa), Judge Gregory (Va)
- **G.H.W. Bush (R) Nominee:** [1] Judge Niemeyer
- **Reagan (R) Nominees:** [1] Judge Wilkinson (Va)
- **Dem. appointed (including Senior): 11**
- **Rep. appointed: 6**
- **Senior Circuit Judges:** Judge Traxler Jr. (SC, Clinton); Judge Keenan (Va, Obama); Judge Motz (Md, Clinton); and Judge Floyd (SC, Obama)

New Senior Status

Judge Barbara Milano Keenan (Va)—August 31, 2021

Judge Floyd (SC)—December 31, 2021

Judge Motz (Md)—September 30, 2022

Judge Toby J. Heytens

- First Biden Appointee
- Law Clerk for Judge Ginsburg, 2002-03
- Solicitor General for Virginia, 2018-21
- July 13, 2021: Nomination sent to Senate
- Judge Keenan's Seat
- November 1, 2021: nomination confirmed
- Sworn into office on November 4, 2021

Pending Nomination: Judge DeAndrea G. Benjamin

- South Carolina Circuit Court for the fifth district, 2011
- September 6, 2022: Nomination sent to Senate
- Judge Floyd's Seat
- Pending before the Senate Judiciary Committee

Opinion Breakdown (Nov. 2021 through Present)

- **Judge Richardson**—2 (2 (# last year))
- **Judge Quattlebaum**—1 (2)
- **Judge Rushing**—2 (0)
- **Judge Niemeyer**—1 (0)
- **Judge King**—1 (0)
- **Judge Wilkinson**—1 (5)
- **Judge Briscoe** (Senior Circuit Judge of the United States Court of Appeals for the Tenth Circuit (all recused for this case))—1
- **Judge Agee**—2 (1)
- **Judge Motz**—2 (0)
- **Judge Harris**—1 (0)
- **Judge Gregory**—2 (2)
- **Judge Keenan**—0 (1)
- **Judge Diaz**—2 (3)
- **Judge Floyd**—1 (1)
- **Judge Traxler**—0 (0)
- **Judge Wynn**—2 (2)
- **Judge Thacker**—1 (0)

Per Curium—4 (16)!

Employment Law Cases, Nov. 2021 through Present

- *Zachariasiewicz v. U.S. Dep't of Just.*, 48 F.4th 237 (4th Cir. 2022); *Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222 (4th Cir. 2022); *Swindell v. CACI NSS, Inc.*, No. 20-2179, 2022 WL 3754531 (4th Cir. Aug. 30, 2022); *Sanchez v. Whole Foods Mkt. Grp., Inc.*, No. 20-2327, 2022 WL 3369521, at *1 (4th Cir. Aug. 16, 2022); *Roberts v. Gestamp W. Virginia, LLC*, 45 F.4th 726 (4th Cir. 2022); *McIver v. Bridgestone Americas, Inc.*, 42 F.4th 398 (4th Cir. 2022); *Cowgill v. First Data Techs., Inc.*, 41 F.4th 370 (4th Cir. 2022); *Felder v. MGM Nat'l Harbor, LLC*, No. 20-2373, 2022 WL 2871905 (4th Cir. July 21, 2022); *Webster v. Chesterfield Cnty. Sch. Bd.*, 38 F.4th 404 (4th Cir. 2022); *Sowash v. Marshalls of MA, Inc.*, No. 21-1656, 2022 WL 2256312 (4th Cir. June 23, 2022); *Bittle-Lindsey v. Seegars Fence Co., Inc.*, No. 21-1044, 2022 WL 1566770 (4th Cir. May 18, 2022); *Harwood v. Am. Airlines, Inc.*, 37 F.4th 954 (4th Cir. 2022);
- *Walton v. Harker*, 33 F.4th 165 (4th Cir. 2022); *Strickland v. United States*, 32 F.4th 311 (4th Cir. 2022); *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288 (4th Cir. 2022); *Holloway v. Maryland*, 32 F.4th 293 (4th Cir. 2022); *Tabb v. Bd. of Educ. of Durham Pub. Sch.*, 29 F.4th 148 (4th Cir. 2022), cert. denied sub nom. *Tabb v. Durham Pub. Sch. Bd. of Ed.*, No. 21-1523, 2022 WL 4651867 (U.S. Oct. 3, 2022); *AirFacts, Inc. v. Amezaga*, 30 F.4th 359 (4th Cir. 2022); *Beverly v. Becerra*, No. 20-1724, 2022 WL 636626 (4th Cir. Mar. 4, 2022); *Warfield v. Icon Advisers, Inc.*, 26 F.4th 666 (4th Cir. 2022); *Coffey v. Norfolk S. Ry. Co.*, 23 F.4th 332 (4th Cir. 2022); *Conner v. Cleveland Cnty., N. Carolina*, 22 F.4th 412 (4th Cir. 2022); *Shupe v. Hartford Life & Accident Ins. Co.*, 19 F.4th 697 (4th Cir. 2021); *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643 (4th Cir. 2021); *DiCocco v. Garland*, 18 F.4th 406 (4th Cir. 2021), reh'g en banc granted, No. 20-1342, 2022 WL 832505 (4th Cir. Mar. 21, 2022); *Callahan v. N. Carolina Dept of Pub. Safety*, 18 F.4th 142 (4th Cir. 2021).

Opinion Breakdown (Nov. 2021—Present)

- **26** total employment law opinions (36 last year; 29 in 2020; 36 in 2019); 20 published (15 last year); 6 unpublished (21 last year).
- **15** employer-friendly (24 last year; 21 in 2020; 19 in 2019).
- **11** worker-friendly (12 last year; 8 in 2020; 17 in 2019).

Opinion Breakdown (Nov. 2021—Present)

- **15** employer-friendly decisions.
 - 10 affirming summary judgment for employer.
 - 2 affirming motion to dismiss for employer.
 - 3 miscellaneous.

Opinion Breakdown (Nov. 2021—Present)

- **11** worker-friendly decisions.
 - 5 reversing summary judgment for employer.
 - 3 reversing motion to dismiss for employer.
 - 1 reversed district court's decision to vacate arbitration award.
 - 1 overturned judgment the pleadings.
 - 1 miscellaneous.

Broad Takeaways

1. Trend way from unpublished, per curiam decisions.

- A. A first!
- B. More than just Covid—low rate even compared to pre-pandemic times.

Broad Takeaways

2. A positive year for employees

- A. Like 2021 and 2020, but unlike 2019, pro-company overall just by the count.
- B. But closer to 50/50.
- C. Emphatic MSJ reversals.

Broad Takeaways

3. Prima facie “legitimate expectations” still an issue.

- A. *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643 (4th Cir. 2021)
- B. *Cowgill v. First Data Techs., Inc.*, 41 F.4th 370 (4th Cir. 2022)

Broad Takeaways

4. Children.

- A. *Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222 (4th Cir. 2022)
- B. *Webster v. Chesterfield Cnty. Sch. Bd.*, 38 F.4th 404 (4th Cir. 2022)

Chapman v. Oakland Living Ctr., Inc., 48 F.4th 222 (4th Cir. 2022)

- Vacated and remanded to Western District of North Carolina on district court's grant of employer's motion for summary judgment.
- Judge King wrote the published opinion.
- Employee sued employer and alleged race discrimination; specifically, hostile work environment and constructive discharge under Title VII and § 1981.

Chapman v. Oakland Living Ctr., Inc., 48 F.4th 222 (4th Cir. 2022)

- The employee worked as a cook for the company. She alleged the owner's son called her the n-word. She alleged the child communicated that the owner himself had referred to her by that slur. The employee complained to the owner, who asked his son to apologize, but his son refused.
- The employee stopped working for the company. In the lawsuit, she alleged constructive discharge, discrimination, and hostile work environment based on race.

Chapman v. Oakland Living Ctr., Inc., 48 F.4th 222 (4th Cir. 2022)

- The Court vacated and remanded, holding the comments were imputable to the employer. This was the main issue before the Court, but it found that the employee presented enough “severe or pervasive” evidence to reach a jury, as well.
- The Court noted that the district court used the correct standard—*i.e.*, “under which an employer is liable for a third party ‘creating a hostile work environment if the employer knew or should have known of the harassment and failed to take prompt remedial action reasonably calculated to end the harassment’” (internal citation omitted)—but erred in its application.
- It found that the district court only looked at actual knowledge, and incorrectly ignored evidence of constructive knowledge.
- There was evidence that the company did not have a reporting policy and, to the extent it had a relevant handbook, it did not distribute it.

Chapman v. Oakland Living Ctr., Inc., 48 F.4th 222 (4th Cir. 2022)

- The Court also disagreed with the district court’s application of the employee’s EEOC documents and statements and found that it improperly took the issue of whether she reported the comments to her supervisor away from the jury.
- Finally, the Court disagreed with the district court’s conclusion that the evidence meant a jury could not find the company failed to take reasonable steps to stop the harassment.

Webster v. Chesterfield Cnty. Sch. Bd., 38 F.4th 404 (4th Cir. 2022)

- Affirmed Eastern District of Virginia’s grant of the company’s motion for summary judgment.
- Judge Gregory wrote the published opinion.
- The employee, who worked as an instructional assistant at an elementary school, filed a lawsuit against the school for hostile work environment sexual harassment under Title VII.

Webster v. Chesterfield Cnty. Sch. Bd., 38 F.4th 404 (4th Cir. 2022)

- The district court granted the school’s motion for summary judgment, holding that the touching at issue was not based on sex and the harassment was not severe pervasive. It also held that the conduct was not imputable to the school.
- The Court agreed and affirmed the district court’s ruling. In doing so, on the “based on sex” prong, the Court relied on an expert’s opinion that the student—who had Down’s Syndrome and ADHD—at issue was incapable of distinguishing between genders.
- On the severe or pervasive analysis, the Court found that the employee only presented evidence on the subjective prong and failed to do so on the objective prong, which made summary judgment appropriate. That is, the law requires both subjective and objective evidence and the employee presented zero evidence from which a jury could find the harassment was objectively severe or pervasive.

Webster v. Chesterfield Cnty. Sch. Bd., 38 F.4th 404 (4th Cir. 2022)

- “In Webster’s view, the district court mistakenly focused on the objective prong of the evaluation and accorded her affidavit zero weight to find that she failed to meet the objective prong. But by continuing to rely on her own statements, Webster conflates the objective and subjective prongs of the severe or pervasive analysis. . . . But when Webster’s statements are used to measure whether the conduct was *objectively* severe or pervasive—Webster’s argument fails. **Without any expert testimony to rebut the School Board’s evidence that S.M.’s behavior was consistent with the behavior of a child his age and with his disabilities, Webster fails to cite to anything in the record suggesting that a reasonable person in her position—an experienced instructional assistant working in special education—would find S.M.’s conduct to be severe or pervasive.** Absent such evidence, we cannot find that Webster satisfied this element’s objective prong.”

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021)

- Vacated and remanded to the Eastern District of North Carolina.
- Judge Motz wrote the published opinion.
- The female employee sued the company and alleged Title VII disparate treatment on the basis of sex and “sex-plus-age” discrimination and retaliation and violations of the Equal Pay Act and wrongful discharge in violation of North Carolina Public Policy.
- The Court overturned the district court’s grant of summary judgment. In doing so, it hit on a myriad of often discussed employment law points:

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021)

THIRD PRIMA FACIE ELEMENT

“Tactile asserts that we may solely consider the ‘perception of the [employer]’ on this factor, ‘not the self-assessment of the plaintiff,’ and that “an employer is free to set its own performance standards. . . . It is not clear that Tactile is correct — although we have held that we must focus on the employer’s perception in the context of the *pretext* stage, we have not so held with respect to a plaintiff’s prima facie case. . . . But even assuming that we must focus on just the employer’s perception at the prima facie stage, a plaintiff may still introduce evidence that demonstrates (or at least creates a question of fact) that the proffered expectation is not, in fact, legitimate at all.”

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021)

THIRD PRIMA FACIE ELEMENT AND PRETEXT

“Here, Sempowich has introduced a good deal of evidence suggesting that Tactile’s explanations for its decisions were false or inconsistent over time. Much of this evidence has already been discussed above in considering Sempowich’s prima facie case.”

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021)

BUSINESS JUDGMENT

“It is true that courts must defer to the company's business judgment with regard to legitimate criteria it chooses to measure successful employee performance. . . . We are not free to substitute criteria of our own. But Sempowich has done more than challenge the criteria or merits of Tactile's evaluations. Sempowich has done what the plaintiff in *Hawkins* failed to do — ‘supply evidence that [*her employer*] actually believed her performance was good.’”

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021)

PROUD v. STONE

“But Rische did not reassign Sempowich ‘within a relatively short time span’ after he rehired her — far from it. In *Proud*, the time span was less than six month. . . . Here, Rische reassigned Sempowich approximately *eight years* after he rehired her and four years after he promoted her.”

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021)

TEMPORAL PROXIMITY ALONE

“But it then held that no rational jury could find that a causal relationship existed, reasoning that (1) temporal proximity alone cannot establish a causal relationship; and (2) no temporal proximity existed in Sempowich’s case. The court erred on both counts. . . . First, the court erred by holding that temporal proximity alone cannot establish a causal relationship. We have made abundantly clear that temporal proximity suffices to show a causal relationship.”

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021)

EQUAL PAY ACT

“The text of the Equal Pay Act unambiguously states that an employer may not ‘discriminate . . . between employees on the basis of sex by paying wages to employees . . . *at a rate* less than the *rate* at which he pays wages to employees of the opposite sex.’ 29 U.S.C. § 206(d)(1) (emphasis added). This critical portion of the statute says nothing about total wages; it places all the emphasis on wage *rates*.”

Cowgill v. First Data Techs., Inc. 41 F.4th 370 (4th Cir. 2022)

- Affirmed in part, vacated in part, and remanded to the District of Maryland.
- Judge Gregory wrote the published opinion; Judge Quattlebaum concurred in part and dissented in part.
- The employee sued the company and alleged ADA discrimination, failure to accommodate, and retaliation.

Cowgill v. First Data Techs., Inc. 41 F.4th 370 (4th Cir. 2022)

- The district court granted the company's motion for summary judgment on all of the employee's ADA claims.
- On the employee's failure to accommodate claim, the district court held that the employee took the requested leave and the company approved the leave.
- **On the retaliation claim, the district court granted summary judgment because the employee's EEOC charged did not contain information to put the company on notice that she was pursuing a retaliation claim. The Court agreed on both and affirmed.**
- On the discrimination claims, the district court found the employee presented insufficient evidence that: (1) she met the company's legitimate expectations, (2) the circumstances raised a reasonable inference of unlawful discrimination; and (3) the company's explanation was pretextual.

Cowgill v. First Data Techs., Inc. 41 F.4th 370 (4th Cir. 2022)

- The Court disagreed on all three points.
- On the third element: **“To satisfy the third element, a plaintiff need not ‘show that [s]he was a perfect or model employee. Rather, a plaintiff must show only that [s]he was qualified for the job and that [s]he was meeting [her] employer’s legitimate expectations.’”** (Internal citation omitted.)
- It found highly relevant that the employee received positive performance reviews.

Cowgill v. First Data Techs., Inc. 41 F.4th 370 (4th Cir. 2022)

- With respect to the fourth element, the Court relied heavily on the close temporal proximity and a comment the jury could view as showing bias.
- Finally, on pretext, the Court found that the district court’s comparator application was too rigid—it effectively found that a proper comparator had to report to the same supervisor, but, the Court noted, that isn’t a requirement and the comparator need only be similar in **“all relevant respects.”**

Roberts v. Gestamp W. Virginia, LLC, 45 F.4th 726 (4th Cir. 2022)

- Affirmed in part, vacated in part, and remanded to the Southern District of West Virginia.
- Judge Diaz wrote the published opinion.
- The employee brought suit against the company for FMLA interference and retaliation and Western Virginia state law wrongful discharge.

Roberts v. Gestamp W. Virginia, LLC, 45 F.4th 726 (4th Cir. 2022)

- The district court granted the company's summary judgment motion because it held the employee did not present sufficient evidence that the employee complied with the company's "usual and customary" absentee notice procedures, as required by the FMLA (29 C.F.R. §825.303 (c)).
- The Court found that, on appeal, the employee failed to present sufficient evidence that the company fired him in retaliation for exercising his FMLA rights, so it affirmed the district court on the FMLA retaliation and state law wrongful discharge claims. However, the Court reversed on the FMLA interference claim.

