Chapter 3

THE EMPLOYMENT RELATIONSHIP

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I. Overview

Workers are covered by the Fair Labor Standards Act (FLSA) if an employment relationship exists between the worker and the entity or individual for whom they are performing work.[[1]](#footnote-2) To determine if an employment relationship exists, courts will look at the “specific exigencies” of the relationship between a principal and a worker, and not simply at any one of the common law factors taken in isolation. This “economic reality” test, first articulated by the Supreme Court in *United States v. Silk*,[[2]](#footnote-3) is discussed in Section III.A [Employee Status; Employee or Independent Contractor] of this chapter. This chapter reviews the various articulations of the economic reality test applied by the courts and by the Department of Labor to determine whether individuals are employees entitled to the protections of the FLSA, which arises often in cases where there is a question whether the worker is an employee or instead an independent contractor. This chapter also evaluates how courts determine whether volunteers, trainees, interns, students, patient-workers, prisoners, clergy, undocumented workers, owners, and student-athletes are employees under the FLSA.

This chapter further examines the factors to consider in determining whether multiple entities are “joint employers” who may be jointly and severally liable for FLSA violations, and whether and how corporate officers, owners or shareholders, or managers may be deemed employers subject to FLSA liability.

In the Migrant and Seasonal Agricultural Worker Protection Act (MSPA),[[3]](#footnote-4) the definition of “employ” is the same as the definition of “employ” under the FLSA. Moreover, the MSPA regulations[[4]](#footnote-5) make it clear that the terms “employer” and “employee” are to have the same meaning under both statutes.[[5]](#footnote-6) MSPA’s adoption of the FLSA definition of employment “was deliberate and done with the clear intent of adopting the ‘joint employer’ doctrine as a central foundation of this new statute … .”[[6]](#footnote-7) This treatise does not address MSPA, its regulations, or its case law, but we call it to the reader’s attention because many joint employer cases under MSPA are analyzed in the same manner as joint employment cases under the FLSA.

II. The Economic Reality Test

The definition of “employee” under the FLSA, which is derived from the child labor statutes,[[7]](#footnote-8) is extremely broad.[[8]](#footnote-9) The FLSA defines an employee as “any individual employed by an employer.”[[9]](#footnote-10) An “employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee.”[[10]](#footnote-11) The “verb ‘employ’ [is defined] expansively to mean ‘suffer or permit to work.’”[[11]](#footnote-12) As the Supreme Court has noted, this definition “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of agency principles.”[[12]](#footnote-13) Thus, courts may use different tests—in particular, the common law test—to determine whether an individual is an employee or independent contractor with respect to statutes other than the FLSA, including those often interpreted in congruence with the FLSA, such as the Age Discrimination in Employment Act (ADEA) or the Family Medical Leave Act (FMLA).[[13]](#footnote-14)

The difference between the FLSA employment relationship and the common law employment relationship arises from the FLSA statement that “*[E]mploy* includes to suffer or permit to work.” … [W]hile “to permit” requires a more positive action than “to suffer,” both terms imply much less positive action than required by the common law.[[14]](#footnote-15)

Although the Supreme Court’s interpretation of these definitions has been expansive, it has applied more specific limitations with respect to special classes of individuals (e.g., trainees). As described in detail in Section III.A [Employee Status; Employee or Independent Contractor] of this chapter, the inquiry into whether an employer-employee relationship exists is not limited by contractual terminology or by traditional common law agency and vicarious tort liability concepts of “employee” or “independent contractor,” nor is it determined exclusively by an employer’s control over a worker. Instead, the economic realities of the relationship are primary: the focal point in determining whether a worker is an employee or an independent contractor 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.”[[15]](#footnote-16)

Before it set forth an employment status test under the FLSA, the Supreme Court, in *NLRB v. Hearst Publications*,[[16]](#footnote-17) focused on the economic relationship of the parties to determine employee coverage under the National Labor Relations Act (NLRA). There the Court rejected the common law right-to-control test as the standard by which to determine employee status for NLRA purposes. The Court reasoned that coverage under the NLRA was to be evaluated with a view toward the evils the statute was designed to eradicate: labor disputes, industrial strife, and inequality of bargaining power in controversies over wages, hours, and working conditions. The Court concluded that, when “the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation,” the relation may be brought within the statute’s protections.[[17]](#footnote-18)

In *United States v. Silk*,[[18]](#footnote-19) the Court held that the *Hearst* rule also applied in determining whether particular workers were employees within the meaning of the Social Security Act (SSA). At issue in the case was whether unloaders of coal were independent contractors or employees. The Court wrote:

Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find 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. No one is controlling nor is the list complete. These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but … Silk [is the director] of their businesses. …

[The lower court has] determined that these workers are independent contractors. … [W]e cannot agree that the unloaders in the *Silk* case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. 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. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases.[[19]](#footnote-20)

In *Rutherford Food Corp. v. McComb*,[[20]](#footnote-21) decided the same day as *Silk*, the Supreme Court applied the same standard to determine employment status under the FLSA. The Court acknowledged that the FLSA

is a part of the social legislation of the 1930’s of the same general character as the National Labor Relations Act … and the Social Security Act … [and that] [d]ecisions that define the coverage of the employer-[e]mployee relationship under [those acts] are persuasive in the consideration of a similar coverage under the [FLSA].[[21]](#footnote-22)

In *Rutherford*, a slaughterhouse employed an experienced boner to assemble a group of skilled boners to do the boning at the slaughterhouse, and paid the experienced boner per hundredweight of boned beef, who in turn paid the boners a flat amount per hundredweight.[[22]](#footnote-23) The boners used their own tools, worked on the slaughterhouse’s premises using its equipment, and were an integral part of an interdependent sequence of meat processing operations.[[23]](#footnote-24) In holding that the boners were employees of the slaughterhouse rather than independent contractors, the Court stated:

We think … that the determination of the relationship does not depend on … isolated factors but rather upon the circumstances of the whole activity. Viewed in this way, the workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of [the slaughterhouses] were used for the work. The group had no business organization that could or did shift as a unit from one slaughter-house to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor.[[24]](#footnote-25)

Although the Court did not expressly refer to the “economic reality” of the putative employees’ work circumstances, it made clear that employee status under the FLSA would be determined by the specific circumstances with which a worker was faced and not simply by any one of the common law factors taken in isolation, including right of control.[[25]](#footnote-26)

In *Bartels v. Birmingham*,[[26]](#footnote-27) decided shortly after *Silk* and *Rutherford*, the Supreme Court noted that, although control is characteristically associated with the employer-employee relationship, “in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”[[27]](#footnote-28)

Although Congress subsequently responded to the Court’s decisions in *Hearst* and *Silk* by amending the definitions of “employee” in the NLRA[[28]](#footnote-29) and the SSA[[29]](#footnote-30) to affirm that the usual common law principles determined employee status under those statutes, Congress did not alter the FLSA definition of “employee” in response to the *Rutherford* decision.

The Supreme Court in 1961 acknowledged the continuing application of the economic reality test to FLSA cases in *Goldberg v. Whitaker House Cooperative*,[[30]](#footnote-31) in which it found that homeworker-members of a cooperative that made and sold knitted and embroidered goods were employees of the cooperative.[[31]](#footnote-32)

More recently, in addressing the joint employer issue, courts have applied the *Rutherford* analysis and used varying versions of an economic reality test to determine joint employer status. See discussion of such cases in Section IV.A [Employer Status; Joint Employers] of this chapter. Similarly, courts have applied some combination of the *Silk* and/or *Rutherford* factors to determine whether individuals are employees covered by the FLSA or are instead independent contractors. See discussion of such cases in Section III.A [Employee Status; Employee or Independent Contractor] of this chapter.

III. Employee Status

A. Employee or Independent Contractor

1. Court Decisions: General Principles

The economic reality test is most often applied in determining whether a particular worker is an “employee” covered by the FLSA or is instead an independent contractor. Contractual or other labeling of a worker as an independent contractor or employee is not determinative of whether a worker is an employee under the FLSA.[[32]](#footnote-33) Nor do common law standards apply.[[33]](#footnote-34) An employer’s own treatment of some workers as employees is highly probative evidence of an employer-employee relationship with similarly situated workers who have been classified as independent contractors.[[34]](#footnote-35) Conversely, the fact that a worker is an acknowledged employee with respect to one job for a company does not preclude that same worker from working in a different role as an independent contractor.[[35]](#footnote-36)

When a putative employer asserts that the individual involved is an independent contractor rather than an employee, courts review the totality of the circumstances in determining the economic reality of the relationship. As discussed earlier, the Supreme Court, in *United States v. Silk*,[[36]](#footnote-37) a non-FLSA case, found the following factors to be relevant considerations in determining employee status:

(1) degree of control;

(2) opportunity for profit and loss;

(3) investment in facilities;

(4) permanency of the relationship; and

(5) required skill.[[37]](#footnote-38)

Most courts use these or similar factors, with several adding a sixth factor—i.e.,whether the service rendered is an integral part of the alleged employer’s business—to determine whether an individual is an employee covered by the FLSA or an independent contractor who is not covered.[[38]](#footnote-39) Most appellate courts have found that while these factors “serve as guides, the overarching focus of the inquiry is economic dependence”—that is, whether the individual is “in business for himself” or instead is “dependent upon finding employment in the business of others.”[[39]](#footnote-40) “Economic dependence” does not mean that the employee must rely on the employer for subsistence, only that the employee relies on the employer for continued employment.[[40]](#footnote-41)

Judicial interpretations of the “economic reality” factors used to determine whether an individual is an employee entitled to the protections of FLSA are discussed below.

a. Control

Under the economic reality test, one of the factors is the degree of control over those performing the work. Appellate courts have explained that “[c]ontrol is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.”[[41]](#footnote-42) As the Eleventh Circuit explained: “Business needs cannot immunize employers from the FLSA’s requirements. If the nature of a business requires a company to exert control over workers … then that company must hire employees, not independent contractors.”[[42]](#footnote-43) Thus, when an employer imposes controlling policies to comply with regulations, rather than of its own volition, the worker so controlled is an employee.[[43]](#footnote-44) By contrast, independent contractor status is suggested where the “fundamental task” of the work is “largely at the discretion” of the worker.[[44]](#footnote-45)

Indicia of control includes the following: evidence that reflects control over the manner and means by which work is performed, such as evidence of work direction;[[45]](#footnote-46) evidence concerning responsibility for such things as paying real and personal property taxes,[[46]](#footnote-47) setting prices,[[47]](#footnote-48) and advertising;[[48]](#footnote-49) and evidence of payment arrangements.[[49]](#footnote-50) Direction as to the ultimate result to be achieved, however, is not the type of “control” that indicates employee status.[[50]](#footnote-51) Similarly, workers’ theoretical ability to exercise control will not transform them into independent contractors where in reality they do not exercise control.[[51]](#footnote-52)

Frequent supervision and oversight, as well as the requirement that an individual report to a superior, favors a finding of employment status.[[52]](#footnote-53) However, “an employer does not need to look over his workers’ shoulders every day in order to ­exercise control.”[[53]](#footnote-54) Nevertheless, contacts that are limited to sporadic and occasional suggestions pertaining to the manner and means of work tend to indicate that a worker is not an employee.[[54]](#footnote-55) The alleged independent contractor’s control must be “over a meaningful part of the business”; a “lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence.”[[55]](#footnote-56)

A flexible work schedule alone will not make an individual an independent contractor rather than an employee,[[56]](#footnote-57) but the absence of set hours and the freedom to leave an employer’s premises at will generally weigh in favor of a finding that there is no employment relationship.[[57]](#footnote-58) Employer control over scheduling and vacation requests are also factors that are considered when evaluating control.[[58]](#footnote-59)

Whether the worker is free to provide services to other entities is another factor that is pertinent to the control analysis.[[59]](#footnote-60) Even where workers transfer their labor between different employers, unless they have “specialized and widely-demanded skills,” such transfers may reflect dependence on finding work “in the business of others.”[[60]](#footnote-61)

The existence of a noncompete clause in a contract may be indicia of control over a worker that weighs in favor of employee status.[[61]](#footnote-62) However, a noncompete clause in and of itself is not sufficient to establish employee status for purposes of FLSA coverage.[[62]](#footnote-63)

Where government regulates the individual’s work, such regulatory control does not suggest employee status.[[63]](#footnote-64)

b. Opportunity for Profit and Loss

In considering whether a worker has an opportunity for profit or loss, the focus is whether the worker’s managerial skill can affect the worker’s profit or loss.[[64]](#footnote-65) This is to be   
distinguished from the opportunity to increase earnings primarily by working more hours or more efficiently.[[65]](#footnote-66) Where determinants of profit and loss are established unilaterally by the putative employer (e.g., through advertisements, location, and prices), courts typically will find that an employment relationship exists,[[66]](#footnote-67) unless outweighed by other factors.[[67]](#footnote-68) Minor additional income from work not connected with the work of the alleged employer has been deemed irrelevant.[[68]](#footnote-69) The fact that an individual bears no risk of loss weighs in favor of employee status.[[69]](#footnote-70) Bearing minor losses, such as those caused by bad checks or minor thefts, weighs little on non-employee status.[[70]](#footnote-71) Workers’ opportunities for profit or loss by investing in the company may signify that they are in business for themselves and are not employees.[[71]](#footnote-72)

c. Investment

Substantial investments in capital expenditures weigh against employment status,[[72]](#footnote-73) but smaller ones, such as tools and labor itself, typically do not.[[73]](#footnote-74) Where an employer has provided a significant amount of capital and the worker has provided only a minimal investment, an employer-employee relationship may be found, whereas significant capital outlays by the alleged employee may signal independent contractor status.[[74]](#footnote-75) A worker’s required “investment” in tools or equipment sold by the alleged employer,[[75]](#footnote-76) or use of equipment already purchased for personal use,[[76]](#footnote-77) may not indicate independent contractor status. Moreover, the mere purchase of accounts receivable generated by goods or services provided on a cyclical basis will not be enough to favor a finding of economic independence.[[77]](#footnote-78) Where the work at issue does not require much capital investment, the investment factor may not be relevant.[[78]](#footnote-79)

d. Permanency

Where written agreements are routinely renewed, this suggests more permanency, and a finding of employee status is more likely.[[79]](#footnote-80) Similarly, engagement over long periods of time is reflective of permanency.[[80]](#footnote-81) “If a worker has multiple jobs for different companies, then that weighs in favor of finding that the worker is an independent contractor.”[[81]](#footnote-82) However, the transitory nature of certain work relationships will not necessarily preclude a finding of an employment relationship where transience is the nature of the industry.[[82]](#footnote-83) Some courts have found, with respect to seasonal jobs, that ­employment for the whole season exemplifies the permanence of an employment relationship,[[83]](#footnote-84) and others have found annual return to seasonal employment indicative of employee status,[[84]](#footnote-85) whereas at least one court has found annual return to seasonal employment equally indicative of a mutually satisfactory contractor arrangement.[[85]](#footnote-86)

e. Specialized Skill

A combination of skill and initiative may support an independent contractor conclusion.[[86]](#footnote-87) However, possession of specialized skills is not, alone, dispositive of employee status, and a variety of skilled workers who do not exercise significant initiative in locating work opportunities have been held to be employees under the FLSA.[[87]](#footnote-88) In analyzing whether a worker possesses specialized skills, courts may look at whether training, certification, or testing is required.[[88]](#footnote-89) The development of occupational skills on the job has been deemed less probative of economic independence than the possession of skills or previous experience when hired.[[89]](#footnote-90) Business sense, sales ability, personality, and good rapport with customers have been equated with “efficiency” and not with the initiative and managerial skills that are the hallmark of workers in business for themselves.[[90]](#footnote-91) Likewise, performance of tasks that are routine in nature and are part of normal business operations will favor employee status.[[91]](#footnote-92) Performance of general labor or other work that requires little if any training or skill may also be regarded as evidence that a worker is an employee.[[92]](#footnote-93)

f. “Integral Part of Employer’s Operation”

Although it is not one of the original *Silk* factors,[[93]](#footnote-94) courts often look to whether the work constitutes an integral part of the putative employer’s operation to find employee status.[[94]](#footnote-95) This factor derives from the Supreme Court’s finding in *Rutherford* [[95]](#footnote-96) that

[t]he operations at the slaughterhouse constitute an integrated economic unit devoted primarily to the production of boneless beef. Practically all of the work entering into the unit is done at one place and under one roof. … The boners work alongside admitted employees of the plant operator at their tasks. The task of each is performed in its natural order as a contribution to the accomplishment of a common objective.[[96]](#footnote-97)

The Supreme Court agreed with the circuit court’s

characterization of their work as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. 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.[[97]](#footnote-98)

For this reason, courts have found that cake decorators at a cake shop,[[98]](#footnote-99) nurses at a nurse’s registry,[[99]](#footnote-100) and installation technicians for a telecommunications installation and repair company[[100]](#footnote-101) are employees rather than independent contractors.

2. Illustrative Cases

Courts have found an employment relationship under the FLSA, rather than one of independent contractor status, regarding a diverse range of workers, and have found no employment relationship under the FLSA regarding an equally diverse range of workers. Cases in which an employment relationship has been found are set forth in Section III.A.2.a [Employee Status; Employee or Independent Contractor; Illustrative Cases; Cases Finding Employee Status], and cases in which no employment relationship has been found are addressed in Section III.A.2.b [Employee Status; Employee or Independent Contractor; Illustrative Cases; Cases Finding Independent Contractor Status] below. Because of the fact-intensive nature of the economic realities test, the same or similarly labeled job categories where courts have found an employment relationship have also been found not to have an employment relationship. For example, as set forth in the next two subsections, courts have found some delivery drivers, cable splicers, security guards, janitors, or migrant pickle harvesters to be employees, whereas other delivery drivers, cable splicers, security guards, janitors, and migrant pickle harvesters are not employees.[[101]](#footnote-102)

a. Cases Finding Employee Status

Jobs where an employment relationship has been found include courier and pick-up and delivery drivers;[[102]](#footnote-103) grocery delivery personnel;[[103]](#footnote-104) chicken catchers and their crew leaders;[[104]](#footnote-105) insurance sales workers;[[105]](#footnote-106) temporary workers;[[106]](#footnote-107) migrant farmworkers[[107]](#footnote-108) and migrant pickle harvesters; exotic dancers at a night club;[[108]](#footnote-109) locker room attendants;[[109]](#footnote-110) real estate salespersons;[[110]](#footnote-111) night dispatchers for ambulance services;[[111]](#footnote-112) attendants at self-service laundromats;[[112]](#footnote-113) security guards;[[113]](#footnote-114) wood workers and truck drivers hauling logs for lumber companies;[[114]](#footnote-115) waiters and waitresses;[[115]](#footnote-116) hotel card room supervisors;[[116]](#footnote-117) harvesters;[[117]](#footnote-118) cake decorators paid by the cake;[[118]](#footnote-119) employment agency employment counselors;[[119]](#footnote-120) nurses of health care services or temporary agencies working simultaneously with several different parties;[[120]](#footnote-121) licensed practical nurses[[121]](#footnote-122) and nursing assistants;[[122]](#footnote-123) personal care and home health aides;[[123]](#footnote-124) station operators for gas distributors;[[124]](#footnote-125) parking lot valets;[[125]](#footnote-126) janitorial and building maintenance workers;[[126]](#footnote-127) installers of doors, windows, siding, and drapery;[[127]](#footnote-128) cosmetologists and manicurists;[[128]](#footnote-129) pizza delivery persons;[[129]](#footnote-130) taxicab drivers providing paratransit services and limousine drivers;[[130]](#footnote-131) special transportation services drivers providing non-emergency transportation for older people and people with disabilities;[[131]](#footnote-132) lawn maintenance workers;[[132]](#footnote-133) construction workers and manual laborers;[[133]](#footnote-134) oilfield workers;[[134]](#footnote-135) housecleaners;[[135]](#footnote-136) computer systems support managers;[[136]](#footnote-137) bail bondsmen;[[137]](#footnote-138) tow truck drivers;[[138]](#footnote-139) call center employees;[[139]](#footnote-140) welders working on a project by project basis;[[140]](#footnote-141) cable and satellite installers,[[141]](#footnote-142) psychotherapists,[[142]](#footnote-143) website content writers[[143]](#footnote-144) and software engineers working for staffing agencies.[[144]](#footnote-145)

b. Cases Finding Independent Contractor Status

Courts have found the absence of an employment relationship under the FLSA with regard to an equally diverse range of workers. Jobs where the independent contractor classification was found proper under the FLSA employee status test include outdoor playground equipment salespersons;[[145]](#footnote-146) delivery drivers, couriers, and truck drivers;[[146]](#footnote-147) taxicab and limo drivers;[[147]](#footnote-148) security officers;[[148]](#footnote-149) computer programmers;[[149]](#footnote-150) carpet layers and floor installers;[[150]](#footnote-151) barbers, hairdressers, cosmetologists, and manicurists;[[151]](#footnote-152) welders working on a project-by-project basis;[[152]](#footnote-153) distributors of telephone research cards to homeworkers performing telephone research;[[153]](#footnote-154) assistants to route salesmen of bottling companies;[[154]](#footnote-155) porter-janitors of helicopter companies;[[155]](#footnote-156) janitors;[[156]](#footnote-157) carpenters;[[157]](#footnote-158) recipients of benefits under state public assistance plans;[[158]](#footnote-159) insurance claims adjusters;[[159]](#footnote-160) insurance agents;[[160]](#footnote-161) real estate agents;[[161]](#footnote-162) ultrasound technicians;[[162]](#footnote-163) gate attendants, drilling consultants, and directional drillers for oilfields;[[163]](#footnote-164) tennis umpires;[[164]](#footnote-165) financial consultants;[[165]](#footnote-166) child care and home care providers;[[166]](#footnote-167) writers;[[167]](#footnote-168) part-time instructors;[[168]](#footnote-169) political canvassers;[[169]](#footnote-170) process servers;[[170]](#footnote-171) service providers operating through a virtual marketplace company;[[171]](#footnote-172) directors of business development;[[172]](#footnote-173) migrant pickle harvesters;[[173]](#footnote-174) exotic dancers;[[174]](#footnote-175) and satellite and cable installers.[[175]](#footnote-176)

***3. Department of Labor Guidance***

The multifactor tests described in detail above have been developed by courts over the past several decades, but the DOL has provided guidance as well, although DOL guidance on this issue has shifted with changing political administrations. In 1997, the DOL issued Fact Sheet #13, titled “Employment Relationship Under the Fair Labor Standards Act (FLSA),” which states that an employee, as distinguished from a person engaged in a business of their own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which they serve. [[176]](#footnote-177) A 2008 fact sheet set forth seven factors the Supreme Court has considered in evaluating the “economic realities” to determine employee status, the six factors generally cited by the U.S. Courts of Appeals plus one additional factor, the “degree of independent business organization and operation.”[[177]](#footnote-178) In 2015, the Wage and Hour Division (WHD) issued an administrator’s interpretation, or AI, that analyzed and summarized the case law that differentiated employees and independent contractors.[[178]](#footnote-179) That AI was withdrawn in 2017.[[179]](#footnote-180) In 2019, the Wage and Hour Administrator issued an opinion letter that relied on a six-factor test derived from the Supreme Court’s opinions in *Silk* and *Rutherford* to determine that individual service providers were not employees of a virtual marketplace company that provided a platform through which consumers could engage the service providers.[[180]](#footnote-181) That opinion letter was withdrawn on February 19, 2021.[[181]](#footnote-182)

On January 7, 2021, the DOL published a final rule, “Independent Contractor Status Under the Fair Labor Standards Act,”[[182]](#footnote-183) with an effective date of March 8, 2021, but then withdrew it on May 6, 2021.[[183]](#footnote-184) A district court found this withdrawal unlawful under the Administrative Procedure Act,[[184]](#footnote-185) and the Department of Labor appealed to the Fifth Circuit, which vacated the district court’s decision as moot in light of a new 2024 regulation (discussed below).[[185]](#footnote-186)

The DOL issued a new final rule, titled “Employee or Independent Contractor Classification under the Fair Labor Standards Act,”[[186]](#footnote-187) on January 10, 2024, with an effective date of March 11, 2024, which officially withdrew and replaced the 2021 regulation.[[187]](#footnote-188) The Department characterized this new regulation as a “return to a totality-of-the-circumstances analysis” and explained its view “that this approach is the most beneficial because it is aligned with the Department’s decades-long approach (prior to the 2021 IC Rule) as well as with federal appellate case law, and is more consistent with the Act’s text and purpose as interpreted by the courts.”[[188]](#footnote-189)

The regulation explains that “economic dependence” is the “ultimate inquiry,”[[189]](#footnote-190) and provides that “[a] determination of whether a worker is an employee or independent contractor under the Act focuses on the economic realities of the worker's relationship with the worker's potential employer and whether the worker is either economically dependent on the potential employer for work or in business for themself.”[[190]](#footnote-191) The regulation sets forth an “Economic reality test to determine economic dependence,”[[191]](#footnote-192) which consists of six factors to be used as “tools or guides to conduct a totality-of-the-circumstances analysis,”[[192]](#footnote-193) noting that “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 relationship.”[[193]](#footnote-194)

The economic reality factors under the regulation are:

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

(2) Investments by the worker and the potential employer. This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs to a worker of tools and equipment to perform a specific job, costs of workers’ labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker’s 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 potential employer’s investments in its overall business. The worker’s investments need not be equal to the potential employer’s investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

(3) Degree of permanence of the work relationship. This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself 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, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative.

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

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

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

(7) Additional factors. Additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the potential employer for work.[[194]](#footnote-195)

Several pending lawsuits seek to enjoin the Employee or Independent Classification regulation.[[195]](#footnote-196)

B. Volunteers

This section of the chapter discusses volunteers for nonprofit corporations and private companies. When Congress amended the FLSA in 1985, to cover certain classes of public employees, the legislation provided that individuals who perform volunteer services for a public agency that is a state or a political subdivision of a state will not be regarded as “employees” under the statute if certain conditions are met.[[196]](#footnote-197) Chapter 11, Government Employment, Section II.D [Coverage Issues; Volunteers] treats the issue of volunteering for a public agency.

