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NOTE

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I. INTRODUCTION

Gone are the times where employers automatically chain workers to cubicles and bind them to regimented schedules motivated by corporate America. Modern jobs come with new and liberating choices—choices to be your own boss, create your own schedule, and control your own time. Virtually all industries reflect these choices through specialized positions, such as freelancing, consulting, and "gig work."[1] These work arrangements are broadly referred to as independent contracting.[2] Contracting arrangements offer greater flexibility and independence to workers than traditional employer-employee arrangements.[3] To no

[*] BSAcc, University of Missouri, 2020; MAcc, University of Missouri, 2020; J.D. Candidate, University of Missouri School of Law, 2025; Editor in Chief, 2024–2025, Associate Member, 2023–2024, *Missouri Law Review*. I wish to express my gratitude to Professor Rafael Gely for his guidance and advice during the crafting of this Note, as well as Jared Gillen, Elizabeth Reiher, Kate Frerking, and Maura Corrigan for their thoughtful feedback. Finally, I am deeply thankful to my husband, Kevin O'Brien, and the rest of my family for their constant encouragement, patience, and support. My successes are attributable to each of you.

[1] *Employing Independent Contractors and Other Gig Workers*, SHRM (Jan. 10, 2024), https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/employingindependentcontractors.aspx [https://perma.cc/WGU7-A57W] [hereinafter *Employing Independent Contractors*]. "Gig work" is often a contingent or alternative arrangement from the traditional employer-employee work arrangement. Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, U.S. BUREAU OF LAB. STATS. (May 2016), https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm [https://perma.cc/4865-V64E]. Gig workers are often hired to perform single projects or tasks and is an emerging work arrangement in the digital marketplace. *Id.*

[2] *Employing Independent Contractors*, *supra* note 1.

[3] Cary Lou & H. Elizabeth Peters, *New Data Shed Light on Why Some Workers Prefer Non-Traditional Employment*, URBAN WIRE (Aug. 23, 2018), https://www.urban.org/urban-wire/new-data-shed-light-why-some-workers-prefer-non-traditional-employment [https://perma.cc/TEV3-DPW8].

surprise, these attractive features of independent contracting have led to a significant rise of independent contractors in the workforce over the years, and this growing practice does not seem to be coming to a halt anytime soon.[4]

Unfortunately, the benefits these nontraditional arrangements provide come at a price. In choosing independent contractor status, workers must forego certain federal protections that only apply to traditional employees.[5] Specifically, the Fair Labor Standards Act of 1938 ("FLSA" or "the Act") gives certain protections, such as federal minimum wage and overtime pay, strictly to employees.[6] Even so, for many workers, the benefits gained from a nontraditional arrangement may still outweigh the costs of losing these protections.

The distinction between an independent contractor and an employee, however, is far more complicated than the superficial desires for one arrangement or another. Classifying a worker as an "independent contractor" or an "employee" becomes critical when determining the application of federal laws like the FLSA.[7] Presently, there is not a clear answer for these classifications, and despite decades of discussion surrounding the distinction, there has been little progress in establishing a definitive rule. In recent years, various presidential administrations have disputed what type of test courts should apply when making these determinations.[8]

This Note illustrates the federal government's back-and-forth battle in defining an independent contractor within the context of the FLSA. Part

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[4] Emmanuel Elone, *Independent Contractors and the Challenges of the New Gig Economy*, BLOOMBERG TAX (May 24, 2023, 10:38 AM), https://news.bloombergtax.com/payroll/independent-contractors-and-the-challenges-of-the-new-gig-economy [https://perma.cc/75PH-HMVW]. There were about 23.9 million independent contractors in the United States in 2021 and it is projected that roughly half of all workers in the country will be independent contractors by 2030. *Id.*

[5] Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, BUREAU OF LAB. STATS. (2002), https://www.bls.gov/opub/mlr/2002/01/art1full.pdf [https://perma.cc/8U8F-35AV] ("U.S. law imposes . . . obligations on employers with respect to employees that are not imposed on independent contractors.").

[6] *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, WAGE AND HOUR DIV. OF U.S. DEP'T OF LAB. (Mar. 2024), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship [https://perma.cc/32TK-ZRKB].

[7] Muhl, *supra* note 5.

[8] *See generally* Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1171 (Jan. 7, 2021) (codified at 29 C.F.R. pts. 780, 788, 795); *see also* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

II of this Note analyzes the legal background of the FLSA, the inconsistencies in deciding who is accorded its rights and protections, and the evolution of the various worker classification tests imposed by different presidential administrations. Part III discusses recent developments for defining independent contractors under a final rule ("2024 IC Rule") published by the Department of Labor ("DOL") and what this publication means for the workforce. Finally, Part IV explores the advantages and drawbacks of the 2024 IC Rule, proposes solutions to the issue of accurately defining an independent contractor, and notes the political tension that has exacerbated the inconsistencies in worker classification. Part IV further recognizes the future implications that the workforce will face if a more consistent approach is not implemented to discern an independent contractor from an employee.

II. LEGAL BACKGROUND

It is imperative to analyze the historical context of the FLSA to understand why an accurate definition of "independent contractor" is of paramount importance. This Part considers the enactment and purpose of the Act and the ambiguity associated with determining who—and what—the Act protects.

A. Historical Background of the Fair Labor Standards Act of 1938

Congress originally enacted the FLSA for the purpose of facilitating better working conditions for United States employees.[9] At its inception, the Act provided covered workers with various new protections in the workplace, including a federal minimum wage and mandated overtime pay.[10] Codified in Title 29, Chapter 8 of the United States Code, these labor standards have been administered and enforced by the Wage and Hour Division ("WHD") within the DOL since 1938.[11]

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[9] Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 558–59 (2019).