Roberts v. Gestamp W. Virginia, LLC, 45 F.4th 726 (4th Cir. 2022)

- Specifically, **the Court held that the district court erred in limiting “usual and customary” notice procedures to the company’s written policies and should have allowed a jury to decide whether use of Facebook Messenger was “usual and customary” at the company.**
- “A plain reading of the phrase ‘usual and customary’ therefore includes methods of providing absentee notice that an employer has accepted as ‘a pattern or course of conduct to date’ or ‘by custom[]’” (internal citation omitted.)
- The employee presented evidence sufficient for a jury to find that his use of Facebook Messenger met the FMLA requirement.

Roberts v. Gestamp W. Virginia, LLC, 45 F.4th 726 (4th Cir. 2022)

- The company argued that, even if the employee properly notified it of his absences, he failed to meet his FMLA obligation to update the company on the duration of his absence, which should defeat the interference claim.
- The Court disagreed, finding that the evidence “cut both ways,” which meant a jury should decide and not the judge.
- Finally, with respect to the termination, the Court held that there was no reasonable evidence that the decision maker was aware of the employee’s request for leave, so the district court properly granted summary judgment on the termination claims.

Coffey v. Norfolk S. Ry. Co., 23 F.4th 332 (4th Cir. 2022)

- Affirmed the Eastern District of Virginia's grant of the company's motion for summary judgment.
- Judge Wilkinson wrote the published opinion.
- The employee, a train engineer, brought this suit against the company under the ADA to challenge the company's right to request certain medical records and discharge him for his failure to comply.

Coffey v. Norfolk S. Ry. Co., 23 F.4th 332 (4th Cir. 2022)

- The company moved for summary judgment, and the district court granted its motion. It found that the company's medical inquiry was proper under the ADA because it had an objectively reasonable basis to believe the employee could not properly carry out his duties and that he posed a safety risk.
- On the termination claim, the district court granted summary judgment because the employee presented insufficient evidence for a jury to find that he was disabled and to overcome the company's legitimate, non-discriminatory reason for the termination.
- The Court agreed and affirmed.

Coffey v. Norfolk S. Ry. Co., 23 F.4th 332 (4th Cir. 2022)

- “Each of Norfolk Southern's specific inquiries into Coffey's medication usage—which included information about diagnoses, symptoms, side effects, ability to perform his job, compliance with prescription regimen, and possible adverse interaction between the medications—were related to Coffey's job. This information is unquestionably consistent with the necessity of ensuring the safe operation of Norfolk Southern's trains. That the inquiries may have required Coffey to provide ample records does not change this conclusion. While we in no way diminish employees' privacy rights against improper medical inquiries, Norfolk Southern, given its responsibility for public safety, was more than justified in requesting enough information to permit an informed decision about whether it was safe for its locomotive engineer to operate a train.”

BONUS: *Warfield v. Icon Advisers, Inc.*, 26 F.4th 666 (4th Cir. 2022)

- Reversed Western District of North Carolina's decision to vacate the employee's arbitration award.
- Judge Motz wrote the published opinion.
- The employee, a securities broker, won a \$1,186,975 damages award from an arbitration panel on his wrongful termination claim.
- The district court granted the employers' motion to vacate the award, finding that the arbitrators manifestly disregarded the law.
- “Warfield appeals, and because ICON has not made the exceedingly difficult showing necessary to demonstrate that the arbitrators acted with manifest disregard of the law, we must reverse the district court's order.”

4th Circuit Update

Sean F. Herrmann

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CHAPTER V

Ethical Considerations in Employment Settlement Agreements

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The views and opinions expressed are those of the individuals and do not necessarily represent official policy, position or views of the North Carolina Bar Association.





Ethical Considerations in Employment Settlement Agreements

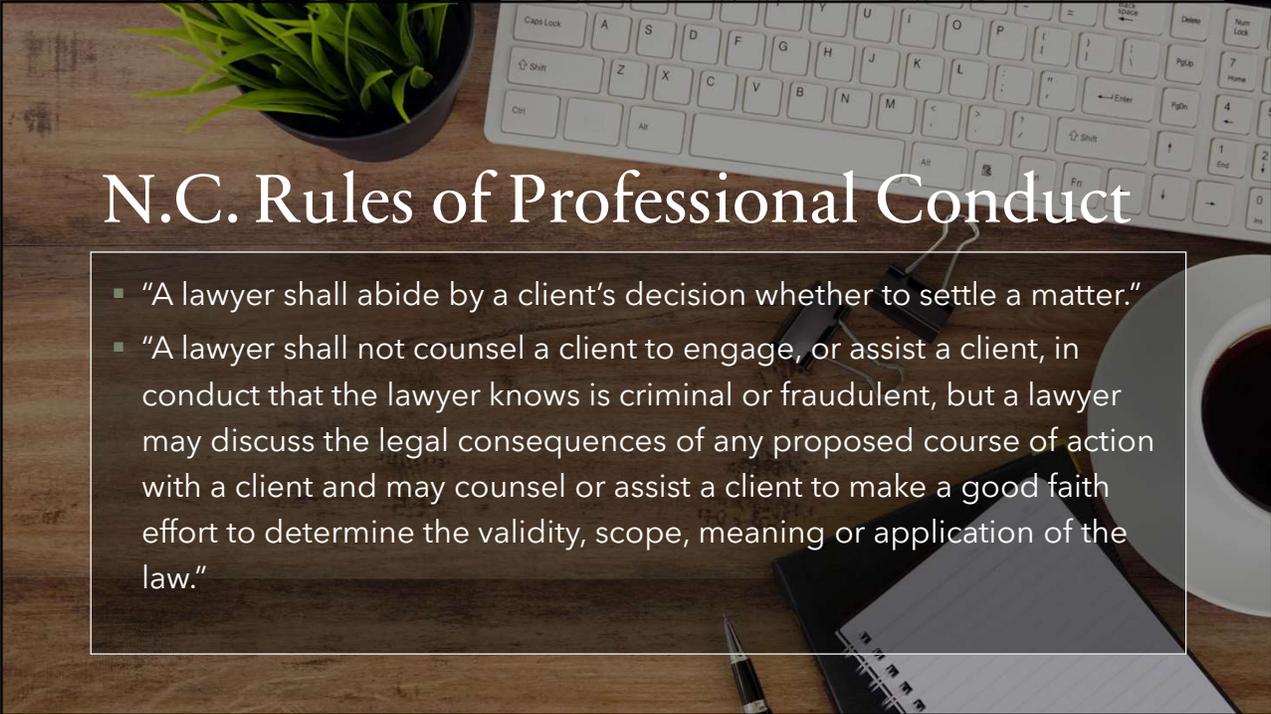
Presented by:

Bartina L. Edwards, The Law Office of Bartina Edwards
Katie Abernethy, The Noble Law Firm
Kyle R. Still, Wyrick Robbins



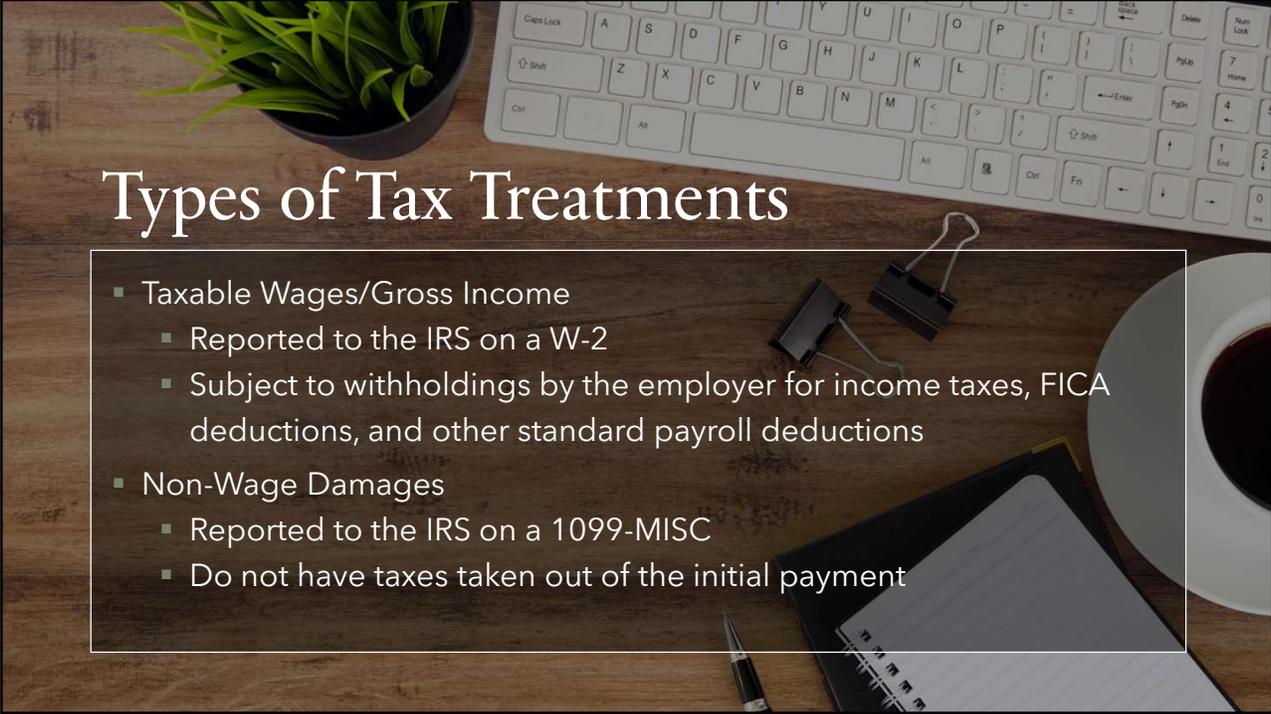
Tax Treatment of Settlement Proceeds

*"A good settlement is one in which neither
party is happy."*



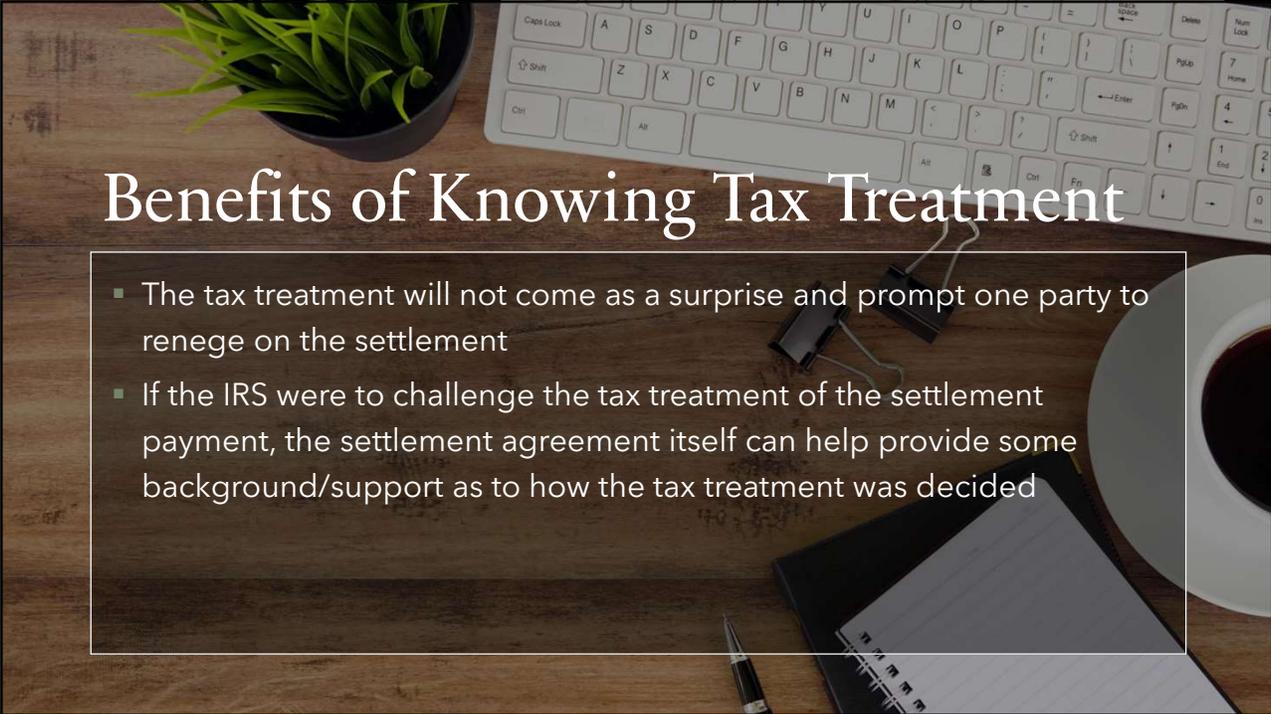
N.C. Rules of Professional Conduct

- "A lawyer shall abide by a client's decision whether to settle a matter."
- "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of action with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."



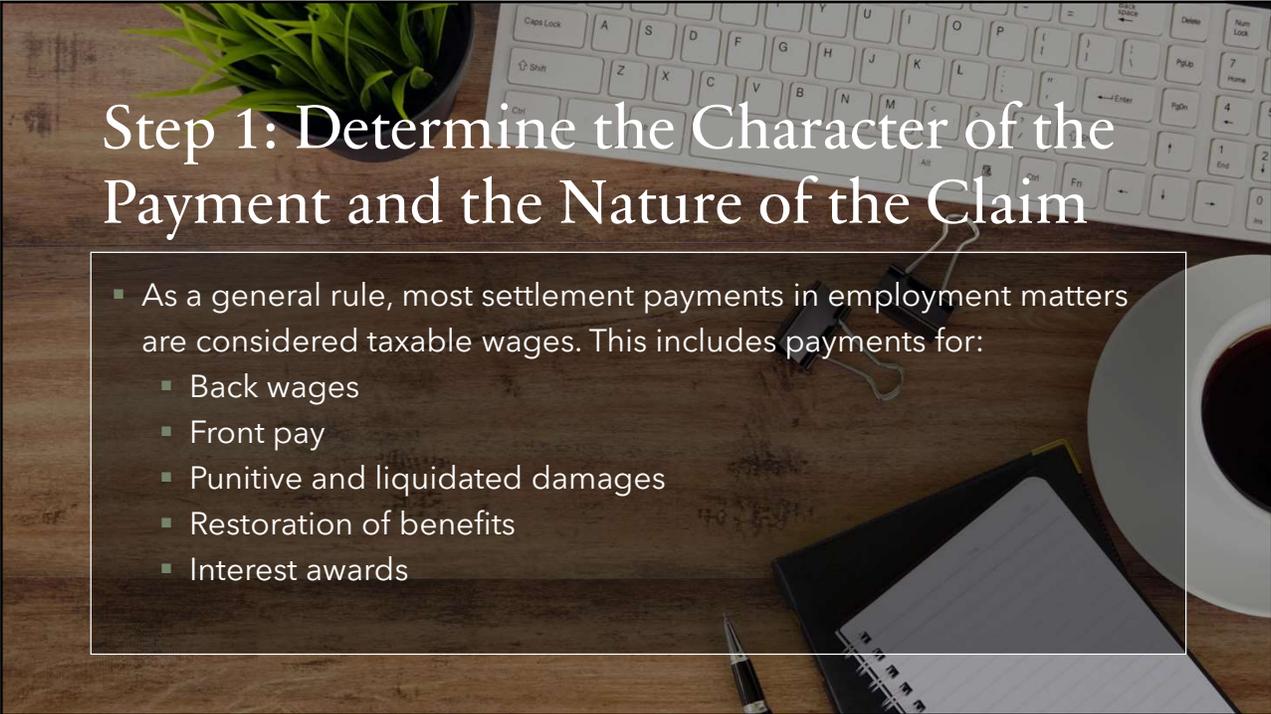
Types of Tax Treatments

- Taxable Wages/Gross Income
 - Reported to the IRS on a W-2
 - Subject to withholdings by the employer for income taxes, FICA deductions, and other standard payroll deductions
- Non-Wage Damages
 - Reported to the IRS on a 1099-MISC
 - Do not have taxes taken out of the initial payment