The leading private nonprofit sector case that addresses the issue of volunteers is *Tony & Susan Alamo Foundation v. Secretary*.[[197]](#footnote-198) In *Alamo*, the Secretary of Labor sued a nonprofit religious institution that operated commercial businesses staffed by “associates,” most of whom were former “drug addicts, derelicts, or criminals” who were undergoing rehabilitation by the defendant institution.[[198]](#footnote-199) These associates denied that they were employees and instead claimed to be “volunteers” in the organization. The Supreme Court, stating that the test was one of “economic reality,” noted that the associates were entirely dependent on the organization for long periods of time (in some cases for several years), and upheld the lower court’s finding that the associates had an expectation of compensation, even if implied, because they must have expected to receive benefits in exchange for their services—  
notwithstanding the associates’ protests against coverage under the FLSA.[[199]](#footnote-200) It held that receipt of compensation in the form of benefits was immaterial because the benefits were wages in another form.[[200]](#footnote-201)

Following the *Alamo* decision, several lower courts examining the economic reality of the situation have determined that alleged volunteers were in fact employees.[[201]](#footnote-202) For example, the District of Columbia Circuit held that individuals who consigned goods to a for-profit organization that held large consignment sales, but worked as salespeople in order to be given earlier access to the sale, were employees rather than volunteers based on the totality of the circumstances, including an expectation of compensation (early sales access and an offer to pay $8 per hour if early sales access was not available) for their services, the degree of control exercised by the putative employer, and the fact that their work was integral to the putative employer’s business.[[202]](#footnote-203)

Other courts have found that individuals were “volunteers” rather than employees even with respect to for-profit companies.[[203]](#footnote-204) The Sixth Circuit relied on *Alamo* to hold that church members who worked at a for-profit restaurant owned and operated by a nonprofit church were volunteers rather than employees because they did not expect compensation for their work.[[204]](#footnote-205) In so doing, the court rejected the DOL’s argument of “spiritual coercion,” noting that it was no substitute for economic coercion.[[205]](#footnote-206) An employer that encourages, but does not require, community volunteerism need not pay employees for the time they spend volunteering for unrelated entities.[[206]](#footnote-207)

However, the DOL takes the position that, in general “individuals may not volunteer services to private sector for profit employers.”[[207]](#footnote-208) The DOL does agree that there can be activities performed by employees that are not compensable if they are performing “civic or charitable work,” noting:

Time spent in work for public or charitable purposes at the employer’s request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee’s normal working hours is not hours worked.[[208]](#footnote-209)

The DOL’s *Field Operations Handbook* states that individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable, and similar nonprofit corporations that receive their services.[[209]](#footnote-210) The *Field Operations Handbook* also explains that such service “is not sufficient to create an employee-employer relationship.”[[210]](#footnote-211) The *Field Operations Handbook* also provides examples of other volunteers who are not deemed employees under the FLSA: students who volunteer at nursing homes and hospitals, parents who assist at their children’s schools, and camp counselors who participate in youth programs.[[211]](#footnote-212)

From 2001 to 2008, and again from 2018 to 2019, the WHD opined on the volunteer status of individuals who perform various services. It found volunteer status present in the following circumstances:

* youth services club employees when chaperoning cultural and sporting field trips or bingo games outside working hours;[[212]](#footnote-213)
* volunteer work in a Habitat for Humanity project sponsored but not required by the employer;[[213]](#footnote-214)
* volunteer “peer reviewers” who performed accreditation evaluations for membership-based religious organization;[[214]](#footnote-215)
* the time university employees spent outside normal working hours volunteering at an annual run hosted by the university, unless the volunteer work was similar to their regular work duties;[[215]](#footnote-216)
* technology and media teacher who volunteered as a school baseball coach;[[216]](#footnote-217)
* employee’s time spent participating in for-profit employer’s optional volunteer program, which could result in bonuses awarded to certain employees, because the program was charitable and participation was voluntary;[[217]](#footnote-218)
* members of a religious organization dedicated to sharing “in a community of goods” who worked for onsite, nonprofit ventures that generated income because the employees chose to donate their services to the nonprofit free of coercion and without any expectation of compensation, and the community provided for all of their needs;[[218]](#footnote-219) and
* executives who traveled from home to serve as volunteer international credentialing graders for a nonprofit organization once per year for no more than two weeks but who remained highly compensated by their usual employers and were not paid fees for the grading service, notwithstanding that the nonprofit reimbursed their travel, lodging, meals, and other expenses incidental to volunteering.[[219]](#footnote-220)

The DOL found volunteer status not present in the following scenarios:

* an individual employed to do computer-related work who “volunteered” to repair computers;[[220]](#footnote-221)
* nurses performing community service activities under the direction of their employer;[[221]](#footnote-222) and
* individuals volunteering time for a volunteer fire company when the nonprofit fire company contracted those individuals’ services to a for-profit company.[[222]](#footnote-223)

The DOL has opined that individuals who are engaged in activities that are an integral part of a for-profit employer’s business, even if performed for a charitable purpose, will ordinarily be deemed employees rather than volunteers.[[223]](#footnote-224) In response to a request from a city regarding the applicability of the FLSA to volunteering activities of certain public agency firefighters, the DOL also took the opportunity to address volunteers in the private sector, stating that, “[u]nder the FLSA, individuals may not volunteer services to private sector for profit employers.”[[224]](#footnote-225)

In 1998, Congress amended the FLSA by enacting the Amy Somers Volunteers at Food Banks Act[[225]](#footnote-226) to exclude from the definition of “employee” any individuals who volunteer at private nonprofit food banks for humanitarian purposes (even if they receive groceries from the food banks). The Tenth Circuit interpreted “volunteer” as “done of one’s own free will” and found that children who were coerced to pick pecans for an alleged food bank were not “volunteers” within meaning of the food bank exception to the FLSA.[[226]](#footnote-227)

C. Trainees, Interns, and Students[[227]](#footnote-228)

1. Generally

The Supreme Court held in 1947 that individuals may work as “trainees” and not be “employees” under the FLSA.[[228]](#footnote-229) At issue before the Supreme Court in *Walling v. Portland Terminal Co.* were individuals who were being trained as railroad yard brakemen. Although they unquestionably worked in “the kind of activities covered by the Act,” they were found not to be “employees.”[[229]](#footnote-230) The trainees enrolled in a course lasting approximately seven or eight days, during which they did some actual work, under close supervision and without pay. If, after completion of the training period, the trainees obtained permanent employment with the railroad, they received a retroactive allowance of $4 for each day of the course; otherwise, they neither received nor expected any remuneration. The Court noted that even the FLSA’s broad definition of “employ” and “employee” “cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.”[[230]](#footnote-231) Considering that the trainees’ employment did not “contemplate compensation,” and accepting findings that the railroads received “no immediate advantage” from any work done by the trainees, the Court ruled that the trainees did not fall within the FLSA’s definition of “employee.”[[231]](#footnote-232)

As described below, courts and the DOL have applied the Supreme Court’s teachings in *Portland Terminal* to a wide variety of similar situations, including short-term trainees similar to those at issue in *Portland Terminal*, interns/externs, and students (including students at vocational schools). Courts’ analyses from one arena frequently carry over to another, so the practitioner is advised to review all three subsections (trainees, interns, students), as well as the discussion of volunteers and the Supreme Court’s *Alamo* decision above.[[232]](#footnote-233)

In 1964, the Fourth Circuit developed a set of tests from the language of *Portland Terminal* to determine if trainees were employees: (1) whether the trainee displaced regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any immediate benefit from the trainee’s work.[[233]](#footnote-234) The Fifth Circuit rejected this test because “the second part of this formulation in part begs the question: presumably if trainees ‘work,’ they are employees.”[[234]](#footnote-235)

In 1967, the DOL issued informal guidance on trainees as part of its *Field Operations Handbook*,and later revised the *Handbook* to include students.[[235]](#footnote-236) The guidance enumerated the six criteria that had been referenced in *Portland Terminal* and stated “if all six of the following criteria apply, the trainee and students are not employees within the meaning of the FLSA:”

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.

2. The training is for the benefit of the trainees or students.

3. The trainees or students do not displace regular employees, but work under close observation.

4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion operations may actually be impeded.

5. The trainees or students are not necessarily entitled to a job at the completion of the training period.

6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.[[236]](#footnote-237)

The DOL and some courts rely upon the specific factors set forth in *Portland Terminal*,[[237]](#footnote-238) whereas other courts focus on the spirit animating *Portland Terminal*, with most asking who is the “primary beneficiary” of the worker’s labor.[[238]](#footnote-239) In *Glatt v. Fox Searchlight Pictures, Inc.*,[[239]](#footnote-240) the Second Circuit established a seven-factor test to determine whether unpaid interns should be considered employees, and several courts refer to that test, not only with reference to unpaid interns, but also with respect to students at vocational schools[[240]](#footnote-241) and trainees.[[241]](#footnote-242) Still other courts have eschewed reliance on multi-factor tests to determine whether trainees, interns, and students are employees: The Tenth Circuit looks at the “totality of the circumstances”[[242]](#footnote-243) and the Seventh Circuit states that there is no “one-size-fits-all” test.[[243]](#footnote-244)

2. Trainees

Several courts have approved of and applied the DOL’s six-factor test to determine whether individuals are “employees” entitled to compensation under the FLSA or instead are non-covered “trainees.”[[244]](#footnote-245) Although the DOL takes the position that *all six criteria* must be satisfied for an individual to be considered a trainee, most courts do not interpret the criteria so rigidly, instead relying upon the totality of the circumstances and the economic realities of the parties’ relationship, focusing on the “primary beneficiary” question.[[245]](#footnote-246) Some courts continue to give substantial deference to the DOL criteria.[[246]](#footnote-247) For example, in *Donovan v. American Airlines*,[[247]](#footnote-248) the Fifth Circuit held that trainees at an airline’s school for reservation clerks and flight attendants were not employees under the FLSA because the airline received no immediate advantage from any work done by the trainees and because the trainees were not employees under each of the DOL’s six criteria.[[248]](#footnote-249)

Some courts have emphasized that the Supreme Court’s *Portland Terminal* decision focuses “principally on the relative benefits of the work performed by the purported employees” and that courts should “apply a primary benefit test to determine employment status.”[[249]](#footnote-250) Thus, the Eighth Circuit found that tax professionals who took required rehire classes during the off-season (when they were not formally employed) were not employees during that time period because H&R Block received “no immediate advantage” from the rehire training, where the tax professionals did not prepare tax returns, complete any other work for clients, or displace regular employees.[[250]](#footnote-251) The Eighth Circuit found “further support” for its decision based on the six-factor test contained in the *Field Operations Handbook*.[[251]](#footnote-252)

In determining whether trainees have provided an immediate benefit to an employer by engaging in productive work for purposes of applying the DOL six-factor test or engaging with *Portland Terminal*, courts have held that trainees are employees when the employer’s training consists merely of supervising trainees as they carry out employee duties.[[252]](#footnote-253) If regular employees receive assistance from the trainees during the training period, the employer may be deemed to be the primary beneficiary of that training.[[253]](#footnote-254) In some circumstances, however, performance of duties by trainees that does not relieve the need for full involvement of the personnel that regularly perform those duties does not constitute productive work.[[254]](#footnote-255)

Although not dispositive, agreements between trainees and employers that trainees are not to be paid for their time and that no employment relationship exists by entering training have been found to be material insofar as they show the trainees’ understanding.[[255]](#footnote-256)

Whether training is similar to vocational school training is determined by comparisons with curricula at educational institutions such as community colleges and at similar programs within particular industries; whether there is emphasis on the particular employer’s practices is irrelevant as long as the training is transferable within such industries.[[256]](#footnote-257)

3. Interns and Externs

In 2010, the DOL published Fact Sheet #71 addressing unpaid interns working in the for-profit sector in which it stated that such interns would be regarded as employees unless they met each one of six criteria.[[257]](#footnote-258) The six criteria in Fact Sheet #71 were identical to the six factors published in the *Field Operations Handbook* in 1967, updated in language to meet the environment of an intern. In 2018, the DOL noted that every federal appellate court to consider the DOL’s six-part test had expressly rejected it as too rigid.[[258]](#footnote-259) Accordingly, the DOL revised the 2010 Fact Sheet[[259]](#footnote-260) by explicitly adopting the seven-factor “primary beneficiary” test first articulated by the Second Circuit in *Glatt v*. *Fox Searchlight Pictures, Inc*.[[260]](#footnote-261)

The Second Circuit was the first court of appeals to extensively address whether unpaid interns are employees under the FLSA. In *Glatt v. Fox Searchlight Pictures, Inc.*,[[261]](#footnote-262) the court explained that, “When properly designed, unpaid internship programs can greatly benefit interns” but “employers can also exploit unpaid interns by using their free labor without providing them with an appreciable benefit in education or experience.”[[262]](#footnote-263) Accordingly, the court recognized that there are some circumstances in which someone labeled an unpaid intern is an employee entitled to compensation under the FLSA, and also some circumstances in which unpaid interns are not employees for FLSA purposes.[[263]](#footnote-264) The court adopted a “primary beneficiary test” for two reasons: (1) to “focus[] on what the intern receives in exchange for his work”[[264]](#footnote-265) and (2) to “accord[] courts the flexibility to examine the economic reality as it exists between the intern and the employer.”[[265]](#footnote-266) The court further explained that “the purpose of a bona-fide internship is to integrate classroom learning with practical skills development in a real-world setting” and stated that “by focusing on the educational aspects of the internship, our approach better reflects the role of internships in today’s economy than the DOL factors, which were derived from a 68-year-old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen.”[[266]](#footnote-267)

The Second Circuit set forth a list of seven factors to weigh in determining whether an unpaid intern is an employee, but emphasized that the list is “non-exhaustive” and that “every factor need not point in the same direction” for an intern to be found not an employee.[[267]](#footnote-268) The factors are:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.

5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees, while providing significant educational benefits to the interns.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[[268]](#footnote-269)

The Second and Eleventh Circuits continue to use the *Glatt* factors to determine if unpaid interns at for-profit companies should be treated as employees or not.[[269]](#footnote-270) Other courts also examine who is the “primary beneficiary” of the relationship, the intern or the enterprise.[[270]](#footnote-271)

Earlier, pre-*Glatt* decisions had found that where the enterprise enjoyed an immediate advantage from the work, the interns might be employees.[[271]](#footnote-272) For instance, in *Wirtz v. Wardlaw*,[[272]](#footnote-273) two high school students providing clerical help to an insurance salesperson were found to be employees. The insurance salesperson sought to justify not paying statutory minimum wage by claiming he was teaching the young workers about the insurance business so they could determine if they were interested in pursuing insurance-related careers after graduating from high school. The Fourth Circuit rejected the argument and, in distinguishing the case from *Portland Terminal*, emphasized that the insurance salesperson “benefited from [the students’] labors,” which were an “essential part” of his promotional activities. Courts finding that the enterprise enjoys no immediate benefit from the intern’s work typically find no coverage.[[273]](#footnote-274)

In contrast, even pre-*Glatt*, where the primary beneficiary was the intern, who benefited from learning hands-on skills, obtaining college credit, or receiving training similar to that which would be provided in a vocational training course, courts typically found that the individual was not an employee covered by FLSA.[[274]](#footnote-275) In Opinion Letters that pre-dated the 2010 version of Fact Sheet #71, the DOL determined that certain interns working for college credit are not employees covered by the FLSA.[[275]](#footnote-276) Courts have excused not paying interns where they are involved in programs that offer vocational-type training, teaching fungible skills useful in different workplaces. For example, students studying medical billing and coding were not employees of the billing service where they completed unpaid externships, because, in part, the “training provided was similar to that which would be given in school and was related to the plaintiffs’ course of study.”[[276]](#footnote-277) However, courts may scrutinize whether vocational training provides adequate educational value and supervision before finding non-employee status under the FLSA.[[277]](#footnote-278) Even within the context of a bona fide internship that primarily benefits the student, if an employer also requires that the student perform tasks or work hours beyond those that could be expected as part of the internship, the student may be an employee for that time or those tasks.[[278]](#footnote-279)

Categorizing an individual as an “intern” for other statutory purposes does not excuse compliance with the FLSA.[[279]](#footnote-280)

4. Students

Neither *Portland Terminal* nor the DOL’s six-factor test may be applicable in training programs sponsored by a school rather than an employer, though some courts apply a “primary beneficiary” test.[[280]](#footnote-281) In *Solis v*. *Laurelbrook Sanitarium & School*,[[281]](#footnote-282) the Sixth Circuit affirmed the district court’s conclusion that high school students who worked caring for patients at a nursing home in accordance with religious instruction provided by a Seventh Day Adventist school were not employees for purposes of the FLSA’s prohibition on child labor. In so holding, the Sixth Circuit rejected the DOL’s trainee test, reasoning that because it was designed “for persons participating in employer-sponsored training programs,”[[282]](#footnote-283) it was “a poor method for determining employee status in a training or educational setting.”[[283]](#footnote-284) Similarly, the Eighth Circuit found on the basis of “economic realities” that boarding-school students required to perform chores as part of their academic experience were not employees, despite the fact that this helped defray certain costs the school might otherwise have incurred.[[284]](#footnote-285)

In evaluating whether massage therapy students were employees of their vocational school, the Tenth Circuit in *Nesbitt v. FCNH*[[285]](#footnote-286) acknowledged that the DOL had abandoned its six factor test in favor of “the more flexible ‘primary beneficiary’ test,” but considered the DOL’s interpretation of the FLSA embodied in its non-regulatory guidelines merely for its persuasive authority. The court decided not to apply *Glatt*, “given the breadth of our test, which relies on the totality of the circumstances and accounts for the economic reality of the situation.” However, in reaching its decision, it did look at the benefits received by the students in finding them to be non-employees. The Seventh Circuit agreed with the “economic realities” and “primary beneficiary” approach, but declined to adopt a “one-size-fits-all” rule for determining employee status in the context of vocational students.[[286]](#footnote-287) There, the court held that cosmetology students were not employees because “the fact that students pay not just for the classroom time but also for the practical-training time is fundamentally inconsistent with the notion” that students were employees while working on the training floor.[[287]](#footnote-288)

Other courts have applied the *Glatt* factors or a similar primary beneficiary test to students at vocational schools, who claimed employee status for their clinical time.[[288]](#footnote-289) Courts applying the primary beneficiary test to vocational school students who perform services for paying customers (e.g., cosmetology, massage) have reached differing results, but most have found that the students are not employees.[[289]](#footnote-290) If students are required to spend more than a de minimis amount of time on activities that arguably have no educational value, such as janitorial or other cleaning work, it may be possible to analyze that work separately and determine that the students are employees for that segment of the work.[[290]](#footnote-291)

D. Student-Athletes

Student-athletes have sued for unpaid wages alleging they are employees under the FLSA.[[291]](#footnote-292) In *Berger v*. *National Collegiate Athletic Ass’n*,[[292]](#footnote-293) the Seventh Circuit held that former students at the University of Pennsylvania who participated in track and field were not employees of the university. The court held that the factors courts look at in the trainee or intern context fail to capture the nature of the relationship between student-athletes and their university.[[293]](#footnote-294) Rather, the court focused on the “revered tradition of amateurism in college sports.”[[294]](#footnote-295) The Seventh Circuit also noted that a majority of courts have determined in other contexts, such as workers’ compensation and the NLRA, that student-athletes are not employees,[[295]](#footnote-296) and relied on the DOL’s *Field Operations Handbook*, which distinguishes participation in collegiate extracurricular activities, including sports, from students who are employed in work-study programs.[[296]](#footnote-297) The Seventh Circuit concluded that student-athletes play for their schools “without any real expectation of earning an income” and are therefore not employees under the FLSA.[[297]](#footnote-298)

In *Dawson v. National Collegiate Athletic Association*,[[298]](#footnote-299) the Ninth Circuit held that student-athletes (there, football players at the University of Southern California (USC)) were not employees of the NCAA or the Pac-12 (it did not address whether they were employees of USC) though specifically declining to adopt the Seventh Circuit’s reasoning in *Berger*. The court looked at the “economic reality” through various lenses, including (1) expectation of compensation; (2) power to hire and fire; and (3) whether the arrangement was conceived to evade the law, and found that the NCAA did not employ the athletes.[[299]](#footnote-300) The Ninth Circuit also examined the four-factor *Bonnette* test for determining joint employment and noted that the NCAA does not have the power to “hire or fire” student-athletes, supervise them, set their compensation (scholarships), or maintain their records.[[300]](#footnote-301) The court rejected application of the seven-part “primary beneficiary” test it had used in 2017 to determine whether students or interns are employees, finding it inapplicable to the circumstances of student-athletes.[[301]](#footnote-302)

The Third Circuit rejected the approaches taken by the Seventh and Ninth Circuits. Relying in part on Justice Kavanaugh’s concurrence in *National College Athletic Association v. Alston*,[[302]](#footnote-303) the Third Circuit rejected the notion of “amateurism” as the defining feature of college sports, and explained that the difficulty in determining whether collegiate athletes are employees under the FLSA does not fit neatly into other “economic realities” multi-factor tests because the question is whether the athletes are “playing” or “working.”[[303]](#footnote-304) The Court held that “the touchstone remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal an economic reality that is that of an employee-employer”[[304]](#footnote-305) and noted that “college athletes may be employees under the FLSA when they (a) perform services for another party, (b) ‘necessarily and primarily for the [other party’s] benefit;’ (c) under that party’s control or right of control; and (d) in return for ‘express’ or ‘implied’ compensation or ‘in-kind benefits.’” [[305]](#footnote-306)

At least one district court has held, relying on the Supreme Court’s decision in *Tony & Susan Alamo Foundation v. Secretary*,[[306]](#footnote-307) and focusing on “economic reality,” that a college football player had alleged sufficient facts about his personal economic dependence on his athletic scholarship to survive a motion to dismiss on the question of employee status.[[307]](#footnote-308)

E. Patient-Workers

In a 1966 amendment to the FLSA, Congress extended the FLSA to include as employers hospitals, institutions, or schools engaged primarily in “care of the sick, the aged, [or] the mentally ill or defective who reside on the premises of such institutions.”[[308]](#footnote-309) When presented with the issue of underpaid or unpaid work by patients in mental institutions, courts have held that the FLSA applies to patients who work for the hospital or other institution in which they reside whenever they perform activities that confer an economic benefit on the institution.[[309]](#footnote-310)

As discussed below, mere commitment of individuals to treatment centers for problems that have a mental or behavioral component does not automatically make the individuals “patients” for coverage purposes. Such individuals may be considered non-covered “prisoners” and not “patients.”[[310]](#footnote-311) Moreover, courts have found that where the relationship is solely rehabilitative, there is no employee status.[[311]](#footnote-312) And patients may not be employees when they are the “primary beneficiary” of the work they are required to perform:[[312]](#footnote-313) for example, a recipient of in-patient treatment in a court-approved rehabilitation program was not an employee when “he was permitted to receive rehabilitation treatment there in lieu of a jail sentence, and was provided with food, a place to live, therapy, vocational training, and jobs that kept him busy and off drugs.”[[313]](#footnote-314)

The employment status of patient-workers was clarified by amendment of the applicable regulations in 1989.[[314]](#footnote-315) The regulations now define “patient worker” as:

a worker with a disability … employed by a hospital or institution providing residential care where such worker receives treatment or care without regard to whether such worker is a resident of the establishment.[[315]](#footnote-316)

According to the DOL, an employment relationship will be found where the patient-worker is performing work of consequential benefit to the institution, such as building maintenance, landscaping, office work, or janitorial work (other than cleaning one’s own quarters).[[316]](#footnote-317) Generally, the DOL should not find an employment relationship during the first three months of evaluation.[[317]](#footnote-318) Under certain circumstances, a patient worker may be employed under a special certificate at a subminimum wage.[[318]](#footnote-319)

F. Prison Labor

Courts have found that when a prisoner performs work in the prison where he or she is incarcerated, the prisoner is not an employee under the FLSA.[[319]](#footnote-320) It does not matter whether the prison is operated by the state or by a private entity.[[320]](#footnote-321) However, some courts have refused to set a firm rule that prisoners can never be employees.[[321]](#footnote-322)

Further, some courts have differed in their analyses depending on whether the work is performed within the prison or for the prison itself or is instead performed for a private outside entity.[[322]](#footnote-323) The Fourth Circuit held that inmates who worked for the county in its separate recycling plant which also employed non-prisoners (and paid those non-prisoners minimum wage) might be employees, particularly because allowing the plant to pay certain workers below the minimum wage raised the specter of “unfair competition” for free workers and because it appeared that the primary motive of the recycling center in employing the inmates was pecuniary rather than rehabilitative.[[323]](#footnote-324) Even where the inmates perform prison industry labor for outside entities as opposed to merely maintenance tasks for the prison itself, however, some courts have not deemed them to be employees.[[324]](#footnote-325) For example, in *Hale v. Arizona*,[[325]](#footnote-326) the Ninth Circuit determined that prisoners working in prisoner industry programs “whose goods and services include[d] clothing, fabricated steel, livestock, dairy products, and hotel reservations for Best Western motels” were not “employees” under the FLSA.[[326]](#footnote-327) The court explained:

Prisoners are essentially taken out of the national economy upon incarceration. When they are assigned work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration.[[327]](#footnote-328)

Following its decision in *Hale*, the Ninth Circuit held in *Morgan v. MacDonald*[[328]](#footnote-329) that a prisoner who performed computer work as a condition of his incarceration was also not covered by the FLSA.[[329]](#footnote-330) The court rejected the prisoner’s argument that he was giving the prison the “fruits of a specialized education” rather than engaging in menial tasks and that his work was for rehabilitative and educational purposes rather than punishment, reasoning that the prisoner’s labor “belonged to the institution.”[[330]](#footnote-331)

The First Circuit addressed the issue of whether persons who were committed to a treatment center due to sex offenses qualified as “employees” due compensation under the FLSA when performing a variety of menial jobs that the treatment center required them to perform.[[331]](#footnote-332) The court found that because such work was required as part of their mandatory treatment as prisoners, not patients, they were not entitled to FLSA coverage.[[332]](#footnote-333) The Eighth Circuit also found that civil detainee sex offenders who participated in therapeutic work programs were not employees.[[333]](#footnote-334) Similarly, a patient allowed to live and work at a drug rehabilitation center in lieu of jail was not an employee where he was the “primary beneficiary” of his work.[[334]](#footnote-335) But residents of a court-ordered drug rehabilitation program forced to work at an affiliated factory might be employees because they are not actually incarcerated.[[335]](#footnote-336)

The Fourth and Fifth Circuits held that alien detainees who worked in a detention facility at which they were detained were not “employees” under the FLSA.[[336]](#footnote-337) Courts have also held that the FLSA is “inapplicable to pretrial detainees working for prison authorities since, like prisoners, they are not employees under the FLSA.”[[337]](#footnote-338) Courts have also treated pretrial detainees in work-release programs as inmates not entitled to employee status.[[338]](#footnote-339)

The Fourth Circuit held that civil detainees on ICE immigration holds in a private detention facility who volunteered for work detail and received some compensation were not employees because their work was not “a bargained for exchange of labor” and the work program, while displacing other food service or janitorial employees, had “non-pecuniary” goals.[[339]](#footnote-340)

When the work performed involves private entities that contract with the prison, some courts have applied principles from the joint employment doctrine,[[340]](#footnote-341) while other courts have declined to do so.[[341]](#footnote-342) For example, in *Gilbreath v. Cutter Biological*,[[342]](#footnote-343) the Ninth Circuit determined that prison inmates did not have an employment relationship with a private contractor under the FLSA. Specifically, the court found that although the company supervised the daily activities of the inmates, the Department of Corrections retained the power to hire or fire the inmates, had the authority to approve assignments, and determined the rate and method of payment.[[343]](#footnote-344)