[10] 29 U.S.C. § 206, 207. Currently, the federal minimum wage is $7.25 per hour and has not been amended since July 24, 2009. *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/flsa [https://perma.cc/B4GZ-9443]. For hours worked, by covered employees, more than 40 hours per work week, the employee is entitled to a rate of at least one and one-half times their regular pay rate. *Id.* The FLSA also served to eliminate child labor practices by prohibiting "oppressive child labor in the United States." Griffith, *supra* note 9, at 558. For further discussion on the child labor provisions within the FLSA, *see* CONG. RSCH. SERV., R42713, THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW (2023) [hereinafter CONG. RSCH. SERV., 2023 FLSA OVERVIEW].

[11] 29 U.S.C. § 204(a).

While the FLSA continues to set the federal standard within the workplace, many state legislatures have also implemented similar labor law provisions in their respective states. Although states pass these laws freely, the FLSA prohibits the "weaken[ing of] worker protections provided by the [Act]."[12] For example, a state may pass a law to increase its employee minimum wage above the federal minimum wage set by the FLSA, but a state may not pass a law to decrease its employee minimum wage lower than what is required in the Act's federal minimum wage provision.[13] As a general rule, the employee-friendly law will prevail.[14]

While the FLSA has had a positive and widespread impact on the workplace, it does not apply to every employer nor does it protect every employee in the United States.[15] Employers and employees are covered by the FLSA in one of two ways: enterprise coverage or individual coverage.[16] Enterprise coverage applies to businesses and organizations with at least $500,000 of annual sales or business.[17] Irrespective of this sales threshold, enterprise coverage also applies to businesses providing certain medical and elder care, hospitals, government agencies, preschools, and other educational institutions.[18] If the business or organization meets the annual sales threshold or falls into one of the mentioned categories, it generally must provide its employees with FLSA protection.[19] If the enterprise coverage test fails, an employer may still be bound by the FLSA if the individual coverage test is satisfied.[20] Under individual coverage, an individual employee engaged in interstate commerce is covered under the FLSA.[21] Accordingly, an employer must conduct both enterprise and individual coverage analyses to ensure

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[12] CONG. RSCH. SERV., 2023 FLSA OVERVIEW, *supra* note 10.

[13] *Id.*

[14] *Id.*

[15] According to the Fact Sheet #14 on the DOL website, the FLSA covers over 143 million American workers. *Fact Sheet 14: Coverage Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. (July 2009), https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage [https://perma.cc/SH56-K7G9].

[16] *Id.*

[17] 29 C.F.R. §§ 779.258–779.259; 29 U.S.C. § 203(s)(1); *see also Fact Sheet 14*, *supra* note 15. Under the enterprise coverage test, the businesses must also have at least two employees. *Id.*

[18] CONG. RSCH. SERV., 2023 FLSA OVERVIEW, *supra* note 10.

[19] *Id.* There are narrow exceptions to the typical coverage analyses, making some employers and employees exempt from the FLSA regardless of satisfying the tests. *Id.*

[20] *Id.*

[21] *Id.* Interstate commerce includes conducting work in other states, such as traveling to other states, handling business transactions in other states, communicating with persons in other states, etc. *Id.*

compliance with the FLSA.[22] The enterprise coverage and individual coverage tests together cast a large net, resulting in the FLSA protecting many workers of the businesses falling within its scope.[23] However, because only *employees* of the employers defined above are "covered workers" under the FLSA, the Act does not protect *all* workers.[24]

The FLSA only applies to nonexempt employers and their respective employees, so the Act's application is limited to employer-employee relationships.[25] But since its enactment, there has been little guidance for accurate worker classification and, as a consequence, establishing a clear employer-employee relationship within the context of the FLSA has proved to be a difficult task for all.[26] Although this Note focuses on the FLSA, the lack of clarification is not unique to the confines of this Act.[27] Other federal regulatory agencies have also struggled with the boundaries of the employer-employee relationship, which further demonstrates the difficulty in finding an answer to the question of who constitutes an employee.[28] Likewise, states have struggled with this issue, as many have implemented different tests for finding employer-employee relationships.[29]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See Fact Sheet 13*, *supra* note 6.

[26] *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947) ("As in the National Labor Relations Act and the Social Security Act, there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act.").

[27] *Id.*

[28] *See* Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1169 (Jan. 7, 2021) (codified at 29 C.F.R. pts. 780, 788, 795) ("[T]he U.S. Supreme Court explored the limits of the employer-employee relationship in a series of cases from 1944 to 1947 under three different federal statutes: The FLSA, the National Labor Relations Act (NLRA), and the Social Security Act (SSA). 85 FR 60601 (summarizing NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); United States v. Silk, 331 U.S. 704 (1947); Bartels v. Birmingham, 332 U.S. 126 (1947); and Rutherford Food, 331 U.S. 722).").

[29] Christopher Wood, *Legal Experts Weigh-in on Labor Department's Upcoming Worker Classification Rule*, THOMSON REUTERS (June 28, 2023), https://tax.thomsonreuters.com/blog/legal-experts-weigh-in-on-labor-departments-upcoming-worker-classification-rule/ [https://perma.cc/HBD8-U366].