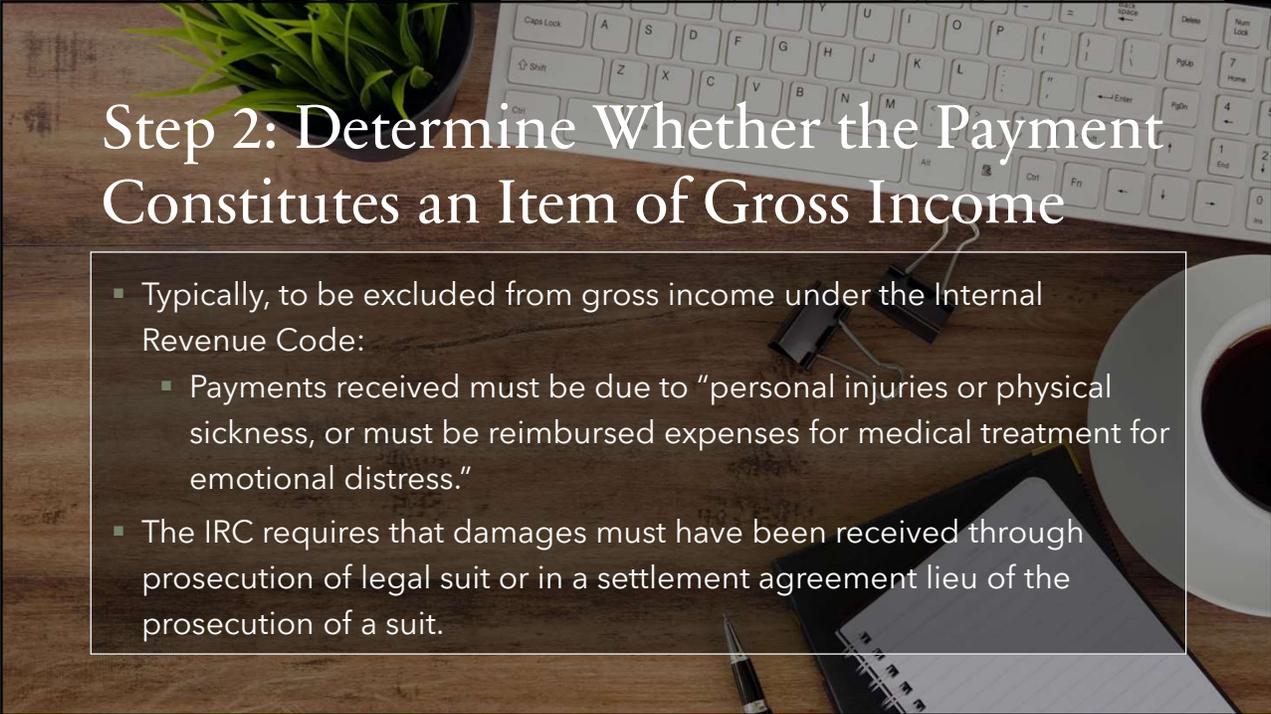
Benefits of Knowing Tax Treatment

- The tax treatment will not come as a surprise and prompt one party to renege on the settlement
- If the IRS were to challenge the tax treatment of the settlement payment, the settlement agreement itself can help provide some background/support as to how the tax treatment was decided



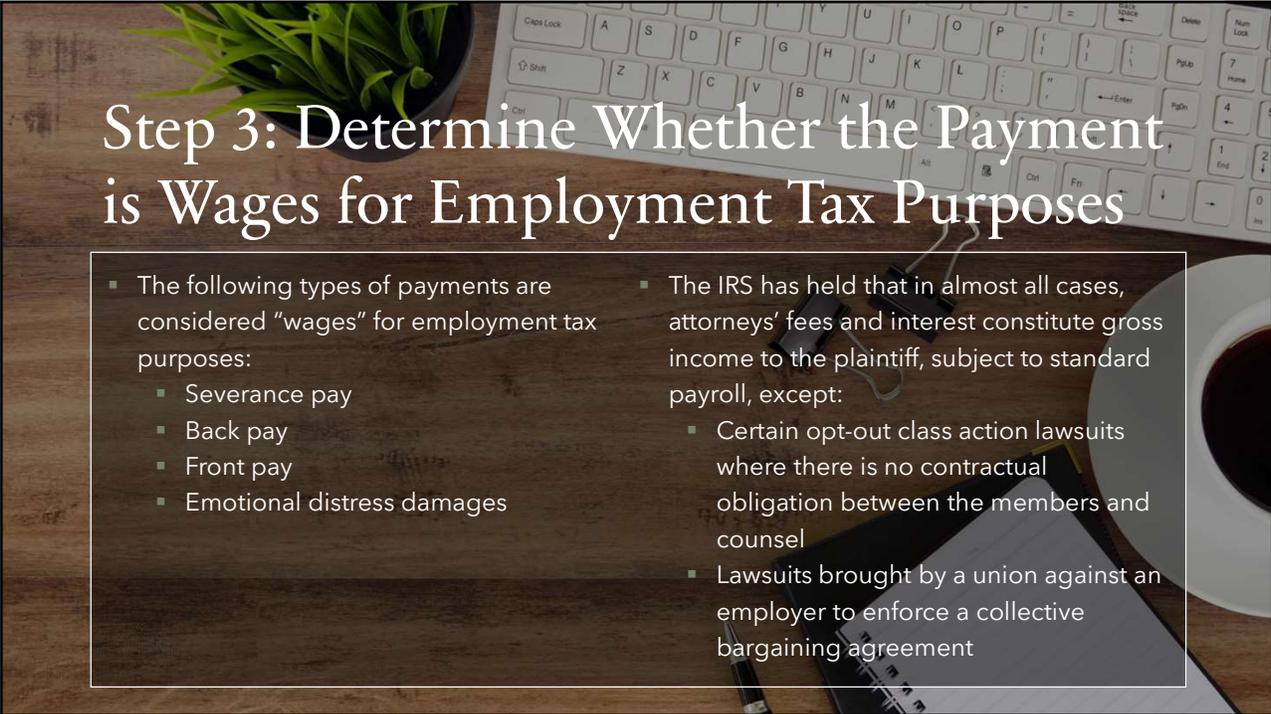
Step 1: Determine the Character of the Payment and the Nature of the Claim

- As a general rule, most settlement payments in employment matters are considered taxable wages. This includes payments for:
 - Back wages
 - Front pay
 - Punitive and liquidated damages
 - Restoration of benefits
 - Interest awards



Step 2: Determine Whether the Payment Constitutes an Item of Gross Income

- Typically, to be excluded from gross income under the Internal Revenue Code:
 - Payments received must be due to “personal injuries or physical sickness, or must be reimbursed expenses for medical treatment for emotional distress.”
- The IRC requires that damages must have been received through prosecution of legal suit or in a settlement agreement lieu of the prosecution of a suit.



Step 3: Determine Whether the Payment is Wages for Employment Tax Purposes

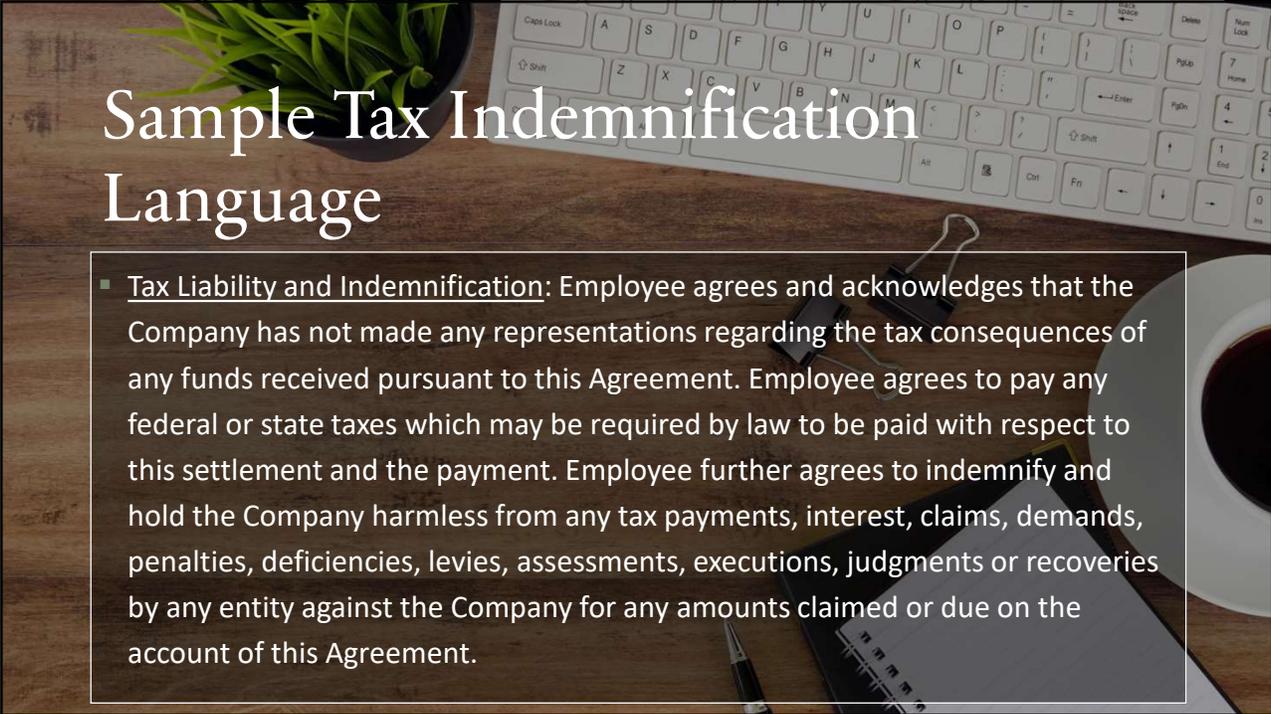
- The following types of payments are considered “wages” for employment tax purposes:
 - Severance pay
 - Back pay
 - Front pay
 - Emotional distress damages
- The IRS has held that in almost all cases, attorneys’ fees and interest constitute gross income to the plaintiff, subject to standard payroll, except:
 - Certain opt-out class action lawsuits where there is no contractual obligation between the members and counsel
 - Lawsuits brought by a union against an employer to enforce a collective bargaining agreement

Step 4: Determine Appropriate Reporting of Payment and Any Attorney's Fees

- Rule 1.1 (Competence) and Rules 1.4(b) (Communication)
 - "...explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."
- Certain claims or rights that may not be waived in a settlement include:
 - Certain federal claims, such as claims arising under the Fair Labor Standards Act: *Brooklyn Savings Bank v. O'Neil* (1945)
 - The right to file an EEOC charge or participate in any EEOC investigation, hearing, or proceeding
 - The right to file an unfair labor practice charge under the NLRA or access the NLRB processes
 - Certain state claims, such as workers' compensation or unemployment compensation
 - The right to receive a whistleblower award under the Sarbanes-Oxley Act or the Dodd-Frank Act
 - Rights to vested benefits, such as pension or retirement benefits, that are governed by the terms of the applicable plan documents and award agreements

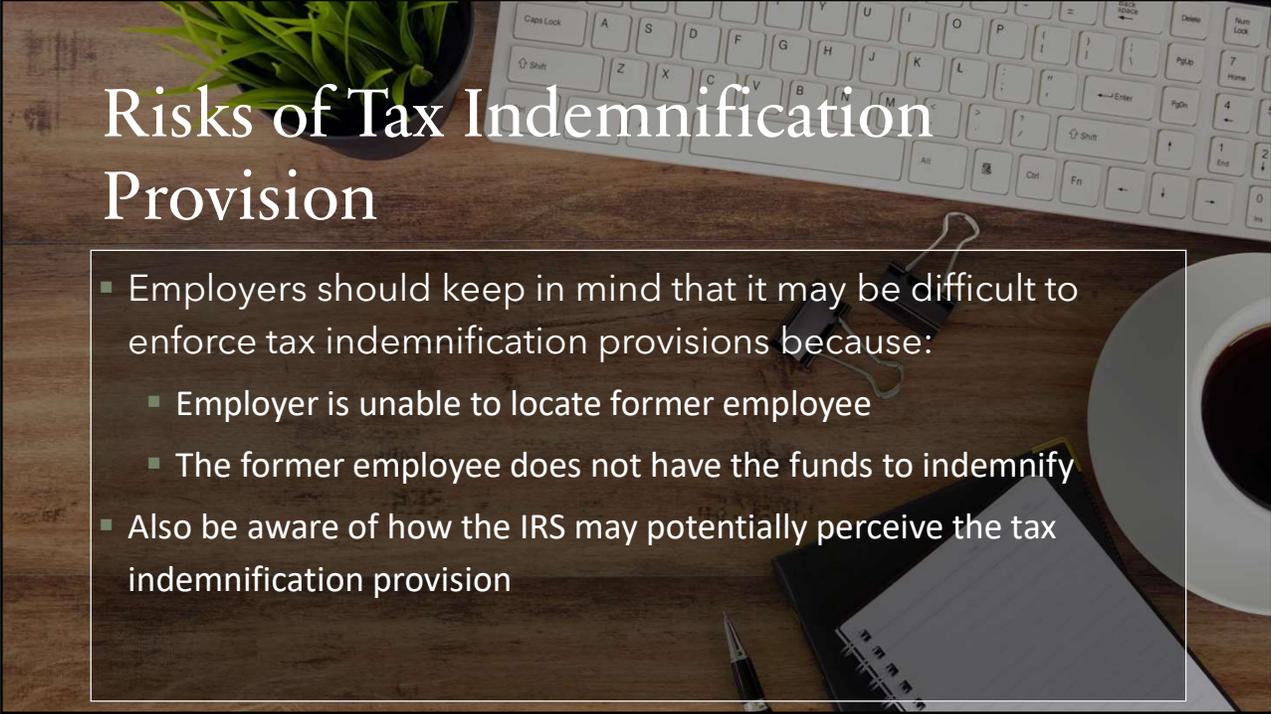
Defense Counsel's Request for Tax Indemnification

- Defense counsel may consider requesting a tax indemnification to further protect the employer from tax liability, should the plaintiff improperly report payments
 - There are limitations to this protection
- Possible scenario:
 - Former employee improperly reports income from the settlement payment on tax return
 - IRS first attempts to collect from the former employee but, for whatever reason, the IRS cannot collect from the employee
 - The employer may then be on the hook for the portion of the taxes the IRS believes should have been taken out of the settlement agreement



Sample Tax Indemnification Language

- Tax Liability and Indemnification: Employee agrees and acknowledges that the Company has not made any representations regarding the tax consequences of any funds received pursuant to this Agreement. Employee agrees to pay any federal or state taxes which may be required by law to be paid with respect to this settlement and the payment. Employee further agrees to indemnify and hold the Company harmless from any tax payments, interest, claims, demands, penalties, deficiencies, levies, assessments, executions, judgments or recoveries by any entity against the Company for any amounts claimed or due on the account of this Agreement.



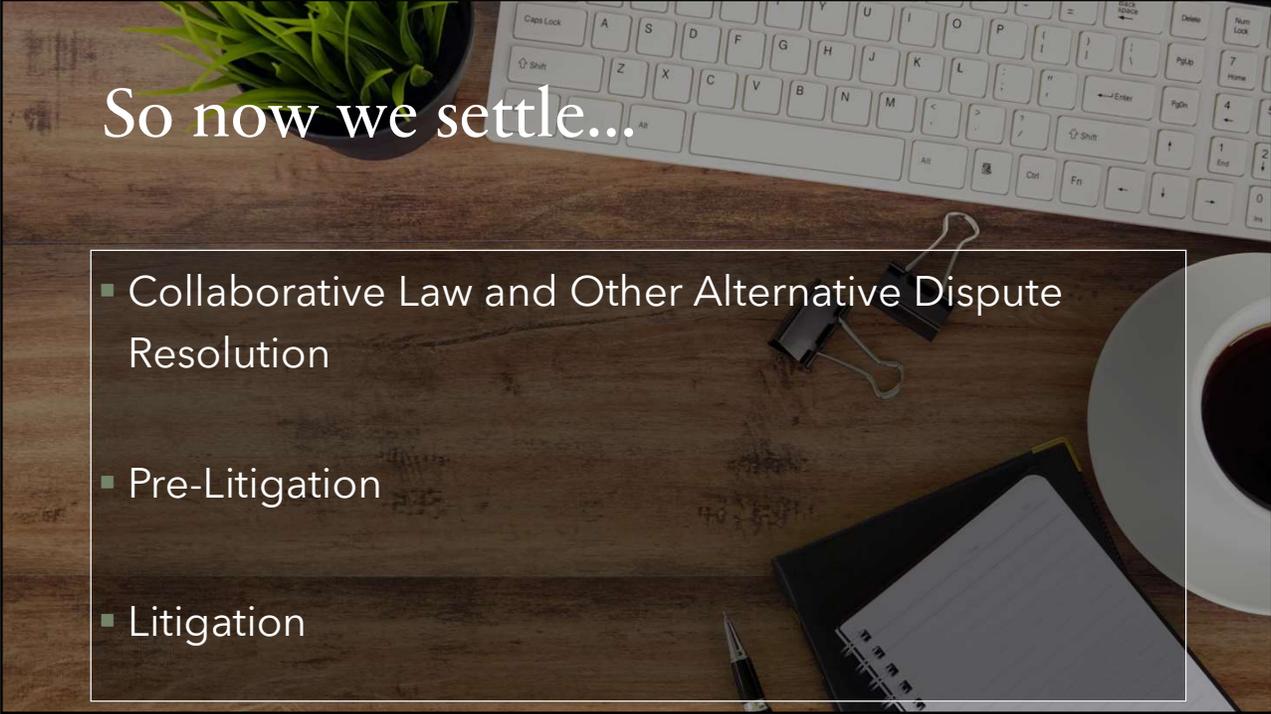
Risks of Tax Indemnification Provision

- Employers should keep in mind that it may be difficult to enforce tax indemnification provisions because:
 - Employer is unable to locate former employee
 - The former employee does not have the funds to indemnify
- Also be aware of how the IRS may potentially perceive the tax indemnification provision



Settlement – How did we get here?