Similarly, in *Williams v. Henagan*,[[344]](#footnote-345) the Fifth Circuit determined that the occasional work inmates performed for a mayor’s private benefit did not reflect an economic reality resembling a sustained employment relationship and that the tasks of waxing the floors at the mayor’s church, moving furniture on one occasion at his house, and making one trip to Texas to pick up furniture did not resemble employment sufficiently permanent to create an employment relationship under the FLSA.[[345]](#footnote-346) On the other hand, the Fifth Circuit previously reached a different conclusion in *Watson v. Graves*,[[346]](#footnote-347) regarding the question of whether inmates in a work-release program working for a private construction business operated by the sheriff’s family were “employees” of that business under the FLSA. The court determined that the inmates were employees of the business given that the business supervised them while they were away from jail and had de facto power to hire and fire them by requesting or rejecting particular inmates.[[347]](#footnote-348) The Third Circuit found that individuals detained for civil contempt for failure to pay child support, who worked at a public-private venture recycling plant for $5 per day so they would later be eligible for work release, sufficiently alleged employee status based on the economic realities and the Circuit’s “*Enterprise* test”[[348]](#footnote-349) for determining joint employment.[[349]](#footnote-350) Facts considered by the court included that the individuals were not convicted criminals, the work was not “intra-prison work for which inmates are categorically not entitled to minimum wages under the FLSA,” the individuals needed to earn money to pay off their debts (unlike prisoners for whom all material needs are provided), and the recycling plant benefited from the lower-cost labor.[[350]](#footnote-351)

In *Carter v. Duchess Community College*,[[351]](#footnote-352) the Second Circuit ruled that a community college that employed prison inmates as teaching assistants qualified as their “employer” under the FLSA, potentially entitling the inmates to the federal minimum wage. The Second Circuit determined that the district court had erred in granting the community college’s motion for summary judgment on this issue given that the community college had made an initial proposal to “employ” the inmates, suggested their wages, developed criteria for hiring, recommended inmates for positions, had discretion in hiring, decided the length of employment, and sent compensation directly to the inmates’ prison accounts.[[352]](#footnote-353)

A district court has ruled that individuals who perform community services as a condition of dismissal of minor criminal charges are not employees.[[353]](#footnote-354)

Attempts by prisoners to assert wage claims in the form of constitutional deprivations have failed. Courts have found that failure to pay the minimum wage does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment or the Equal Protection Clause.[[354]](#footnote-355)

G. Ministerial Exception

There is no reference to a ministerial exception in the FLSA, but a few courts have interpreted the FLSA to exclude from coverage employees of religious institutions whose primary duties are ministerial in nature. This judicially created rule, referred to as “the ministerial exception,”[[355]](#footnote-356) is rooted in the First Amendment and based on the assumption that Congress does not want courts to interfere in the internal management of religious institutions.[[356]](#footnote-357) The Fourth Circuit has held that the ministerial exception under the FLSA is coextensive in scope with the ministerial exception under Title VII.[[357]](#footnote-358) The Supreme Court has refused to adopt a “rigid formula for deciding when an employee qualifies as a minister” exempt from anti-  
discrimination statutes.[[358]](#footnote-359)

The DOL has also recognized the ministerial exception in its *Field Operations Handbook*:

Persons such as nuns, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be “employees.”[[359]](#footnote-360)

Further, the DOL recognized the ministerial exception in a 2018 opinion letter.[[360]](#footnote-361) The DOL explained that members of a religious organization dedicated to sharing “in a community of goods,” including those who work for onsite nonprofit, income-generating ventures, are not FLSA employees.[[361]](#footnote-362) However, even if construed as FLSA employees, the members “fall squarely in the ministerial exception”[[362]](#footnote-363) as recognized in *Hosanna-Tabor*,[[363]](#footnote-364) because the members’ “way of life resembles that of a monastic community.”[[364]](#footnote-365) Although no rigid formula applied, the members had egalitarian relationships and shared in common all necessities; imposing the FLSA on the members would have forced private property recognition, wages, and hierarchical economic relationships among members, all of which vitiated their central religious tenets.[[365]](#footnote-366) As to the members working for the nonprofit, income-generating ventures, the DOL determined that their work was an “inextricable part of their religious communal life.”[[366]](#footnote-367) The fact that potentially competing FLSA-covered employer enterprises existed did not convert those members to FLSA-covered employees.[[367]](#footnote-368)

The exception does not apply to religious employees of secular employers or to the secular employees of religious employers.[[368]](#footnote-369)

H. Owner-Employees

Owners and partners who also perform work for their companies raise unique issues regarding coverage under the FLSA.[[369]](#footnote-370) In one case, the court found that the plaintiff was a partner rather than an employee, using a modified economic reality test that considered the following four factors: (1) risk of loss and personal liability, (2) participation in profit sharing, (3) capital contributions and asset ownership, and (4) participation in management decisions subject to the agreement of the other partners.[[370]](#footnote-371) In another case, a court held that a co-owner or shareholder could nonetheless also serve as a company’s employee entitled to FLSA protection—the two roles are not mutually exclusive.[[371]](#footnote-372)

I. Undocumented Workers

Federal courts[[372]](#footnote-373) and the DOL[[373]](#footnote-374) have historically disregarded immigration status, regardless of whether the individual is documented or undocumented, in determining whether a person is an employee under the FLSA. This follows from the FLSA’s broad definition of “employee” and the absence of any exemption or other special provision for immigrant workers. For example, in *Patel v. Quality Inn South*,[[374]](#footnote-375) an employer argued that coverage of undocumented immigrant employees under the FLSA was inconsistent with the prohibitions of the Immigration Reform and Control Act of 1986 (IRCA), which prohibits employment of immigrant workers lacking authorization to work. The Eleventh Circuit, following the views of the DOL, rejected that argument and found that enforcement of FLSA requirements would eliminate the most attractive aspect of employing such workers: their willingness to work for less than the minimum wage.[[375]](#footnote-376)

In the 2002 non-FLSA case of *Hoffman Plastic Compounds, Inc. v. NLRB*,[[376]](#footnote-377) the Supreme Court held that federal immigration policy, as expressed by Congress in the IRCA, foreclosed the NLRB from awarding back pay, that is, wages the employee would have earned had he not been unlawfully terminated, to an undocumented immigrant who had never been legally authorized to work in the United States. Following that decision, the DOL issued Fact Sheet #48 to reinforce the DOL’s position that it “[would] continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented.”[[377]](#footnote-378)

Circuit courts to consider the issue have rejected the argument that *Hoffman Plastics* precludes undocumented workers from recovering wages due under the FLSA.[[378]](#footnote-379) The Eighth Circuit explained in *Lucas v. Jerusalem Café, LLC*[[379]](#footnote-380) that argument

rests on a legal theory as flawed today as it was in 1931 when jurors convicted Al Capone of failing to pay taxes on illicit income … there is no reason why the fact that the employers unlawfully hired the workers should exempt them from paying the wages that if lawful they would have had to pay.[[380]](#footnote-381)

The court distinguished *Hoffman Plastic* on the grounds that FLSA plaintiffs are seeking payment for work already performed, and relied on the DOL and the legislative history of the IRCA to find that “there is no conflict between the FLSA and the IRCA.”[[381]](#footnote-382) Rather, “exempting unauthorized aliens from the FLSA would frustrate the purposes of the IRCA, for unauthorized workers’ acceptance of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens.”[[382]](#footnote-383) The Eleventh Circuit has similarly concluded that “by reducing the incentive to hire such workers the FLSA’s coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA.”[[383]](#footnote-384) The rationale varies slightly, but courts that have considered the issue agree that *Hoffman Plastic* does not prevent undocumented workers from pursuing an award for unpaid wages under the FLSA.[[384]](#footnote-385)

Following this approach, courts have denied discovery requests seeking information regarding immigration status.[[385]](#footnote-386)

Other issues related to presentation of false documents have been presented to the courts. For example, in one case, a district court held that at least where the employer was not actually deceived by an employee’s use of false immigration documents, the employee’s use of such documents does not bar recovery under the FLSA.[[386]](#footnote-387) Similarly, the Eleventh Circuit held that an undocumented employee’s recovery was not barred by the doctrine of *in pari delicto*, despite the fact that the employee would not have been hired but for his use of a false Social Security number and that the employee had failed to accurately report his earnings to the IRS, because the employee was not an active participant in “the unlawful activity *that is the subject of the suit*”—there, the refusal to pay overtime wages in violation of the FLSA.[[387]](#footnote-388)

IV. Employer Status[[388]](#footnote-389)

A. Joint Employers[[389]](#footnote-390)

Under the FLSA, an employee is “any individual employed by an employer.”[[390]](#footnote-391) The “verb ‘employ’ [is defined] expansively to mean ‘suffer or permit to work.’”[[391]](#footnote-392) Accordingly, the DOL and courts have long recognized that an employee can have two or more employers who are jointly and severally liable for the wages due the employee, called “joint employers.”[[392]](#footnote-393) For example, in *Falk v. Brennan*[[393]](#footnote-394) the Supreme Court held that maintenance workers at an apartment complex were jointly employed by the owners of the apartment complex and by the real estate management company that supervised their work. And in *Rutherford Food v. McComb*,[[394]](#footnote-395) the Supreme Court held that boners were employees of a slaughterhouse, even though the slaughterhouse contracted with a master boner to retain the boners.

The courts and the DOL recognize two types of joint employment: “vertical” and “horizontal.”[[395]](#footnote-396) Vertical joint employment refers to situations, such as those described in *Falk* and *Rutherford*, in which an employee is directly employed by one entity, but another entity may also benefit from that work, and be jointly liable as an employer under FLSA.[[396]](#footnote-397) Horizontal joint employment refers to situations where an employee works for two employers at different times during the workweek, but the two employers are not completely disassociated, such that both employers are jointly liable for FLSA compliance with respect to all hours worked (and all hours worked for both employers during the workweek must be considered in determining entitlement to overtime compensation).[[397]](#footnote-398)

Over the years both the DOL, in its regulations and opinion letters, and the courts have established a number of different multi-factor tests to determine who is a “joint employer” with respect to vertical joint employment.

1. Court Decisions Addressing the Joint Employment Doctrine

a. Multi-Factor Tests to Determine Joint Employer Status

The Supreme Court held in *Falk v. Brennan*[[398]](#footnote-399) that a real estate management company (D&F), along with the owners of the apartment complexes that D&F managed, was a joint employer of the maintenance workers who worked at each of the apartment complexes. The Court stated: “we think that the Court of Appeals was unquestionably correct in holding that D&F is also an employer of the maintenance workers under Section 3(d) of the Act.”[[399]](#footnote-400) The Court added:

In view of the expansiveness of the Act’s definition of “employer” and the extent of D&F’s managerial responsibility at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees, we hold that D&F is, under the statutory definition, an “employer” of the maintenance workers.[[400]](#footnote-401)

However, the Supreme Court’s decision in *Falk* did not set forth any particular test for determining which entities should be considered joint employers under the FLSA. Although the Supreme Court’s decision in *Rutherford Food v. McComb*[[401]](#footnote-402)arguably described what we would now call a joint employment relationship, it was couched in terms of determining whether the workers were independent contractors or employees. Accordingly, as described below, most circuit courts have developed their own tests for determining joint employer status, only some of which rely on *Rutherford.*

For many years, the most commonly employed judicially created test to find a “joint employment relationship” was the “economic reality” test articulated by the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*.[[402]](#footnote-403) In *Bonnette*, the court evaluated whether “chore workers” who provided domestic in-home services to disabled public assistance recipients were employed jointly by the individual recipients and the state social service agencies administering the program. In reaching its conclusion that the chore workers were jointly employed, the court adopted the four factors set forth in the district court opinion because “in varying combinations, these factors [had] been considered by other courts for the same purpose. … More important, these four factors [were] relevant to this particular situation.”[[403]](#footnote-404) These four factors are whether the alleged employer (public social service agencies)

(1) had the power to hire and fire the employees;

(2) supervised and controlled employee work schedules or conditions of employment;

(3) determined the rate and method of payment; and

(4) maintained employment records.[[404]](#footnote-405)

Applying those factors to the case before it, the Ninth Circuit explained:

It is undisputed that the chore workers’ wages were paid by appellants. In some cases the wages were paid directly to the chore worker, in other cases jointly to the chore worker and the recipient, and in still other cases to the recipient with the understanding that the wages would be paid over to the chore worker. Regardless of the method of payment, the chore workers were paid by the appellants. It is also undisputed that the appellants controlled the rate and method of payment, and that they maintained employment records.

Appellants also exercised considerable control over the structure and conditions of employment by making the final determination, after consultation with the recipient, of the number of hours each chore worker would work and exactly what tasks would be performed. The recipients were responsible for the day-to-day supervision of the chore workers, but appellants intervened when problems arose which the recipient and the chore worker could not resolve.[[405]](#footnote-406)

Although the parties disagreed about whether the public agencies had the power to hire and fire the chore workers, the court found that “regardless of whether the appellants are viewed as having had the power to hire and fire, their power over the employment relationship by virtue of their control over the purse strings was substantial.”[[406]](#footnote-407)

The four-factor test in *Bonnette* has been adopted or slightly modified by other circuit courts, including the First,[[407]](#footnote-408) Third,[[408]](#footnote-409) and Fifth[[409]](#footnote-410) Circuits.Other courts, such as the Second,[[410]](#footnote-411) Fourth,[[411]](#footnote-412) Seventh,[[412]](#footnote-413) and Eleventh[[413]](#footnote-414) Circuits, have not followed *Bonnette* and instead have articulated their own, different multi-factor tests, sometimes relying on the Supreme Court’s decision in *Rutherford Food v. McComb*.[[414]](#footnote-415) Because almost every circuit has set forth a slightly different multi-factor test for determining joint employment status, they are set out here in order by circuit:

(i.) First Circuit

The First Circuit follows *Bonnette.* In *Baystate Alternative Staffing v. Herman*,[[415]](#footnote-416) the First Circuit considered whether temporary employment agencies were “employers” of the temporary workers under the FLSA. The court found that “the factors used in [*Bonnette*] provide[d] a useful framework” to decide the joint employment issue.[[416]](#footnote-417) Applying the *Bonnette* factors, the court determined that the agencies not only had the responsibility for hiring and firing workers and supervising work schedules and employment conditions, but also determined the workers’ rate and method of payment.[[417]](#footnote-418) Although the agencies argued that the fact that there was no “direct, on-the-job supervision of the workers at the client companies” precluded a finding of employer status, the court rejected this argument, explaining that

In any event, it is the totality of the circumstances, and not any one factor, which determines whether a worker is the employee of a particular alleged employer. For these reasons, we conclude that the absence of direct, on-site supervision does not preclude a determination that plaintiffs are the employers of the temporary workers within the broad definition of the FLSA.[[418]](#footnote-419)

The First Circuit therefore held that the district court did not err in finding the agencies to be employers under the FLSA.[[419]](#footnote-420) One district court[[420]](#footnote-421) within the First Circuit has supplemented its analysis under the *Baystate* factors with those articulated by the Second Circuit in *Zheng v. Liberty Apparel Co.*[[421]](#footnote-422)

(ii.) Second Circuit

The Second Circuit in *Zheng v. Liberty Apparel Co*.[[422]](#footnote-423) rejected use of the *Bonnette* factors as too narrow and established a new test to find a joint employer relationship. The plaintiffs, garment workers who were directly employed by contractors for garment manufacturers, claimed that the garment manufacturers were their joint employers because they worked predominantly on the manufacturers’ garments, they performed a line-job that was integral to the production of the manufacturers’ product, and their work was frequently and directly supervised by the manufacturers’ agents. The manufacturers argued that the contractors, who, among other things, hired and paid plaintiffs to assemble clothing for numerous manufacturers, were plaintiffs’ sole employers. Both the plaintiff workers and the manufacturers moved for summary judgment on the issue of joint employment, and the district court agreed with the manufacturers.[[423]](#footnote-424)

On appeal, the Second Circuit reversed the district court, holding that the court had erred in applying the four *Bonnette* factors.[[424]](#footnote-425) The Second Circuit ruled that the expansive definition of “employee” found in the FLSA could not be reconciled with the “unduly narrow” four-part test of *Bonnette*, and laid out a six-factor formulation,[[425]](#footnote-426) drawn from the Supreme Court’s decision in *Rutherford Food Corp. v. McComb*,[[426]](#footnote-427) and also urged the district court to “consider any other factors it deems relevant to its assessment of the economic realities.” The *Zheng* test includes the following factors:

(1) whether the putative employer’s premises and equipment are used for the employee’s work,

(2) whether the subcontractor (and primary employer of the worker) has a business that can or does shift from one putative employer to another,

(3) the extent to which the workers perform a line-job integral to the joint entity’s process of production,

(4) whether responsibility under the contracts could pass from one subcontractor to another without material changes,

(5) the degree to which the putative employer supervises the employee’s work, and

(6) whether the workers work “exclusively or predominantly” for the putative employer.[[427]](#footnote-428)

The Second Circuit has continued to apply the *Zheng* test.[[428]](#footnote-429)

(iii.) Third Circuit

The Third Circuit has articulated a multi-factor test based on *Bonnette*, but slightly different. In *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, [[429]](#footnote-430) the Third Circuit created an “*Enterprise* test” focusing on the control the potential joint employer exercises over the relevant employees, including the alleged employer’s ability to hire employees, issue work rules, and maintain control over employee records.[[430]](#footnote-431) The Third Circuit continues to follow the factors set forth in *Enterprise Rent-A-Car*:

(1) the alleged employer’s authority to hire and fire the relevant employees;

(2) the alleged employer’s authority to promulgate work rules and assignments and to set the employees’ conditions of employment compensation, benefits, and work schedules, including the rate and method of payment;

(3) the alleged employer’s involvement in day-to-day employee supervision, including employee discipline; and

(4) the alleged employer’s actual control of employee records, such as payroll, insurance, or taxes.[[431]](#footnote-432)

The Third Circuit noted that “[t]here is no specific number or combination of *Enterprise* factors that conclusively determines whether an alleged employer is a joint employer,” which “instead depends on the ‘total employment situation and the economic realities of the work relationship.’”[[432]](#footnote-433)

(iv.) Fourth Circuit

In *Salinas v*. *Commercial Interiors, Inc*.,[[433]](#footnote-434) the Fourth Circuit rejected use of the *Bonnette* factors or any other test that focuses on the relationship between the worker and the putative joint employer, instead instructing courts to examine the relationship between the two putative joint employers.[[434]](#footnote-435) Relying on the DOL’s 1961-era interpretations, the Fourth Circuit held that any other focus would ignore the regulatory command that employers are joint unless they are “completely disassociated.”[[435]](#footnote-436) The court held that:

joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine––formally or informally, directly or indirectly––the essential terms and conditions of a worker’s employment and (2) the two entities’ combined influence over the essential terms and conditions of the worker’s employment render the worker an employee as opposed to an independent contractor.[[436]](#footnote-437)

The Fourth Circuit instructed that at least the following six factors should be considered in answering the first question:

(1) whether, “formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means”;

(2) whether the putative joint employers jointly “hire or fire the worker or modify the terms or conditions of the worker’s employment”;

(3) “[t]he degree of permanency and duration of the relationship between the putative joint employers”;

(4) whether “shared management or a direct or indirect ownership interest [by] one putative joint employer controls … the other”;

(5) whether the work is performed on premises owned or controlled by one of the putative joint employers; and

(6) whether the joint employers “jointly determine” or share responsibility “over functions ordinarily carried out by an employer, such as handling payroll; providing workers’ compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.”[[437]](#footnote-438)

The Fourth Circuit ultimately determined that the subcontractor and the general contractor were joint employers and that the workers were jointly employed by both the subcontractor and the general contractor.[[438]](#footnote-439) The Fourth Circuit noted that this conclusion depended on the facts (i.e., it was not inherent in the subcontractor/general contractor relationship).[[439]](#footnote-440) The Fourth Circuit has continued to follow the test it created in *Salinas*.[[440]](#footnote-441)

(v.) Fifth Circuit

The Fifth Circuit follows the *Bonnette* test.[[441]](#footnote-442)

(vi.) Sixth Circuit

The Sixth Circuit has not articulated a definitive test for determining joint employer status, but, in a nonbinding unpublished case,[[442]](#footnote-443) relied on subsequently withdrawn DOL regulations derived from the four-factor *Bonnette* test.[[443]](#footnote-444) Because the Sixth Circuit had not articulated a test for determining joint employment under the FLSA, some district courts have turned to the Sixth Circuit’s tests for joint employment under other statutes,[[444]](#footnote-445) others look to the *Bonnette* factors,[[445]](#footnote-446) others look to the Sixth Circuit’s factors for distinguishing employees from independent contractors,[[446]](#footnote-447) and some look to a combination of those factors.[[447]](#footnote-448)

(vii.) Seventh Circuit

Like the Second Circuit in *Zheng*, in *Reyes v. Remington Hybrid Seed Co., Inc*.,[[448]](#footnote-449) the Seventh Circuit has also turned to the *Rutherford* [[449]](#footnote-450) factors to determine joint employment status. Nevertheless, some district courts within the Seventh Circuit have relied upon *Bonnette.*[[450]](#footnote-451)

(viii.) Eighth Circuit

The Eighth Circuit has not articulated a specific test for determining joint employer status, but district courts within the Eighth Circuit have applied the *Bonnette* test.[[451]](#footnote-452)

(ix.) Ninth Circuit

As described in detail earlier, the Ninth Circuit follows a four-factor test first articulated in the seminal case *Bonnette*[[452]](#footnote-453)that has since been followed by many other circuits and the 2020 DOL regulations.[[453]](#footnote-454)

The Ninth Circuit continues to follow *Bonnette.*[[454]](#footnote-455) Nevertheless, in *Torres-Lopez v. May*[[455]](#footnote-456) the Ninth Circuit also relied on multiple factors other than the four *Bonnette* factors, including those set forth in the Supreme Court’s *Rutherford Food* opinion,[[456]](#footnote-457) to determine joint employment status, at least in the context of migrant farmworkers bringing claims under both the FLSA and the MSPA.[[457]](#footnote-458) Some district courts within the Ninth Circuit have concluded that the *Torres-Lopez* factors supplement, rather than replace, the *Bonnette* factors and have examined both, including in work settings beyond agricultural.[[458]](#footnote-459)

(x.) Tenth Circuit

The Tenth Circuit has not articulated a test for determining joint employment. Some district courts within the Tenth Circuit have looked to the *Bonnette* test[[459]](#footnote-460) or the four-factor test in subsequently withdrawn DOL regulations.[[460]](#footnote-461) Another has looked to the Fourth Circuit’s test from *Salinas*.[[461]](#footnote-462)

(xi.) Eleventh Circuit

The Eleventh Circuit combines elements from *Rutherford Food* with factors derived from regulations under the MSPA,[[462]](#footnote-463) even in non-agricultural work contexts, because they are “indicators of economic dependence.”[[463]](#footnote-464) The Eleventh Circuit follows an eight-factor test first set out in *Aimable v. Long & Scott Farms*,[[464]](#footnote-465) including (1) nature and degree of control; (2) degree of supervision, direct or indirect; (3) power to determine pay rates or methods of payment; (4) right, directly or indirectly, to hire, fire, or modify employment conditions; (5) preparation of payroll and payment of wages; (6) ownership of facilities where work occurred; (7) performance of specialty job integral to the business; and (8) investments of the purported employer and contractor.

The Eleventh Circuit has continued to adhere to its eight-factor test, but provided more guidance in *Garcia-Celestino v*. *Ruiz Harvesting, Inc*.[[465]](#footnote-466) In *Garcia-Celestino*,citrus harvesters working under H-2A visas alleged that a large citrus producer was liable for FLSA violations as a joint employer. The Eleventh Circuit affirmed the district court’s holding that the producer was a joint employer under its eight-factor test set forth in *Aimable*.[[466]](#footnote-467) The appellate court noted that when applying the *Aimable* factors, courts should heed five overarching principles: (1) in joint employer cases, rather than fixating on whether the worker is relatively more dependent on one putative employer than the other, the court should separately focus on the worker’s relationships with each putative employer; (2) no one factor is dispositive; (3) the eight factors are useful because they indicate economic dependence, so the weight given to each factor will depend upon the extent to which it is probative of the worker’s economic dependence on the putative employer under the circumstances; (4) evidence germane to the issue of economic dependence should be analyzed holistically and qualitatively; and (5) the common law principles of employment have no bearing on the “suffer or permit to work” analysis.[[467]](#footnote-468)

(xii.) District of Columbia Circuit

The District of Columbia Circuit has not articulated a specific test to determine joint employer status, but the district court has applied the Second Circuit *Zheng* factors.[[468]](#footnote-469)

b. Application of Joint Employment in Various Employment Situations

The issue of joint employment has arisen in a variety of situations, resolution of which depends on the facts. For example, although the Fifth Circuit has stated, “[w]e do not suggest that franchisors can never qualify as the FLSA employer for a franchisee’s employees,” it held that a specific employee “failed to produce legally sufficient evidence to satisfy the economic reality test.”[[469]](#footnote-470) Other courts have also relied on various permutations of an economic reality test to find that franchisors are not joint employers of their franchisees’ employees.[[470]](#footnote-471) Some courts have held that certain facts, if proven, could establish that a franchisor is a joint employer.[[471]](#footnote-472)

Based on the particular factual scenario, courts have also found joint employment established or adequately pled with respect to labor contractors,[[472]](#footnote-473) affiliated entities,[[473]](#footnote-474) owners and their relatives,[[474]](#footnote-475) individual corporate employees or managers,[[475]](#footnote-476) companies employing subcontracting companies.,[[476]](#footnote-477) and private equity owners.[[477]](#footnote-478) Similarly, joint employment has been found in a wide variety of industries, including farming,[[478]](#footnote-479) janitorial,[[479]](#footnote-480) telecommunications,[[480]](#footnote-481) security,[[481]](#footnote-482) delivery,[[482]](#footnote-483) garment manufacture,[[483]](#footnote-484) door-to-door sales,[[484]](#footnote-485) transportation,[[485]](#footnote-486) professional and college sports,[[486]](#footnote-487) and home health care.[[487]](#footnote-488) Based on the facts, other courts have failed to find joint employer status with respect to franchisors,[[488]](#footnote-489) payroll companies,[[489]](#footnote-490) general contractors,[[490]](#footnote-491) related entities,[[491]](#footnote-492) individual corporate officials or managers,[[492]](#footnote-493) owners and their relatives,[[493]](#footnote-494) and companies employing subcontractors.[[494]](#footnote-495) Courts have found no joint employment relationship in a variety of industries, including farm work,[[495]](#footnote-496) telecommunications/cable installation,[[496]](#footnote-497) home care,[[497]](#footnote-498) security guards,[[498]](#footnote-499) janitorial/maintenance,[[499]](#footnote-500) delivery services,[[500]](#footnote-501) government agencies,[[501]](#footnote-502) political campaigns,[[502]](#footnote-503) and colleges and universities student-athletes did not attend.[[503]](#footnote-504)

2. Department of Labor Activity

a. Regulations

In 1958, the DOL promulgated Part 791 of the *Code of Federal Regulations*, titled “Joint Employment Relationship Under the Fair Labor Standards Act of 1938.” In 29 C.F.R. §791.2(b), the DOL set forth three specific situations in which a joint employment relationship would be considered to exist:

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between the employers to share the employee’s services, as, for example, to interchange employees; or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee;[[504]](#footnote-505) or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[[505]](#footnote-506)

Courts occasionally cited to this regulation in determining joint employer status.[[506]](#footnote-507)

As discussed earlier, despite the fact that Part 791 was first drafted in 1958 and amended in 1961, few of the cases deciding “joint employment” status relied upon it in reaching a decision, but instead interpreted the statutory text directly to craft multi-factor economic realities tests that varied by circuit.