B. The Evolution of Defining an "Independent Contractor" Under the FLSA

Employers may hire workers with specialized knowledge to fulfill task-specific roles without retaining them as employees.[30] Independent contractors often fill these roles.[31] While an employer may intend to hire an individual as an independent contractor, the worker's status depends on more than his or her technical title.[32] Under traditional agency law, which is the common law approach, an independent contractor is largely distinguishable from an employee by and through the level of control that the employer retains over the worker.[33] If an employer can control both the result achieved and the means in achieving that result, the worker is likely an employee.[34] If an employer can control the worker only as to the result achieved, the worker is likely an independent contractor.[35] Thus, the agency analysis hinges on whether the employer controls the means or actions the employee takes to achieve a particular result.[36]

When determining worker status under this common law agency approach, courts may also rely on a slew of other factors, but the question of control remains essential.[37] While the emphasis on "control" over the worker is often the benchmark for common law agency, the FLSA applies a broader standard.[38]

Under the FLSA, an independent contractor is not an employee; accordingly, independent contractors do not receive the vast protections of

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[30] *Independent Contractor*, CORNELL L. SCH.–LEGAL INFO. INST., https://www.law.cornell.edu/wex/independent_contractor [https://perma.cc/H8YL-3JDK] (last visited Mar. 28, 2024).

[31] *Hiring Independent Contractors for your Work Force Needs*, WOLTERS KLUWER (Aug. 10, 2020), https://www.wolterskluwer.com/en/expert-insights/hiring-independent-contractors-for-your-work-force-needs [https://perma.cc/MVA3-MBK7].

[32] *See Fact Sheet 13*, *supra* note 6 ("What the worker is called is not relevant—a worker may be an employee under the FLSA regardless of the title or label they are given.").

[33] RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958).

[34] Spirides v. Reinhardt, 613 F.2d 826, 831–32 (D.C. Cir. 1979).

[35] C.C. E., Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995) (quoting Twin City Freight, Inc., 221 N.L.R.B. 1219, 1220 (1975)).

[36] *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958) (discussing the factors considered for whether a worker is an employee or an independent contractor in the traditional agency context).

[37] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992).

[38] *See id.* at 326 (holding that the definition under the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify . . . under a strict application of traditional agency law").

this Act.[39] Though ascertainable distinctions exist between independent contractors and employees, the FLSA fails to define an "independent contractor."[40] The FLSA does, however, define "employer," "employee," and what it means to "employ."[41] An "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[42] An "employee" is "any individual employed by an employer."[43] Finally, to "employ" is "to suffer or permit to work."[44] According to the Supreme Court, the broad definition of "employ" exhibits Congress's intent to stretch the FLSA's definition of an employee beyond that of traditional agency law.[45] Despite the necessity of accurate worker classification, these definitions do not provide much direction with respect to who exactly is covered under the FLSA. Moreover, while the FLSA has undergone various amendments since its enactment, the Act has failed to clarify its definitions for worker classification.[46]

Although statutory guidance for defining a worker as an employee or an independent contractor is sparse, the judiciary has been wrestling with the question for over seven decades.[47] In the early 1940s, the courts decided that certain legislation, such as the Social Security Act (the "SSA"), the National Labor Relations Act (the "NLRA"), and the FLSA would require a different test from the common law agency "control" test.[48] Instead of focusing primarily on the control element, the courts focused on the economic dependence of the worker in light of the totality-of-the-circumstances.[49] Since the 1940s, the judicial system has

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[39] Allen Smith, *What's the Independent Contractor Standard Now?*, SHRM (May 15, 2023), https://www.shrm.org/topics-tools/employment-law-compliance/whats-independent-contractor-standard-now [https://perma.cc/ED5D-HZKS].

[40] *See* 29 U.S.C. § 203.

[41] *Id.*

[42] *Id.* § 203(d).

[43] *Id.* § 203(e)(1).

[44] *Id.* § 203(g).

[45] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325 (1992).

[46] *See History of Wage and Hour Division*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/agencies/whd/about/history [https://perma.cc/P5BN-MGGY] (last visited Mar. 28, 2024).

[47] United States v. Silk, 331 U.S. 704, 716 (1947) (introducing the economic realities test for worker classifications).

[48] Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

[49] *See id.* ("Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those who as a matter of economic reality are defendant upon the business to which they render service.").

developed variants of this "economic realities test" when making worker classification determinations.[50]

The economic realities test was first introduced within the SSA context in *United States v. Silk*.[51] In its opinion, *Silk* outlined a non-exhaustive list of factors: (1) the degree of control over the worker; (2) the worker's opportunity for profit or loss; (3) the investment by the worker in the business' facilities; (4) the permanency of relation between the worker and the employer; and (5) the skill required in the worker's claimed independent operation.[52] The Court weighed all five factors together and found no one factor to be controlling when determining a worker's status.[53] On the same day, the Court reaffirmed this multifactor test in *Rutherford Food Corp. v. McComb* to determine whether workers were classified as employees or independent contractors for FLSA purposes.[54] The Court there introduced an additional factor: whether the worker's job was an integral part of the employer's operations.[55] It did not analyze this additional factor in isolation but as one consideration to the entire set of circumstances, which illustrated the economic realities test set forth in *Silk*.[56] Through its application of the test, the Court in *Rutherford* ultimately found the worker to be an employee under the FLSA.[57] Thereafter, the *Silk* and *Rutherford* decisions became guideposts for future worker classification determinations.

Nationwide Mut. Ins. Co. v. Darden later abrogated *Silk* for purposes of defining an employee under the NLRA and SSA; however, this abrogation did not impact the FLSA.[58] Coming on the heels of statutory amendments to the NLRA and SSA definition of "employee," *Darden* concluded that the definition of an "employee" under the NLRA and the SSA should parallel the traditional common law agency test.[59] In contrast, Congress did not amend the employee definition under the FLSA.[60] Consequently, *Darden* held that continued use of the economic realities test for the FLSA better aligned with Congress's intent to apply a broader

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[50] *See Silk*, 331 U.S. at 716; *see also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947); *see also Bartels*, 332 U.S. at 130.

[51] *Silk*, 331 U.S. at 716.

[52] *Id.*

[53] *Id.*

[54] *See generally McComb*, 331 U.S. 722 (1947) (analyzing the totality-of-the-circumstances to find the existence of an employer-employee relationship).