- Only 3% of civil cases are tried
- 26.7 months – the average length of time from filing to jury verdict
- 21.1 months – the average length of time from filing to verdict in bench trial
- 635 days – the average length of time from notice of appeal to final disposition
- *Analysis by Harper Heckman; Nexsen Pruet; figures are for N.C. (2019, pre-COVID).



So now we settle...

- Collaborative Law and Other Alternative Dispute Resolution
- Pre-Litigation
- Litigation

Collaborative Law as an Alternative Dispute Resolution

- Cooperation is the cornerstone of the Collaborative Law Process which is an alternative dispute resolution governed by the Uniform Collaborative Law Act, signed into law on July 1 and made effective October 1, 2020. It involves several elements, a suitability and *common interest* technique. The primary difference between C/L and mediation, other than the technique is the parties each have a collaborative trained attorney without a mediator, and the parties agree in advance not to litigate the case, but rather to collaborate using a written participation agreement; and as part of that agreement, while the parties retain the right to litigate if the dispute is not settled through the Collaborative Law Process, the C/L attorneys involved in the process have to withdraw from the case and are deemed disqualified from litigating that dispute.

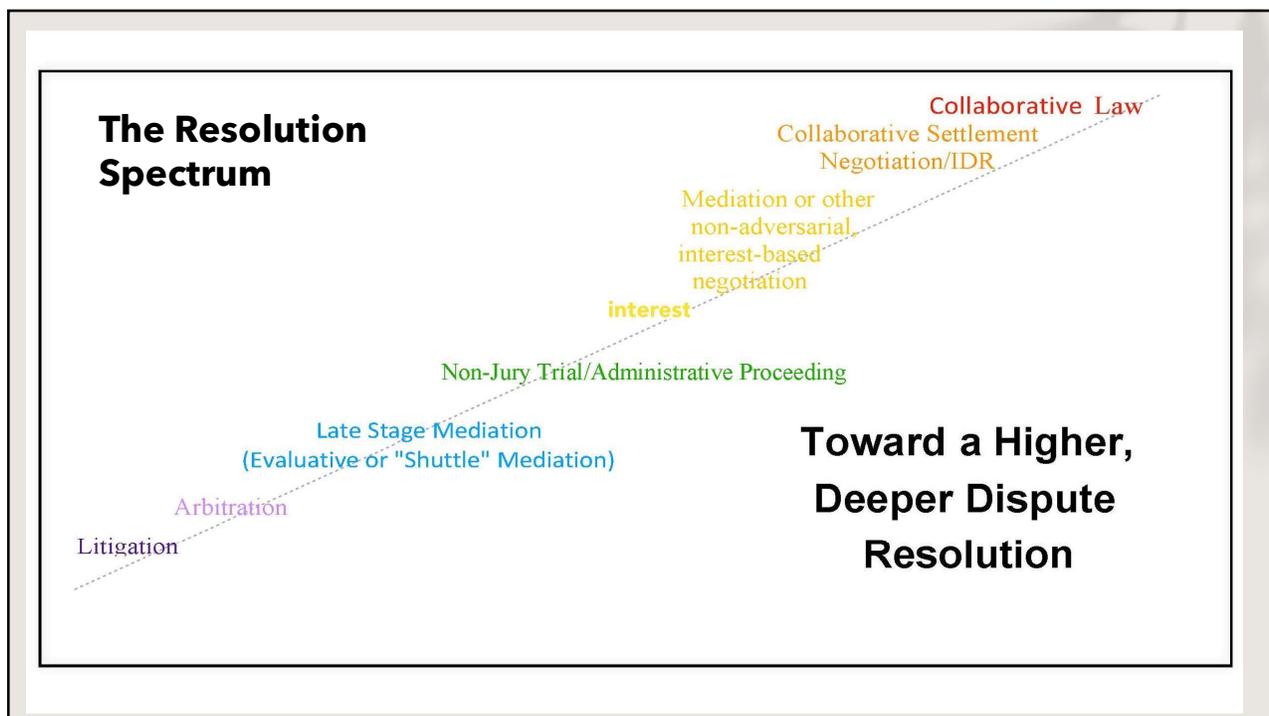
N.C. Collaborative Act

§ 1-644. Collaborative law participation agreement; requirements.

(a) A collaborative law participation agreement must meet all of the following requirements:

- (1) Be in a record.
- (2) Be signed by the parties and their collaborative lawyers.
- (3) State the parties' intention to resolve a collaborative matter through a collaborative law process under this Article.
- (4) Describe the nature and scope of the collaborative matter.
- (5) Identify the collaborative lawyer who represents each party in the collaborative law process.
- (6) Contain a statement by each collaborative lawyer confirming the collaborative lawyer's representation of a party in the collaborative law process.
- (7) State that the collaborative lawyers are disqualified from representing their respective parties in a proceeding before a tribunal related to the collaborative matter, except as provided in G.S. 1-647, 1-649(c), 1-650, or 1-651.
- (8) Provide an address for each party where any notice required under this Article may be sent.

(b) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with this Article. (2020-65, s. 1.)



N.C. Rules of Professional Conduct (RPC)

Scope of Representation and Allocation of Authority (1.2)(a)

- (1) "a lawyer shall abide by a client's decision whether to settle a matter."
- (2) "a lawyer does not violate this rule by acceding to reasonable requests by opposing counsel that do not prejudice the rights of a client."
- **1.2(c)** "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances."

N.C. Rules of Professional Conduct (RPC)

Communication

(1.4)(a)

- (1) "a lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required..."
- (2) "a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished." **Comments 2 and 5** (Settlement & Explanation of Settlement Agreement Terms)

N.C. Rules of Professional Conduct (RPC)

Truthfulness in Statements to Others (4.1)

Preamble

Collaborative Law Ethical Considerations

- Limited Scope of Representation - 1.2(c)
- Informed Consent - 1.0(f)
- Suitability/Role of Lawyer (RPC Preamble & Sec 14 of UCLA - Appropriateness of Collaborative Law Process)
- Zealousness - Preamble (Para. 2)
- Disqualification & Conflict of Interest - UCLA

Ethics Opinions – Settlement Agreements

- RPC 179 - Restricting a Lawyer's Practice
- 2019 FEO 2 - Conditions Imposed by Client's ERISA Plan
- 2003 FEO 9 - Confidentiality Provision
- RPC 5.5(c)(2);RPC 5.5(d)/Advisory Opinion #24 (2013) of N.C. Dispute Resolution Comm. - Mediation Attendance by Out of State Attorney not admitted to practice in N.C.

Settlement Agreement Clauses: No Rehire Provision

- No Rehire - A clause that allows the employer to prevent the employee from working for the company in the future.
- Some states prohibit No Rehire provisions and if such a provision is included in a settlement agreement, it will be unenforceable.
- The EEOC deems such provisions illegal and retaliatory when in settlement agreements
- NC Allows No Rehire Clauses, and they are standard in most employment settlement agreements

An example of a very restrictive "No Rehire" Clause

No Rehire. Perfect Employee understands and agrees that, as a condition of receiving the consideration described in Paragraphs 2 through 5 herein, Perfect Employee will not be entitled to any future employment with BIGCO, its subsidiaries, affiliates or successors ("Releasees"). Perfect Employee further agrees that he/she will not apply for or otherwise seek future employment with or engagement by BIGCO, its subsidiaries or affiliates in any capacity, including employee, independent contractor or vendor. Perfect Employee further agrees that if Perfect Employee inadvertently applies for employment, he/she shall immediately withdraw the application or Releasees may summarily disregard and reject any future application with no advance notice to Perfect Employee. Perfect Employee acknowledges and understands that these provisions are negotiated provisions of this Agreement and General Release and not evidence of retaliation.

An example of a less restrictive "No Rehire Clause"

- **No Rehire.** After the date of this Agreement, Employee will not be eligible to receive any salary, bonus, or benefits from the Company other than as provided in Paragraph x of this Agreement. Employee further agrees and recognizes that the employment relationship between Employee and Employer has been permanently and irreconcilably severed and Company shall not employ and has no obligation to employ or retain the services of Employee in any capacity in the future. Employee further agrees that employee shall not knowingly seek employment with Company; and should employee become employed inadvertently by company in the future, Company may summarily dismiss employee immediately and without notice.

Ethics of “Standard” Clauses in Settlements Hypothetical

- Plaintiff Velma filed suit against Defendant Mystery Incorporated for discrimination claiming she was wrongfully terminated on the basis of her sexual orientation.
- Following several months of negotiation, the parties reached a settlement in principle in which Mystery Inc. would pay Velma \$50,000 in exchange for her execution of a general release of claims.
- Defendants included three provisions that Plaintiff Velma objected to

Plaintiff Challenges Clauses in Hypothetical

Confidentiality: Plaintiff Velma and her attorneys prohibited from "disclosing the facts and circumstances relating to any dispute or disagreement Velma may have or may believe she has, or had, with Mystery Inc, including, but not limited to, any allegations of discrimination, harassment or retaliation by Mystery Inc. current or former owners, partners, employees, officers, agents, affiliates, vendors, directors or board members concerning Velma's employment, workplace or work environment at, and separation from employment with Mystery Inc. without limitation in time."

Liquidated Damages: If Plaintiff Velma violates the confidentiality provision of the settlement agreement, "Mystery Inc. would suffer immediate, substantial, and irreparable injury amount to \$250,000 in damages for each violation."

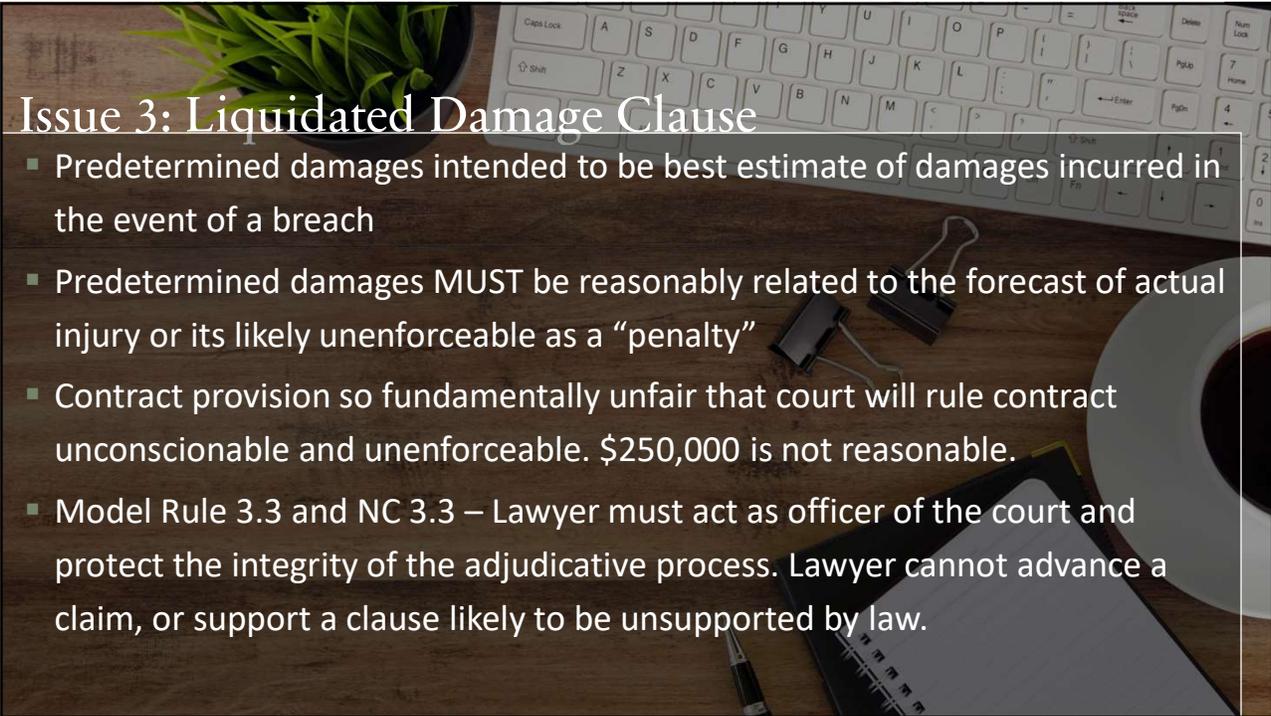
Non-Participation in Litigation: Velma will not sue Mystery Inc. and the Related Parties on any matters relating to her allegations against Mystery Inc., her employment or separation therefrom or join as a party with others who may sue on any such claims, or opt-in to an action brought by others asserting such claims, and in the event that Velma is made a member of any class asserting such claims without her knowledge or consent, Velma shall opt out of such action at the first opportunity."

Issue 1: Nondisclosure by CLIENT of FACTS leading to Termination and Suit

- Clauses mandating confidentiality of facts underlying dispute may violate ABA Model Rule 3.4 and NC Rule 3.4:
 - **Rule 3.4** – Lawyer shall not request that a non-client refrain from giving relevant information to another party
 - **Rationale for Rule** – Witnesses do not “belong” to either party. Functioning and fair justice system relies on witnesses sharing relevant and material facts
 - **Cases** – Some have held broad non-disparagement clauses violate public policy. Most courts will now allow, but attorneys should still consider public policy implications. Less of a concern in pre-suit but limitation of public filings a no-no.

Issue 2: Nondisclosure by ATTORNEY of FACTS leading to Termination and Suit

- Prohibition against a lawyer disclosing facts underlying a dispute may violate Model Rules and NC Rules 5.6(b) and 8.4(a)
 - **Rule 5.6(b)** – Lawyer shall not participate in a settlement agreement which restricts lawyer right to practice law
 - **Rule 8.4(a)** – Misconduct for a lawyer to violate Rules of Professional Conduct or knowingly assist another to do so
- **Rule interpretation** – At least one state bar has interpreted confidentiality application to lawyers as impermissibly interfering with lawyer's ability to inform prospective clients about the lawyer's past experience and expertise. SC Ethics advisory opinion.