In January 2020, the DOL published a final rule to update its 29 C.F.R. Part 791 interpretive regulations governing the determination of joint employment status under the FLSA, effective March 16, 2020.[[507]](#footnote-508) On September 8, 2020, a federal district court struck down that portion of the final rule dealing with vertical joint employment.[[508]](#footnote-509) On July 29, 2021, the DOL withdrew the entire regulation, effective September 28, 2021.[[509]](#footnote-510) Although the DOL withdrew the entire regulation discussing joint employment, including that portion of the regulation describing horizontal joint employment, it stated:

Although the Department is rescinding the Joint Employer Rule in its entirety, it did not reconsider the substance of its longstanding horizontal joint employment analysis. The focus of a horizontal joint employment analysis will continue to be the degree of association between the potential joint employers, as it was in the Joint Employer Rule and the prior version of part 791.As has been the Department’s position for decades, the association will be sufficient to demonstrate joint employment in the following situations, among others:

(1) There is an arrangement between the employers to share the employee’s services;

(2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or

(3) the employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.[[510]](#footnote-511)

b. Opinion Letters and Administrator Interpretations

The DOL has issued several opinion letters and administrator interpretations applying its regulation and adding other factors to the joint employment analysis.

For example, Administrator’s Interpretation No. 2014-1 discussed whether providers of home care in shared living arrangements were jointly employed by both the individual consumer of the home care and a third party that administers the shared living arrangement, such as a public agency or nonprofit. Although the Administrator’s Interpretation cited the 1961 version of 29 C.F.R. §791.2(a), its chief emphasis was on the economic realities test.[[511]](#footnote-512) The WHD concluded that a third party is likely the employer of the provider if the third party’s case manager directs and manages the care to be provided such as by frequent visits or phone calls, or by determining the specific tasks to be performed on a specified schedule, or if the third party collectively bargains with providers or otherwise determines providers’ conditions of employment, such as wage rates, vacation/sick time, and benefits.[[512]](#footnote-513) Conversely, the third party is likely not the joint employer of the home care provider when the third party only makes an initial determination that the provider meets the program’s qualifications, helps match providers and consumers, and performs occasional follow-up visits.[[513]](#footnote-514)

In a Non-Administrator letter issued on May 11, 2001, the WHD concluded that where private duty nurses were hired by patients or their representatives to provide care to patients while they were in the hospital, and where the hospital was legally required to provide certain oversight of the private duty nurses and the responsibility for the care of the patient remained with the hospital, the hospital was a joint employer of the nurses.[[514]](#footnote-515) Relying on the 1961 version of 29 C.F.R §791.2(b), the WHD stated that the relevant factors in determining joint employment were: (1) the power to control or supervise workers or work performed; (2) the power, whether alone or jointly, directly or indirectly, to hire, fire, or modify employment conditions of the individual; (3) the permanency and duration of the relationship; (4) the level of skill involved; (5) whether the worker’s activities are an integral part of overall business operations; (6) where the work is performed and what equipment is used; and (7) who performs payroll and similar functions.[[515]](#footnote-516) The WHD concluded that “because the ultimate question is one of economic dependence, the factors are not to be applied as a checklist, but rather the outcome must be determined by a qualitative rather than a quantitative analysis.”[[516]](#footnote-517)

In another Non-Administrator opinion letter, the WHD considered whether a residential nursing facility that operated a home health care program to provide companion services for its outpatients through various referral agencies qualified as a joint employer with the agencies of the referred workers.[[517]](#footnote-518) The nursing facility’s home health program paid the agencies an hourly rate for the aides they referred. The agencies, in turn, hired and trained the aides, paid them a somewhat lower hourly rate, and provided them with benefits. Some of the nursing facility’s full-time employees worked for the referral agencies during their time off, which resulted in their sometimes working a total of more than 40 hours per week providing both inpatient care at the nursing facility and outpatient care through the home health program. Relying on the 1961 version of 29 C.F.R. §791.2, the WHD concluded, based upon “all of the facts in the particular case,” that the health aides were jointly employed by the nursing facility and the referral agencies when they provided home health care.

In 2016, the Administrator had issued Administrator’s Interpretation No. 2016-1, “Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act” (AI No. 2016-1),[[518]](#footnote-519) which emphasized that “the expansive definition of ‘employ’ as including ‘to suffer or permit to work’ rejected the common law control standard and ensures that the scope of employment relationships and joint employment under the FLSA and MSPA is as broad as possible.”[[519]](#footnote-520) The DOL withdrew the AI effective June 7, 2017.[[520]](#footnote-521)

B. Individuals (Corporate Officers, Owners, Shareholders, and Managers/Supervisors) Who Are “Employers”

The FLSA defines the term “employer” broadly to include “any person acting directly or indirectly in the interest of an employer in relation to any employee.”[[521]](#footnote-522) Furthermore, the term “person” is also broadly defined under the FLSA to include, inter alia, an “individual.”[[522]](#footnote-523) Thus, an individual who acts directly or indirectly in the interest of an employer in relation to an employee, including an individual corporate officer, owner, participating shareholder, manager, supervisor, or spouse may be subject to individual liability for FLSA violations.[[523]](#footnote-524) However, an individual employee cannot be liable as a joint employer for failure to pay wages to himself.[[524]](#footnote-525)

The key consideration in determining individual liability is whether the individual has exerted sufficient operational control over significant aspects of the employer’s employment policies.[[525]](#footnote-526) Some courts also apply a four-factor “economic reality” test,[[526]](#footnote-527) examining whether the individual exercises supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation,[[527]](#footnote-528) or require a showing that the individual was “either … involved in the day-to-day operation or [had] some direct responsibility for the supervision of the employee.”[[528]](#footnote-529) Courts have held that managerial responsibilities and substantial control of the terms and conditions of the employees’ work create employer status under which an individual such as a corporate officer or manager may be liable.[[529]](#footnote-530) For example, the Second Circuit has explained that the individual defendant need not have been “personally complicit in FLSA violations.”[[530]](#footnote-531) Individual defendants may be jointly and severally liable along with the corporation for FLSA violations.[[531]](#footnote-532) The traditional requirements for piercing the corporate veil in order to find a corporate agent individually liable for his or her acts on behalf of the corporation are not required under the FLSA.[[532]](#footnote-533)

For example, in *Irizarry*, the Second Circuit explains that “a person exercises operational control over employees if his or her role within the company, and the decisions it entails, directly affect the nature of conditions of the employees’ employment.”[[533]](#footnote-534) There, the court affirmed summary judgment finding that the owner and CEO of a supermarket chain was an “employer” responsible for FLSA violations even though there was no evidence that he was personally responsible for the FLSA violations or that he ever directly managed the employees at issue, where he had overall authority for financial, banking, real estate, and merchandising at the grocery store chain, visited five to ten stores a week, addressed problems that arose in individual stores, had ultimate authority to shut a store down, and was responsible for hiring managerial employees.[[534]](#footnote-535)

Similarly, the Fifth Circuit determined that an individual who was the founder and president of five hotel corporations was liable as an employer under the FLSA because he actively controlled the spending of the corporations, guided corporate policy, authorized compliance with labor standards, personally selected managers of each hotel, and solved major corporate problems.[[535]](#footnote-536)

1. Corporate Officers

Many cases have addressed individual liability of corporate officers and found, based on operational control, that the corporate officer is an employer.[[536]](#footnote-537) For example, the First Circuit summarized its prior holdings to explain why “[c]ourts have generally agreed that a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation, jointly and severally liable.”[[537]](#footnote-538) The court explained that such an individual “controls a corporation’s financial affairs and can cause the corporation to compensate (or not to compensate) employees under the FLSA.”[[538]](#footnote-539) Accordingly, the court held that “an executive who not only possessed, but repeatedly exercised the authority to establish company-wide policy regarding employment-related matters and made significant decisions regarding the allocation of financial resources that directly affected [the corporation’s] employees” could be held individually liable under the FLSA.[[539]](#footnote-540) In contrast, where corporate officers fail to exercise sufficient operational control, courts refuse to hold them liable as employers.[[540]](#footnote-541)

2. Owners and Shareholders

The First Circuit has explained that “an ownership stake [is] highly probative of an individual’s employer status … as it suggests a high level of dominance over the company’s operations.”[[541]](#footnote-542) In cases involving the potential individual liability of owners, courts engage in a detailed examination of the facts concerning the owner’s involvement in the operation of the business and the work of the employees, and hold individuals with varying amounts of equity liable as employers, but also require some showing of actual operational control.[[542]](#footnote-543)

For example, a CEO with a 75 percent ownership interest was liable as an employer in an FLSA retaliation suit where there was evidence that he guided company policy, instructed managers regarding job duties, was the company’s ultimate decision maker, and directed the precise actions that the plaintiffs alleged constituted retaliation.[[543]](#footnote-544) The Eleventh Circuit held that minority shareholders (owning 22.5 percent of the company) who were directors rather than officers could be employers where they were present on the job site approximately one week per month to observe the workers’ progress and sometimes distribute orders, and met with employees to tell them they could not pay them but that they would try to fix the problem.[[544]](#footnote-545)

However, ownership by itself, without sufficient evidence of operational control, will not suffice to establish employer status.[[545]](#footnote-546) Likewise, mere investment, without any showing of operational control, is unlikely to lead to liability.[[546]](#footnote-547) For instance, the Fifth Circuit held that a member of a five-member limited liability corporation was not an employer under the FLSA where he had no authority to individually control employment terms of lower-level employees, did not supervise or control work schedules or employment conditions, did not determine employees’ rate or method of payment, and did not maintain employment records.[[547]](#footnote-548) Similarly, the Second Circuit held that the owner of a restaurant was not an employer under the FLSA, despite the fact that he regularly visited the restaurant, tasted the food, and directed employees to clean.[[548]](#footnote-549) Applying the *Carter*[[549]](#footnote-550) factors, which mirror the *Bonnette* factors, the court noted that it was the general manager, rather than the owner, who hired and fired employees, set their schedules, and paid them in cash every week.[[550]](#footnote-551) A significant ownership interest, in and of itself, did not mean that the owner exercised “financial control.”[[551]](#footnote-552) Although the owner did review payroll records, there was no evidence that he actively maintained the records, and this fourth *Carter* factor is not in any case dispositive.[[552]](#footnote-553)

Similarly, shareholders who exercise significant operational control over a corporation’s functions are considered employers along with the corporation and are jointly and severally liable with the corporation and each other under the FLSA.[[553]](#footnote-554) This is true even if the individual delegated the authority to others.[[554]](#footnote-555) On the other hand, shareholders who are not actively involved in a corporation’s operations are not liable under the FLSA.[[555]](#footnote-556)

3. Managers and Supervisors

An individual manager or supervisor, even one with no ownership share in the business, may be personally liable as an employer under the FLSA if the individual had supervisory authority over the complaining worker and was responsible in whole or in part for the alleged violation or had control over the employer’s compliance with the FLSA.[[556]](#footnote-557) Individual supervisors or managers who do not meet this test are not liable as “employers” under the FLSA.[[557]](#footnote-558) Indeed, no circuit court has found an individual supervisor or manager who was not a high-level corporate officer or owner liable as an FLSA employer.[[558]](#footnote-559)

1. *See* 29 U.S.C. §§206–207. See discussion of agricultural employees in Chapter 7, Agricultural Exemptions, and discussion of public employees in Chapter 11, Government Employment. See discussion of the employer-employee relationship in the context of FLSA retaliation claims in Chapter 13, Retaliation, §II.A.1 [Parties; Plaintiffs; “Any Employee”]. [↑](#footnote-ref-2)
2. 331 U.S. 704 (1947). [↑](#footnote-ref-3)
3. 29 U.S.C. §§1801–1872. [↑](#footnote-ref-4)
4. 29 C.F.R. Part 500. [↑](#footnote-ref-5)
5. 29 C.F.R. §500.20(h)(4). [↑](#footnote-ref-6)
6. H.R. Rep. No. 97-885, 97th Cong., 2d Sess., at 6 (1982). [↑](#footnote-ref-7)
7. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 14 EB Cases 2625 (1992) (citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 726–28, 6 WH Cases 990 (1947)). [↑](#footnote-ref-8)
8. *See* United States v. Rosenwasser, 323 U.S. 360, 363 n.3, 4 WH Cases 935, 936 (1945) (quoting Senator Black’s statement on Senate floor that term “employee” in FLSA had been given “the broadest definition that has ever been included in any one act”); Donovan v. DialAmerica Mktg., 757 F.2d 1376, 1382, 27 WH Cases 113 (3d Cir. 1985) (stating FLSA definition of employee broadest among labor statutes). [↑](#footnote-ref-9)
9. 29 U.S.C. §203(e)(1). [↑](#footnote-ref-10)
10. *Id*. §203(d). [↑](#footnote-ref-11)
11. *Nationwide*, 503 U.S. at 326 (quoting 29 U.S.C. §203(g)). See Chapter 8, Compensable Hours, for a discussion of the meaning of “suffer or permit.” [↑](#footnote-ref-12)
12. *Nationwide*, 503 U.S. at 326. The Supreme Court has also indicated that this definition is so broad that, if read literally, it covers persons Congress did not intend to protect. Walling v. Portland Terminal Co., 330 U.S. 148, 152, 6 WH Cases 611 (1947) (explaining that the definition, if read literally, would cover students, who would be considered “employees of the school or college they attended”). The DOL’s Office of the Assistant Secretary for Policy has stated that “[w]elfare recipients would probably be considered employees in many, if not most, of the work activities described in the [Personal Responsibility and Work Opportunity Reconciliation Act of 1996].” U.S. Dep’t of Labor, Office of the Assistant Sec’y for Policy, Labor Protections and Welfare Reform (May 26, 1997); *see also* Pub. L. No. 104-193, 110 Stat. 2105 (1996). [↑](#footnote-ref-13)
13. *Compare* Alexander v. Avera St. Luke’s Hosp., 768 F.3d 756, 761–64 (8th Cir. 2014) (declining to apply FLSA “economic realities” test to claims brought under ADEA and FMLA; explaining reasons for difference from FLSA test), *with* Lilley v. BTM Corp., 958 F.2d 746 (5th Cir. 1992) (using economic realities test developed under FLSA for purposes of the ADEA). *See Nationwide*, 503 U.S. at 325–26 (noting FLSA’s broader definitions). [↑](#footnote-ref-14)
14. U.S. Dep’t of Labor, Wage & Hour Div., Field Operations Handbook §10b01, https://www.dol.gov/agencies/whd/field-operations-handbook [hereinafter FOH]. [↑](#footnote-ref-15)
15. Dole v. Snell, 875 F.2d 802, 804, 29 WH Cases 465 (10th Cir. 1989) (citing Bartels v. Birmingham, 332 U.S. 126 (1947)). See discussion in §III.A [Employee Status; Employee or Independent Contractor] of this chapter. [↑](#footnote-ref-16)
16. 322 U.S. 111 (1944). [↑](#footnote-ref-17)
17. *Id*. at 128. [↑](#footnote-ref-18)
18. 331 U.S. 704 (1947). [↑](#footnote-ref-19)
19. *Id*. at 716–18 (citations and footnotes omitted, emphasis added). [↑](#footnote-ref-20)
20. 331 U.S. 722, 6 WH Cases 990 (1947). [↑](#footnote-ref-21)
21. 331 U.S. at 722 (citing with approval *Hearst Publ’ns*, 322 U.S. 111, and *Silk*, 331 U.S. 704). [↑](#footnote-ref-22)
22. *Id*. at 725. [↑](#footnote-ref-23)
23. *Id.* at 724–26. [↑](#footnote-ref-24)
24. *Id.* at 730. [↑](#footnote-ref-25)
25. *Id*. [↑](#footnote-ref-26)
26. 332 U.S. 126 (1947). [↑](#footnote-ref-27)
27. *Id*. at 130. [↑](#footnote-ref-28)
28. *See* 29 U.S.C. §152(3); 2 Legislative History of the Labor Management Relations Act 1537 (1947); *see also* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256, 67 LRRM 2649 (1968) (applying general agency principles in determining employment status under NLRA). [↑](#footnote-ref-29)
29. *See* 42 U.S.C. §410(j)(2) (“‘[E]mployee’ includes … any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee.”); *see also* United States v. W.M. Webb, Inc., 397 U.S. 179, 183–88 (1970) (discussing congressional reaction to *Silk*). [↑](#footnote-ref-30)
30. 366 U.S. 28, 15 WH Cases 31 (1961). [↑](#footnote-ref-31)
31. 366 U.S. at 33 (citing United States v. Silk, 331 U.S. 704, 713 (1947), and Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947)). [↑](#footnote-ref-32)
32. *Supreme Court:* Rutherford Food Corp. v. McComb, 331 U.S. 722, 6 WH Cases 990 (1947).

    *Second Circuit:* Brock v. Superior Care, 840 F.2d 1054, 28 WH Cases 801 (2d Cir. 1988); Varnish v. Best Medium Publ’g Co., 405 F.2d 608 (2d Cir. 1968); Ivanov v. Builderdome, 2021 BL 232194, 2021 WL 2554620, at \*\*3–4, 12 (S.D.N.Y. June 22, 2021) (under totality of circumstances, individual who signed “employment agreement” but acted as partner in business for 1% equity and no salary was in business for herself and not an employee).

    *Third Circuit*: Verma v. 3001 Castor, Inc., 937 F.3d 221, 229 (3d Cir. 2019) (“The whole point of the FLSA … is to protect workers by overriding contractual relations through statute.”); Safarian v. American DG Energy Inc., 622 F. App’x 149 (3d Cir. 2015) (fact that worker had, on putative employer’s instruction, established a separate corporation to “invoice” the employer for his work as “independent contractor” did not mean he was not an employee; courts must look at economic realities, not structure of the relationship).

    *Fifth Circuit:* Robicheaux v. Radcliff Material, 697 F.2d 662, 667, 25 WH Cases 1210 (5th Cir. 1983) (welders so dependent on boss for work that they were “employees” unable to waive that status through contract); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 22 WH Cases 783 (5th Cir. 1976); McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972); Wirtz v. Lone Star Steel Co., 405 F.2d 668, 18 WH Cases 687 (5th Cir. 1968).

    *Sixth Circuit:* Imars v. Contractors Mfg. Servs., Inc., 165 F.3d 27, 1998 WL 598778, at \*6 (6th Cir. 1998) (unpublished) (rejecting “contract” as dispositive); Williams v. King Bee Delivery, LLC, 199 F. Supp. 3d 1175 (E.D. Ky. 2016) (holding that the existence of contract and its labels and definitions are not dispositive on issue of employment status).

    *Seventh Circuit:* Brant v. Schneider Nat’l, Inc., 43 F.4th 656, 662 (7th Cir. 2022) (noting “what matters is the economic reality of the working relationship, not necessarily the terms of a written contract. ‘The FLSA is designed to defeat rather than implement contractual arrangements.’”) (quotingSecretary of Labor v. Lauritzen, 835 F.2d 1529, 1544–45 (7th Cir. 1987)); Simpkins v. DuPage Hous. Auth., 893 F.3d 962, 966–67 (7th Cir. 2018) (reversing summary judgment for defendant and remanding to address factual disputes around contracts, explaining that the nature of contracts might shed some light on overall economic reality); Hefferman v. Illinois Cmty. Coll. Dist. No. 508, 2000 WL 631309, 6 WH Cases2d 132 (N.D. Ill. May 16, 2000) (denying defendant’s motion to dismiss, noting that “an independent contractor ‘label does not necessarily take the worker from the protection of the Act’”) (quoting Dole v. Amerlink Corp., 729 F. Supp. 73, 76, 29 WH Cases 1019 (E.D. Mo. 1990)).

    *Ninth Circuit:* Donovan v. Sureway Cleaners, 656 F.2d 1368, 25 WH Cases 105 (9th Cir. 1981); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 755 (9th Cir. 1979) (“Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA.”).

    *Tenth Circuit*: Acosta v. Jani-King of Okla., Inc., 905 F.3d 1156, 1159–60 (10th Cir. 2018) (franchise agreements between janitorial cleaners and defendant were not determinative of employee status; rather, “the economic realities of an individual’s working relationship with the employer—not necessarily the label or structure overlaying the relationship—determine whether the individual is an employee under the FLSA”).

    *Eleventh Circuit:* Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311 (11th Cir. 2013); Quezada v. Sante Shipping Lines, Inc., 2013 WL 1334516 (S.D. Fla. Mar. 29, 2013) (fact that individual is paid through a 1099 rather than a W-2 is not dispositive); Olson v. Star Lift Inc., 709 F. Supp. 2d 1351, 1356 (S.D. Fla. 2010) (same) [↑](#footnote-ref-33)
33. Rutherford Food Corp. v. McComb, 331 U.S. 722, 727; 6 WH Cases 990 (1947). [↑](#footnote-ref-34)
34. *Second Circuit:* *Superior Care*, 840 F.2d at 1059 (concluding employer’s treatment of taxed nurses, who performed same functions as nontaxed nurses, as employees was “highly probative” in determining employment status of nontaxed nurses).

    *Fifth Circuit:* Mitchell v. John R. Cowley & Bros., Inc., 292 F.2d 105, 107, 15 WH Cases 106 (5th Cir. 1961) (determining watchman performed same duties as he performed under predecessor employer that considered him employee).

    *Eighth Circuit:* Hodgson v. Taylor, 439 F.2d 288, 19 WH Cases 982 (8th Cir. 1971) (concluding workers who loaded railroad cars at night performed identical duties to employees loading cars during day); Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547 (8th Cir. 1952) (observing employer admitted employees performed work identical to workers whom employer disclaimed as employees).

    *Ninth Circuit:* *Sureway Cleaners*, 656 F.2d 1368 (observing workers performed jobs integral to business and of same nature as at facilities where workers were admittedly employees). [↑](#footnote-ref-35)
35. Barlow v. C.R. England, Inc., 703 F.3d 497, 506 (10th Cir. 2012) (noting that “little in the case indicates the relationship between Barlow and C.R. England materially differed from one the company would have with any other cleaning service except for the fact Barlow also happened to otherwise be an employee. This suggests Barlow was in business for himself as a janitor”); Newsom v. Carolina Logistics Servs., Inc., 2012 WL 4320809 (N.D. Miss. Sept. 18, 2012) (where acknowledged employee separately performed janitorial services, applying Fifth Circuit five-factor test separately to determine individual was employee rather than independent contractor while working as janitor). [↑](#footnote-ref-36)
36. 331 U.S. 704 (1947). See discussion in §I [Overview] and §II [The Economic Reality Test] of this chapter. [↑](#footnote-ref-37)
37. *Silk*, 331 U.S. at 716. [↑](#footnote-ref-38)
38. *First Circuit:* Goldberg v. Warren Bros. Roads Co., 207 F. Supp. 99, 101–02 (D. Me. 1962) (applying six-factor test).

    *Second Circuit:* Saleem v. Corporate Transp. Grp., Ltd., 854 F.3d 131, 139–40 (2d Cir. 2017); Gayle v. Harry’s Nurse Registry, Inc., 2014 WL 6865431 (2d Cir. 2014) (unpublished) (using five-factor test); Brock v. Superior Care, 840 F.2d 1054 (2d Cir. 1988) (same).

    *Third Circuit:* Razak v. Uber Techs., Inc., 951 F.3d 137, 142–43 (3d Cir. 2020) (using six-factor test announced in *Donovan v DialAmerica*, *infra*); Verma v. 3001 Castor, Inc., 937 F.3d 221, 229 (3d Cir. 2019) (same); Martin v. Selker Bros., Inc., 949 F.2d 1286 (3d Cir. 1991) (same); Donovan v. DialAmerica Mktg., 757 F.2d 1376, 1382–83; 27 WH Cases 113 (3d Cir. 1985) (six-factor test plus consideration of whether alleged employees “are dependent upon the business to which they render service”).

    *Fourth Circuit:* Hall v. DirecTV, 846 F.3d 757 (4th Cir. 2017) (six-factor *Silk* test); McFeeley v. Jackson St. Entm’t, LLC, 825 F.3d 235 (4th Cir. 2016) (applying six-factor economic realities test); Schultz v. Capital Int’l Sec., Inc., 466 F.3d 298 (4th Cir. 2006) (using six-factor test); Chao v. Mid-Atl. Installation Serv., Inc., 2001 WL 739243 (4th Cir. July 2, 2001) (same).

    *Fifth Circuit:* Flores v. FS Blinds, LLC, 73 F.4th 356 (5th Cir. 2023) (five-factor test); Hargrave v. AIM Directional Servs., LLC, 2022 BL 163462, 2022 WL 1487020, at \*2 (5th Cir. May 11, 2022) (applying five-factor test); (Faludi v. U.S. Shale Sols., LLC, 950 F.3d 269, 275 (5th Cir. 2020) (applying five-factor test); Hobbs v. Petroplex Pipe & Const., Inc., 946 F.3d 824 (5th Cir. 2020); Parrish v. Premier Directional Drilling, LP, 917 F.3d 369, 379, 387 (5th Cir. 2019) (applying five-factor “non-exhaustive” test, but also considering “(1) the presence of an express agreement; (2) what the industry standard is for [the role]; and (3) the purpose of the FLSA”); Thibault v. Bellsouth Telecomms., Inc., 612 F.3d 843, 845–49 (5th Cir. 2010) (using five-factor test); Talbert v. American Risk Ins. Co., 405 F. App’x 848 (5th Cir. 2010) (same); Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008) (same); Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299 (5th Cir. 1998) (same).

    *Sixth Circuit:* Acosta v. Off Duty Police Servs., Inc., 915 F.3d 1050, 1055 (6th Cir. 2019) (applying six-factor test); Keller v. Miri Microsystems LLC, 781 F.3d 799 (6th Cir. 2015) (six-factor test plus other indicia of employment status); Donovan v. Brandel, 736 F.2d 1114, 1117 (6th Cir. 1984) (using six-factor test).

    *Seventh Circuit:* Brant v. Schneider Nat’l, Inc., 43 F.4th 656, 665 (7th Cir. 2022); Simpkins v. DuPage Hous. Auth., 893 F.3d 962, 965 (7th Cir. 2018) (six-factor test); Secretary of Labor v. Lauritzen, 835 F.2d 1529, 28 WH Cases 654 (7th Cir. 1987) (using six-factor test).