[55] *Id.* at 730.

[56] *Id.*

[57] *Id.*

[58] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324–25 (1992).

[59] *Id.*

[60] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1169 (Jan. 7, 2021) (codified at 29 C.F.R. pts. 780, 788, 795).

analysis to the Act than the common law test could.[61] As previously mentioned, the common law agency test focuses on the employer's right to control the worker, while the economic realities test broadens the scope to focus on the worker's economic dependence on the employer.[62] While there may be overlapping factors considered in the two analyses, the different focal points make it possible for a worker to be classified as an independent contractor under one federal law while maintaining employee status under another.[63]

In 2021, the Trump Administration's DOL decided that this pre-2021 economic realities test, as applied to the FLSA, provided inconsistent results and led to overall confusion among both workers and employers.[64] It found that the test needed "a more developed and dependable touchstone."[65] As a result, the WHD of the DOL published a final ruling for the purpose of interpreting independent contractor status within the FLSA.[66] Beginning March 8, 2021, the 2021 IC Rule established a more limited reading of the economic realities test while still analyzing the ultimate issue: whether a worker is economically dependent on its employer.[67] Until this 2021 ruling, the DOL had never published an official regulation addressing the definition of an independent contractor under the FLSA.[68] Instead, the DOL previously relied on the federal courts of appeals' interpretations of the economic realities test to make such determinations.[69] Moreover, prior to 2021, the WHD sporadically published sub-regulatory guidance to bolster the findings in the appellate courts, adding confusion to the inquiry.[70] The 2021 IC Rule was the first

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[61] *Darden*, 503 U.S. at 324–25.

[62] Muhl, *supra* note 5.

[63] *Id.* For example, a worker could be classified as an employee under the SSA's common law test and an independent contractor under the FLSA's economic realities test. *Id.*

[64] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1172.

[65] *Id.* at 1173.

[66] *Id.* at 1168. Final rules published by the DOL must go through the rulemaking process. *See Learn About the Regulatory Process*, REGULATIONS.GOV, https://www.regulations.gov/learn [https://perma.cc/J9RK-Q2RQ] (last visited Feb. 14, 2024). The rulemaking process includes the origination, the proposal, and the final ruling. *Id.* At the origination stage, the government agency obtains authorization to set forth a proposed regulation. *Id.* Once authorized, the agency will publish a Notice of Proposed Rulemaking and accept public comments on the matter. *Id.* At the close of the comment period, the agency will adjust the proposal to its direction and public a final rule. *Id.*

[67] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1168.

[68] *Id.* at 1172.

[69] *Id.*

[70] *Id.*

notice-and-comment rulemaking law on this topic and effectively replaced all previous guidance.[71]

The 2021 IC Rule considered a set of five factors similar to ones seen in *Silk* and *Rutherford* but weighed the factors differently.[72] Two of the five factors were deemed potentially dispositive.[73] These dispositive, or "core," factors were: (1) the nature and degree of control over the worker's work and (2) the worker's opportunity for profit or loss.[74] The remaining, less probative factors considered were: the amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production.[75] If the two core factors pointed in the same direction, it was deemed highly unlikely that the other three factors would shift the classification.[76] Therefore, the final three factors, while still considered, would carry minimal probative value to the remaining analysis.[77]

Shortly after its final publication, the Biden Administration displayed its disapproval of the Trump Administration's 2021 IC Rule by delaying and withdrawing it.[78] However, the delay and withdrawal were short-lived, as the Eastern District of Texas vacated both due to the DOL's failure to comply with procedural requirements.[79] Despite the clear disagreement over worker classification between the Trump and Biden Administrations, the 2021 IC Rule remained in effect until Biden's Administration finalized its own DOL rule in January 2024.[80] Part III

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[71] *Id.* at 1171.

[72] *Id.* at 1168. *See supra* note 52 and accompanying text for the five factors set forth in *Silk*.

[73] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1168.

[74] *Id.*

[75] *Id.* at 1171. Notably, the 2021 IC Rule collapsed the separate factor considering investment by the worker in Silk into the factor of the worker's opportunity for profit or loss. *Id.* at 1179.

[76] *Id.* at 1179.

[77] *Id.* at 1197. The less probative factors would be analyzed with a "skeptical" eye if the core value did not point toward the same classification. *Id.* This was one of the most significant shifts from the pre-2021 interpretations of the economic realities test. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1655 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[78] *See* Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date, 86 Fed. Reg. 12535 (Mar. 4, 2021); *see also* Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24303 (May 5, 2021).

[79] Coalition for Workforce Innovation v. Walsh, No. 1:21-cv-00130-MAC, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

[80] *See Fact Sheet 13*, *supra* note 6.

discusses this new rule and highlights the return to the totality-of-the-circumstances approach that began on March 11, 2024.

III. RECENT DEVELOPMENTS

On October 13, 2022, the DOL under the Biden Administration proposed a rule that would rescind the Trump Administration's 2021 IC Rule for purposes of defining independent contractors within the FLSA context.[81] After much anticipation, the final ruling for this proposal was published on January 10, 2024.[82] Effective March 11, 2024, this final rule returned to the historically relied upon judicial interpretation of worker classification under the FLSA.[83] Specifically, this rule reiterates the "totality-of-the-circumstances" approach with six factors largely inspired by *Silk*, *Rutherford*, and the federal appellate courts' interpretations.[84] These factors include: (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an integral part of the employer's business; and (6) skill and initiative.[85] The DOL has not provided specific additional factors to be considered, but it has indicated that other factors may impact the analysis when determining worker classifications.[86]

While this rule differs in approach from the 2021 IC Rule, it continues to ask the ultimate question of whether the worker is "economically dependent on the employer for work or in business for themself."[87] If it is determined that a worker is economically dependent on her employer, the worker will be classified as an employee rather than as an independent contractor.[88] According to the current DOL under the Biden Administration, the 2021 IC Rule did not provide the clarity necessary in answering this question, complicated the classification

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[81] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62219 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[82] *See id.*

[83] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1639 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[84] *Id.* at 1669.