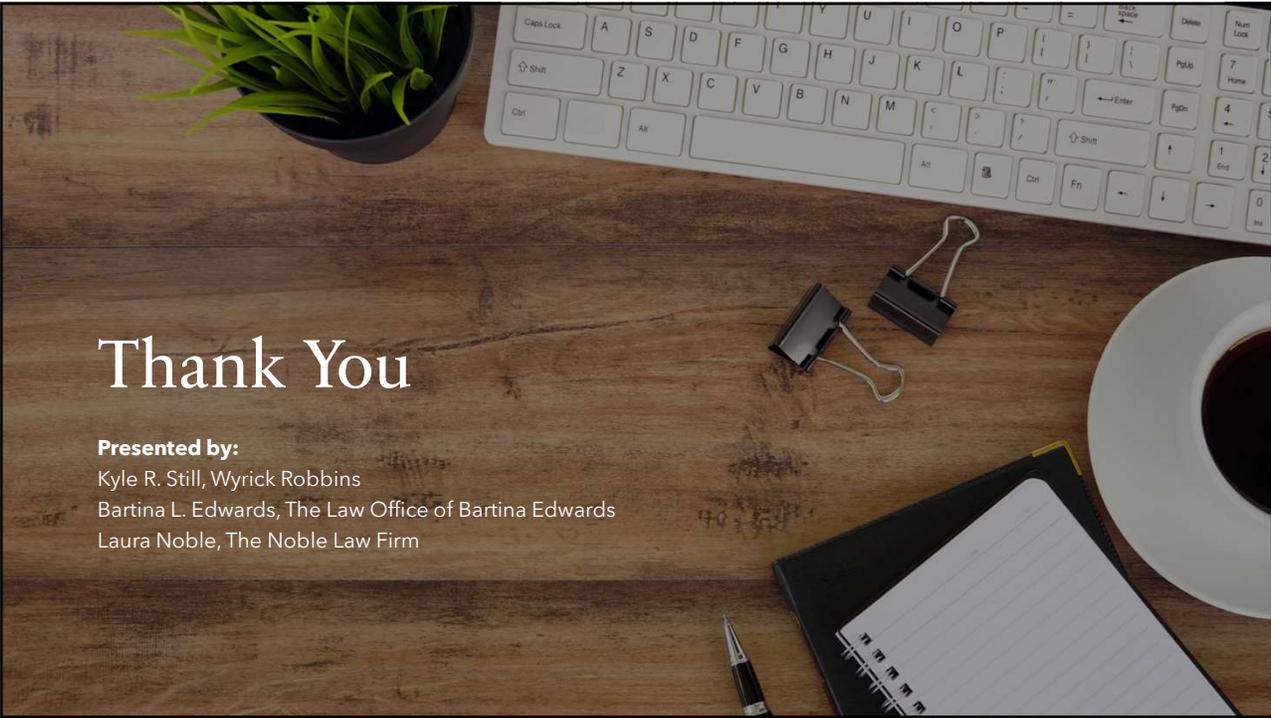
Issue 3: Liquidated Damage Clause

- Predetermined damages intended to be best estimate of damages incurred in the event of a breach
- Predetermined damages MUST be reasonably related to the forecast of actual injury or its likely unenforceable as a “penalty”
- Contract provision so fundamentally unfair that court will rule contract unconscionable and unenforceable. \$250,000 is not reasonable.
- Model Rule 3.3 and NC 3.3 – Lawyer must act as officer of the court and protect the integrity of the adjudicative process. Lawyer cannot advance a claim, or support a clause likely to be unsupported by law.



Issue 4: Non-Participation in Litigation

- Clause prohibiting plaintiff from participation in other litigation may violate Model Rule 8.4(d)
- **Rule 8.4(d)**: Rule prohibits attorneys from engaging in conduct that is prejudicial to the administration of justice
- **Rational for Rule**: Lawyers as officers of the court have special responsibility for the quality of justice. Limiting potential witnesses’ ability to voluntarily provide information to future litigants may impede justice and make litigation less transparent.
- **Cases**: Most courts will allow non-participation clauses for private entities but must include carve out for government agency investigation and subpoenaed testimony



Thank You

Presented by:
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Bartina L. Edwards, The Law Office of Bartina Edwards
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CHAPTER VI

DEI

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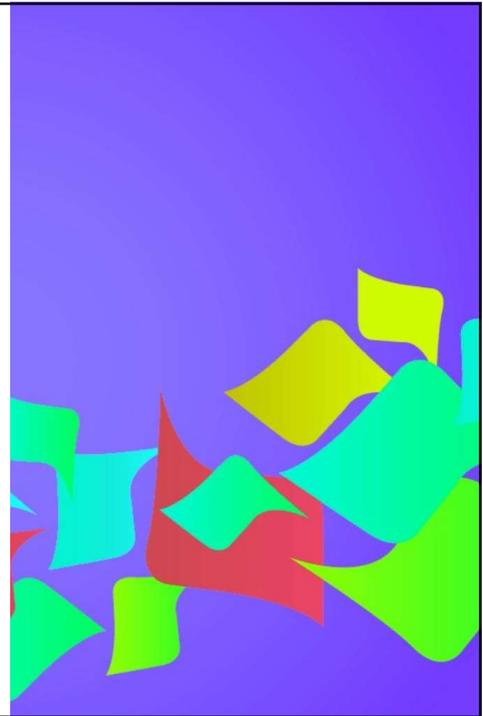
NORTH CAROLINA
BAR ASSOCIATION

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Critical Race Theory for Practitioners

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Overview

What Critical
Race Theory
("CRT") is (and is
not).

CRT's Genesis &
Key
Frameworks.

CRT's
Application to
Practitioners.

What Critical Race Theory Is NOT?

Critical Race Theory Mainstream Narratives

Jeffrey Rosen / December 9, 1996

The Bloods and the Crits

O.J. Simpson, critical race theory, the law, and the triumph of color in America.

During the past decade, an academic movement called critical race theory has gained increasing currency in the legal academy. Rejecting the achievements of the civil rights movement of the 1960s as epiphenomenal, critical race scholars argue that the dismantling of the apparatus of formal segregation failed to purge American society of its endemic racism, or to improve the social status of African Americans in discernible or lasting ways. The claim that these scholars make is not only political: it is also epistemological. Our perception of facts, they maintain,

Ted Cruz says critical race theory is as racist as 'Klansmen in white sheets'

BY SARAH POLLUS - 06/16/21 05:49 PM EDT

2,885 COMMENT



What IS Critical Race Theory (“CRT”)?

Theoretical framework developed in 1980's by legal scholars to help us understand legal (and non-legal) problems concerning race, inequality, and power.

The frameworks acknowledge the communally constitutive connection between race and the law.

The frameworks help us understand racial disparities endure and are engendered in the law.



CRITICAL LEGAL STUDIES

Critical Legal Studies (“CLS”) is a theory which states that the law is necessarily intertwined with political and social issues.

The law contributes to illegitimate social hierarchies, producing domination of women by men, nonwhites by whites, and the poor by the wealthy.

Neutral language and institutions, operated through law, mask relationships of power and control.

CLS CRITIQUE OF RIGHTS

- Legal Rights are not as useful in securing progressive changes & dismantling social hierarchies as we think.
- Legal Rights are indeterminate and incoherent.
- Legal Rights discourse reflects and produces pernicious forms of individualism.
- Legal Rights discourse can impede progressive movement for genuine democracy and justice.

CONSEQUENCES OF CLS CRITIQUE

Antidiscrimination law is predicated on a belief in the value and validity of rights.

CLS scholars therefore apply much of the same critique to Antidiscrimination law that they do to Legal Rights discourse.

CLS scholars suggest that antidiscrimination law has been more important for legitimating existing class and race relations than it has been for ameliorating racism and discrimination.

CLS CONCLUSION

Antidiscrimination law has been more important for legitimating existing class and race relations than it has been for ameliorating racism and discrimination.

Must look to other mechanisms outside of antidiscrimination law to disrupt existing hierarchies.

Solution likely rooted in political transformation—**a reordering of the state relationship to people—**with less focus on legal rights as a method for disrupting existing hierarchies.

CRITICAL RACE THEORY GENESIS: A FRAMEWORK MISALIGNMENT



Professor Kimberle Crenshaw

“Our dissatisfaction with CLS stemmed from its failure to come to terms with the particularity of race, and with the specifically racial character of ‘social interests’ in the racialized state.”

CRT DEPARTURE FROM CLS

CLS Rights Critique fails to address racial domination, particularly the hegemonic role of **race and racism** in creating existing hierarchies.

CLS Rights Critique does not account for social and transformative value of rights discourse in the context of racial subordination.

CLS Rights Critique discounts the lived experiences of people of color.

HOW CRT DEFINES RACE

Race is socially constructed, lacking in any grounding in biological fact or meaning.

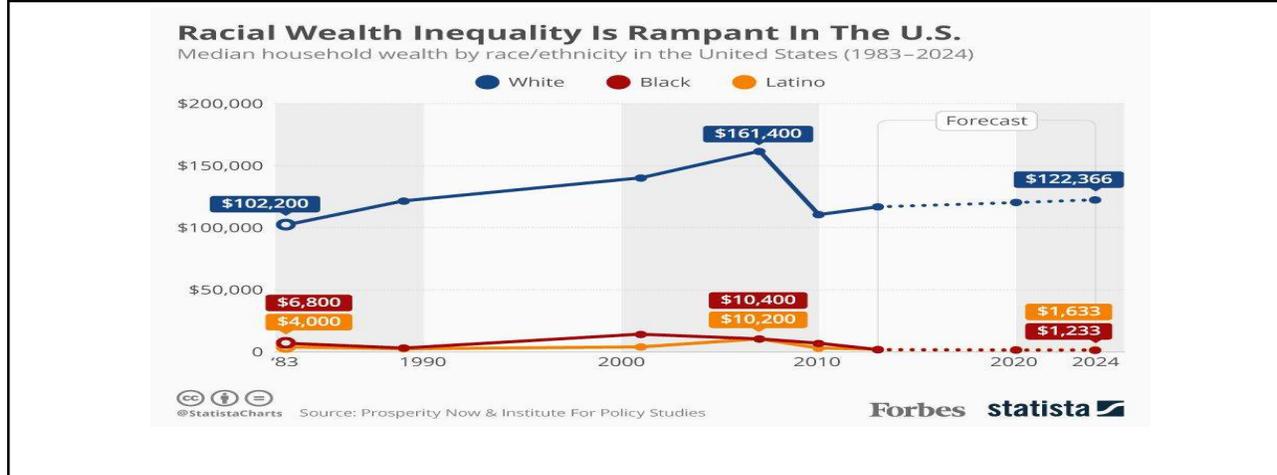


HOW CRT DEFINES RACISM

The normalization and legitimization of an array of dynamics – historical, cultural, institutional and interpersonal – that routinely advantage whites while producing cumulative and chronic adverse outcomes for people of color.

A system of hierarchy and inequity, primarily characterized by white supremacy – the preferential treatment, privilege and power for white people.

CRT EXAMPLE OF SOCIAL CONSTRUCTION OF RACE CONSEQUENCES



CRT CONCLUSION

"Until we recognize the hegemonic function of racism and turn our we have to develop pragmatic political strategies to minimize the costs of liberal rights-based reform while maximizing its utility." Kimberle Crenshaw



USEFULNESS OF CRT FRAMES

CRT gives us frames to understand the relationship between race, racism and the law.

The frames help us see that the law is not just a remedial tool for addressing racism, as discourse *post Brown v. Bd. Of Education* suggests.

Instead, the frames help us see how the law created both race, racism, and continues to do so today.

RACIAL REALISM

Racism is ordinary, not aberrant.

The history of race relations in the United States is not one of linear uplift and improvement; but of a reform then retrenchment.

Status quo arrangements are not the natural result of individual agency and merit. Rather we all inherit advantages and disadvantages, including the historically accumulated social effects of race.

INTEREST CONVERGENCE

Interests of marginalized groups in achieving justice will be accommodated only when it converges with the interests of elites.

The Fourteenth amendment alone will not authorize a judicial remedy providing effective racial equality for marginalized groups where the remedy sought threatens superior societal status of elites.

Examples:

Grutter v. Bollinger affirmative action case amict by military & fortune 500 companies heavily cited

Reparations for victims placed in Japanese Internment camps

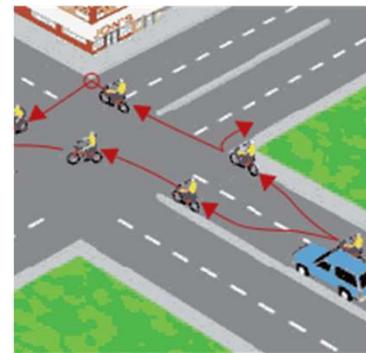
INTERSECTIONALITY



- **DeGraffenreid v. General Motors, 413 F. Supp. 142 (E.D. Mo. 1976).**
- **Moore v. Cricket Communications Inc., 764 F. Supp. 2d 853 (S.D. Tex. 2011).**

INTERSECTIONALITY

- **Dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis, usually the most privileged axis.**
- **There are overlapping systems of oppression and discrimination that individuals face, based not just on one identity, but on multiple identities ethnicity, sexuality, economic background and several other axis.**



STORYTELLING & COUNTERNARRATIVES

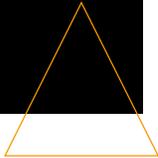
The law purports to be objective but can reinforce culturally deficit notions about marginalized groups.

CRT suggests centering the lived experiences of marginalized groups and telling their stories as a method of deconstructing biases within the law.



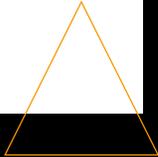


CRT LESSONS FOR PRACTICIONERS

- Racial realism helps us to understand that the law purports to be objective but can reify the status quo in ways that further entrenches racism and inequality.
 - Interest convergence helps us to think about appropriate legal and political strategies to employ in advocating for our clients.
 - Intersectionality helps us to understand the multiple intersecting layers of subordination that may impact our clients and to design appropriate advocacy strategies.
 - Storytelling and counternarratives gives us a tool to use in framing our case theories.
- 



CONSIDER POLITICAL LAWYERING

- **“A model of social justice advocacy that integrates legal advocacy and political mobilization by linking courtroom advocacy to community education, mobilization, and organizing.”** - Political Lawyering: Conversations on Progressive Social Change, 31 HARV. C.R.-C.L. L. REV 287 (1996)
 - **It does NOT advance a partisan agenda. It advocates for disenfranchised communities against the forces of subordination and oppression.**
- 

CONSIDER POLITICAL LAWYERING

- It uses **integrated advocacy strategies**, including litigation, legislative advocacy, public education, media, and social-science research.
- It assesses the efficacy and impact of each tool with a longer-term goal of addressing subordination and inequality.
- It breaks advocacy efforts down into small components and has **long-term and short-term advocacy strategies**.

CRT LAWYERING STRATEGIES

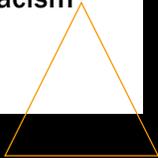
Use of **integrated advocacy strategies** that focus only on “rights based” paradigms but also on inspiring political action, educating the public, publicizing injustice, and shaping public debate.

Advocacy strategies must be shaped by an **understanding of the complex role of race** (and other intersecting identities) in creating subordination (e.g., the experience of race, gender, national origin, class status will differ amongst subordinated groups and no one size advocacy strategy will work).

Advocacy strategies must rely on an **expansive tool-box to assist in holistically addressing problems** that plague subordinated communities (e.g., individual and impact litigation to create and reinforce rights; traditional & social media engagement to shape and promote narratives/identify injustices; interdisciplinary collaborations ; community organizing).



RESPONDING TO CHALLENGES

- **Correct Misinformation-** CRT is not “diversity training” or “anti-white propaganda.” Important to emphasize that is an analytical framework used to explain structural racism and maneuver in the face of it.
 - **CRT Frames are Critical to Finding Appropriate Interventions** – Anti-discrimination laws alone have failed in eradicating structural racism and inequality. Current events show us that finding solutions is not only necessary for purposes of addressing inequality but also for national security reasons.
 - **Stifling CRT Perpetuates Racism and Inequality** – CRT frames help us see that race is baked into the current political, economic, and social system so that racial subordination is reproduced through normal operations, often without regard to intent. Ignoring those lenses will do the work of perpetuating racism and inequality.
- 

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CHAPTER VII

Choosing Wellness for Your Mind, Body and Best Life as an Attorney

April Harris-Britt, Ph.D.

*AHB Center for Behavioral Health and Wellness
Durham, NC*

NORTH CAROLINA

BAR ASSOCIATION

seeking liberty + justice

The views and opinions expressed are those of the individuals and do not necessarily represent official policy, position or views of the North Carolina Bar Association.

CHOOSING WELLNESS FOR YOUR MIND, BODY, AND BEST LIFE AS AN ATTORNEY

APRIL HARRIS-BRITT, PH.D.

38TH ANNUAL NORTH CAROLINA/SOUTH CAROLINA LABOR & EMPLOYMENT LAW PROGRAM

LEARNING OBJECTIVES :

- To recognize the effects of unmanaged stress.
- To gain knowledge about the symptoms and different types of anxiety and depression.
- To identify methods of self care.
- To be aware of options for mental health treatment.

IT'S A BEAUTIFUL
LIFE. AND.....



Constant problem-solving for
others

Enjoy confrontation

Balance empathy with facts and
objective detachment

Skilled in the art of disagreement



IT'S A BEAUTIFUL
LIFE. AND.....



Long hours

Relaxing means you miss an
opportunity, knowledge, or a client

High-demand clients

Client satisfaction can be
unpredictable

IT'S A BEAUTIFUL
LIFE. AND.....