    *Eighth Circuit:* Walsh v. Alpha & Omega USA, Inc., 39 F.4th 1078, 1081–86 (8th Cir. 2022) (assuming without deciding six-factor test was appropriate means of determining employee or independent contractor status); Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547, 549–50 (8th Cir. 1952) (adopting *Silk* factors); Cruthis v. Vision’s, 2014 WL 282028 (E.D. Ark. Jan. 24, 2014) (using six-factor test).

    *Ninth Circuit:* Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981) (employing six-factor test); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 24 WH Cases 279 (9th Cir. 1979).

    *Tenth Circuit:* Merrill v. Harris, 2022 BL 300224, 2022 WL 3696669, at \*7–14 (10th Cir. Aug. 26, 2022) (six-factor test); Barlow v. C.R. England, Inc., 703 F.3d 497, 506 (10th Cir. 2012) (using six-factor test plus four-factor test applicable in putative joint employment situations); Dole v. Snell, 875 F.2d 802, 29 WH Cases 465 (10th Cir. 1989) (using six-factor test).

    *Eleventh Circuit:* Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311–12 (11th Cir. 2013) (using six-factor test); Perdomo v. Ask 4 Realty & Mgmt., Inc., 298 F. App’x 820 (11th Cir. 2008) (deeming realtor an independent contractor under the eight-factor test in *Antenor v. D. & S. Farms*, 88 F.3d 925 (11th Cir. 1996)); Freund v. Hi-Tech Satellite, Inc., 185 F. App’x 782, 11 WH Cases2d 917 (11th Cir. 2006) (employing six-factor test).

    *D.C. Circuit:* Morrison v. International Programs Consortium, Inc. (IPC), 253 F.3d 5, 7 WH Cases2d 74 (D.C. Cir. 2001) (applying five-factor *Silk* test and four-factor test for employer status set forth in *Henthorn v. Department of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994)).

    *Federal Circuit:* Tetzlaff v. United States, 2015 WL 7585333 (Fed. Cl. Nov. 25, 2015) (applying federal common law under *Nationwide Mutual Insurance Co*. *v*. *Darden*, 503 U.S. 318 (1992), analyzed several factors in determining that home child care worker was not federal employee: degree of control, right to discharge, opportunity for profit or loss, investment in tools or workplace, degree of skill, duration and permanency of relationship, whether work is part of the principal’s regular business, and whether parties believe worker is employee or independent contractor).

    *Cf*.Yue Yu v. McGrath, 597 F. App’x 62 (3d Cir. 2014) (citing four-factor economic reality test used in joint employment situations (citing *In re* Enterprise Rent-a-Car Wage & Hour Emp. Practices Litig., 683 F.3d 462, 469–70 (3d Cir. 2012))). [↑](#footnote-ref-39)
39. *Scantland*, 721 F.3d at 1312 (quoting Mednick v. Albert Enters., Inc., 508 F.2d 297, 301–02 (5th Cir. 1975)).

    *See also*

    *Second Circuit:* Saleem v. Corporate Transp. Grp., Ltd., 854 F.3d 131, 140 & n.20 (2d Cir. 2017) (cautioning that five *Silk* factors are helpful but not necessarily determinative and affirming summary judgment finding that “black car” drivers were independent contractors where they “made significant decisions regarding the operation of their small businesses”); Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988).

    *Third Circuit: Razak*, 951 F.3d at 143; *Verma*, 937 F.3d at 230; *Selker Brothers*, 949 F.2d at 1293.

    *Fourth Circuit*: *Capital International Security*, 466 F.3d at 305.

    *Fifth Circuit:* *Faludi*, 950 F.3d at 275; *Parrish*, 917 F.3d at 379; Chapman v. A.S.U.I. Healthcare & Dev. Ctr., 562 F. App’x 182 (5th Cir. 2014); *Hopkins*, 545 F.3d at 346; Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311–12 (5th Cir. 1976).

    *Sixth Circuit:* *Off Duty Police Services*, 915 F.3d at 1055; *Keller*, 781 F.3d at 807; Werner v. Bell Family Med. Ctr., Inc., 529 F. App’x 541 (6th Cir. 2013); Lilley v. BTM Corp., 958 F.2d 746, 750 (6th Cir. 1992) (ADEA).

    *Seventh Circuit:* *Simpkins*, 893 F.3d at 965 (quoting Berger v. National Collegiate Athletic Ass’n, 843 F.3d 285, 290 (7th Cir. 2016)) (“the *Lauritzen* factors are not the exclusive means by which the ultimate determination can be made … inquiry is aimed at determining the economic reality of the working relationship by examining the totality of the circumstances”); *Lauritzen*, 835 F.2d at 1538.

    *Tenth Circuit:* Acosta v. Jani-King of Okla., Inc., 905 F.3d 1156, 1159 (10th Cir. 2018); *Barlow*, 703 F.3d at 506; Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998); Doty v. Elias, 733 F.2d 720, 722–23 (10th Cir. 1984). [↑](#footnote-ref-40)
40. *Third Circuit: DialAmerica Marketing*, 757 F.2d at 1385 (homeworkers were employees even though earnings were only secondary source of income).

    *Fifth Circuit*: Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1054 (5th Cir. 1987) (firework stand operators were employees despite the fact that this was only seasonal work to supplement other income).

    *Sixth Circuit*: *Off Duty Police Services*, 915 F.3d at 1058 (off-duty police officers were employees of private security company despite fact that income was secondary to their primary job; noting that “whether a worker has more than one source of income says little about that worker’s employment status”). [↑](#footnote-ref-41)
41. Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1313 (11th Cir. 2013) (quoting Usery v. Pilgrim Equip., 527 F.2d 1308, 1312–13 (5th Cir. 1976)); Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1441 (10th Cir. 1998). [↑](#footnote-ref-42)
42. *Scantland*, 721 F.3d at 1316. [↑](#footnote-ref-43)
43. Holden v. Bwell Healthcare, Inc., 2021 BL 468458, 2021 WL 5827898, at \*3 (D. Md. Dec. 7, 2021). [↑](#footnote-ref-44)
44. Leffler v. Creative Health Servs., Inc., 2017 WL 4347610, at \*7 (E.D. Pa. Sept. 29, 2017). [↑](#footnote-ref-45)
45. *Third Circuit*: Verma v. 3001 Castor, Inc., 937 F.3d 221, 230 (3dCir. 2019) (topless dancers were employees where, among other factors, club dictated dancer’s choice of dress, hair, makeup; selected songs; fined them for being late; and set price and duration of private dances).

    *Fifth Circuit:* Carrell v. Sunland Constr., 998 F.2d 330, 1 WH Cases2d 993 (5th Cir. 1993) (deeming pipe welders not employees where, among other things, contracting company had no control over manner or method of work performance—customers controlled procedures and materials to be used—and was prohibited from participating in testing/certification of welders); Halferty v. Pulse Drug Co., 821 F.2d 261, 28 WH Cases 322 (5th Cir. 1987) (involving instructions to dispatcher on how to answer phone and what information to obtain).

    *Seventh Circuit:* Garcia v. Pace Suburban Bus Serv., 955 F. Supp. 75, 3 WH Cases2d 1477 (N.D. Ill. 1996) (finding that bus company was not driver’s employer where company contracted out operation of service and did not involve itself in day-to-day management of business or exercise significant control over employment relationship).

    *Eighth Circuit:* Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547, 10 WH Cases 658 (8th Cir. 1952) (holding lumber company’s haulers and woods workers were employees where, among other things, they were told where and what to cut and amounts of deliveries were determined by size of company’s loader and storage facility).

    *Ninth Circuit:* Collinge v. IntelliQuick Delivery, Inc., 2015 WL 1299369 (D. Ariz. Mar. 23, 2015) (holding delivery drivers were employees where delivery company regulated drivers through standard operating procedures enforced with financial penalties and disciplined drivers for violating protocols).

    *Eleventh Circuit:* Yoder v. Fla. Farm Bureau, 2023 BL 144846, 2023 WL 3151107 (11th Cir, Apr. 28, 2023) (unpublished) (following *Scantland*, finding that the record reflected that agents were free to control the manner in which the work was to be performed); Freund v. Hi-Tech Satellite, Inc., 185 F. App’x 782, 11 WH Cases2d 917 (11th Cir. 2006) (determining plaintiff was an independent contractor when, among other things, plaintiff could change appointments for installation as needed); Aimable v. Long & Scott Farms, 20 F.3d 434, 440 (11th Cir. 1994) (determining control factor by “specific indicia of control” such as deciding on number of employees to be hired, making work assignments, and structuring management). [↑](#footnote-ref-46)
46. Donovan v. Sureway Cleaners, 656 F.2d 1368, 1371 (9th Cir. 1981) (finding payment of real and personal property taxes levied on laundry and dry cleaning retail outlets indicative of control). [↑](#footnote-ref-47)
47. *Pilgrim Equipment*, 527 F.2d at 1312 (determining corporations set prices for operators of laundry pickup stations). [↑](#footnote-ref-48)
48. *Sureway Cleaners*, 656 F.2d at 1371 (finding that, although agents who operated laundry and dry cleaning outlets possessed, in theory, power to advertise on their own to limited extent, in reality they relied mainly on dry cleaning corporations for advertising). [↑](#footnote-ref-49)
49. Agerbrink v. Model Servs., LLC, 787 F. App’x 22, 26 (2d Cir. 2019) (finding triable issue of fact as to whether plaintiff could meaningfully negotiate compensation, rejecting district court’s finding that her ability to turn down jobs on take-it-or-leave-it basis afforded her the ability to negotiate pay); Brock v. Superior Care, 840 F.2d 1054, 28 WH Cases 801 (2d Cir. 1988) (determining health care facility’s unilateral dictation of nurses’ hourly wage favored finding of employment status); Usery v. Pilgrim Equip., 527 F.2d 1308, 1312 (5th Cir. 1976) (concluding dry cleaning corporations required operators of laundry pickup stations to remit certain amount of money every day and to settle accounts once a week). [↑](#footnote-ref-50)
50. As the Eleventh Circuit explained, “It is in the nature of a contract that the contractor promises to deliver the performance bargained for by the client. For example, a builder will build a building according to the specifications of an architect. That does not make the builder an employee. A painter will paint a house the colors dictated by the homeowner. That does not make the painter an employee.” Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1315 n.8 (11th Cir. 2013) (quoting Herman v. Mid-Atlantic Installation Servs., Inc., 164 F. Supp. 2d 667, 672–73 (D. Md. 2000)). [↑](#footnote-ref-51)
51. *Fifth Circuit:* Brock v. Mr. W Fireworks, 814 F.2d 1042, 1047, 28 WH Cases 57 (5th Cir. 1987) (stating that it is not what workers *could* do that counts, but as matter of economic reality what they actually do that is dispositive).

    *Seventh Circuit*: Brant v. Schneider Nat’l, Inc., 43 F.4th 656, 666–68 (7th Cir. 2022) (holding that control factor weighed in favor of employee status even though contract purported to give driver control over operations, where driver alleged that he could not actually choose which loads to haul or hire helpers and company closely monitored his conduct).

    *Ninth Circuit:* Donovan v. Sureway Cleaners, 656 F.2d 1368, 1371 (9th Cir. 1981) (holding fact that laundry operators theoretically possessed power to set prices, determine own hours, and advertise independently not determinative where operators actually worked same hours, charged same prices, and relied mainly on company for advertising). [↑](#footnote-ref-52)
52. *Scantland*, 721 F.3d at 1313–14 (employee status indicated where technicians routinely communicated with dispatch and company conducted site checks of technicians’ work and levied fines for not meeting specifications); Martin v. Selker Bros., Inc., 949 F.2d 1286, 30 WH Cases 1061 (3d Cir. 1991) (finding gas distributor made daily visits to gas stations and required daily sales reports from station operators). [↑](#footnote-ref-53)
53. *Superior Care*, 840 F.2d at 1060.

    *See also*

    *Second Circuit: Id.* at 1054 (holding that nursing service that reviewed patient care notes and visited job sites of nurses once or twice a month exercised sufficient control over nurses to favor finding of employment status); Gayle v. Harry’s Nurse Registry, Inc., 2009 WL 605790, at \*5–9 (E.D.N.Y. Mar. 9, 2009) (deeming nurse for nursing referral agency employee of agency because agency exercised “functional control” over nurse, reviewed her progress notes, and provided training once per month).

    *Third Circuit:* Donovan v. DialAmerica Mktg., 757 F.2d 1376, 1384, 27 WH Cases 113 (3d Cir. 1985) (stating that, where nature of home research industry precluded direct supervision, lack of direct control over manner of work did not weigh in favor of independent contractor status).

    *Sixth Circuit:* Acosta v. Off Duty Polices Servs., Inc., 915 F.3d 1050, 1061–62 (6th Cir. 2019) (simple tasks did not require much supervision: “the absence of need to control should not be confused with the absence of right to control”) (quotation and citation omitted); Keller v. Miri Microsystems LLC, 781 F.3d 799, 814 (6th Cir. 2015) (failure to exercise “traditional control” did not necessarily negate employee status where job performance controlled through initial training).

    *Eleventh Circuit:* Preston v. Settle Down Enters., Inc., 90 F. Supp. 2d 1267, 6 WH Cases2d 1237 (N.D. Ga. 2000) (holding that direct on-site supervision may not be required). [↑](#footnote-ref-54)
54. *Second Circuit:* Saleem v. Corporate Transp. Grp., 52 F. Supp. 3d 526 (S.D.N.Y. 2014) (car service drivers’ ability to set own hours and lack of consistent monitoring by defendant weighed in favor of independent contractor status), *aff’d*, 854 F.3d 131 (2d Cir. 2017).

    *Third Circuit:* Pendleton v. JEVS Human Servs., 2020 WL 2793131, at \*9 (E.D. Pa. May 29, 2020) (relying on DOL Fact Sheet #79G, determining that home care workers in shared living arrangements were independent contractors where agency monitored services to ensure compliance with regulatory requirements but did not engage in day-to-day supervision).

    *Fifth* *Circuit:* Talbert v. American Risk Ins. Co., 405 F. App’x 848 (5th Cir. 2010) (fact that claims adjuster had little supervision and was permitted to determine her own hours and working conditions weighed against employee status); Thibault v. Bellsouth Telecomms., Inc., 612 F.3d 843, 845–49 (5th Cir. 2010) (noting lack of regular supervision).

    *Seventh* *Circuit:* Estate of Suskovich v. Anthem Health Plan of Va., 553 F.3d 559, 566 (7th Cir. 2009) (finding that lack of control weighed in favor of independent contractor status because defendant controlled only computer programmer’s final product, not his daily activities). [↑](#footnote-ref-55)
55. Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008). [↑](#footnote-ref-56)
56. *Third Circuit*: Verma v. 3001 Castor, Inc., 937 F.3d 221, 230 (3d Cir. 2019) (dancers’ ability to select which shifts they would work not sufficiently indicative of employee control).

    *Fifth Circuit:* Martinez v. Tri-State Enters., LLC, 2018 WL 6038188 (N.D. Miss. Nov. 16, 2018) (setting own hours not sufficient to show control); Hill v. Cobb, 2014 WL 3810226, at \*5 (N.D. Miss. Aug. 1, 2014) (finding bonding company maintained “extensive control” over some aspects of bond transactions despite bail bondsman’s ability to set his own hours).

    *Sixth Circuit:* Keller v. Miri Microsystems LLC, 781 F.3d 799, 814 (6th Cir. 2015) (“worker’s ability to set his own hours and vacation schedule is not sufficient to negate control”).

    *Tenth Circuit:* Dole v. Snell, 875 F.2d 802, 804, 29 WH Cases 465 (10th Cir. 1989) (finding cake decorators “free to leave early” only if there was not a “ton of work”; in other words, bakery’s volume determined length of workday); Doty v. Elias, 733 F.2d 720, 26 WH Cases 1216 (10th Cir. 1984) (observing that, although waiters and waitresses were free within limits to set their own hours, they could wait tables only during restaurant’s business hours and thus restaurant essentially established their work schedules). [↑](#footnote-ref-57)
57. *Third Circuit:* Leffler v. Creative Health Servs., Inc., 2017 WL 4347610, at \*7 (E.D. Pa. Sept. 29, 2017) (therapists’ discretion to set their own schedules weighed in favor of independent contractor status).

    *Fifth Circuit:* Carrell v. Sunland Constr., 998 F.2d 330, 1 WH Cases2d 993 (5th Cir. 1993) (finding that company using welders did not specify set number of hours).

    *Sixth Circuit:* Imars v. Contractors Mfg. Servs., Inc., 165 F.3d 27 (6th Cir. 1998) (individual’s control over hours and methods weighed in favor of independent contractor status).

    *Ninth Circuit:* Wirtz v. San Francisco & Oakland Helicopter Airlines, Inc., 244 F. Supp. 680 (N.D. Cal. 1965) (concluding porter-janitors free to leave airline terminal at will).

    *Eleventh Circuit*:Nieman v. National Claims Adjusters, Inc., 775 F. App’x 622 (11th Cir. 2019) (appraiser who controlled his schedule, including how and when he took on assignments and whether he took on more or fewer assignments, was in business for himself and therefore was properly classified as an independent contractor). [↑](#footnote-ref-58)
58. *Fourth Circuit*: McFeeley v. Jackson St. Entm’t, LLC, 825 F.3d 235 (4th Cir. 2016) (holding that exotic dancers were employees in part because defendant club had control over their work schedule).

    *Tenth Circuit*: Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989) (deeming cake decorators to be employees where they had to have vacations, special work schedules, or time off approved).

    *Eleventh Circuit*: Scantland v. Jeffry Knight, Inc*.*, 721 F.3d 1308, 1315 (11th Cir. 2013) (technicians were employees where they had no choice about how many days they worked or their daily work schedule and had to request time off in advance). [↑](#footnote-ref-59)
59. Hopkins v. Cornerstone Am., 545 F.3d 338, 343–44 (5th Cir. 2009); Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 570–71, 2 WH Cases2d 787 (10th Cir. 1994). [↑](#footnote-ref-60)
60. McLaughlin v. Seafood, Inc., 867 F.2d 875, 876–77, 29 WH Cases 321 (5th Cir. 1989) (without specialized skills, freedom to work for more than one employer does not signify true economic independence). [↑](#footnote-ref-61)
61. *See* Acosta v. Off Duty Police Servs., Inc., 915 F.3d 1050, 1060 (6th Cir. 2019) (finding under the control factor that the noncompete clause that prevented officers from working for business’ customers for two years after severing ties with ODPS limited their ability to do so). *See also* Hughes v. Family Life Care, Inc., 117 F. Supp. 3d 1365 (N.D. Fla. 2015) (noncompete agreement that limited plaintiff’s activities for two years after she terminated was a control factor in her favor); Perez v. Super Maid, LLC, 55 F. Supp. 3d 1065 (N.D. Ill. 2014) (rejecting the notion that Skokie Maid could designate maids as independent contractors—who would normally be free to utilize their skills in an open market—while simultaneously restricting that very ability in a three-year noncompete agreement). [↑](#footnote-ref-62)
62. Faludi v. U.S. Shale Sols., LLC, 950 F.3d 269, 276 (5th Cir. 2020) (the mere existence of a noncompete clause does not automatically negate independent contractor status) (citing Talbert v. American Risk Ins. Co., 405 F. App’x 848, 856 (5th Cir. 2010) (upholding the district court’s independent contractor determination despite the presence of a confidentiality agreement that plaintiff claims would have effectively precluded her from working for competing companies)); Franze v. Bimbo Bakeries USA, Inc., 826 F. App’x 74, 77 (2d Cir. 2020) (existence of noncompete clause insufficient by itself to overcome all other indicia indicating lack of control by putative employer). [↑](#footnote-ref-63)
63. *See* Iontchev v. AAA Cab, Inc., 2015 WL 1345275 (D. Ariz. Mar. 18, 2015), *aff’d*, 685 F. App’x 548 (9th Cir. Mar. 27, 2017) (taxicab drivers are not employees of the cab company where it is the city, rather than the cab company, that regulates them); Callahan v. City of Chi., 78 F. Supp. 3d 791 (N.D. Ill, 2015) (city is not the taxicab drivers’ employer because the city is not in the cab business). [↑](#footnote-ref-64)
64. *See, e.g.,* Verma v. 3001 Castor, Inc., 937 F.3d 221, 230–31 (3d Cir. 2019); Acosta v. Off Duty Polices Servs., Inc., 915 F.3d 1050, 1059 (6th Cir. 2019). [↑](#footnote-ref-65)
65. *Fourth Circuit:* Schultz v. Capital Int’l Sec., Inc., 466 F.3d 298, 307–08 (4th Cir. 2006) (security guards were employees where they could not use managerial skill to increase their compensation, which was based on time worked).

    *Sixth Circuit:* Acosta v. Off Duty Police Servs., Inc., 915 F.3d 1050, 1059 (6th Cir. 2019) (off-duty police officers performing security services “earned set wages to perform low-skilled jobs for fixed periods of time” and could not use skill to increase compensation, supporting employee status); Keller v. Miri Microsystems LLC, 781 F.3d 799, 812–14 (6th Cir. 2015); Donovan v. Brandel, 736 F.2d 1114, 1118–19 (6th Cir. 1984) (migrant workers were independent contractors where they had opportunity for greater earnings based upon management of fields, which was not solely a function of a piecework compensation system).

    *Ninth Circuit:* Collinge v. IntelliQuick Delivery, Inc., 2015 WL 1299369 (D. Ariz. Mar. 23, 2015) (delivery drivers receiving “piecework” wages were employees where defendant set their wages and drivers had little control over costs).

    *Tenth Circuit:* Dole v. Snell, 875 F.2d 802, 809 (10th Cir. 1989) (cake decorators paid by the cake were employees because “toiling for money on a piecework basis is more like wages than an opportunity for ‘profit.’”).

    *Eleventh Circuit:* Yoder v. Fla. Farm Bureau, 2023 BL 144846, 2023 WL 3151107 (11th Cir, Apr. 28, 2023) (unpublished) (following *Scantland*, finding that deciding which sales methods to prioritize, hiring staff, and how to advertise reflected managerial skill and thus were proper determinants of this factor); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1316–17 (11th Cir. 2013) (technicians whose opportunity for profit was dependent upon their ability to complete more jobs was “analogous to an employee’s ability to take on overtime work or an efficient piece-rate worker’s ability to produce more pieces”) (quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (“[A] job whose profits are based on efficiency is ‘more like piecework than an enterprise that actually depends for success upon the initiative, judgment or foresight of the typical independent contractor.’”). [↑](#footnote-ref-66)
66. *Second Circuit:* Gayle v. Harry’s Nurses Registry, Inc., 2014 WL 6865431 (2d Cir. 2014) (deeming nurses as employees who earned hourly wage with no downside risk).

    *Third Circuit:* Martin v. Selker Bros., Inc., 949 F.2d 1286, 30 WH Cases 1061 (3d Cir. 1991) (determining gas station operators had no cognizable opportunity for profit or loss where volume of business depended on location).

    *Fourth Circuit:* Heath v. Perdue Farms, Inc., 87 F. Supp. 2d 452, 5 WH Cases2d 1633 (D. Md. 2000) (finding chicken catchers and crew leaders had little opportunity for profit or risk of loss).

    *Fifth Circuit:* Hopkins v. Cornerstone Am., 545 F.3d 338, 344 (5th Cir. 2008) (major determinants of profit or loss controlled by employer);Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987) (employer controlled prices, advertising, and location and size of stand); Usery v. Pilgrim Equip*.*, 527 F.2d 1308 (5th Cir. 1976) (employer controlled price, location, and advertising).

    *Ninth Circuit:* Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981)(employer controlled advertising, price, and location of cleaner outlets).

    *Eleventh Circuit:* *Scantland*, 721 F.3d at 1316–17 (fact that technicians could not negotiate rates they were paid suggested employee status; only opportunity for “profit” was to complete more jobs than assigned, like an efficient piece-rate employee); Armitage v. Dolphin Plumbing & Mech*.*, 510 F. Supp. 2d 763 (M.D. Fla. 2007) (holding plumber misclassified as independent contractor where, among other things, he had no almost no opportunity to control his profits or losses). [↑](#footnote-ref-67)
67. Freund v. Hi-Tech Satellite, Inc., 185 F. App’x 782, 784, 11 WH Cases2d 917 (11th Cir. 2006) (“[A]lthough the installers did not set the prices, the installers were ‘no less in control of their net profits as a result of [their independence, skills, and investment] than typical independent contractors.’”); *Brandel*, 736 F.2d at 1120 (noting that migrant pickle harvesters were granted substantial autonomy to tend fields as they saw fit, which gave them opportunity to increase return). [↑](#footnote-ref-68)
68. *See* Usery v. Pilgrim Equip*.*, 527 F.2d 1308 (5th Cir. 1976) (finding selling ties and wigs at laundry pickup station irrelevant). [↑](#footnote-ref-69)
69. Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1536 (7th Cir. 1987); Dole v. Snell, 875 F.2d 802, 809, 810 (10th Cir. 1989) (reduction in earnings not same as risk of loss). [↑](#footnote-ref-70)
70. *Sureway Cleaners*, 656 F.2d 1368; *Pilgrim Equipment*, 527 F.2d 1308. [↑](#footnote-ref-71)
71. Ivanov v. Builderdome, Inc., 2021 BL 232194, 2021 WL 2554620, at \*9, 12 (S.D.N.Y. June 22, 2021) (after bench trial, finding that individual who worked for start-up company for two years as creative director in exchange for 1% of company, and never demanded or received any payment for her services, was partner/investor in company, not employee). [↑](#footnote-ref-72)
72. Yoder v. Florida Farm Bureau Cas. Ins. Co., 2023 BL 144846, 2023 WL 3151107 (11th Cir. Apr. 28, 2023) (unpublished) (where insurance agents invested significant risk capital into advertising and had the ability to hire support staff they met the “investment factor” of the independent contractor analysis). [↑](#footnote-ref-73)
73. *Lauritzen*, 835 F.2d 1529 (deeming farmworkers’ provision of gloves not to be a capital investment).

    *See also*

    *Second Circuit:* Gayle v. Harry’s Nurse Registry, Inc., 2009 WL 605790, at \*5–9 (E.D.N.Y. Mar. 9, 2009) (finding that field nurses’ investments in scrubs, stethoscopes, and vehicles were negligible), *aff’d*, 594 F. App’x 714 (2d Cir. 2014).

    *Fifth Circuit:* McLaughlin v. Seafood, Inc., 867 F.2d 875, 876–77 (5th Cir. 1989) (concluding crab and crawfish pickers and peelers provided only garments and knives).

    *Tenth Circuit:* Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989) (concluding that cake decorators’ $400 investment in tools did not qualify as investment in business). [↑](#footnote-ref-74)
74. *See*

    *Third Circuit:* Leffler v. Creative Health Servs., Inc., 2017 WL 4347610, at \*7 (E.D. Pa. Sept. 29, 2017) (investment factor not significant because mental health therapy was not a profession requiring “equipment and materials”; nonetheless, factor weighed against employment status where therapists paid for their own licenses, liability insurance, continuing education, and dog for animal therapy, whereas defendant provided work space, administrative support, and equipment); 7-Eleven, Inc. v. Sodhi, 2016 WL 3085897 (D.N.J. May 31, 2016) (finding franchisees’ investments, including franchise fee and investments in store, weighed in favor of finding plaintiffs independent contractors); Naik v. 7-Eleven, Inc., 2014 WL 3844792 (D.N.J. Aug. 5, 2014) (same).