[85] *Id.* Notice slight differences in the 2024 IC Rule from the factors provided in *Silk* and *Rutherford*. *See supra* notes 52, 54 and accompanying text.

[86] *Id.* at 1715.

[87] *Id.* at 1639.

[88] *Id.* at 1638.

matter, and wrongfully conflicted with judicial precedent.[89] To resolve the alleged mistakes in the 2021 IC Rule, the 2024 IC Rule returns to longstanding judicial precedent by answering the economic dependence question in light of the totality-of-the-circumstances.[90]

IV. DISCUSSION

The potential impact of the newly effective 2024 IC Rule on the workforce is worth a thorough discussion. This Part of the Note first analyzes the advantages and drawbacks of the 2024 IC Rule and what the final publishing of this rule means for employers and workers in the United States. Next, this Part will focus on proposed solutions and considerations for a more accurate worker classification test within the FLSA context. Finally, this discussion criticizes the politically charged back-and-forth guidance of worker classification and identifies future implications of the new rule. Because there are rational elements of both the 2021 IC Rule and the 2024 IC Rule, finding a sound solution not grounded in political propaganda would serve to minimize the risk of misclassification while instilling confidence in workers and employers of a more reliable classification test.

A. Advantages of the 2024 IC Rule

Currently, more than 143 million Americans are covered under the FLSA.[91] Accurately protecting these individuals depends on accurately classifying them as employees or independent contractors; thus, misclassification can be detrimental to a worker's livelihood.[92] One of the greatest disruptions that workers face from misclassification as an independent contractor is the loss of federal guarantees under the FLSA.[93] This consequence essentially strips misclassified workers of protections to which they have a federal right, such as minimum wage and overtime pay.[94] The DOL asserts that the totality-of-the-circumstances analysis reduces the risk of this type of misclassification because it tilts the scale toward broader employee classification.[95] The DOL maintains that the

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[89] *Id.* at 1647.

[90] *Id.* at 1639.

[91] *Fact Sheet 14*, *supra* note 15.

[92] *U.S. Department of Labor Announces Proposed Rule on Classifying Employees, Independent Contractors; Seeks to Return to Longstanding Interpretation*, U.S. DEP'T OF LAB. (Oct. 11, 2022), https://www.dol.gov/newsroom/releases/WHD/WHD20221011-0 [https://perma.cc/TT9B-NVR9].

[93] *Id.*

[94] *Id.*

[95] Smith, *supra* note 39.

2021 IC Rule, in contrast, favored independent contractor classification and increased the risk of misclassification.[96] This distinction results in one of the most obvious advantages of the 2024 IC Rule: the potential for more Americans to receive protection under the FLSA.

If the totality-of-the-circumstances test tilts the scale toward classifying workers as employees, a second advantage of the 2024 IC Rule is that employers may reclassify many current independent contractors as employees.[97] Some independent contractors who failed employee classification under the 2021 IC Rule may be thrilled with reclassification and, understandably, view this as an advantage of the 2024 IC Rule. Though the features of independent contracting may be enticing for some, advocates for the 2024 IC Rule claim it is a misconception that *most* independent contractors prefer his or her work arrangements.[98] These advocates claim that some arrangements, such as work in the gig economy, do not provide for true independence as seemingly promised in independent contracting jobs.[99] If a job does not actually offer the desirable qualities of independent contracting, these type of workers would likely prefer to be deemed employees in order to receive FLSA protection.

Some companies operate entirely with independent contractors yet seem to treat these workers as employees.[100] This opportunistic business model assists companies in avoiding the economic and legal consequences that come from hiring employees rather than independent contractors, such as providing FLSA protections.[101] The 2024 IC Rule may prevent some of this behavior by making it more difficult to classify workers as independent contractors.[102] The inevitable reclassifications would be advantageous for both the worker and the business industry for many

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[96] *Id.*

[97] *See* Taylor Telford, *Biden Wants to Let Gig Workers be Employees. Here's Why it Matters.*, THE WASHINGTON POST (Oct. 17, 2022, 10:20 AM), https://www.washingtonpost.com/business/2022/10/17/gig-workers-contractors-faq/ [https://perma.cc/PN6L-5JGA].

[98] *Id.*

[99] *Id.* (claiming that independent contractors in the rideshare industry do not truly receive the independence because they do not control many aspects of their job except for when to turn on and off the app).

[100] Jennifer Sherer & Margaret Poydock, *Flexible Work Without Exploitation*, ECON. POL'Y INST. (Feb. 23, 2023), https://www.epi.org/publication/state-misclassification-of-workers/ [https://perma.cc/WAT5-VPC3]. Platform companies, such as Uber, Lyft, Instacart, and DoorDash, operate almost entirely on independent contractors. *Id.*

[101] *Id.*

[102] *Businesses Will Struggle to Classify Workers as Independent Contractors Thanks to New DOL Rule: 5 Takeaways*, FISHER PHILLIPS (Jan. 9, 2024), https://www.fisherphillips.com/en/news-insights/businesses-will-struggle-to-classify-workers-as-independent-contractors.html [https://perma.cc/MDF2-F7ZA].

reasons. First, independent contractors are generally engaged for specialized tasks and in short durations.[103] Business models running exclusively on independent contractors conflict with this purpose of hiring independent contractors, and reclassification may better align with the objective of independent contracting.[104] Second, "law-abiding" businesses are placed at a disadvantage if other businesses avoid paying "should-be" employees minimum wage and overtime simply by contracting them.[105] Because the 2024 IC Rule reintroduces a test to consider all of these relevant facts, the rule will likely prevent companies from circumventing their obligation to give proper FLSA protections by simply classifying all workers as independent contractors.