Constant competition and conflict
with your peer community

Competition within a practice or
to maintain a practice

Economic struggles because of
fluctuations in caseload or
economy

INTERACTIVE AND CUMULATIVE STRESSORS



IS THIS TRAUMA?

- Trauma is the response to a deeply distressing or disturbing experience that overwhelms an individual's ability to cope.
 - Perceptions of threat to ourselves or loved ones
 - Experiencing loss
 - Witnessing or knowledge about trauma to others

IN THE MIDST OF UNCERTAINTY, ANXIETY, AND FEAR...

- Activation of Fight, Flight, Freeze, or Fawn response
 - Some people become more irritable and confrontational
 - Some people may be more apt to feel hypervigilant or anxious even if they never have before.
 - Some people cope through escapism or avoidance of responsibilities, tasks, and pressure

IN THE MIDST OF UNCERTAINTY, ANXIETY, AND FEAR...

- Activation of Fight, Flight, Freeze, or Fawn response
 - Feeling somewhat numb and out of touch with our emotions can be normal
 - Others may feel hopeless, become withdrawn, or depressed.
 - The fawn response involves immediately moving to try to please a person to avoid any conflict. People pleasing!

There is no “right or wrong” way to feel.

COMMON REACTIONS TO STRESS & TRAUMA

- Worries about future
 - “What happens if I mess up this case?”
- Negative thoughts that affect your ability to cope
 - “I just don’t care anymore”
- Irritability
 - “Leave me alone!”



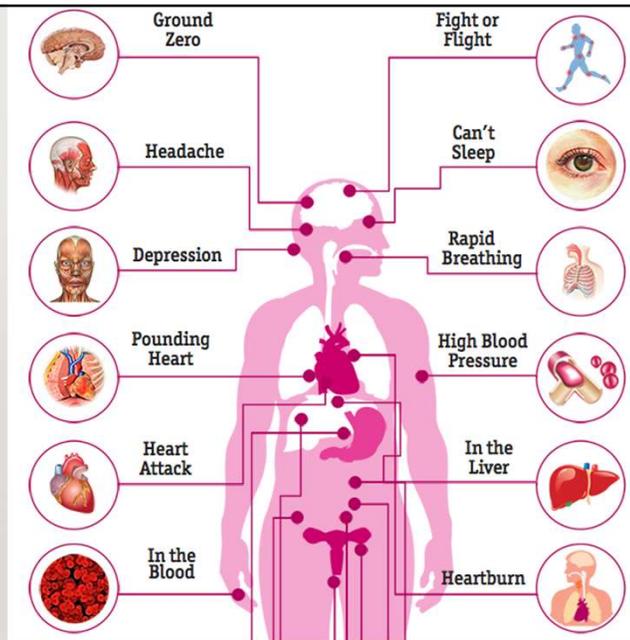
COMMON REACTIONS TO STRESS & TRAUMA

- Denial
 - “I will slow down, I just need to get this one thing done”
- Anger and frustration
 -when a cooler head would prevail.
- Social withdrawal
 - “I don’t care about visiting my friends or family anymore”

COMMON REACTIONS TO STRESS & TRAUMA

- Exhaustion
 - “I’m too tired for this”
- Sleeplessness due to never-ending concerns
 - “What if something goes wrong?”
- Lack of concentration
 - “I was so busy, I forgot my appointment”
- Personal health concerns
 - “I can’t remember the last time I felt really good.”

OUR BODY'S RESPONSE TO STRESS



EFFECTS ON YOUR BODY

- Weightloss/ gain
- Migraines
- Chronic Inflammation
- Cardiovascular problems (e.g., hypertension, arrhythmia)
- Worsens other conditions (cholesterol, diabetes)



The Human Brain Under Stress

Three Key Brain Areas Under Investigation

Prefrontal cortex

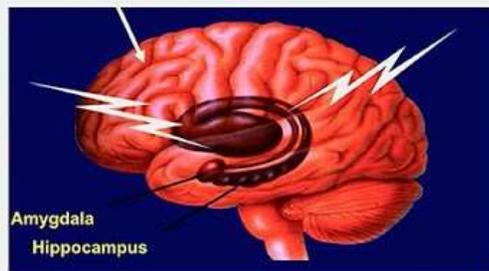
Decision making, working memory,
self regulatory behaviors: mood, impulses

Helps shut off the stress response

Hippocampus

Memory of daily events; spatial
memory; mood regulation

Helps shut off stress response



Amygdala

Anxiety, fear;
aggression

Turns on stress hormones and
increases heart rate

EFFECTS ON YOUR MIND

- Most people think that feelings come first, but our thoughts actually influence our feelings

- Something bad will happen.
- It's my fault.

Anxiety

- I can't ask for help.
- I'm not good enough.

Depression

ANXIETY

- Feeling of apprehension or fear. The source of this uneasiness is not always clear or recognized, which can add to the distress.
- Estimates that about 19% of Attorneys struggle with an anxiety disorder.
- Highly treatable but only 1/3 of those who suffer receive treatment
- Highly comorbid with depression

COMMON TYPES OF ANXIETY DISORDERS

- Generalized Anxiety Disorder
- Panic Disorder
- Obsessive-Compulsive Disorder

GENERALIZED ANXIETY DISORDER

- Excessive uncontrollable worry about everyday things, which affects daily functioning and produces somatic symptoms.
- Focus can shift on issues like career, finances, health, social...
- The intensity, duration, and frequency of worry are disproportionate to issue

GENERALIZED ANXIETY DISORDER

- Twitching/trembling
- Muscle tension
- Headaches
- Sweating
- Dry mouth
- Difficulty swallowing
- Dizziness
- Irritability
- Decreased sleep
- Sexual problems

PANIC DISORDER

- Abrupt onset of an episode of intense fear or discomfort, when there is no sudden danger or apparent cause; a sudden feeling of overwhelming anxiety and fear
- Unpredictable and peak within 10 minutes,
- Can happen anywhere and at anytime, even during periods of relaxation.

SYMPTOMS OF PANIC DISORDER

- The need to escape
- Palpitations
- Sweating
- Feeling of danger
- Fear of dying
- Shortness of breath
- Choking feeling
- Nausea or upset stomach
- Trembling or shaking
- Numbness or tingling sensation
- Feeling dizzy, lightheaded, or faint

ATTORNEYS AND DEPRESSION

- Attorneys have the highest rates of depression (19%) of any profession, compared to the general public (6.7%).
- 20% of attorneys will have substance abuse problem vs. 10% of general population.

SYMPTOMS OF DEPRESSION

- Sadness, numbness, or irritability
- Change in sleeping patterns: sleeping too much or insomnia
- Fatigue/lack of energy/lethargy
- Weight loss or gain
- Unexpected headaches, pains, backaches
- Decreased/Loss of sex drive
- Decreased/Loss of enjoyment of things

SYMPTOMS OF GENERALIZED ANXIETY DISORDER

- Twitching/trembling
- Muscle tension
- Headaches
- Sweating
- Dry mouth
- Difficulty swallowing
- Dizziness
- Irritability
- Decreased sleep
- Sexual problems

ATTORNEYS AND DEPRESSION

- Attorneys have the highest rates of depression (28%) of any profession, compared to the general public (6.7%).
- 21-36% of attorneys will have alcohol or substance abuse problem vs. 10% of general population.

COMMON TYPES OF DEPRESSION

- Major Depression
- Dysthymia
- Bipolar Disorder
- Seasonal Affective Disorder (SAD)



SYMPTOMS OF DEPRESSION

- Sadness, numbness, or irritability
- Change in sleeping patterns: sleeping too much or insomnia
- Fatigue/lack of energy/lethargy
- Weight loss or gain
- Unexpected headaches, pains, backaches
- Decreased/Loss of sex drive
- Decreased/Loss of enjoyment of things

DYSTHYMIA

- Mildly depressed for years
- Low energy/Fatigue/sluggishness
- Feeling empty
- Insomnia
- Social withdrawal
- Functions fairly well but relationships suffer over time



SEASON AFFECTIVE DISORDER

A depression that results from changes in the season. Most cases begin in the fall or winter, or when there is a decrease in sunlight. Seasonal Affective Disorder begins and ends at about the same periods each year.



EFFECTS OF DEPRESSION AND ANXIETY

- Impacts the way a person functions
 - Socially
 - At work/school
 - Personally



SUICIDE



- One of the leading causes of death in the world
- There are many more “unsuccessful” attempts
- Lawyers rank between 1st and 5th when the proportion of suicides in that profession is compared to suicides in all other occupations.

TRIGGERS

- Immediate stressors
 - Loss of of a loved one
 - Loss of a job
- Long term stressors:
 - Social isolation
 - Serious illness
 - Occupational stress
 - Steady increase in sadness or hopelessness

WHAT ABOUT YOU?

- How are YOU coping and how are YOU doing?





PRACTICAL STRATEGIES

BE INTENTIONAL.....TAKING ACTION

- **The Power of Self-Care**
- The Power of Coping
- The Power of Seeking Help.



DEVELOP YOUR SELF-CARE PLAN

- Mind
- Body
- Spirit
- Community

DEVELOP YOUR SELF-CARE PLAN

- Sleep
- Exercise/physical activity
- Diet
- Play

be good to yourself

HAPPY HORMONES AND HOW TO HACK THEM!

Endorphins

The Pain Killer

Relieves stress & blocks discomfort

- Using essential oils
- Watching a funny movie
- Eating dark chocolate
- Exercising



Dopamine

The Reward Chemical

Motivation & concentration

- Completing a task
- Performing self-care activities
- Striving towards a goal
- Eating food



Oxytocin

The Love Chemical

Increases trust/relationships

- Playing with a dog/cat
- Playing with a baby
- Hugging a loved one
- Giving/receiving a compliment



Serotonin

The Mood Stabilizer

Well-being & happiness

- Improving social behavior
- Meditating
- Running
- Walks through nature
- Having Sun exposure



BE INTENTIONAL.....TAKING ACTION

- The Power of Self-Care
- **The Power of Coping**
- The Power of Seeking Help.



COPING....WHAT DOES THAT REALLY MEAN?

- Problem-Focused Coping:
 - Taking action to change your relationship to the stressor
 - Communication skills, anger management
- Emotion-Focused Coping:
 - Reducing emotional distress
 - Journaling, Prayer, Meditation, Social Support, Mindfulness, Breathing Exercises, Visualization, Acceptance

COPING....WHAT DOES THAT REALLY MEAN?

- Meaning-Focused Coping:
 - Drawing on your personal beliefs, values and goals to motivate and sustain well-being
 - Positive Reframing, Benefit Finding, Benefit Reminding, Reordering Priorities, Adapting Goals
- Social-Focused Coping:
 - Seeking emotional support and practical support from family, friends, and your network

BE INTENTIONAL.....TAKING ACTION

- The Power of Self-Care
- The Power of Coping
- **The Power of Seeking Help.**



SEEKING HELP: TREATMENT

- Approximately 80% of people who receive treatment improve
- Therapy
- Medication
- Alternative Treatments
- Holistic Treatments



MEDICATION FOR DEPRESSION AND ANXIETY:

- Antidepressant medication - generally SSRI's - helps by increasing the level of serotonin in the brain.
- Often take 3-5 weeks to become fully effective, but improvement can often be experienced within the first week.
- Work well
- They are non-habit forming.

ALTERNATIVE TREATMENTS FOR TREATMENT RESISTANT DEPRESSION

- Electroconvulsive Therapy (ECT)
- Transcranial Magnetic Stimulation (TMS)
- Ketamine Treatments



HOLISTIC TREATMENTS FOR DEPRESSION AND ANXIETY

- Acupuncture
- Executive or Adult Wellness Programs



BE INTENTIONAL.....TAKING ACTION

- Avoid extra stress and big changes
- Reduce/eliminate alcohol/drugs
- See a doctor for a complete check up.



YOU HAVE THE POWER TO CHOOSE

- To choose what is important and what is not...
- To let go of things outside your control....
- That you will not operate in a default mode....
- That you will respond instead of react....
- That you will take care of yourself.



CONTACT INFORMATION

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CHAPTER VIII-B

The Evolving Legal Landscape in Employee Departures

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BAR ASSOCIATION

The views and opinions expressed are those of the individuals and do not necessarily represent official policy, position or views of the North Carolina Bar Association.



EMPLOYEE DEPARTURES

TODD SULLIVAN

FITZGERALD HANNA & SULLIVAN, PLLC

RALEIGH

LAST YEAR SUPREME COURT RESOLVED MEANING OF CFAA'S
"EXCEEDS AUTHORIZED ACCESS" IN *VAN BUREN V. UNITED STATES*,
141 S. CT. 1648 (2021) – POLICEMAN SELLING LICENSE PLATE DATA
HE ACCESSED IN PATROL CAR



NORTH CAROLINA

- FEDERAL DEFEND TRADE SECRETS ACT; 18 U.S.C. § 1836, ET SEQ.
- NORTH CAROLINA TRADE SECRETS PROTECTION ACT; N.C. GEN. STAT. § 66-152 ET SEQ.
- NORTH CAROLINA COMPUTER TRESPASS STATUTE; N.C. GEN. STAT. § 14-458
- NDA/CONFIDENTIALITY CONTRACT

SOUTH CAROLINA

- FEDERAL DEFEND TRADE SECRETS ACT; 18 U.S.C. § 1836, ET SEQ.
- SOUTH CAROLINA TRADE SECRETS ACT; S.C. CODE ANN. § 39-8-10, ET SEQ.
- NDA/CONFIDENTIALITY CONTRACT



EMPLOYMENT CONTRACT PROVISIONS ADDRESSING DEPARTURES;

NONDISCLOSURE, NONSOLICITATION, NONCOMPETE, NOTICE, REPRESENTATION OF COMPLIANCE, CHOICE OF LAW AND FORUM, EQUITABLE TOLLING, BLUE-PENCIL, AND ATTORNEY FEE SHIFTING

APPENDIX A: GIGANTIC DRUG'S EMPLOYMENT AGREEMENT – DO WE LIKE THIS AGREEMENT?

- DEFINITION OF CONFIDENTIAL INFORMATION – IS THERE ANY INFORMATION THAT WOULDN'T BE CONFIDENTIAL?
- NONSOLICITATION OF COMPANY CUSTOMERS AND PROSPECTIVE CUSTOMERS – COULD EMPLOYEE EVEN RESPOND TO THE CUSTOMER'S INQUIRIES? WHY DOES EMPLOYER HAVE A RIGHT TO LOCK UP PROSPECTIVE (NON) CUSTOMERS?
- NONCOMPETE – DO WE LIKE 6 MONTH COVENANTS? DOES IT MATTER WHETHER EMPLOYER TERMINATES WITHOUT CAUSE?
- CHOICE OF LAW AND VENUE – IS IT A GOOD IDEA FOR NC/SC EMPLOYEES TO AGREE TO LITIGATE IN DELAWARE OR TEXAS OR NEW YORK?



SOME RELATIVELY RECENT INTERESTING OPINIONS IN EMPLOYEE DEPARTURE MATTERS FROM SOUTH CAROLINA AND NORTH CAROLINA THAT ILLUSTRATE LEGAL EVOLUTION

- FAY V. TOTAL QUALITY LOGISTICS, LLC, 419 S.C. 622, 628, 799 S.E.2D 318, 322 (CT. APP. 2017)
- BELIMED, INC. V. BLEECKER, 2022 U.S. DIST. LEXIS 56855 (D.S.C. MARCH 29, 2022)
- KRAWIEC V. MANLY, 370 N.C. 602, 609, 811 S.E.2D 542, 547-48 (2018)
- CTY. OF WAKE PDF ELEC. & SUPPLY CO., LLC V. JACOBSEN, 2020 NCBC LEXIS 103, AT *18 (N.C. SUPER. CT. SEPT. 9, 2020)

TEN TIPS FOR EMPLOYEE DEPARTURE LITIGATORS – FOR BOTH THE EMPLOYER AND EMPLOYEE SIDE

- 1. CONNECT THE BUSINESS INTEREST WITH THE CONTRACT LANGUAGE
- 2. WORK HARDER DEVELOPING THE STORY THAN THE LAW
- 3. CONSIDER THE CUSTOMER AFFIDAVIT
- 4. BRING TO COURT THE ORDER YOU'RE SHOOTING FOR
- 5. EMPLOYEES CAN SUE A DJ ACTION
- 6. EXPEDITED DISCOVERY IS A TWO-WAY STREET
- 7. DON'T UNDERESTIMATE THE LENGTH OF A PI HEARING
- 8. BRING THE CLIENTS TO THE PI HEARING
- 9. EMPLOYEE SHOULD SPELL OUT WHAT SHE/HE WILL LOSE IF INJUNCTION ISSUES
- 10. REMEMBER TO GET YOUR EVIDENCE INTO THE RECORD



FIVE FORECASTS FOR NC/SC EMPLOYEE DEPARTURE LAW

- (1) SHORT THE NON-COMPETES AND GO LONG THE NON-SOLICITS
- (2) USA-WIDE AND WORLD-WIDE GEOGRAPHIES WILL SURVIVE IF DURATION = SIX MONTHS
- (3) "GARDEN LEAVE" AND ADVANCE NOTICE PROVISIONS WILL BECOME MORE COMMON
- (4) INJUNCTION BONDS WILL CREATE APPELLATE ISSUES
- (5) CHOICE OF LAW PROVISIONS WILL BE INCREASINGLY CHALLENGED



QUESTIONS?