    *Fourth Circuit:* Heath v. Perdue Farms, Inc., 87 F. Supp. 2d 452, 458, 5 WH Cases2d 1633 (D. Md. 2000) (“The crew leaders’ relative lack of capital investment in equipment is perhaps one of the strongest indicators that they are employees and not independent contractors.”).

    *Fifth Circuit:* Hopkins v. Cornerstone Am., 545 F.3d 338, 344 (5th Cir. 2008) (employer’s investment far outweighed employee’s investment in home office); Carrell v. Sunland Constr., 998 F.2d 330, 1 WH Cases2d 993 (5th Cir. 1993) (holding that welders were independent contractors where they owned own trucks as well as welding machines and specialized welding tools worth, on average, $15,000 per welder; assumed all equipment-related liability costs; supplied own lodging and meals; and were required to have own general liability insurance and workers’ compensation insurance while company supplied only grinder blades and other minor equipment); Brock v. Mr. W Fireworks, 814 F.2d 1042, 28 WH Cases 57 (5th Cir. 1987) (determining operator of fireworks stand to be an employee of fireworks company where operator’s minor investments—hay, gravel, pallets, and $25–$90 toilets—were insignificant in comparison to company’s assumption of costs of stand, licenses, insurance, land, electricity, inventory, and advertising); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 22 WH Cases 783 (5th Cir. 1976) (finding employer provided laundry pickup station, cash register, fixtures, security devices, counters, racks, hangers, bags, tags, receipts, utilities, telephone, and insurance, while employee supplied only de minimis $10 annual rental fee).

    *Sixth Circuit:* Keller v. Miri Microsystems LLC, 781 F.3d 799, 810 (6th Cir. 2015) (“courts must compare the worker’s investment in the equipment to perform his job with the company’s total investment including office rental space, advertising, software, phone systems, or insurance”).

    *Eighth Circuit*: Karlson v. Action Process Serv. & Private Investigations, LLC, 860 F.3d 1089, 1096 (8th Cir. 2017) (“district court did not abuse its discretion in deciding it would permit questions addressing the nature of the parties’ relative investments but would not allow plaintiff to ‘billboard large numbers’ that would create the danger of unfair prejudice”).

    *Ninth Circuit:* Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981) (determining laundry and dry cleaning company supplied necessary risk capital for agents to run outlets).

    *Tenth Circuit:* Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1442 (10th Cir. 1998) (rig welders’ investments in equipped trucks costing $40,000 did not indicate independent contractor status when compared to employer’s investment in business); *Snell*, 875 F.2d at 804 (finding employer-employee relationship although cake decorator purchased $400 in equipment when hired; expended $400 per year thereafter on work-related expenses and employer-leased facilities; and provided icing, tables, turntables, copy cake machine, novelty items for cakes, doilies, boxes, boards, phone service, utilities, and counter help); Johnson v. Unified Gov’t of Wyandotte Cnty., 180 F. Supp. 2d 1192, 1196, 7 WH Cases2d 1000 (D. Kan. 2001) (determining off-duty police furnishing own uniforms, firearms, and personal protective gear not to be employees), *aff’d*, 371 F.3d 723, 9 WH Cases2d 1185 (10th Cir. 2004).

    *Eleventh Circuit:* Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1317–18 (11th Cir. 2013) (deeming technicians to be employees where employer supplied the hardware actually being installed while technicians supplied vehicles, insurance, and tools; most of them already owned vehicles and purchased the specialty tools directly from the employer via payroll withholdings, such that there was “little need for significant independent capital”); Armitage v. Dolphin Plumbing & Mech., LLC, 510 F. Supp. 2d 763 (M.D. Fla. 2007) (deeming plumber who provided no special tools to be employee).

    *Opinion Letters:* WH Op., 2000 WL 34444342 (Dec. 7, 2000) (pointing out that knowing the amount invested by worker, $20,000 to $40,000, was not sufficient to determine “relative investment” of parties since no information had been provided about capital investment of company). [↑](#footnote-ref-75)
75. *Third Circuit:* Martin v. Selker Bros., Inc., 949 F.2d 1286, 1294–95 (3d Cir. 1991).

    *Eighth Circuit:* Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547 (8th Cir. 1952) (deeming truck drivers and wood haulers “employees” where they purchased trucks from employer with no money down and $2 deduction from paycheck).

    *Eleventh Circuit:* *Scantland*, 721 F.3d at 1317–18 (deeming technicians to be employees where they purchased the specialty tools directly from the employer via payroll withholdings, such that there was “little need for significant independent capital”). [↑](#footnote-ref-76)
76. *Fifth Circuit:* Herman v. Express Sixty-Minutes Delivery Serv., Inc.,161 F.3d 299, 304 (5th Cir. 1998) (employees used trucks for personal use); *Mr. W Fireworks*, 814 F.2d at 1052.

    *Sixth Circuit:* *Keller*, 781 F.3d at 810–11.

    *Eleventh Circuit:* *Scantland*, 721 F.3d at 1317–18 (deeming technicians to be employees where most of them already owned vehicles). [↑](#footnote-ref-77)
77. *Sureway Cleaners*, 656 F.2d 1368 (finding no capital investment when dry cleaning agent bought out old agent’s stock); Usery v. Pilgrim Equip. Co., 527 F.2d 1308 (5th Cir. 1976) (deeming investment plan requiring operators of laundry pickup stations to purchase cleaning charge values in clothing on hand at station to be nothing more than method of settling accounts between outgoing and incoming operators). [↑](#footnote-ref-78)
78. Donovan v. Brandel, 736 F.2d 1114, 1118–19 (6th Cir. 1984). [↑](#footnote-ref-79)
79. *Pilgrim Equipment*, 527 F.2d 1308 (finding one-year contracts routinely renewed indicated employee status); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1318–19 (11th Cir. 2013) (same). [↑](#footnote-ref-80)
80. *Third Circuit:* *Selker Brothers*, 949 F.2d 1286 (determining employment performed over period of several years favored employee status); Leffler v. Creative Health Servs., Inc., 2017 WL 4347610, at \*6 (E.D. Pa. Sept. 29, 2017) (fact that therapist provided services to defendant for 19 years as independent contractor and 5 years as employee supported employee status).

    *Fourth Circuit:* Heath v. Perdue Farms, 87 F. Supp. 2d 452 (D. Md. 2000) (involving employment of 10 to 20 years).

    *Fifth Circuit:* Thibault v. Bellsouth Telecomms., Inc., 612 F.3d 843, 846 (5th Cir. 2010) (noting that plaintiff only intended to work for defendant for “seven or eight months”); Hopkins v. Cornerstone Am., 545 F.3d 338, 345 (5th Cir. 2008) (citing sales leaders’ multi-year exclusive relationships with defendant as weighing the permanency factor in support of employee status).

    *Sixth Circuit:* Acosta v. Off Duty Police Servs., Inc., 915 F.3d 1050, 1055 (6th Cir. 2019) (length and consistency of working relationship, even if officers held other jobs, favored employee status).

    *Ninth Circuit:* Donovan v. Sureway Cleaners, 656 F.2d 1368, 1372 (9th Cir. 1981) (finding agents who operated retail outlets for laundry and dry cleaning company worked continuously for company for “long periods of time”).

    *Tenth Circuit:* Dole v. Snell, 875 F.2d 802, 804, 29 WH Cases 465 (10th Cir. 1989) (involving cake decorator who worked for bakery for four and a half years and, at time she began working, expected to work there “indefinitely”).

    *Eleventh Circuit:* Armitage v. Dolphin Plumbing & Mech., LLC, 510 F. Supp. 2d 763, 773 (M.D. Fla. 2007) (stating period of three years “strongly suggests an established employer-employee relationship”).

    *Compare* Cromwell v. Driftwood Elec. Contractors, Inc., 348 F. App’x 57 (5th Cir. 2009) (cable splicers who worked approximately 11 months were found to be employees), *with* Lindsley v. Bellsouth Telecomms., Inc., 401 F. App’x 944 (5th Cir. 2010) (distinguishing *Cromwell* based on duration of plaintiff’s engagement with defendant, finding independent contractor status where splicer worked only three months). [↑](#footnote-ref-81)
81. Keller v. Miri Microsystems LLC, 781 F.3d 799, 808 (6th Cir. 2015). [↑](#footnote-ref-82)
82. Brock v. Superior Care, 840 F.2d 1054, 28 WH Cases 801 (2d Cir. 1988) (finding nurses to be employees of temporary staffing agency even though few maintained long-term relationship with agency, because nursing profession was transient by nature); Gayle v. Harry’s Nurses Registry, Inc., 2014 WL 6865431 (2d Cir. 2014) (same); Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1053–54 (5th Cir. 1987) (finding fireworks stand operators were employees even though there was 80% turnover because of seasonal nature of work). [↑](#footnote-ref-83)
83. Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1442 (10th Cir. 1998) (rig welders worked exclusively for one employer during pendency of each project); Donovan v. Gillmor, 535 F. Supp. 154, 162–63 (N.D. Ohio 1982) (migrant workers were exclusive for duration of season). [↑](#footnote-ref-84)
84. Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1537 (7th Cir. 1987); Cavazos v. Foster, 822 F. Supp. 438, 443–44 (W.D. Mich. 1993) (migrant workers returned season after season). [↑](#footnote-ref-85)
85. Donovan v. Brandel, 736 F.2d 1114, 1117 (6th Cir. 1984). [↑](#footnote-ref-86)
86. *See* Donovan v. DialAmerica Mktg., 757 F.2d 1376, 1384–87, 27 WH Cases 113 (3d Cir. 1984) (holding that where distributors in home research business exercised “business-like initiative” in recruiting new home researchers, skill factor weighed in favor of independent contractor status); *Brandel*, 736 F.2d at 1120 (noting that pickle picking entailed higher level of skill than other migrant harvest work). [↑](#footnote-ref-87)
87. *Second Circuit:* Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988) (deeming nurses employees); Walling v. Twyeffort, Inc., 158 F.2d 944, 6 WH Cases 534 (2d Cir. 1947) (deeming tailors working in their own shops to be employees).

    *Third Circuit:* Jimenez v. Best Behavioral Healthcare, Inc., 391 F. Supp. 3d 380 (E.D. Pa. 2019) (deeming psychotherapist to be an employee).

    *Fifth Circuit:* Robicheaux v. Radcliff Material, 697 F.2d 662, 666–67, 25 WH Cases 1210 (5th Cir. 1983) (deeming welders employees). [↑](#footnote-ref-88)
88. *See*, *e.g*., Carrell v. Sunland Constr., 998 F.2d 330, 1 WH Cases2d 993 (5th Cir. 1993) (determining that welders had both specialized skills as reflected by testing and certification requirements and initiative required to move from job to job); Leffler v. Creative Health Servs., Inc., 2017 WL 4347610, at \*7 (E.D. Pa. Sept. 29, 2017) (plaintiffs were “highly trained mental therapists with masters degrees and special licenses to practice therapy,” which weighed in favor of independent contractor status). [↑](#footnote-ref-89)
89. *Sixth Circuit:* Keller v. Miri Microsystems LLC, 781 F.3d 799, 809 (6th Cir. 2015).

    *Tenth Circuit:* Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989).

    *Eleventh Circuit:* Scantland v. Jeffry Knight, Inc*.*, 721 F.3d 1308, 1318 (11th Cir. 2013). [↑](#footnote-ref-90)
90. Hopkins v. Cornerstone Am., 545 F.3d 338, 345 (5th Cir. 2008) (finding that abilities common to all effective managers are not “specialized skills”); Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1053 (5th Cir. 1987) (“initiative, not efficiency, determines independence”); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 22 WH Cases 783 (5th Cir. 1976). [↑](#footnote-ref-91)
91. *See* Martin v. Selker Bros., Inc., 949 F.2d 1286, 1295, 30 WH Cases 1061 (3d Cir. 1991) (stating “routine work which requires industry and efficiency” is not indicative of independence and nonemployment status); Mitchell v. John R. Cowley & Bros., Inc., 292 F.2d 105, 107, 15 WH Cases 106 (5th Cir. 1961) (night watchman). [↑](#footnote-ref-92)
92. *Second Circuit:* Hart v. Rick’s Cabaret Int’l, Inc., 967 F. Supp. 2d 901, 920 (S.D.N.Y. 2013) (exotic dancers’ “hustling” of customers did not demonstrate initiative or skill).

    *Fourth Circuit:* Heath v. Perdue Farms, Inc., 87 F. Supp. 2d 452 (D. Md. 2000) (deeming chicken catching to be unskilled labor).

    *Fifth Circuit:* McLaughlin v. Seafood, Inc., 867 F.2d 875, 877, 29 WH Cases 321 (5th Cir. 1989) (determining that, in absence of specialized and widely demanded skills, freedom of crab and crawfish pickers and peelers to work for multiple employers was “hardly the same as true economic independence”); *Cowley & Brothers*, 292 F.2d at 107 (work performed by night and weekend security guard did not require highly specialized skills). [↑](#footnote-ref-93)
93. United States v. Silk, 331 U.S. 704 (1947). [↑](#footnote-ref-94)
94. *See, e.g.,*

    *Second Circuit:* Gayle v. Harry’s Nurses Registry, Inc., 594 F. App’x 714 (2d Cir. 2014) (noting that “nurses” was literally the company’s middle name, and placing nurses accounted for company’s sole source of income).

    *Third Circuit:* *Selker Brothers*, 949 F.2d 1286 (deeming commissioned gas station operators to be station owners’ employees where, among other things, operators performed owners’ primary work of distributing and selling gasoline); Donovan v. DialAmerica Mktg., 757 F.2d 1376, 27 WH Cases 113 (3d Cir. 1985) (finding home researchers’ location of phone numbers to be integral part of telephone marketing firm’s primary work of locating phone numbers of various people and calling them to sell particular products).

    *Sixth Circuit:* Keller v. Miri Microsystems LLC, 781 F.3d 799, 815 (6th Cir. 2015) (satellite dish installer integral to satellite dish installation provider).

    *Seventh Circuit:* Secretary of Labor v. Lauritzen, 835 F.2d 1529, 28 WH Cases 654 (7th Cir. 1987) (deeming farmworkers’ pickle picking an integral part of farm owner’s business).

    *Ninth Circuit:* Donovan v. Sureway Cleaners, 656 F.2d 1368, 25 WH Cases 105 (9th Cir. 1981) (stating that agents who operated retail outlets were essential part of laundry and dry cleaning company’s operation).

    *Tenth Circuit:* Dole v. Snell, 875 F.2d 802, 811 (10th Cir. 1989) (finding cake decorators’ work “obviously” integral to business that sells custom-decorated cakes).

    *Eleventh Circuit:* Scantland v. Jeffry Knight, Inc*.*, 721 F.3d 1308, 1319 (11th Cir. 2013) (where two-thirds of company’s business consisted of telecommunications installations and repair services, the technicians performing those installations and repairs were integral to the business, favoring employee status). [↑](#footnote-ref-95)
95. Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). [↑](#footnote-ref-96)
96. *Id.* at 726 (internal quotations omitted). [↑](#footnote-ref-97)
97. *Id.* at 730. [↑](#footnote-ref-98)
98. *Snell*, 875 F.2d at 811. [↑](#footnote-ref-99)
99. *Gayle*, 594 F. App’x 714. [↑](#footnote-ref-100)
100. Scantland v. Jeffry Knight, Inc*.*, 721 F.3d 1308, 1319 (11th Cir. 2013). [↑](#footnote-ref-101)
101. For example, *compare* Cromwell v. Driftwood Elec. Contractors, Inc., 348 F. App’x 57 (5th Cir. 2009) (deeming cable splicers who provided services to damaged telecommunications lines in wake of Hurricane Katrina employees because they worked on steady and reliable basis over approximately 11 months exclusively for their purported employer who had complete control of schedule and pay), *with* Thibault v. Bellsouth Telecommc’ns, Inc., 612 F.3d 843, 848–49 (5th Cir. 2010) (finding splicer employed to repair wiring damaged by Hurricane Katrina was independent contractor because he was in business for himself and not economically dependent upon defendants; specifically noting “we do not hold that *all* splicers are always independent contractors”), *and* Lindsley v. Bellsouth Telecommc’ns, Inc., 401 F. App’x 944 (5th Cir. 2010) (distinguishing *Cromwell* based on duration of plaintiff’s engagement with defendant).

     *See also* Keller v. Miri MicrosystemsLLC, 781 F.3d 799 (6th Cir. 2015) (reversing district court grant of summary judgment to defendant because many factors favored employee status for cable installers); Freund v. Hi-Tech Satellite, Inc., 185 F. App’x 782, 11 WH Cases2d 917 (11th Cir. 2006) (holding satellite installer was independent contractor where, because he received compensation by the job, he could have accepted more jobs, hired employees, and made more money); Solis v. Cascom, Inc., 2011 WL 10501391 (S.D. Ohio Sept. 21, 2011) (cable installers were employees where they were forbidden from employing their own helpers, forced to wear defendant’s logo, received training from defendant, and were employed for substantial time periods); Santelices v. Cable Wiring, 147 F. Supp. 2d 1313, 6 WH Cases2d 1853 (S.D. Fla. 2001) (concluding that amount of control cable company exerted over installers warranted a trial on the issue of employee status). [↑](#footnote-ref-102)
102. *See*

     *Seventh Circuit:* Arunin v. Oasis Chi., Inc., 2016 WL 851989 (N.D. Ill. Mar. 4, 2016) (granting drivers’ motion for summary judgment; finding drivers treated like employees where they were required to do more than deliver food, including taking out garbage and making bank deposits).

     *Ninth Circuit:* Flores v. Velocity Express, LLC, 250 F. Supp. 3d 468 (N.D. Cal. 2017) (granting summary judgment in favor of delivery drivers; finding defendant controlled how drivers performed their duties, including appearance of drivers and their vehicles, and when and how drivers performed their work); Collinge v. IntelliQuick Delivery, Inc., 2015 WL 1299369, at \*6 (D. Ariz. Mar. 23, 2015) (granting delivery drivers’ motion for summary judgment where employer exercised “a great deal of control” over how drivers performed their work).

     *Eleventh Circuit:* Sakacsci v. Quicksilver Delivery Sys., Inc., 2007 WL 4218984 (M.D. Fla. Nov. 28, 2007) (granting courier drivers’ motion for summary judgment).

     *Opinion Letters:* WH Op., 2000 WL 34444342 (Dec. 7, 2000) (opining that delivery drivers of private carrier furnishing nationwide package pickup and delivery service were employees rather than independent contractors, in disagreement with *Herman v. Express Sixty-Minutes Delivery Serv., Inc*., 161 F.3d 299 (5th Cir. 1998)). [↑](#footnote-ref-103)
103. Ansoumana v. Gristede’s Operating Corp., 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (holding that delivery personnel were not independent contractors where store controlled hiring, firing, transfer, and pay, and personnel had minimal investment in business and used little skills or initiative in work), *reaff’d on reconsideration,* 255 F. Supp. 2d 197 (S.D.N.Y. 2003). [↑](#footnote-ref-104)
104. Heath v. Perdue Farms, Inc.,87 F. Supp. 2d 452, 5 WH Cases2d 1633 (D. Md. 2000). [↑](#footnote-ref-105)
105. Hopkins v. Cornerstone Am., 545 F.3d 338 (5th Cir. 2008) (finding “insurance sales leaders” in pyramid marketing structure to be employees); Merritt v. Texas Farm Bureau, 2023 BL 162763, 2023 WL 3441573 (W.D. Tx. May 12, 2023) (relying on *Hopkins*,holding insurance company exerted significant control over insurance broker who owned local insurance agency where company had ultimate decision making authority to hire and fire agents and other control factors met). [↑](#footnote-ref-106)
106. Baystate Alternative Staffing v. Herman, 163 F.3d 668, 5 WH Cases2d 65 (1st Cir. 1998) (upholding DOL Administrative Review Board’s decision that temporary workers hired by employee-leasing company were employees); Preston v. Settle Down Enters., Inc., 90 F. Supp. 2d 1267, 1274, 6 WH Cases2d 1237 (N.D. Ga. 2000) (deeming temporary workers to be employees where temporary employment service “recruited, transported, paid, and maintained records” for the temporary workers). [↑](#footnote-ref-107)
107. Perez v. D. Howes, LLC, 7 F. Supp. 3d 715 (W.D. Mich. 2014) (in suit brought by Secretary of Labor, finding migrant farmworkers to be employees of farm upon analysis of six-factor test), *aff’d*,790 F.3d 681 (6th Cir. 2015); Elizondo v. Podgorniak, 70 F. Supp. 2d 758, 6 WH Cases2d 705 (E.D. Mich. 1999); Soto v. McLean, 20 F. Supp. 2d 901, 4 WH Cases2d 1650 (E.D.N.C. 1998) (finding migrant farmworkers to be employees of farm where farmer controlled their work and provided equipment, workers invested only unskilled labor, and labor was integral part of farmer’s business). [↑](#footnote-ref-108)
108. *Second Circuit:* Hart v. Rick’s Cabaret Int’l, Inc., 967 F. Supp. 2d 901, 922 (S.D.N.Y. 2013).

     *Third Circuit*: Verma v. 3001 Castor, Inc., 937 F.3d 221, 232 (3d Cir. 2019).

     *Fourth Circuit:* McFeeley v. Jackson St. Entm’t, LLC, 825 F.3d 235 (4th Cir. 2016); Foster v. Gold & Silver Private Club, Inc., 2015 WL 8489998 (W.D. Va. Dec. 9, 2015); Butler v. PP&G, Inc., 2013 WL 5964476 (D. Md. Nov. 7, 2013).

     *Fifth Circuit:* Reich v. Circle C Invs., 998 F.2d 324, 326–27, 1 WH Cases2d 945 (5th Cir. 1993) (deeming topless dancers at nightclub to be employees where club set hours and controlled atmosphere and the only initiative they exercised was regarding what to wear and how provocatively to dance, even though they were solely compensated by tips, had paid a fee to perform each night, and were permitted to perform whenever they wished); Johnson v. North Texas Dancers, 2021 BL 191232, 2021 WL 2077649, at \*5 (N.D. Tex. May 24, 2021).

     *Sixth Circuit:* Gilbo v. Agment, LLC, 831 F. App’x 772 (6th Cir. 2020); Tassy v. Lindsay Entm’t Enters., Inc., 591 F. Supp. 3d 191, 199–203 (W.D. Ky. 2022); Lester v. Agment LLC, 2016 WL 1588654 (N.D. Ohio Apr. 20, 2016).

     *Seventh Circuit:* Mays v. Rubiano, Inc., 560 F. Supp. 3d 1230, 1235–36 (N.D. Ind. 2021); Morse v. Mer Corp., 2010 WL 2346334 (S.D. Ind. June 4, 2010).

     *Eighth Circuit*: Miller v. Centerfold Entm’t Club, Inc., 2017 WL 3425887 (W.D. Ark. Aug. 9, 2017).

     *Ninth Circuit*: Roldan v. PSLA LLC, 2021 BL 390356, 2021 WL 4690587, at \*4–6 (C.D. Cal. July 2, 2021).

     *Eleventh Circuit:* Schofield v. Gold Club Tampa, Inc., 2021 BL 50544, 2021 WL 533540, at \*4–5 (M.D. Fla. Feb. 12, 2021); Hurst v. Youngelson, 354 F. Supp. 3d 1362 (N.D. Ga. 2019); Shaw v. Set Enters., 241 F. Supp. 3d 1318 (S.D. Fla. 2017) (rejecting defendant’s arguments that dancers were “licensees”); Burrell v. Toppers Int’l, Inc., 2017 WL 1395612 (M.D. Ga. Apr. 18, 2017); Stevenson v. Great Am. Dream, Inc., 2013 WL 6880921 (N.D. Ga. Dec. 31, 2013); Clincy v. Galardi S. Enters., Inc.,808 F. Supp. 2d 1326 (N.D. Ga. 2011).

     *D*.*C*. *Circuit:* Thompson v. Linda & A, Inc., 779 F. Supp. 2d 139 (D.D.C. 2011). [↑](#footnote-ref-109)
109. Donovan v. Unique Racquetball Clubs, 674 F. Supp. 77, 28 WH Cases 913 (E.D.N.Y. 1987). [↑](#footnote-ref-110)
110. Luther v. Z. Wilson, Inc., 528 F. Supp. 1166, 27 WH Cases 413 (S.D. Ohio 1981). [↑](#footnote-ref-111)
111. Halferty v. Pulse Drug Co., 821 F.2d 261, 28 WH Cases 322 (5th Cir. 1987). [↑](#footnote-ref-112)
112. Brennan v. Partida, 492 F.2d 707, 709, 21 WH Cases 677 (5th Cir. 1974); *see also* Donovan v. Sureway Cleaners, 656 F.2d 1368, 1371–73, 25 WH Cases 105 (9th Cir. 1981) (determining operators of retail outlets for laundry and dry cleaning company were employees); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 22 WH Cases 783 (5th Cir. 1976) (deeming operators of laundry pickup stations employees). [↑](#footnote-ref-113)
113. *Second Circuit:* Ethelberth v. Choice Sec. Co., 91 F. Supp. 3d 339 (E.D.N.Y. 2015) (security guards are employees).

     *Fifth Circuit:* Mitchell v. Strickland Transp. Co., 228 F.2d 124, 12 WH Cases 712 (5th Cir. 1955) (security guards are employees).

     *Sixth Circuit*: Acosta v. Off Duty Police Servs., Inc., 915 F.3d 1050, 1055 (6th Cir. 2019) (sworn and non-sworn security officers and traffic controllers are employees); Walsh v. EM Protective Servs., 2021 BL 299658, 2021 WL 3490040, at \*6–11 (M.D. Tenn. Aug. 9, 2021) (finding security officers to be employees).

     *Seventh Circuit:* Solis v. International Detective & Protective Serv., Inc., 819 F. Supp. 2d 740 (N.D. Ill. 2011) (security guards are employees).