A third advantage of the 2024 IC Rule is the return to long-standing and clearcut judicial practice.[106] The courts have been answering worker classification questions for over seven decades, dating back to the 1940s when *Silk* and *Rutherford* were decided.[107] Proponents for the 2024 IC Rule criticize the 2021 IC Rule largely because the 2021 IC Rule, allegedly, departed from judicial precedent.[108] Decades ago, the Supreme Court specifically established, and subsequently affirmed, a multifactor economic realities test for determining worker classification in the FLSA context.[109] This multifactor analysis is akin to the totality-of-the-circumstances approach set forth in the 2024 IC Rule.[110] Further, the federal appellate courts have consistently opposed any "formulaic application of the economic realities test," which the DOL claims was an erroneous function of the 2021 IC Rule.[111] Biden's DOL specifically argues that the two core factors emphasized in the 2021 IC Rule conflicted

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[103] Telford, *supra* note 97.

[104] William E. Grob, *Beware of Traps with Independent Contractor Business Models*, OGLETREE DEAKINS (July 18, 2012), https://ogletree.com/insights-resources/blog-posts/beware-of-traps-with-independent-contractor-business-models/ [https://perma.cc/7PNQ-QX7V].

[105] *U.S. Department of Labor Announces Proposed Rule on Classifying Employees*, *supra* note 92.

[106] *Id.*

[107] United States v. Silk, 331 U.S. 704 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

[108] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1647 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[109] *McComb*, 331 U.S. at 729; *see also* Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (holding that the economic realities is applied in worker classification determinations for FLSA purposes).

[110] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1638; *see also Silk*, 331 U.S. at 716, 719.

[111] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1651.

with the judiciary's opposition to a mechanical approach.[112] Although the 2021 IC Rule claimed that it did not truly depart from precedent, the totality-of-the-circumstances test in the 2024 IC Rule is more closely aligned with previous case law.[113]

Because following precedent promotes an "evenhanded, predictable, and consistent development of legal principles," the 2024 IC Rule's return to long-standing judicial practice is advantageous.[114] By adhering to a similar multifactor analysis conducted through decades of court decisions, the 2024 IC Rule will arguably lead to these beneficial outcomes of consistency and predictability. However, opponents of the 2024 IC Rule have hotly contested this proposition, claiming that the multifactor analysis has led to historically inconsistent results and that returning to this approach will risk similar unreliable and unpredictable outcomes.[115] Part B of this discussion further explores these concerns, along with additional perceived drawbacks of the 2024 IC Rule.

B. Drawbacks of the 2024 IC Rule

When accounting for the 2024 IC Rule, employers must accommodate for the inevitable shifts in worker classifications. The first major drawback of the 2024 IC Rule is the fiscal cost of reclassifying current independent contractors as employees.[116] Even if an employer hired a worker with the intention to classify him or her as an independent contractor, and despite surviving the independent contractor classification under the 2021 IC Rule, the 2024 IC Rule may result in a forced shift to employee status.[117] Reclassification may raise financial concerns for employers that did not plan for costs associated with the FLSA, or perhaps intended to circumvent the costliness in the first place, such as recognizing overtime and minimum wage.[118] For example, some businesses that rely

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[112] *Id.*

[113] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1206 (Jan. 7, 2021) (codified at 29 C.F.R. pts. 780, 788, 795).

[114] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

[115] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1172.

[116] Sterling Miller, *Employee vs. Independent Contractor: What's the Difference?*, THOMSON REUTERS (Mar. 21, 2022), https://legal.thomsonreuters.com/en/insights/articles/independent-contractor-vs-employee-what-does-it-matter [https://perma.cc/Y48H-879F].

[117] *Id.*

[118] *Id.* In contexts other than the FLSA, potential costs that employers may face when classifying a worker come in the form of "taxes, training promotions, [ ] benefits, unemployment insurance, workers' compensation insurance, FMLA leave, 401K match, and so on." *Id.*

on independent contractors may not be able to afford the expenses associated with hiring, or reclassifying, such individuals as employees.[119] In reality, these businesses, especially small businesses bound to the requirements of the FLSA, may find it impossible to absorb the costs of newly classified employees.[120]

Even if a worker remains an independent contractor under the 2024 IC Rule, the costs of applying the totality-of-the-circumstances test could similarly pose a financial hardship for businesses with less sophisticated means to ensure compliance.[121] The 2024 IC Rule requires full consideration of each factor and does not exclude complete consideration of additional factors.[122] This could lead to limitless analyses and unpredictable costs, especially for smaller businesses disproportionately impacted by the test.[123] Prior to its final ruling, "[t]he DOL itself estimated that 6.5 million small businesses or small entities could be affected by [the 2024 IC Rule], along with 22.1 million independent contractors"; therefore, there is a concern that the DOL does not understand the negative implications of this rule.[124] The magnitude of costs incurred by employers is then multiplied by the number of reclassifications.[125] The downstream effect of this calculation could lead to disruptive and chaotic results within the economy.[126]

The second drawback of the 2024 IC Rule is the ambiguity of the totality-of-the-circumstances approach.[127] Under the 2021 IC Rule, the employer first assessed two core factors when determining a worker's classification.[128] If the two factors pointed toward the same classification, the analysis would skeptically shift to the remaining three factors because of the substantial likelihood that the core factors would result in accurate classification.[129] While additional factors could have been considered

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[119] *SBE Council Comments on DOL's Proposed Independent Contractor Rule*, SMALL BUS. & ENTREPRENEURSHIP COUNCIL (Dec. 13, 2022, 5:43 PM), https://sbecouncil.org/2022/12/13/sbe-council-comments-on-dols-proposed-independent-contractor-rule/ [https://perma.cc/4TRF-7FXF] [hereinafter *SBE Council Comments*].