- EMAIL IS TSULLIVAN@FHSLITIGATION.COM
- OFFICE NUMBER IS 919-863-9093



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CHAPTER IX-A – Part 2

North Carolina Update

North Carolina Federal District Court Opinions – The Year
in Review – October 1, 2021 to October 1, 2022

*Jonathan “Jon” Wall
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NORTH CAROLINA
BAR ASSOCIATION

The views and opinions expressed are those of the individuals and do not necessarily represent official policy, position or views of the North Carolina Bar Association.

North Carolina Federal District Court Update

Jonathan Wall, Greensboro

38th Annual NC/SC Labor & Employment Law Conference
Asheville, NC - November 5, 2022

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780, 2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ Plaintiffs are transgender individuals or parents of transgender individuals who receive health insurance through the North Carolina State Health Plan for Teachers and State Employees (“NCSHP”).
- ▶ They allege the Plan’s categorical exclusion of coverage for treatments “leading to or in connection with sex changes or modifications” discriminates against them on the basis of sex and transgender status in violation of the Equal Protection Clause and the Affordable Care Act (ACA).
- ▶ Defendants: N.C. State Health Plan for Teachers and State Employees
Dale Folwell, N.C. State Treasurer
Dee Jones, NCSHP Executive Administrator
University of North Carolina at Chapel Hill
N.C. State University
University of North Carolina at Greensboro
N.C. Department of Public Safety (DPS)
- ▶ Defendants move for summary judgment.

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780, 2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ Amendment XIV

 - Section 1.

- ▶ All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.**

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780, 2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ “Gender Dystopia”: Gender identity different than the sex assigned at birth. This incongruence may result in gender dystopia, significant stress and discomfort “born out of experiencing that something is fundamentally wrong.” Gender dystopia is a recognized medical condition, which if left untreated may result in severe anxiety, depression, and suicidal ideation.
- ▶ Treatment of gender dystopia may include gender transitioning involving:
 - (1) psychological diagnosis of the condition, (2) hormone replacement therapy through which secondary sex characteristics (e.g. hair growth patterns and body fat distribution) can be feminized or masculinized, and (3) in some cases, gender-confirming surgery. These treatments are not “cosmetic, elective, or experimental,” but rather safe, effective and medically necessary treatments for a serious health condition.

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780, 2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ “Conor,” designated female at birth
- ▶ 19 years old
- ▶ Serious and increasing distress, depression, and suicidal ideation.
- ▶ Diagnosed with gender dysphoria: significant distress and anxiety resulting from an incongruence between an individual’s gender identity and birth-assigned sex.
- ▶ Physician recommends treatment plan of (1) counseling; (2) hormone therapy, and (3) chest reconstruction surgery.
- ▶ Health insurance (NCSHP) from father, state employee at UNCG.
- ▶ Prescribed testosterone treatments denied, under exclusion for sex changes and related care.

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780, 2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ NCSHP: N.C.’s largest insurer with 740,000 members.
- ▶ Collected \$2.4 billion during 8 months in 2018, with a \$1.1 billion cash balance.
- ▶ In 2016, U.S. Dept. of Health and Human Services prohibited categorical coverage exclusions for healthcare related to gender transition.
- ▶ For 2017 only, NCSHP Board allowed “Medically necessary services for treatment of gender dysphoria.” Cost of all treatment = \$404,609.26.
- ▶ Board voted to reinstate the exclusion for 2018 and moving forward.

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780,
2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ When considering an equal protection claim, a court must determine (1) "what level of scrutiny applies" and (2) "whether the law or policy at issue survives such scrutiny."
- ▶ In the Fourth Circuit, laws that discriminate based on sex or transgender status receive intermediate scrutiny.
- ▶ Such policies are unconstitutional "unless [they are] substantially related to a sufficiently important governmental interest."

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780,
2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ Court determines the policy facially discriminates based on sex and transgender status.
- ▶ As in *Grimm*, the policy "necessarily rests on a sex classification" and "cannot be stated without referencing sex."
- ▶ Upshot? When a suspect classification appears on the face of the policy, "[n]o inquiry into legislative purpose is necessary."

CONSTITUTIONAL CLAIMS

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780,
2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ Can the State meet its burden to survive intermediate scrutiny by providing “an exceedingly persuasive justification” for its important government interest?
- ▶ Limiting healthcare costs?
- ▶ Protecting public health by avoiding ineffective medical treatments?

Bottom Line: Summary Judgment for Plaintiffs Granted.

Title VII Discrimination

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780,
2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ Is NCSHP the “Employer” of any of the Plaintiffs?
- ▶ Agency?
- ▶ Joint Employer?
- ▶ No and no - Summary judgment appropriate for NCSHP on Title VII

Title VII Discrimination

KADEL V. FOLWELL, ___ F. SUPP.3D ___, 2022 U.S. DIST. LEXIS 103780, 2022 WL 3226731 (M.D.N.C. JUNE 10, 2022).

- ▶ What about Plaintiff Caraway’s employer, Department of Public Services (DPS)?
- ▶ Standing Issue: Is the injury “fairly traceable” to challenged conduct of Defendant?
- ▶ DPS argues: We did not make the decision to exclude gender-confirming healthcare coverage from the Plan, and had no authority to offer any other plan.
- ▶ No “ministerial” exception to the standing doctrine.
- ▶ Court finds standing.
- ▶ Discrimination against a transgender person violates Title VII; summary judgment appropriate for Plaintiff Caraway against Defendant DPS.

Title VII Discrimination

WILKES V. BUNCOMBE OPERATIONS, LLC, NO. 1:20-CV-00376, 2022 U.S. DIST. LEXIS 46899, 2022 WL 812384 (W.D.N.C. MAR. 16, 2022); ADOPTING 2021 U.S. DIST. LEXIS 255058 (NOV. 4, 2021).

- ▶ Wilkes (Black) works at a senior living facility.
- ▶ Wilkes endures harassment from (white) supervisor Watts, including being told not to eat with white co-worker because “it did not look right.”
- ▶ Wilkes complains to HR representative in December 2018 and February 2019, following up with written letter and formal complaint on March 27, 2019.
- ▶ Investigation begins in April; Supervisor Watts refuses to resign in August; disparate treatment continues.
- ▶ September 19, 2019: Wilkes files a charge of discrimination with EEOC.
- ▶ October 2, 2019: Watts terminated.
- ▶ October 8, 2019: Wilkes gives 2-week notice, works through Nov. 13, 2019.

Title VII Discrimination

WILKES V. BUNCOMBE OPERATIONS, LLC, No. 1:20-cv-00376, 2022 U.S. DIST. LEXIS 46899, 2022 WL 812384 (W.D.N.C. MAR. 16, 2022); ADOPTING 2021 U.S. DIST. LEXIS 255058 (NOV. 4, 2021).

- ▶ Wilkes files suit under Title VII and § 1981 for (1) constructive discharge and (2) hostile work environment.
- ▶ Defendant moves to dismiss under Rule 12(b)(6).
- ▶ Constructive Discharge fails: EEOC Charge never amended; what were conditions at time of resignation?
- ▶ Hostile work environment claim may proceed. HR Representative's knowledge imputed to employer.

Class Action Notice

WILLIAMS V. CHARLOTTE-MECKLENBURG HOSP. AUTH., No. 3:20-cv-242, 2022 U.S. DIST. LEXIS 63428 (W.D.N.C. APR. 5, 2022).

- ▶ Age Discrimination (ADEA) class action utilizing FLSA Opt-In Class procedures.
- ▶ Court rejects Plaintiff's request to post notice in employee-only areas, agreeing with Employer that it was unnecessary and might cause "disruption and distraction" to employees.
- ▶ Notice by email and U.S. mail approved. Notice by text-messaging also approved, but phone numbers need only be provided after mail and email returned as "undeliverable."

Class Action Notice

CIRILLO V. CITRIX SYS., NO. 5:21-CV-88, 2022 U.S. DIST. LEXIS 49911, 2022 WL 841327 (E.D.N.C. MAR. 21, 2022)

- ▶ 2,000 inside sales persons switched to hourly workers and allegedly told to just write down their scheduled 40 hours week, despite working several more hours.
- ▶ Class Notice: a Two-Step process.
- ▶ “Social media has become a primary method of communication and organization for many individuals and is therefore an effective means of informing potential plaintiffs of the collective action in a timely manner.”
- ▶ Court approves requested notice by first class mail, email, and text message as well as via radio and/or social media postings to all putative plaintiffs, including a reminder 45 days after the initial contact to all non-responding putative plaintiffs.
- ▶ Court rejects Rule 23 class under NCWHA.

Civil Procedure

CAIN V. TOWN OF YADKINVILLE, NO. 1:21-CV-81, 2022 U.S. DIST. LEXIS 77854, 2022 WL 1289669 (M.D.N.C. APR. 29, 2022).

- ▶ Police Officers alleged that since 2004, their benefits - vacation, compensatory, sick pay, etc. - had been incorrectly calculated using 8-hour credits instead of 12-hour credit representing their 12-hour shifts.
- ▶ Four months after Scheduling Order deadline for pleading amendments, Defendant moves under Rule 15 to amend pleading to include Statute of Limitations defense.
- ▶ Court notes tension between Rule 16 (requiring “good cause”) and liberality of Rule 15.
- ▶ Defendant failed to address any “good cause” in brief.
- ▶ Defendant also failed to rebut “continuing wrong” doctrine, thus conceding it.
- ▶ Motion denied.

Local Rules Amendments

- ▶ MDNC amendments (effective 1/1/2021) address sealed documents.
- ▶ Sealing is disfavored.
 1. LR5.4 sets out new procedures.
 2. Must address need for sealing in Rule 26(f) Report.
 3. Party must submit LR5.4 “Checklist” within 3 days of filing.
 4. Separate brief not required.

WDNC has had similar requirements since 1/1/2018; amendment effective 12/1/2022 amends LR7.1(c) to indicate no brief is required for Motion to Seal.

--The End--

Thank you!

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CHAPTER IX-B

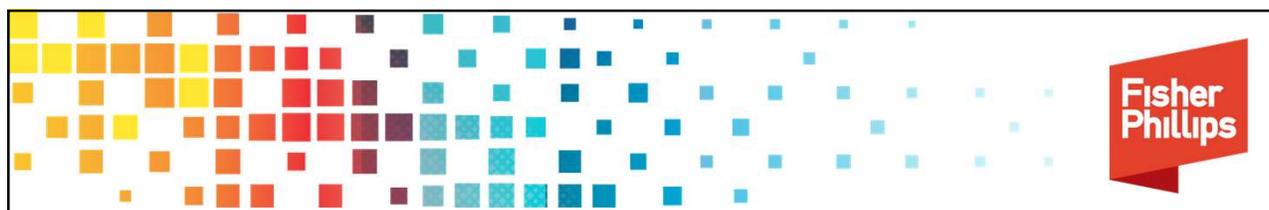
South Carolina State Update

George A. Reeves III
Fisher Phillips LLP
Columbia, SC

NORTH CAROLINA
BAR ASSOCIATION

The views and opinions expressed are those of the individuals and do not necessarily represent official policy, position or views of the North Carolina Bar Association.





South Carolina Legal Update 2022

George A. Reeves, III
Fisher Phillips, LLP
greeves@fisherphillips.com

November 5, 2022

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2022 Topics Covered

- Local Rule changes
- Proposed FRCP Rule change
- At-will employment and implied covenants
- Arbitration agreements and acceptance of same
- Punitive damage caps and affirmative defenses
- Offers of judgment and claims of liquidated damages/attorney's fees
- Exclusive jurisdiction in forum selection clauses

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Local Rules Amendments

- Adopted June 3, 2022
- Local Civil Rule 83.I.04 – *Representation by Local Counsel Who Must Sign All Pleadings*
- Local Civil Rule 83.I.06 – *Pleadings, Service and Attendance by Local Counsel in Cases Where Out-of-State Attorneys Appear*



Local Rule 83.I.04

83.I.04: *Representation by Local Counsel Who Must Sign All Pleadings.*

- (A) Except as provided in subsection (B) below, litigants in civil and criminal actions, other than parties appearing pro se, must be represented by at least one member of the bar of this court who shall sign each pleading, motion, discovery procedure, or other document served or filed in this court. The attorney identification number is also required on each pleading, motion, discovery procedure, or other document served or filed in this court.
- (B) The following attorneys are exempt from the requirements of Local Civil Rules 83.I.01-83.I.06, except for Rule 83.I.05(B):
 - (1) United States Department of Justice attorneys attending to the interests of the United States, pursuant to 28 USC §§ 515(a) and 517; and
 - (2) Social Security Administration attorneys serving as Special Assistant United States Attorneys to represent the agency in court.

Such attorneys shall sign each pleading, motion, discovery procedure, or other document served or filed in this court.

Local Rule 83.I.06

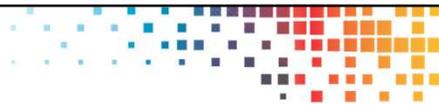
83.I.06: *Pleadings, Service, and Attendance by Local Counsel in Cases Where Out-of-State Attorneys Appear.* Pleadings and other documents filed in a case where an attorney who is not admitted to the bar of this court appears pursuant to Local Civil Rule 83.I.05 shall contain the individual name, firm name, address, and phone number of both the attorney making a special appearance under that rule and of the associated local counsel. In such a case, the service of all pleadings and notices as required shall be sufficient if served upon only the associated local counsel. Unless excused by the court, the associated local counsel shall be present at all pretrial conferences, hearings, and trials and may, but is not required, to attend discovery proceedings or other proceedings that are not before the court. Local counsel is expected to be prepared to actively participate in all proceedings before the court if necessary.

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Proposed Rules Amendments

- Proposed amendments to Federal Rule of Procedure 7.1 set to take effect December 1, 2022
- Original intent of Rule 7.1 was to alert judges of potential financial interests they may related to a corporate party
- Although not intended to be used for jurisdictional purposes, in practice courts have used disclosures to verify diversity jurisdiction
- Proposed additions to Rule 7.1 focus now on the determination of party citizenship for purposes of diversity jurisdiction. See Memorandum from Committee on Rules of Practice and Procedure to Scott S. Harris, Clerk, Supreme Court of the United States (Oct. 18, 2021).

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Proposed Amended Rule 7.1

The relevant addition to Rule 7.1(a)(2), if amended, would read:

(2) Parties or Intervenors in a Diversity Case. In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

(A) when the action is filed in or removed to federal court, and

(B) when any later event occurs that could affect the court’s jurisdiction under § 1332(a).

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Proposed Amendment to Local Rule 26.01

- October 6, 2022 – United States District Court issued Request for Public Comment on proposed change to local rule
- Proposed amendment would add section (H) to current rule:

(H) [Parties or Intervenors in a Diversity Case.] In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, name--and identify the citizenship of--every individual or entity whose citizenship is attributed to that party or intervenor. This response must be supplemented when any later event occurs that could affect the court’s jurisdiction under § 1332(a).

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Curt O. Hall v. UBS Financial Services Inc. and Mary Lucy Reid

Appellate Case No. 2020-001195

FACTS & CLAIMS

- Hall sued former employer and a co-worker following his termination
- Asserted claims of breach of implied covenant of good faith and fair dealing against UBS and tortious interference with contractual relations against Reid

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Curt O. Hall v. UBS Financial Services Inc. and Mary Lucy Reid

Appellate Case No. 2020-001195

CERTIFIED QUESTION I

- Are terminable-at-will employment relationships contractual in nature as a matter of law?
- Answer: “yes” . . .BUT. . . “answer does not light a path to a viable breach of contract action by the terminated employee against the employer.”