     *Eleventh Circuit*: Walsh v. Freeman Sec. Servs, Inc., 2022 BL 49471, 2022 WL 445501, at \*7–9 (M.D. Fla. Feb. 14, 2022) (finding security guards to be employees). [↑](#footnote-ref-114)
114. Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547, 10 WH Cases 658 (8th Cir. 1952). [↑](#footnote-ref-115)
115. Doty v. Elias, 733 F.2d 720, 26 WH Cases 1216 (10th Cir. 1984). [↑](#footnote-ref-116)
116. Mednick v. Albert Enters., 508 F.2d 297, 299, 22 WH Cases 166 (5th Cir. 1975). [↑](#footnote-ref-117)
117. Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987); Perez v. Howes, LLC, 7 F. Supp. 3d 715 (W.D. Mich. 2014) (holding migrant pickle harvesters were employees, in contrast to migrant pickle harvesters at issue in *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984)*,* who were more like sharecroppers), *aff’d*, 790 F.3d 681 (6th Cir. 2015);Elizondo v. Podgorniak, 70 F. Supp. 2d 758, 6 WH Cases2d 705 (E.D. Mich. 1999). [↑](#footnote-ref-118)
118. Dole v. Snell, 875 F.2d 802, 29 WH Cases 465 (10th Cir. 1989). [↑](#footnote-ref-119)
119. Shultz v. Cadillac Assocs., 413 F.2d 1215, 19 WH Cases 71 (7th Cir. 1969) (deeming counselors to be employees where they depended on company for training, direction, and compensation based on number of placements, which was set by company). [↑](#footnote-ref-120)
120. *Second Circuit:* Brock v. Superior Care, 840 F.2d 1054, 28 WH Cases 801 (2d Cir. 1988); Gayle v. Harry’s Nurse Registry, Inc., 2009 BL 47147, 2009 WL 605790, at \*5–9 (E.D.N.Y. Mar. 9, 2009).

     *Fourth Circuit*: Walsh v. Medical Staffing of Am., 580 F. Supp. 3d 216, 229–34 (E.D. Va. 2022).

     *Eleventh Circuit:* Solis v. A+ Nursetemps, Inc., 2013 WL 1395863 (M.D. Fla. Apr. 15, 2013). [↑](#footnote-ref-121)
121. LeMaster v. Alternative Healthcare Sols., Inc., 726 F. Supp. 2d 854 (M.D. Tenn. 2010) (holding that licensed practical nurses were employees, not independent contractors). [↑](#footnote-ref-122)
122. Hughes v. Family Life Care, Inc., 117 F. Supp. 3d 1365 (N.D. Fla. 2015) (holding nursing assistant employee of nurse registry). [↑](#footnote-ref-123)
123. Holden v. Bwell Healthcare, Inc., 2021 BL 468458, 2021 WL 5827898, at \*3–5 (D. Md. Dec. 7, 2021); Acosta v. Heart II Heart, LLC, 2019 WL 5197329, at \*6–7 (W.D. Pa. Oct. 15, 2019); Acosta v. At Home Personal Care Servs. LLC, 2019 WL 1601997, at \*8 (E.D. Va. Apr. 15, 2019). [↑](#footnote-ref-124)
124. Martin v. Selker Bros., Inc., 949 F.2d 1286, 30 WH Cases 1061 (3d Cir. 1991); *see also* Donovan v. Williams Oil Co., 717 F.2d 503, 26 WH Cases 643 (10th Cir. 1983) (holding service station operators with “form leases” were employees of oil company); Marshall v. Truman Arnold Distrib. Co., 640 F.2d 906, 24 WH Cases 1217 (8th Cir. 1981) (concluding service station operators were employees of distributors). [↑](#footnote-ref-125)
125. Weisel v. Singapore Joint Venture, 602 F.2d 1185, 24 WH Cases 276 (5th Cir. 1979) (holding valet was employee where he wore hotel uniform supplied by hotel, was covered by hotel’s insurance, had identification card identifying him as hotel employee, received Christmas bonus, and ate meals at hotel at employees’ discount). [↑](#footnote-ref-126)
126. *Fifth Circuit:* Newsom v. Carolina Logistics Servs., Inc., 2012 WL 4320809 (N.D. Miss. Sept. 18, 2012).

     *Seventh Circuit:* Bulaj v. Wilmette Real Estate & Mgmt. Co., 2010 WL 4237851 (N.D. Ill. Oct. 21, 2010).

     *Eleventh Circuit:* Robles v. RFJD Holding Co., Inc., 2013 WL 2422625 (S.D. Fla. June 3, 2013). [↑](#footnote-ref-127)
127. Guerra v. Teixeira, 2019 WL 330871 (D. Md. Jan. 25, 2019); Calle v. Chul Sun Kang Or., 2012 WL 163235 (D. Md. Jan. 18, 2012). [↑](#footnote-ref-128)
128. *Second Circuit:* Gonzalez v. Jane Roe, Inc., 2014 WL 4175730 (E.D.N.Y. Aug. 20, 2014) (manicurists).

     *Fifth Circuit:* Donovan v. John Jay Esthetic Salons, 1983 WL 2114, 26 WH Cases 823 (E.D. La. Oct. 25, 1983) (finding shampoo maids to be employees where jobs did not require special training or skill and they were entirely dependent on hairdresser for whom they worked).

     *Eighth Circuit:* Stagl v. Vadell, 2011 WL 5553484 (D.N.D. Nov. 15, 2011). [↑](#footnote-ref-129)
129. Campos v. Zopounidis, 2011 WL 2971298 (D. Conn. July 21, 2011). [↑](#footnote-ref-130)
130. *Third Circuit:* Blan v. Classic Limousine Transp., LLC, 2021 BL 113422, 2021 WL 1176063 (W.D. Pa. Mar. 29, 2021).

     *Eighth Circuit:* Solis v. Kansas City Transp. Grp., 2012 BL 221327, 2012 WL 3753736 (W.D. Mo. Aug. 28, 2012).

     *Eleventh Circuit:* Brandt v. Gasolinera, Inc., 2019 WL 3890633, at \*4–6 (S.D. Fla. June 18, 2019); Gordilis v. Ocean Drive Limousines, Inc., 2014 WL 2214289 (S.D. Fla. May 28, 2014). [↑](#footnote-ref-131)
131. Walsh v. Alpha & Omega USA, Inc., 553 F. Supp. 3d 659 (D. Minn. 2021). [↑](#footnote-ref-132)
132. De Luna-Lopez v. A Lawn & Landcare Servs. Co., LLC, 2013 WL 4504767 (N.D. Tex. July 29, 2013). [↑](#footnote-ref-133)
133. *Fifth Circuit:* Martinez v. Ranch Masonry, Inc., 2018 WL 1579476, at \*1 (S.D. Tex. Apr. 2, 2018), *aff’d,* 2019 WL 258230 (5th Cir. Jan. 17, 2019) (duties included laborer, scaffolding, and stucco work); Villarreal v. Samaripa Oilfield Servs. LLC, 2014 WL 7405206 (S.D. Tex. Dec. 30, 2014).

     *Seventh Circuit:* Calderon v. J. Younes Constr. LLC, 2013 WL 3199985 (N.D. Ill. June 23, 2013).

     *Eighth Circuit*: Marshall v. MWF Constr., LLC, 2019 WL 1437599 (E.D. Ark. Mar. 29, 2019).

     *Ninth Circuit:* Perez v. Oak Grove Cinemas, Inc., 68 F. Supp. 3d 1234 (D. Or. 2014). [↑](#footnote-ref-134)
134. Valenzuela v. Trinity Thru Tubing LLC, 2020 BL 270315, 2020 WL 4192752, at \*3, 5 (S.D. Tex. July 21, 2020). [↑](#footnote-ref-135)
135. Perez v. Super Maid, LLC, 55 F. Supp. 3d 1066 (N.D. Ill. 2014); Harris v. Skokie Maid & Cleaning Serv., 2013 WL 3506149 (N.D. Ill. July 11, 2013). [↑](#footnote-ref-136)
136. Karna v. BP Corp. N. Am., Inc., 2013 WL 1155485 (S.D. Tex. Mar. 19, 2013). [↑](#footnote-ref-137)
137. Hill v. Cobb, 2014 WL 3810226 (N.D. Miss. Aug. 1, 2014). [↑](#footnote-ref-138)
138. Ingram v. Passmore, 2016 WL 1212570 (N.D. Ala. Mar. 29, 2016). [↑](#footnote-ref-139)
139. Acosta v. Wellfleet Commc’n, 2018 WL 4682316 (D. Nev. Sep. 29, 2018). [↑](#footnote-ref-140)
140. Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1442 (10th Cir. 1998) (rig welders working on project-to-project basis were employees); Robicheaux v. Radcliff Material, 697 F.2d 662, 25 WH Cases 1210 (5th Cir. 1983) (deeming welders employees where they worked between 10 months and three years for company performing work that required only moderate skill, company told them how long jobs should take, and welders spent only 50% of their time welding and the rest of their time performing other tasks for company). [↑](#footnote-ref-141)
141. Trujeque v. DirecTV, LLC, 2017 WL 8238315, at \*1 (C.D. Cal. Nov. 2, 2017) (holding that cable installation technician was employee due to substantial control exerted by defendant, including hiring guidelines and restrictions on work with other companies); Thornton v. Mainline Commc’ns, LLC, 157 F. Supp. 3d 844 (E.D. Mo. 2016) (holding cable repair and installation technicians improperly classified as independent contractors where defendants exercised high degree of control over manner of work). [↑](#footnote-ref-142)
142. Jimenez v. Best Behavioral Healthcare, Inc., 391 F. Supp. 3d 380 (E.D. Pa. 2019). [↑](#footnote-ref-143)
143. Carusillo v. FanSided, Inc., 2021 BL 357288, 2021 WL 4311167, at \*3–4 (S.D.N.Y. Sept. 21, 2021). [↑](#footnote-ref-144)
144. Feng Xue v. Koenig, 2022 BL 326635, 2022 WL 4279185 (S.D.N.Y. Sept. 14, 2022). [↑](#footnote-ref-145)
145. Murray v. Playmaker Servs., LLC, 512 F. Supp. 2d 1273 (S.D. Fla. 2007). [↑](#footnote-ref-146)
146. *Second Circuit:* Franze v. Bimbo Foods Bakeries USA, Inc., 826 F. App’x 74 (2d Cir. 2020); Mikhaylov v. Y&B Transp. Co., 2019 WL 1492907 (E.D.N.Y. Mar. 31, 2019); Browning v. CEVA Freight, LLC, 885 F. Supp. 2d 590 (E.D.N.Y. 2012).

     *Third Circuit:* Hicks v. Mulhallen, 2008 WL 1995143 (D.N.J. May 5, 2008).

     *Ninth Circuit:* Moba v. Total Transp. Servs., Inc., 16 F. Supp. 3d 1257, 1264–66 (W.D. Wash. 2014).

     *Tenth Circuit*: Merrill v. Harris, 2022 BL 300224, 2022 WL 3696669, at \*7–14 (10th Cir. Aug. 26, 2022). [↑](#footnote-ref-147)
147. Saleem v. Corporate Transp. Grp., 854 F.3d 131 (2d Cir. 2017); Carter v. Rasier-CA, LLC, 2017 WL 4098858, at \*1 (N.D. Cal. Sept. 15, 2017), *aff’d*, 724 F. App’x 586 (9th Cir. 2018); Iontchev v. AAA Cab, Inc., 2015 WL 1345275 (D. Ariz. Mar. 18, 2015), *aff’d*, 685 F. App’x 548 (9th Cir. Mar. 27, 2017); Arena v. Delux Transp. Servs., 2014 WL 794300 (E.D.N.Y. Feb. 26, 2014); *see also* Callahan v. City of Chi., 78 F. Supp. 3d 791 (N.D. Ill. 2015) (city exercised power over taxicab industry through regulation but was not ultimately employer of taxicab drivers because city not in taxi business). [↑](#footnote-ref-148)
148. Dimingo v. Midnight Xpress, Inc., 325 F. Supp. 3d 1299 (S.D. Fla. 2018); Johnson v. Unified Gov’t of Wyandotte Cnty., 180 F. Supp. 2d 1192, 7 WH Cases2d 1000 (D. Kan. 2001) (off-duty police officers who worked as security officers for housing authority were independent contractors), *aff’d*, 371 F.3d 723, 9 WH Cases2d 1185 (10th Cir. 2004). [↑](#footnote-ref-149)
149. Estate of Suskovich v. Anthem Health Plans of Va., 553 F.3d 559, 565–70 (7th Cir. 2009); Baker v. Dataphase, Inc., 781 F. Supp. 724, 30 WH Cases 1189 (D. Utah 1992). [↑](#footnote-ref-150)
150. Herrera v. South Valley Floors, Inc., 2019 WL 1376821 (D. Utah Mar. 27, 2019); Brennan v. Longview Carpet & Specialty Co., 1974 WL 1144, 21 WH Cases 756 (E.D. Tex. Mar. 25, 1974). [↑](#footnote-ref-151)
151. Romero v. Razzle Dazzle Barbershop Inc., 793 F. App’x 853 (11th Cir. 2019) (affirming jury verdict finding that barbers were independent contractors); Bolden v. Callahan, 595 F. Supp. 3d 727, 736–39 (E.D. Ark. 2022) (cosmetologist on commission); Viar-Robinson v. Dudley Beauty Salon, 2013 WL 63888646 (D. Md. Dec. 5, 2013) (licensed nail technician who worked at salon in exchange for 75% of proceeds for her work). [↑](#footnote-ref-152)
152. Carrell v. Sunland Constr., 998 F.2d 330, 1 WH Cases2d 993 (5th Cir. 1993). [↑](#footnote-ref-153)
153. Donovan v. DialAmerica Mktg., 757 F.2d 1376, 1384–87, 27 WH Cases 113 (3d Cir. 1985). [↑](#footnote-ref-154)
154. Dunlop v. Dr. Pepper-Pepsi Cola Bottling Co., 529 F.2d 298, 22 WH Cases 683 (6th Cir. 1976). [↑](#footnote-ref-155)
155. Wirtz v. San Francisco & Oakland Helicopter Airlines, Inc., 244 F. Supp. 680, 17 WH Cases 132 (N.D. Cal. 1965), *aff’d*, 17 WH Cases 552 (9th Cir. 1966). [↑](#footnote-ref-156)
156. Barlow v. C.R. England, Inc., 703 F.3d 497 (10th Cir. 2012) (affirming summary judgment against janitor, finding he was independent contractor because he created limited liability corporation to provide services to company, kept records, and had ultimate freedom to determine how to accomplish his tasks). [↑](#footnote-ref-157)
157. Shultz v. Jim Walter Corp., 314 F. Supp. 454, 19 WH Cases 563 (N.D. Ala. 1970). [↑](#footnote-ref-158)
158. Johns v. Stewart, 57 F.3d 1544 (10th Cir. 1995) (finding overall nature of relationship, given economic reality of the particular circumstances, to be that of assistance, not employment). [↑](#footnote-ref-159)
159. Nieman v. National Claims Adjusters, Inc., 775 F. App’x 622 (11th Cir. 2019); Talbert v. American Risk Ins. Co., 405 F. App’x 848 (5th Cir. 2010) (finding that claims adjuster was independent contractor, not employee). [↑](#footnote-ref-160)
160. Yoder v. Florida Farm Bureau Cas. Ins. Co., 2023 BL 144846, 2023 WL 3151107 (11th Cir. Apr. 28, 2023) (unpublished); Daskam v. Allstate Corp., 2012 WL 4420069 (W.D. Wash. Sept. 24, 2012). [↑](#footnote-ref-161)
161. Perdomo v. Ask 4 Realty & Mgmt., Inc., 298 F. App’x 820, 821 (11th Cir. 2008). [↑](#footnote-ref-162)
162. Werner v. Bell Family Med. Ctr., Inc., 529 F. App’x 541 (6th Cir. 2013). [↑](#footnote-ref-163)
163. Hargrave v. AIM Directional Servs., LLC, 2022 BL 163462, 2022 WL 1487020, at \*2–5 (5th Cir. May 11, 2022) (directional drillers); Parrish v. Premier Directional Drilling, L.P., 917 F.3d 369 (5th Cir. 2019) (oil field drilling consultants); Gate Guard Servs. LP v. Solis, 2013 WL 593418 (S.D. Tex. Feb. 13, 2013) (oil field gate attendants). [↑](#footnote-ref-164)
164. Meyer v. United States Tennis Ass’n, 2014 WL 4495185 (S.D.N.Y. Sept. 11, 2014), *aff’d*, 607 F. App’x 121 (2d Cir. 2015). [↑](#footnote-ref-165)
165. Sellers v. Royal Bank of Can., 2014 WL 104682 (S.D.N.Y. Jan. 8, 2014). [↑](#footnote-ref-166)
166. Pendleton v. JEVS Human Servs., 2020 WL 2793131, at \*9 (E.D. Pa. May 29, 2020) (home care); Tetzlaff v. United States, 2015 WL 7585333 (Fed. Cl. Nov. 25, 2015) (child care). [↑](#footnote-ref-167)
167. Brown v. BCG Attorney Search, 2013 WL 6096932, at \*2 (N.D. Ill. Nov. 20, 2013). [↑](#footnote-ref-168)
168. Hardison v. Healthcare Training Sols., LLC, 2017 WL 2276840 (D. Md. May 25, 2017) (concluding that “focal point” of analysis was plaintiff’s lack of economic dependence on defendant). [↑](#footnote-ref-169)
169. Diego v. Victory Lab, Inc., 282 F. Supp. 3d 1275 (S.D. Fla. 2017). [↑](#footnote-ref-170)
170. Karlson v. Action Process Serv. & Private Investigations, LLC, 860 F.3d 1089 (8th Cir. 2017). [↑](#footnote-ref-171)
171. WH Op. FLSA2019-6 (Apr. 29, 2019). [↑](#footnote-ref-172)
172. Green v. Golla Center for Plastic Surgery, 2019 WL 1083688 (W.D. Pa. Mar. 7, 2019). [↑](#footnote-ref-173)
173. Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984). [↑](#footnote-ref-174)
174. Nelson v. Texas Sugars, Inc., 838 F. App’x 39 (5th Cir. 2020). [↑](#footnote-ref-175)
175. *Fourth Circuit:* Chao v. Mid-Atlantic Installation Servs., 2001 WL 739243 (4th Cir. 2001), *aff’d sub nom*.Herman v. Mid-Atlantic Installation Servs., Inc., 164 F. Supp. 2d 667 (D. Md. 2000).

     *Fifth Circuit:* Eberline v. Media Net LLC, 636 F. App’x 225 (5th Cir. 2016) (holding satellite installer was independent contractor because installers could control hours and days they worked, perform custom work or additional services for customers for extra profit, and hire assistants, and were required to provide their own tools and supplies); Thibault v. Bellsouth Telecomms., Inc., 612 F.3d 843 (5th Cir. 2010) (finding splicer employed to repair wiring damaged by Hurricane Katrina was independent contractor because he was in business for himself and not economically dependent on defendants); Lindsley v. Bellsouth Telecomms., Inc., 401 F. App’x 944 (5th Cir. 2010) (same).

     *Eighth Circuit:* Roslov v. DirecTV Inc., 218 F. Supp. 3d 965 (E.D. Ark. 2016) (holding that satellite installers were not covered employees as matter of law because, although defendant initially assigned work orders, plaintiffs had ability to set their schedule (including vacations), reject additional orders at end of day without recourse, complete work orders in order they chose, switch work orders with other installers, and hire other technicians to fulfill their work orders, and were not restrained from engaging in outside work); Dole v. Amerilink Corp., 729 F. Supp. 73, 29 WH Cases 1019 (E.D. Mo. 1990); Brennan v. A-1 Heating Co., 21 WH Cases 544 (D. Neb. 1973).

     *Eleventh Circuit:* Freund v. Hi-Tech Satellite, Inc., 185 F. App’x 782, 11 WH Cases2d 917 (11th Cir. 2006) (holding satellite installer was independent contractor because he received compensation by the job and therefore could have accepted more jobs, hired employees, and made more money). [↑](#footnote-ref-176)
176. *See* WHD Fact Sheet #13 (1997). Earlier Opinion letters had discussed the six “primary factors which the Court considered significant” in *Rutherford* and *Silk*. *See, e.g.,* WH Op. Ltr. (June 23, 1949); WHD Op. Ltr. (Oct. 12, 1965); WHD Op. Ltr. (Feb. 18, 1969); 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). [↑](#footnote-ref-177)
177. U.S. Dep’t. of Labor, Wage & Hour Div., Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (rev. July 2008), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship. [↑](#footnote-ref-178)
178. WH Admin. 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 (July 15, 2015). [↑](#footnote-ref-179)
179. The DOL’s website stated that removal of the AI “does not change the legal responsibilities of employers under the Fair Labor Standards Act … as reflected in the department’s long-standing regulations and case law. The department will continue to fully and fairly enforce all laws within its jurisdiction, including the Fair Labor Standards Act.” News Release, U.S. Dep’t of Labor, U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (June 7, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170607. [↑](#footnote-ref-180)
180. WH Op. FLSA 2019-6 (Apr. 29, 2019). [↑](#footnote-ref-181)
181. Opinion Letter Search, U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/​agencies/​whd/​opinion-letters/​search?​FLSA (to access, select “FLSA” in the left-hand column and search for “2019-6” using the search field). [↑](#footnote-ref-182)
182. 86 Fed. Reg. 1168 (Jan. 7, 2021) [↑](#footnote-ref-183)
183. 86 Fed. Reg. 24,303 (May 6, 2021). [↑](#footnote-ref-184)
184. Coalition for Workforce Innovation v. Walsh, 2022 BL 128723, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022). [↑](#footnote-ref-185)
185. Coalition for Workforce Innovation v. Su, 2024 WL 2108472 (5th Cir. 2024). [↑](#footnote-ref-186)
186. 29 C.F.R. §795.105(a). [↑](#footnote-ref-187)
187. 89 Fed. Reg. 1638 (Jan. 10, 2024). [↑](#footnote-ref-188)
188. 89 Fed. Reg. 1638, 1640 (Jan. 10, 2024). [↑](#footnote-ref-189)
189. 29 C.F.R. §795.105(b) [↑](#footnote-ref-190)
190. 29 C.F.R. §795. [↑](#footnote-ref-191)
191. 29 C.F.R. §795.110(a). [↑](#footnote-ref-192)
192. 29 C.F.R. §795.110(a). [↑](#footnote-ref-193)
193. 29 C.F.R. §795.110(b). [↑](#footnote-ref-194)
194. 29 C.F.R. §795.110(b). [↑](#footnote-ref-195)
195. Coalition for Workforce Advancement v. Su, Case No. 1:21-CF-00130-MAC (E.D. Tex.); Warren v. U.S. Department of Labor, Case No. 2:24-cf-00007-RWS (N.D. Ga.); Littman v. U.S. Department of Labor, Case No. 3:24-cv-00194 (M.D. Tenn); Frisard’s Transp., LLC v. U.S. Dept. of Labor, Case Number 2:24-cv-00347 EEF EJD (E.D. La.) (motion for TRO denied); Colt & Joe Trucking LLC v. U.S. Dept. of Labor, Case No. 1:24-cv-00391-KWR-GWB (D.N.M.). [↑](#footnote-ref-196)
196. *See* 29 U.S.C. §203(e)(4), (5); 29 C.F.R. §553.101. [↑](#footnote-ref-197)
197. 471 U.S. 290, 27 WH Cases 209 (1985). [↑](#footnote-ref-198)
198. *Id*. at 292. [↑](#footnote-ref-199)
199. *Id.* at 300–01. The Court (and the district court) borrowed the expectation-of-compensation test from *Walling v. Portland Terminal*, 330 U.S. 148 (1947), a case evaluating whether trainees for a railroad were employees, and which considered, in part, whether they expected compensation. That decision and trainees’ status under the FLSA is addressed, in §III.C [Employee Status; Trainees, Interns, and Students] of this chapter. [↑](#footnote-ref-200)
200. *Alamo*, 471 U.S. at 301. [↑](#footnote-ref-201)
201. *Second Circuit:* Hallissey v. America Online, Inc., 2006 U.S. Dist. LEXIS 12964 (S.D.N.Y. Mar. 10, 2006) (denying employer’s motion to dismiss on issue of whether plaintiffs were volunteers and surveying case law).

     *Third Circuit:* Genarie v. PRD Mgmt., Inc., 2006 WL 436733 (D.N.J. Feb. 17, 2006) (concluding that tenant who served as live-in maintenance worker was not volunteer where she worked to maintain her living situation).

     *Fourth Circuit:* Griffin v. Daniel, 768 F. Supp. 532, 539, 30 WH Cases 865, 870 (W.D. Va. 1991) (relying on *Alamo* to determine that “economic reality” of situation was that individual who worked at his aunt’s boyfriend’s truck stop without pay was an employee where he did not perform “such services voluntarily—as a friend might do for a friend,” but did so “out of a sense of obligation for the room and board he received”).

     *Seventh Circuit:* Okoro v. Pyramid 4 Aegis, 2012 WL 1410025 (E.D. Wis. Apr. 23, 2012) (holding on summary judgment that alleged “volunteer” for residential care facility was employee, where defendant was for-profit business that secured an economic advantage from the work performed, employee did not benefit from any alleged training provided, and all parties contemplated that plaintiff would be compensated if the company eventually proved profitable).

     *Tenth Circuit:* Acosta v. Paragon Contractors Corp., 884 F.3d 1225 (10th Cir. 2018) (in suit brought by DOL for child labor violations, holding that children who worked as pecan pickers for church elder were not volunteers because they did not choose to work for their own personal purpose or pleasure, but instead were coerced); Copeland v. C.A.A.I.R., Inc, 2019 WL 4307125, at \*5–6 (N.D. Okla. Sept. 11, 2019) (offenders in court-ordered rehabilitation center forced to work at separate private factory were not volunteers but instead similar to those found to be employees in *Alamo*).

     *Eleventh Circuit:* Morrison v. Veale, 2017 WL 1100898 (M.D. Ala. Mar. 23, 2017) (finding no specific formula to determine “volunteer” status at for-profit employer; considering six economic reality factors plus seventh factor, whether alleged volunteer was aware she would not be paid). [↑](#footnote-ref-202)
202. Rhea Lana, Inc. v. United States, 925 F.3d 521 (D.C. Cir. 2019) (affirming district court determination that DOL, applying totality-of-the-circumstances approach, correctly concluded that volunteers who organized consignment sales on behalf of for-profit business were employees). [↑](#footnote-ref-203)
203. *First Circuit:* Roman v. Maietta Constr., Inc., 147 F.3d 71, 75–76 (1st Cir. 1988) (holding that person who worked as crew chief at stock car races for son of construction company owner was volunteer).

     *Second Circuit:* Rogers v. Schenkel, 162 F.2d 596 (2d Cir. 1947) (pre-*Alamo* decision holding that person who worked for plating company during World War II was volunteer); Figurowski v. Marbil Inv’rs, LLC, 2018 WL 1582072 (E.D.N.Y. Mar. 30, 2018) (wife of employee deemed a volunteer because defendant employers were not primary beneficiaries of plaintiff’s efforts in assisting her husband (the employee) with some of his duties); Greater N.Y. Health Care Facilities Ass’n, Inc. v. Axelrod, 770 F. Supp. 183, 184 n.1 (S.D.N.Y. 1991) (noting October 16, 1979, letter received by proprietary hospital from DOL’s Division of Labor Standards stated that “while the minimum wage laws did not explicitly permit volunteers to work in proprietary nursing homes, the Division would not apply the laws to prohibit volunteers from serving individual patients by performing limited tasks that were ‘not directly the work of hospital personnel’”) (citation omitted).

     *Fourth Circuit:* Isaacson v. Penn Cmty. Servs., 450 F.2d 1306, 1309, 20 WH Cases 337 (4th Cir. 1971) (pre-*Alamo* decision holding that conscientious objector working for nonprofit corporation in lieu of military service was not employee).