[120] *Id.*

[121] Smith, *supra* note 39.

[122] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1640 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[123] *SBE Council Comments*, *supra* note 119.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Telford, *supra* note 97.

[128] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1197 (Jan. 7, 2021) (codified at 29 C.F.R. pts. 780, 788, 795).

[129] *Id.*

under the 2021 IC Rule, any additional factor was similarly "unlikely to outweigh either of the core factors."[130] The 2024 IC Rule has the opposite effect. No one factor listed in the 2024 IC Rule is dispositive nor is the analysis limited to the factors set forth in the proposal.[131] While the DOL does not specify the additional factors under the 2024 IC Rule, these additional factors must only be linked to the economically dependent inquiry before they are considered as extensively as the other six factors.[132] Since virtually any "relevant factor" may be examined, this case-by-case analysis may be confusing and ambiguous, leaving companies straddled with costs and legal hurdles to determine where the line can be drawn.[133] The 2024 IC Rule does not provide markers analogous to the two core factors in the 2021 IC Rule.[134] This is a drawback because it leaves room for strategically pushing a worker into a favored classification simply by adding a plethora of factors to the equation. The possibilities seem endless without some hierarchy of probative factors.

A third noteworthy drawback arises in response to the perceived advantage of the 2024 IC Rule as an aid to alleviate the dissatisfaction felt by independent contractors. While *some* independent contractors may prefer employee status, the 2024 IC Rule will inevitably force a large number of independent workers into employee classification despite their preference to remain independent contractors.[135] Independent contractor jobs are desirable for many workers.[136] As mentioned in this Note, these work arrangements notoriously allow for greater flexibility and purport to give the independent contractor a degree of independence not otherwise available in traditional employment arrangements.[137] Given that the 2024 IC Rule favors employee classification, there is concern that it will halt the growing practice of independent contract work—a reality which itself is a significant drawback.[138] Overall, independent contracting remains a tool for greater self-employment opportunities, control over one's time, and

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[130] *Id.* at 1196.

[131] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1666 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[132] *Id.* at 1715.

[133] Telford, *supra* note 97 ("[I]t's going to be years and years of litigation to figure out where the line actually is.").

[134] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. at 1638.

[135] Telford, *supra* note 97; *see also* Lou & Peters, *supra* note 3 (80% of independent contractors have reported the preference to independent contracting over traditional employment).

[136] *See generally* Telford, *supra* note 97.

[137] Lou & Peters, *supra* note 3.

[138] *SBE Council Comments*, *supra* note 119.

overall positive contributions to the marketplace stemming from an increase in job creation.[139]

C. Meeting in the Middle: Alternative Solutions to Defining Independent Contractors

The federal government owes workers and employers a fair test for determining worker classification to avoid yet another flip in the definition of an independent contractor.[140] The workforce deserves clarification and will greatly benefit if a clear and consistent test is implemented. This Note advocates for a level of certainty and predictability that neither the 2021 IC Rule nor the 2024 IC Rule can provide when standing alone. The 2021 IC Rule focuses primarily on just two core factors, which carries great concern for misclassifying workers as independent contractors. In contrast, the 2024 IC Rule allows consideration of virtually any relevant factor, which may lead to the misclassification of workers as employees. An idealistic solution to this tension would be to meet somewhere in the middle of the broad 2024 IC Rule and narrow 2021 IC Rule by combining elements from each. This Part sets forth proposals reflecting a combination of the regulations, along with considerations for future decision-making.

First, any future changes to the 2024 IC Rule should come as mere modifications to the rule rather than a complete replacement. Despite the DOL agreeing with several points in the 2021 IC Rule, it chose to fully rescind and replace the 2021 IC Rule with the 2024 IC Rule.[141] Future refinements to the regulation currently in place would lead to a clearer and more definitive rule rather than starting from scratch each time a new administration disagrees with the effective rule. Accordingly, future changes or improvements to the 2024 IC Rule should build upon the foundation that has been set.

Next, both employers and the courts should seldom consider additional factors beyond the six factors explicitly identified in the 2024 IC Rule. While there may be rare circumstances that require consideration of additional factors, these factors pose the threat of making the worker classification analysis more convoluted than it already is. Especially given

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[139] *Id.* During the proposal phase for the 2024 IC Rule, the Small Business & Entrepreneurship Council expressed its opposition to the rule for the concern of its negative impact on small business and independent contractors. *Id.*

[140] The 2021 final ruling by Trump Administration's DOL was a massive change to the worker classification determination. Wood, *supra* note 29. The 2024 IC Rule piles onto the confusion by leaving workers, employers, and the courts with another test to consider.

[141] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1661 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

that the 2024 IC Rule does not allocate weight to any of the six factors, welcoming full consideration of additional factors promotes a subjective, unpredictable, and potentially limitless analysis.[142] By narrowing the ability to assess additional factors, employers and workers alike will have greater knowledge about the exact factors used in making worker status determinations. While the 2024 IC Rule claims that an employer would only examine factors relevant to the economic dependence inquiry, the broad scope of potentially "relevant" factors may still reach beyond what is necessary.[143] In order to foster predictability and consistent application, the focus should turn almost exclusively on the six identifiable factors. This approach would both narrow the analysis from the 2024 IC Rule's totality-of-the-circumstances test and preserve a broader analysis than the core factor test from the 2021 IC Rule.