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Curt O. Hall v. UBS Financial Services Inc. and Mary Lucy Reid

Appellate Case No. 2020-001195

CERTIFIED QUESTION II

- Does the covenant of good faith and fair dealing arise in at-will employment relationships, and can an employer's termination of an at-will employee constitute a breach of the relationship such that it may give rise to a claim by the former employee against the former employer for breach of the implied covenant of good faith and fair dealing?
- Answer: yes . . . BUT . . .

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Curt O. Hall v. UBS Financial Services Inc. and Mary Lucy Reid

Appellate Case No. 2020-001195

CERTIFIED QUESTION II

- A – Does the covenant of good faith and fair dealing arise in at-will employment relationships?
- Answer: **Yes**. The employment relationship is contractual and there exists in every contract an implied covenant of good faith and fair dealing.

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Curt O. Hall v. UBS Financial Services Inc. and Mary Lucy Reid

Appellate Case No. 2020-001195

CERTIFIED QUESTION II

- B – Can an employer’s termination of an at-will employee give rise to a claim by the former employee against the employer for breach of the implied covenant of good faith and fair dealing?
- **Answer: No.** There is not an independent cause of action for breach of implied covenant of good faith and fair dealing.



Curt O. Hall v. UBS Financial Services Inc. and Mary Lucy Reid

Appellate Case No. 2020-001195

CERTIFIED QUESTION III (Modified)

- Can an employer’s termination of an at-will employee, which results from a third-party employee’s report to the employer, give rise to a claim by the terminated employee against the third-party employee for tortious interference with a contractual relationship, *even when the termination itself was not a breach of the at-will contract?*
- **Answer: Yes.** The absence of an underlying breach by the terminating employer does not shield the third-party from liability when the termination is intentionally and unjustifiably procured.



Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe
Appellate Case No. 2018-001885 (S.C. Ct. App., filed Nov. 3, 2021)

FACTS & CLAIMS

- Employee entered into employment agreement which set out employee's salary and commission. Employment agreement contained a "Governing Law" section stating parties "AGREE TO THE JURISDICITON OF THE STATE AND FEDERAL COURT LOCATED IN HARRIS COUNTY, TEXAS . . ."
- Employee filed action alleging breach of South Carolina Payment of Wages Act, breach of contract, and equitable accounting

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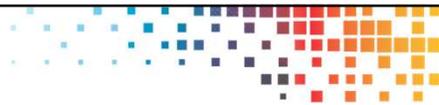


Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe
Appellate Case No. 2018-001885 (S.C. Ct. App., filed Nov. 3, 2021)

MOTION TO DISMISS

- Employer filed Rule 12(b)(3) for improper venue.
- Court granted employer's motion and denied employee's Rule 59(e) motion
- Employee appeals and argues that the agreement's choice of law provision violates S.C. Code Ann. 15-7-120(A) and section 41-10-100

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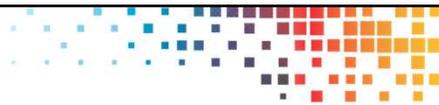


Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe
Appellate Case No. 2018-001885 (S.C. Ct. App., filed Nov. 3, 2021)

MOTION TO DISMISS

- Employer filed Rule 12(b)(3) for improper venue.
- Court granted employer’s motion on Form 4: “The Motion to Dismiss filed by Defendants . . . is hereby granted[,] and the action is dismissed due to South Carolina being the improper venue.”
- Original order was rescinded for error but stated “the proper forum for this action is Texas . . .”

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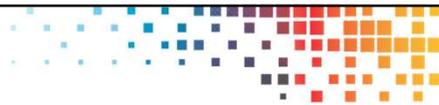


Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe
Appellate Case No. 2018-001885 (S.C. Ct. App., filed Nov. 3, 2021)

APPEAL

- Employee appealed and argued that the agreement’s choice of law provision violates S.C. Code Ann. 15-7-120(A) and section 41-10-100
- Employer argued issue is moot because circuit court’s order did not rely on the choice of law provision
- Employee noted that two rescinded orders referenced Texas and demonstrated the court’s express rationale

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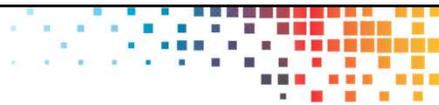


Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe
Appellate Case No. 2018-001885 (S.C. Ct. App., filed Nov. 3, 2021)

HOLDING (CHOICE OF LAW)

- Court declines to hold employee's choice of law argument moot because Form 4 order at issue did not indicate if court considered the choice of law provision
- Court noted that generally choice of law provisions will be honored in South Carolina unless application of foreign law results in violation of State's public policy

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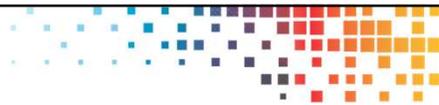


Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe
Appellate Case No. 2018-001885 (S.C. Ct. App., filed Nov. 3, 2021)

HOLDING (CHOICE OF LAW)

- The parties' choice of law provision was limited to contract *interpretation* and does not subsume the employment relationship
- Therefore no preemption of South Carolina Payment of Wages Act or South Carolina venue statute

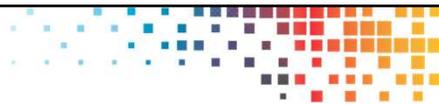
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Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe
Appellate Case No. 2018-001885 (S.C. Ct. App., filed Nov. 3, 2021)
HOLDING (FORUM SELECTION)

- Employee argued that the plain language of the forum selection provision does not require the parties to litigate claims exclusively in Texas because there is no mandatory language.
- Court agrees

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Glenn P. Howell v. Covalent Chemical, LLC and Matthew W. Rowe
Appellate Case No. 2018-001885 (S.C. Ct. App., filed Nov. 3, 2021)
HOLDING (FORUM SELECTION)

- “THE PARTIES AGREE TO THE JURISDICTION OF THE STATE AND FEDERAL COURTS LOCATED IN HARRIS COUNTY, TEXAS . . .”
- Court of Appeals applied Texas law: unless a forum selection clause expressly provides for exclusive jurisdiction, then the parties did not intend to submit to exclusive jurisdiction
- Plain language of clause “shows [the parties] intended for the clause to be permissive rather than mandatory because the language does not expressly provide for Texas to have exclusive jurisdiction . . .”

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**Reggie (“Reg”) Keith Wells v. Vetech, LLC; Vetech Group; Fastube;
Process Development Corporation; and James R. Pongracz,
individually**

Appellate Case No. 2019-001038 (S.C. Ct. App., filed Aug. 10, 2022)

FACTS & CLAIMS

- Wells brought claims against employer for unjust enrichment and violation of the South Carolina Payment of Wages Act
- Complaint included claims for treble damages and attorney’s fees and costs under the Act
- Employer answered complaint and filed an offer of judgment pursuant to Rule 68, SCRPC

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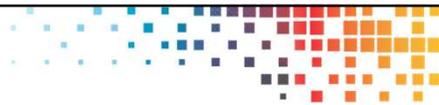
Reggie (“Reg”) Keith Wells v. Vetech, LLC, et al.

Appellate Case No. 2019-001038 (S.C. Ct. App., filed Aug. 10, 2022)

FACTS & CLAIMS

- Offer of judgment: “take judgment for all claims alleged” in the “total amount” of \$5,968.89
- Wells accepted and also filed a motion seeking an award of treble damages, attorney’s fees, and costs pursuant to Act and Rule 54 SCRPC
- Circuit Court denied motion and appeal followed

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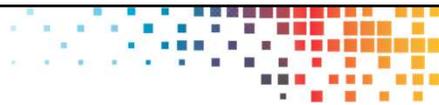


Reggie (“Reg”) Keith Wells v. Vetech, LLC, et al.

Appellate Case No. 2019-001038 (S.C. Ct. App., filed Aug. 10, 2022)

HOLDING

- “all claims alleged” included Wells’ claims for liquidated damages and fees and costs
- Interpreting offer of judgment under Rule 68 involves construing offer as a contract
- Language of offer could not permit Wells to accept the offer and still hold on to claims for treble damages and fees and costs

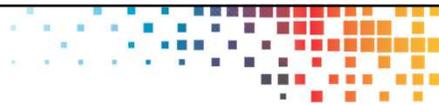


Reggie (“Reg”) Keith Wells v. Vetech, LLC, et al.

Appellate Case No. 2019-001038 (S.C. Ct. App., filed Aug. 10, 2022)

HOLDING

- BUT Court of Appeals noted that decision may have been different if offer of judgment stated only a sum without a description of what the offer was for
- Also, Rule 68 offers of judgment are likened to settlements and may not be construed as a resolution of a matter on the merits
- Therefore, no basis for court to declare employer violated the Act which is required for an award of attorney’s fees under section 41-10-80(c)



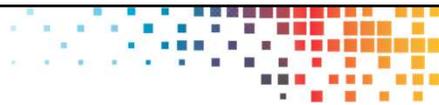
Reggie (“Reg”) Keith Wells v. Vetech, LLC, et al.

Appellate Case No. 2019-001038 (S.C. Ct. App., filed Aug. 10, 2022)

HOLDING

- Additional points about attorney’s fees:
 1. A party cannot use Rule 54 to achieve what was covered by offer of judgment
 2. A party accepting an offer of judgment is not a “prevailing party” entitled to attorney’s fees under the Act

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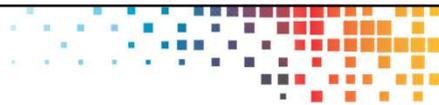
Carla Denise Garrison and Clint Garrison v. Target Corporation

Appellate Case No. 2020-000523 (S.C. filed January 26, 2022)

FACTS & CLAIMS

- Not an employment case – negligence case arising out of an injury that occurred in Target parking lot
- Jury awarded plaintiff \$100,000 in compensatory damages and \$4.51 million in punitive damages
- Target moved for JNOV on liability and punitive damages and also moved for reduction of punitive damage award to the statutory maximum pursuant to SC Code Ann. 15-32-530

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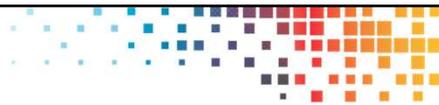
Carla Denise Garrison and Clint Garrison v. Target Corporation

Appellate Case No. 2020-000523 (S.C. filed January 26, 2022)

APPEAL (COURT OF APPEALS)

- Trial Court granted Target's motion for JNOV on punitive damages
- On appeal Court of Appeals reinstated punitive damage award and remanded for further analysis and a remittitur
- Court of Appeals found that the statutory cap in section 15-32-530 was an affirmative defense that must be pled or else waived and that Target had failed to plead the cap

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Carla Denise Garrison and Clint Garrison v. Target Corporation

Appellate Case No. 2020-000523 (S.C. filed January 26, 2022)

HOLDING (SUPREME COURT)

- Statutory cap is neither an affirmative defense nor an avoidance that must be pled because it does not affect liability or require new matter to be asserted but is instead limits the amount of damages a plaintiff can recover.
- Statutory cap does not fall within residuary clause of Rule 8(c), SCRCP
- Statutory cap does not shift burden of proof to defendant to prove the applicability of cap

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Nicole Lampo v. Amedisys Holding, LLC and Leisa Victoria Neasbitt,

Appellate Case No. 2019-000451 (S.C. Ct. App. filed August 10, 2022)

FACTS & CLAIMS

- Lampo was employed with Amedisys from July 2013-March 2018
- Following her termination she filed suit alleging wrongful discharge, interference with prospective contractual relations, and defamation
- Amedisys moved to compel arbitration of all claims based on arbitration agreement

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Nicole Lampo v. Amedisys Holding, LLC and Leisa Victoria Neasbitt,

Appellate Case No. 2019-000451 (S.C. Ct. App. filed August 10, 2022)

FACTS & CLAIMS

- Amedisys distributed the arbitration agreement in an email to employees
- Subject line: “Important Policy Change – Must Read”
- Hyperlink in email: “This e-mail contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them.”
- Pop-up message: THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGMENT FORM

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Nicole Lampo v. Amedisys Holding, LLC and Leisa Victoria Neasbitt,

Appellate Case No. 2019-000451 (S.C. Ct. App. filed August 10, 2022)

FACTS & CLAIMS

- After clicking “Acknowledge” employees were directed to page with links to “Arbitration Agreement,” “Cover Letter,” and “Frequently Asked Questions”
- Employees given opt-out option by printing opt-out form and returning it to Company within 30 days
- Lampo opened email and clicked on “Acknowledge” button; did not return an opt-out

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Nicole Lampo v. Amedisys Holding, LLC and Leisa Victoria Neasbitt,

Appellate Case No. 2019-000451 (S.C. Ct. App. filed August 10, 2022)

FACTS & CLAIMS

- Lampo opposed motion to compel arbitration arguing she did not have actual notice of the agreement as she did not recall receiving the email and there was no evidence presented that she scrolled through or read the agreement or other documents
- Circuit Court denied motion to compel arbitration ruling “there is no competent record evidence of acceptance, mutual assent, or a meeting of the minds to warrant declaring the arbitration agreement enforceable.”

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Nicole Lampo v. Amedisys Holding, LLC and Leisa Victoria Neasbitt,

Appellate Case No. 2019-000451 (S.C. Ct. App. filed August 10, 2022)

APPEAL

- Amedisys appealed and argued that Lampo accepted the arbitration agreement by continuing to work for company after declining to exercise opt-out option within 30 days

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Nicole Lampo v. Amedisys Holding, LLC and Leisa Victoria Neasbitt,

Appellate Case No. 2019-000451 (S.C. Ct. App. filed August 10, 2022)

HOLDING (COURT OF APPEALS)

- Actual Notice and Continued Employment as Acceptance
 - Lampo received actual notice when she received the email (combined with links to the documents) and clicked “Acknowledge” on the pop-up form while logged in with her unique user name
 - Language of offer made clear that acceptance was accomplished by her continuing to work – not her signature

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Nicole Lampo v. Amedisys Holding, LLC and Leisa Victoria Neasbitt,

Appellate Case No. 2019-000451 (S.C. Ct. App. filed August 10, 2022)

HOLDING (COURT OF APPEALS)

- Court of Appeals acknowledged that Amedisys' agreement was "at outer limits" of what constitutes a valid offer to add an arbitration agreement to terms of employment
 - Included barriers to opting out with no barriers to accepting
 - Did not require confirmation of reading agreement

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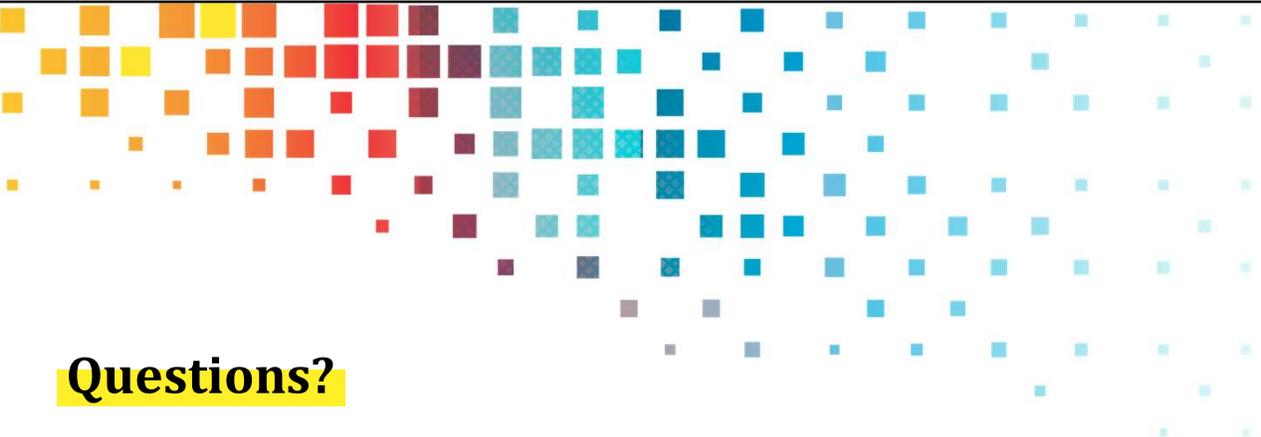
Nicole Lampo v. Amedisys Holding, LLC and Leisa Victoria Neasbitt,

Appellate Case No. 2019-000451 (S.C. Ct. App. filed August 10, 2022)

STAY TUNED...

- Lampo filed Petition for Writ of Certiorari on September 29, 2022
- Amedisys filed Return on October 28, 2022

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Questions?

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