D. Looking Toward the Uncertain Future

The question of whether a worker is classified as an employee or an independent contractor has been a recurring point of political tension for many years.[144] In fact, the pervasive debates over the definition of an "employee" find roots in the New Deal Era.[145] The 2021 IC Rule and the 2024 IC Rule are clear products of this longstanding discussion.[146] At the heart of both the 2021 IC Rule and the 2024 IC Rule, the question remains the same: whether a worker is economically dependent on an employer.[147] The two administrations and their respective rules, representing two different political parties, disagree on where to draw the line on answering this question.[148] The Trump Administration's DOL took a more employer-

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[142] *Id.* at 1664.

[143] *Id.* at 1666.

[144] Eva Bertram, *Whose Work Counts? Congressional Republicans and the Battle over Employment Status, 1947–48*, 37 STUDS. IN AM. POL. DEV. 164, 164 (2002).

[145] *Id.* The Democratic and Republican parties have been in contest for defining an "employee" since the New Deal Era. *Id.* Democrats, historically, have wanted to expand the definition of an employee to provide greater eligibility under New Deal social programs. *Id.* Conversely, Republicans sought to give employers the discretion in classifying workers, restricting the expansion of the "employee" definition. *Id.*

[146] Telford, *supra* note 97 ("Presidential administrations have spent the past decade playing legal tug-of-war over the [independent contractor and employee] distinction.").

[147] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1171 (Jan. 7, 2021) (codified at 29 C.F.R. pts. 780, 788, 795); *see also* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1639 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[148] Wood, *supra* note 29.

friendly approach, while the Biden Administration's DOL has taken preference to employee classification.[149]

It seems that political views can provide ammunition for these regulations. The political divide only makes defining an independent contractor more complicated and further proves the need for certainty. Determining who is, or who is not, protected under the FLSA should not be at the expense of who is in command from the Oval Office. The likelihood that political parties will fail to reach a consensus only continues this back-and-forth definition of an independent contractor, exacerbates the confusion that already exists among the workforce, and creates costly and burdensome results for employers to bear. While the disposition of this question rested solely with the judicial system until the 2021 IC Rule, the DOL now has an obligation to find a workable and consistent test for the future.

To make matters more confusing, the federal landscape is not the only forum where worker classification issues arise.[150] States can also pass legislation on worker classification and develop tests for determining whether a worker will be an employee.[151] Ideally, having one bright-line test for all employers to follow would prove the most helpful. Unfortunately, ideals are not always attainable, and this is an impracticable solution for a nation with great power reserved to the states.[152] As previously mentioned, states have every right to enact labor laws so long as they do not weaken employee protections under the FLSA.[153] This right, rooted in our country's federalism principles, includes individual states' abilities to adopt more stringent standards for classifying workers.[154] While still appropriately reserving to states the power to determine who is an employee or an independent contractor, federal law must provide a clear baseline. If federal law is inconsistent or changing with every presidential election, states may never know how far they can

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[149] *Id.*

[150] For a quick overview of how states have implemented their own state-level wage and hour provisions, *see Businesses Will Struggle to Classify Workers as Independent Contractors Thanks to New DOL Rule*, *supra* note 102.

[151] California enacted an "ABC test" to make worker classification determinations. Assemb. B. 5, 2019−20 Leg. Reg. Sess. (Cal. 2019) (codified at Cal. Labor Code § 2750.3); *see also* Dynamex v. Superior Ct., 416 P.3d 1, 34 (Cal. 2018). This test presumptively classifies a worker as an employee unless the employer can satisfy certain requirements. *Id.* This test is restrictive and favors employee classification. *Id.*

[152] Wood, *supra* note 29.

[153] CONG. RSCH. SERV., 2023 FLSA OVERVIEW, *supra* note 10.

[154] *See* Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1171 (Jan. 7, 2021) (codified at 29 C.F.R. pts. 780, 788, 795) (noting that NPRM commenter, Truckload Carriers Association, understands the ability for states to adopt a more stringent standard than the federal government).

depart from the DOL's rule to ensure their state-level legislation does not weaken FLSA protections.

It is impossible to theorize what the future of worker classification determinations will look like. If politics continue to play a role, an incoming administration may replace the 2024 IC Rule with yet another new standard, and we will be discussing those federal and state implications next. While the 2024 IC Rule understandably focuses on the heightened need for employee protection under the FLSA, administrations should apply this protection in a manner that leads to accurate and consistent outcomes. At the end of the day, workers and employers alike deserve peace of mind when it comes to the security of their federal rights and predictability regarding reclassification.

VI. CONCLUSION

Where does the 2024 IC Rule leave the workforce? It is not exactly clear. It appears that this rule may be replaced if (and when) the political climate shifts in the future, leaving employers and workers in constant anticipation of the next flip. The need for clearer guidance will only grow as the independent contracting industry continues to flourish. Even if the 2024 IC Rule favors employees and promotes greater protections for workers under the FLSA, the rule will not eliminate the risk of misclassification. The misclassification of workers as employees could force some companies to upend their business model in an attempt to avoid burdensome costs associated with classifying their workers as employees.[155] Because both the 2021 IC Rule and the 2024 IC Rule aim to answer the same economic dependence question, it is the government's obligation to find middle ground. Accuracy should not be influenced by shifts in the political climate. This long history of tension should be about affording the proper individuals protection under the FLSA while allowing other individuals the freedom to remain as independent contractors. Therefore, the DOL has a long way to go before establishing a test that consistently leads to this desired outcome.

[155] Daniel Wiessner, *How a U.S. Rule on Independent Contracting Will Affect Workers, Businesses*, REUTERS (Oct. 12, 2022, 12:16 PM), https://www.reuters.com/markets/us/how-us-rule-independent-contracting-will-affect-workers-businesses-2022-10-11/ [https://perma.cc/N2V6-LS7Q].