     *Fifth Circuit:* Devore v. Lyons, 2016 WL 6277810 (N.D. Tex. Oct. 25, 2016) (holding former romantic partner of defendant was volunteer, not employee, during years she assisted defendant in his plumbing business).

     *Seventh Circuit:* Emanuel v. Rolling in the Dough, Inc., 2012 WL 5878385 (N.D. Ill. Nov. 21, 2012) (girlfriend of pizza store manager who chose to assist her boyfriend after being told she would not be paid was volunteer rather than employee).

     *Eighth Circuit:* Reich v. ConAgra, Inc., 987 F.2d 1357, 1361 (8th Cir. 1993) (holding that participants in display model program for a for-profit company may be volunteers and not employees).

     *Ninth Circuit:* Patel v. Patel, 2014 WL 6390893 (E.D. Cal. Nov. 17, 2014) (holding romantic partner of son of owners of motel/trailer park was volunteer, not employee, while managing the motel/trailer park because she had no expectation of compensation).

     *Tenth Circuit:* Padilla v. American Fed’n of State, Cnty. & Mun. Emps., 551 F. App’x 941 (10th Cir. 2014) (elected union president was volunteer, not employee, where he was not economically dependent on union and did not expect to receive wages). [↑](#footnote-ref-204)
204. Acosta v. Cathedral Buffet, Inc., 887 F.3d 761 (6th Cir. 2018). [↑](#footnote-ref-205)
205. *Id*. at 767–68. The court distinguished *Acosta v*. *Paragon Contractors Corp*., 884 F.3d 1225 (10th Cir. 2018) (finding that children coerced into working for pecan farm owned by church elder were “employees”) on basis that *Paragon* involved child labor and that pecan farm was not church-affiliated enterprise. [↑](#footnote-ref-206)
206. Palar v. Blackhawk Bancorp., Inc., 2013 WL 5366124 (C.D. Ill. Sept. 25, 2013) (bank that encouraged employee to volunteer as high school baseball coach, and allowed employee to leave work early to do so, not required to pay employee for coaching hours). [↑](#footnote-ref-207)
207. WH Op., 1999 WL 1788145 (Aug. 19, 1999); *see also* Rhea Lana, Inc. v. United States, 925 F.3d 521, 526 (D.C. Cir. 2019) (quoting declaration of District Director: “In addition, Rhea Lana was a for-profit company. [The Department’s] longstanding position is that, with very limited exceptions, for-profit companies cannot treat workers as volunteers instead of employees under the FLSA. That position was further support for our conclusion that the workers at issue were employees.”). [↑](#footnote-ref-208)
208. 29 C.F.R. §785.44. [↑](#footnote-ref-209)
209. FOH §10b03(c) (Oct. 20, 1993). [↑](#footnote-ref-210)
210. *Id*. [↑](#footnote-ref-211)
211. *Id*. [↑](#footnote-ref-212)
212. WH Op. FLSA2006-18, 2006 WL 1836646 (June 1, 2006). [↑](#footnote-ref-213)
213. WH Op. FLSA2006-4, 2006 WL 561849 (Jan. 27, 2006). [↑](#footnote-ref-214)
214. WH Op. FLSA2005-6NA, 2005 WL 5419042 (Aug. 26, 2005). [↑](#footnote-ref-215)
215. WH Op. FLSA2005-33, 2005 WL 3308604 (Sept. 16, 2005). [↑](#footnote-ref-216)
216. WH Op. FLSA2004-8, 2004 WL 3177885 (Sept. 7, 2004). [↑](#footnote-ref-217)
217. WH Op. FLSA2019-2, 2019 WL 1225928 (Mar. 14, 2019). [↑](#footnote-ref-218)
218. WH Op. FLSA2018-29, 2018 WL 6839426 (Dec. 21, 2018). [↑](#footnote-ref-219)
219. WH Op. FLSA2018-22, 2018 WL 4562932 (Aug. 28, 2018). [↑](#footnote-ref-220)
220. WH Op. FLSA2004-8, 2004 WL 3177885 (Sept. 7, 2004). [↑](#footnote-ref-221)
221. WH Op. FLSA2001-18, 2001 WL 1870384 (July 31, 2001). [↑](#footnote-ref-222)
222. WH Op. FLSA2018-16, 2018 WL 2348795 (Jan. 5, 2018) (reissuing WH Op. FLSA2009-35). [↑](#footnote-ref-223)
223. WH Op. FLSA2002-9, 2002 WL 32406599 (Oct. 7, 2002) (holding that commercial for-profit grocery stores were not permitted to engage students on an uncompensated volunteer basis to “bag[] customers’ groceries … and carr[y] the bags to people’s cars for tips and donations,” because such activities were an integral part of the retailer’s business, performed on the retailer’s premises, and retailer reduced the hours of regular employees to facilitate the charitable program). [↑](#footnote-ref-224)
224. WH Op., 1999 WL 1788145 (Aug. 19, 1999). [↑](#footnote-ref-225)
225. Pub. L. No. 105-221, 112 Stat. 1248 (1998) (codified at 29 U.S.C. §203(e)(5)). [↑](#footnote-ref-226)
226. Acosta v. Paragon Contractors Corp., 884 F.3d 1225 (10th Cir. 2018). [↑](#footnote-ref-227)
227. For more analysis of pre-hiring training requirements, as well as compensability of post-hire training, see Chapter 8, Compensable Hours, §IV.F [Application of Principles; Lectures, Meetings, and Training Programs]. [↑](#footnote-ref-228)
228. Walling v. Portland Terminal Co., 330 U.S. 148, 6 WH Cases 611 (1947). [↑](#footnote-ref-229)
229. *Id*. at 150. [↑](#footnote-ref-230)
230. *Id.* at 152. [↑](#footnote-ref-231)
231. *Id*. at 153. [↑](#footnote-ref-232)
232. *See, e.g.,* Senne v. Kansas City Royals Baseball Corp., 591F. Supp. 3d 453, 506–09 (N.D. Cal. 2022) (analyzing whether minor league baseball players were employees under Supreme Court’s *Alamo* test rather than *Portland Terminal* “trainee” test). [↑](#footnote-ref-233)
233. Wirtz v. Wardlaw, 339 F.3d 785, 787–88 (4th Cir. 1964). [↑](#footnote-ref-234)
234. Donovan v. American Airlines, Inc., 686 F.2d 267, 272, 25 WH Cases 901 (5th Cir. 1982). [↑](#footnote-ref-235)
235. *See* FOH §10b11 (Oct. 20, 1993). [↑](#footnote-ref-236)
236. *Id.*; *see also* WH Op. FLSA2004-18, 2004 WL 3177875 (Oct. 29, 2004) (deeming applicants participating in one-day “job view,” observing the job before they are hired, were not employees). [↑](#footnote-ref-237)
237. Atkins v. General Motors Corp., 701 F.2d 1124, 1127–29 (5th Cir. 1983); Donovan v. American Airlines, Inc., 686 F.2d 267, 273 n.7 (5th Cir. 1982). [↑](#footnote-ref-238)
238. *Second Circuit*: Velarde v. GW GJ, Inc., 914 F.3d 779, 785 (2d Cir. 2019) (applying “primary beneficiary” test to student at vocational school);Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015) (applying “primary beneficiary” test to unpaid intern).

     *Fourth Circuit:* Harbourt v. PPE Casino Resorts Md. LLC, 820 F.3d 655, 660 (4th Cir. 2016) (applying “primary beneficiary” test to trainees); McLaughlin v. Ensley, 877 F.2d 1207, 1209–10 (4th Cir. 1989) (same).

     *Sixth Circuit:* Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1013, 1018–19 (6th Cir. 2020) (applying “primary beneficiary” test as set forth in *Solis v*. *Laurelbrook Sanitarium, infra);* Solis v. Laurelbrook Sanitarium, 642 F.3d 518, 528 (6th Cir. 2011) (“primary beneficiary” test most suited to learning or training situations); Marshall v. Baptist Hosp., Inc., 668 F.2d 234, 236 (6th Cir. 1981) (applying “primary beneficiary” test to X-ray students interning at hospital).

     *Eighth Circuit:* Petroski v. H&R Block Enters., LLC, 750 F.3d 976, 980 (8th Cir. 2014) (applying “primary beneficiary” test to trainees).

     *Ninth Circuit:* Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1147–48 (9th Cir. 2017) (applying “primary beneficiary” test to vocational students).

     *Eleventh Circuit:* McKay v. Miami-Dade Cnty., 36 F.4th 1128, 1139–40 (11th Cir. 2022) (applying “primary beneficiary” test to intern for public entity); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015) (applying “primary beneficiary” test to interns). [↑](#footnote-ref-239)
239. 791 F.3d 376 (2d Cir. 2015). [↑](#footnote-ref-240)
240. *Second Circuit*: Velarde v. GW GJ, Inc., 914 F.3d 779, 785 (2d Cir. 2019) (applying *Glatt* factors to student at vocational school).

     *Ninth Circuit:* Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1147–48 (9th Cir. 2017) (applying *Glatt* factors to vocational students).

     *Eleventh Circuit*: Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015) (applying *Glatt* factors to interns). [↑](#footnote-ref-241)
241. Espinosa v. Abraham Refrigeration Corp., 2019 WL 2725539, at \*2–3 (S.D.N.Y. July 1, 2019) (applying *Glatt* factors to find putative trainee was employee where plaintiff received little training, had responsibilities similar to other employees, and had no ties to formal education). [↑](#footnote-ref-242)
242. Nesbitt v. FCNH, Inc., 908 F.3d 643 (10th Cir. 2018) (under totality of the circumstances, massage therapy students were not employees). [↑](#footnote-ref-243)
243. Hollins v. Regency Corp., 867 F.3d 830, 836 (7th Cir. 2017) (examining *Portland Terminal*, *Glatt*, and other considerations). [↑](#footnote-ref-244)
244. *Second Circuit*: Archie v. Grand Cent. P’ship, Inc., 997 F. Supp. 504, 531–35 (S.D.N.Y. 1998).

     *Fifth Circuit:* Atkins v. General Motors Corp., 701 F.2d 1124, 1127–29 (5th Cir. 1983); Donovan v. American Airlines, Inc., 686 F.2d 267, 273 n.7 (5th Cir. 1982).

     *Ninth Circuit:* Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996, 1105–09 (N.D. Cal. 2010) [↑](#footnote-ref-245)
245. *First Circuit*: Montoya v. CRST Expedited, Inc., 404 F. Supp. 3d 364, 385 (D. Mass. 2019) (noting that because First Circuit has not established a test, district court “flexibly considers both the six DOL factors and the primary beneficiary test”).

     *Fourth Circuit:* McLaughlin v. Ensley, 877 F.2d 1207, 1209–10 & n.2 (4th Cir. 1989) (explicitly choosing to rely on the Supreme Court’s explication in *Portland Terminal* rather than the Department’s six-factor test to determine whether the employer or employee is the “primary beneficiary” of the trainee’s labor).

     *Fifth Circuit:* Donovan v. American Airlines, 686 F.2d 267, 25 WH Cases 901 (5th Cir. 1982) (examining both the Supreme Court’s decision in *Portland Terminal* and the DOL’s six-factor test with respect to airline trainees).

     *Ninth Circuit:* Otico v. Hawaiian Airlines, Inc., 229 F. Supp. 3d 1047, 1051 (N.D. Cal. 2017) (holding customer service trainee was not employee as matter of law because she “did not actually perform the work of an employee,” applying “primary beneficiary” test and finding WHD six-factor test “relevant” but not “exhaustive”); Nance v. May Trucking Co., 2014 WL 199136 (D. Or. Jan. 15, 2014) (noting that both primary beneficiary test and WHD six-factor test are rooted in *Portland Terminal*; distinction between tests is “form over substance”); Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996 (N.D. Cal. 2010) (taking “flexible approach” to WHD’s six-factor test).

     *Tenth Circuit:* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026, 1 WH Cases2d 748 (10th Cir. 1993) (holding fire department trainees not employees even though there was expectation of permanent employment at end of training period and noting “there is nothing in *Portland Terminal* to support an ‘all or nothing approach’”). [↑](#footnote-ref-246)
246. *Atkins*, 701 F.2d at 1127–28; *Archie*, 997 F. Supp. at 531–35. [↑](#footnote-ref-247)
247. 686 F.2d 267, 25 WH Cases 901 (5th Cir. 1982). [↑](#footnote-ref-248)
248. *Id*. at 271–72; *see also* Ulrich v. Alaska Airlines, Inc., 2009 WL 364056 (W.D. Wash. Feb. 9, 2009); Donovan v. Trans World Airlines, 1983 WL 2017, 26 WH Cases 202 (W.D Mo. Mar. 4, 1983), *aff’d*, 726 F.2d 415, 26 WH Cases 1000 (8th Cir. 1984) (determining trainees at airline’s flight attendant school were not employees). [↑](#footnote-ref-249)
249. Petroski v. H&R Block Enters., LLC, 750 F.3d 976, 980 (8th Cir. 2014) (quotingSolis v. Laurelbrook Sanitarium, 642 F.3d 518, 528 (6th Cir. 2010)).

     Other courts applying a “primary benefits” test to trainees include:

     *Fourth Circuit:* Harbourt v. PPE Casino Resorts Md. LLC, 820 F.3d 655, 660 (4th Cir. 2016), *on remand*, 2018 WL 3660167 (D. Md. Aug. 2, 2018) (granting casino summary judgment where trainees did not interact with actual customers or take bets so no benefit to casino); McLaughlin v. Ensley, 877 F.2d 1207, 1209–10 (4th Cir. 1989).

     *Sixth Circuit:* Clay v. Durango JS, LLC, 2018 WL 6529522 (W.D. Mich. Sept. 11, 2016) (truck driver not employee where he did not drive truck on his own and employer provided him truck so he could practice but did not benefit from his driving). [↑](#footnote-ref-250)
250. *Petroski*, 750 F.3d at 980–81. [↑](#footnote-ref-251)
251. *Id.* at 982. [↑](#footnote-ref-252)
252. *First Circuit:* Herman v. Hogar Praderas de Amor, Inc., 130 F. Supp. 2d 257 (D.P.R. 2001) (holding that nurse’s aides, maintenance/laundry workers, and kitchen workers who were required to participate in a mandatory two-day “training,” which included little, if any, instruction, but considerable productive work, were entitled to compensation for work performed during the training sessions).

     *Second Circuit:* Archie v. Grand Cent. P’ship, Inc., 997 F. Supp. 504, 531–35, 4 WH Cases2d 783 (S.D.N.Y. 1998) (using the six-factor test to find formerly homeless participants in a nonprofit entity’s job training program to be employees where they did the same work as other staff and the entity had underbid commercial businesses).

     *Third Circuit:* Bailey v. Pilots’ Ass’n, 406 F. Supp. 1302, 1307, 22 WH Cases 723 (E.D. Pa. 1976) (concluding apprentice river pilot performed tasks necessary to functioning of pilot boat).

     *Fourth Circuit:* McLaughlin v. Ensley, 877 F.2d 1207, 1209 n.2, 29 WH Cases 537 (4th Cir. 1989) (observing that training for snack food distribution route driver positions consisted simply of helping driver service existing route for one week).

     *Sixth Circuit:* Marshall v. Baptist Hosp., 473 F. Supp. 465, 473–77, 24 WH Cases 325 (M.D. Tenn. 1979) (determining X-ray technician trainees were employees where trainees performed all duties of regular employees and were minimally supervised by qualified personnel), *rev’d on other grounds*, 668 F.2d 234, 25 WH Cases 232 (6th Cir. 1981). [↑](#footnote-ref-253)
253. *See Ensley*, 877 F.2d at 1209 n.2. [↑](#footnote-ref-254)
254. *See* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1028–29 (10th Cir. 1993) (determining that firefighter trainees’ response to accident was not productive work where need for response from qualified firefighters and emergency medical technicians not obviated). [↑](#footnote-ref-255)
255. *See id.* at 1029 n.2. [↑](#footnote-ref-256)
256. Montoya v. CRST Expedited, Inc., 404 F. Supp. 3d 364, 385–89 (D. Mass. 2019) (initial training to enable drivers to receive commercial driver’s license resembled that given at any truck driving school such that drivers were not employees, but drivers were employees during second training phase when they learned company-specific materials and completed basic employment orientation tasks). *See also Parker Fire Prot. Dist.,* 992 F.2d at 1027 (finding that firefighter academy emphasizing particular employer’s practices taught vocational skills within meaning of WHD’s six-factor test because it was similar to associate degree programs at several community colleges and academies at other fire protection districts); Donovan v. American Airlines, Inc., 686 F.2d 267, 273 n.7 (5th Cir. 1982) (finding that learning center for flight attendant and reservation agent trainees taught vocational skills within meaning of test where skills were transferable within industry, even though training strongly emphasized employer’s particular practices). [↑](#footnote-ref-257)
257. U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (Apr. 2010). [↑](#footnote-ref-258)
258. U.S. Dep’t of Labor, Wage & Hour Div., Field Assistance Bull. No. 2018-2: Determining Whether Interns at For-Profit Employers Are Employees Under the FLSA (Jan. 5, 2018). [↑](#footnote-ref-259)
259. U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (Jan. 2018). [↑](#footnote-ref-260)
260. 791 F.3d 376 (2d Cir. 2015). [↑](#footnote-ref-261)
261. *Id.* [↑](#footnote-ref-262)
262. *Id.* at 382–83. [↑](#footnote-ref-263)
263. *Id.* at 383. [↑](#footnote-ref-264)
264. *Id.* (citing Walling v. Portland Terminal, 330 U.S. 148, 152 (1947)). [↑](#footnote-ref-265)
265. Glatt v. Fox Searchlight Pictures, Inc*.*, 791 F.3d 376, 384 (2d Cir. 2015). [↑](#footnote-ref-266)
266. *Id.* at 385. [↑](#footnote-ref-267)
267. *Id.* at 384. [↑](#footnote-ref-268)
268. *Id.* [↑](#footnote-ref-269)
269. *Second Circuit:* Wang v. Hearst Corp., 877 F.3d 69, 72 (2d Cir. 2017) (following *Glatt*); Mark v. Gawker Media, LLC, 2016 WL 1271064 (S.D.N.Y. Mar. 29, 2016) (applying *Glatt* to hold interns at online media company not employees).

     *Eleventh Circuit*: McKay v. Miami-Dade Cnty., 36 F.4th 1128 (11th Cir. 2022) (applying *Schumann* seven-factor primary beneficiary test to determine individual participating in county training program was intern, not employee); Axel v. Fields Motorcars of Fla., Inc., 711 F. App’x 942, 947 (11th Cir. 2017) (applying factors from the *Portland Terminal*, *Schumann*, and *Glatt* approaches to evaluate employment status of son training under and shadowing father to learn auto sales business); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1211 (11th Cir. 2015) (adopting *Glatt* seven-factor primary beneficiary test to determine if individual is intern or employee). [↑](#footnote-ref-270)
270. *Fourth Circuit:* Wolfe v. AGV Sports Grp., Inc., 2014 WL 5595295 (D. Md. 2014) (denying employer’s motion to dismiss where unpaid intern pled sufficient facts to show that company was primary beneficiary of his labor, alleging that the company had over 50 unpaid interns working in all departments, who performed work that would otherwise have had to be done by paid employees; 2010 Fact Sheet #71 not dispositive).

     *Sixth Circuit:* Marshall v. Baptist Hosp., Inc., 668 F.2d 234, 236 (6th Cir. 1981) (fact that hospital was “primary beneficiary” of relationship with X-ray students supported finding of employment status). [↑](#footnote-ref-271)
271. *Fourth Circuit:* Wirtz v. Wardlaw,339 F.2d 785, 787–88 (4th Cir. 1964); *Wolfe*, 2014 WL 5595295 (denying employer’s motion to dismiss where unpaid intern pled sufficient facts to show that company was primary beneficiary of his labor, alleging that the company had over 50 unpaid interns working in all departments, who performed work that would otherwise have had to be done by paid employees).

     *Sixth Circuit: Baptist Hospital,* 668 F.2d at 236 (finding X-ray students enrolled in a two-year college program of classroom study and hospital clinical training were employees of the hospital where the hospital received “direct and substantial benefit” from their “work that would otherwise have been done by regular employees and work for which the hospital charged patients at full rates”).

     *Seventh Circuit*: Okoro v. Pyramid 4 Aegis, 2012 WL 1410025 (E.D. Wis. Apr. 23, 2012) (finding individual who “volunteered” for almost a year to help establish long-term care facility was an employee despite the fact that she wanted to learn about the business, because the work she performed bestowed an immediate benefit and was not akin to the “course of training” discussed in *Portland Terminal*).

     *Opinion Letters:* WH Op. FLSA2004-5NA, 2004 WL 5303033 (May 17, 2004) (declining to opine that “marketing interns” fall outside of FLSA coverage, where the interns analyzed trends on their college campus and developed marketing information in a number of areas that may be of benefit to the putative employer). [↑](#footnote-ref-272)
272. 339 F.2d 785 (4th Cir. 1964). [↑](#footnote-ref-273)
273. *See*, *e.g.*, Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App’x 831, 834 (11th Cir. 2013) (medical billing and coding students were not employees where “Defendants received little if any economic benefit from Plaintiffs’ work”). [↑](#footnote-ref-274)
274. *Id.* (affirming summary judgment for alleged employer, holding that students in a billing and coding specialist program who worked at unpaid externships to meet graduation requirements benefited from engaging in hands-on work, received academic credit, and caused defendants’ business to run less efficiently); Demayo v. Palms W. Hosp., Ltd., 918 F. Supp. 2d 1287 (S.D. Fla. 2013) (extern at for-profit medical corporation was not employee because primary benefit of externship flowed to extern, who benefited both from hands-on training in surgical procedures and from performing nonsurgical procedures). [↑](#footnote-ref-275)
275. WH Op. FLSA2006-12, 2006 WL 1094598 (Apr. 6, 2006) (unpaid university externs earning college credits not employees of sponsoring employers); WH Op. Letter FLSA2004-5NA, 2004 WL 5303033 (May 17, 2004) (unpaid marketing interns earning college credits not employees). [↑](#footnote-ref-276)
276. *Kaplan*, 504 F. App’x at 835 (applying “economic realities” test derived from *Portland Terminal*,including examination of primary beneficiary; also citing to DOL six-factor test for trainees set forth in the *Field Operations Handbook*). [↑](#footnote-ref-277)
277. *See* Marshall v. Baptist Hosp., Inc., 668 F.2d 234, 236 (6th Cir. 1981) (clinical education portion of X‑ray technician academic program not a bona fide educational activity because students were not adequately supervised and quickly became regular working members of the hospital’s X-ray department); Archie v. Grand Cent. P’ship, Inc., 997 F. Supp. 504, 533 (S.D.N.Y. 1998) (lack of meaningful supervision supported finding of employment status for formerly homeless and jobless employment program participants). [↑](#footnote-ref-278)
278. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015). [↑](#footnote-ref-279)
279. For example, in *Jatupornchaisri v*. *Wyndham Vacation Ownership, Inc*., 2012 WL 1600435 (M.D. Fla. May 7, 2012), the plaintiffs were Thai and Vietnamese nationals brought to the United States under the auspices of a J-1 visa training program. The plaintiffs claimed that they were required to work as housekeepers, full time. The defendants argued that since the plaintiffs’ visa status was that of an “intern” under the Exchange Visitor Act, they were not intended to be subject to the FLSA. According to the court, the defendant did not explain why the goals of the Exchange Visitor Act should trump the express terms of the FLSA. In denying the defendant’s motion to dismiss, the court held that visa status is not dispositive of employee status under the FLSA. [↑](#footnote-ref-280)
280. *See*, *e.g.*,Marshall v. Regis Educ. Corp., 666 F.2d 1324 (10th Cir. 1981) (student resident advisors in college dormitories were not employees where they received substantial educational benefit, despite fact that college may also have derived some economic value from their services). [↑](#footnote-ref-281)
281. 642 F.3d 518 (6th Cir. 2010). [↑](#footnote-ref-282)
282. *Id*. at 521. [↑](#footnote-ref-283)
283. *Id*. at 525. [↑](#footnote-ref-284)
284. Blair v. Willis, 420 F.3d 823, 829 (8th Cir. 2005) (educational benefit of chores performed by a boarding school student serving a juvenile sentence outweighed the labor savings enjoyed by the school). [↑](#footnote-ref-285)
285. 908 F.3d 643, 647 (10th Cir. 2018). [↑](#footnote-ref-286)
286. Hollins v. Regency Corp., 867 F.3d 830, 836–37 (7th Cir. 2017) (cosmetology students not employees). [↑](#footnote-ref-287)
287. *Id.* [↑](#footnote-ref-288)
288. *Second Circuit:* Velarde v. GW GJ, Inc., 914 F.3d 779, 786 (2d Cir. 2019) (evaluating totality of circumstances based on primary beneficiary test, determining students in vocational school or vocation-related programs were not FLSA employees).

     *Sixth Circuit*: Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1013, 1018–19 (6th Cir. 2020) (applying “primary beneficiary” test as set forth in *Solis v*. *Laurelbrook Sanitarium & School*, 642 F.3d 518 (6th Cir. 2010)).

     *Ninth Circuit:* Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017) (“primary beneficiary” test following *Glatt*). [↑](#footnote-ref-289)
289. *Third Circuit:* Jochim v. Jean Madeline Educ. Ctr. of Cosmetology, 98 F. Supp. 3d 750 (E.D. Pa. 2015) (finding cosmetology student not employee of school’s cosmetology clinic under economic realities test).

     *Seventh Circuit:* Hollins v. Regency Corp., 867 F.3d 830 (7th Cir. 2017) (cosmetology student not employee of school’s cosmetology clinic where students pay for practical training time).

     *Ninth Circuit:* Benjamin v. B&H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017) (finding cosmetology students required to perform practice hours to obtain license were “primary beneficiaries” of their labor because they obtained required hands-on training in educational setting); Guy v. Casal Inst. of Nev., 2019 WL 2192112 (D. Nev. May 21, 2019) (reversing its own earlier decision that requiring students to perform cleaning and other tasks made them employees; following *Benjamin* to find that benefit to students still outweighed benefit to school); Guzman v. Lincoln Tech. Inst., 339 F. Supp. 3d 1048 (D. Nev. 2018) (salon students were primary beneficiary of training; even cleaning time was incorporated into overall academic calendar); Ford v. Yasuda, 2017 WL 4676575 (C.D. Cal. June 20, 2017) (cosmetology students of for-profit school found to be primary beneficiaries of relationship such that they were not FLSA employees); Gerard v. John Paul Mitchell Sys., 2016 WL 4479987 (C.D. Cal. Aug. 22, 2016) (cosmetology students were interns rather than employees under “primary beneficiary” test).

     *Tenth Circuit:* Nesbitt v. FCNH, Inc., 908 F.3d 643 (10th Cir. 2018) (massage students not employees under totality-of-circumstances test). [↑](#footnote-ref-290)
290. *Eberline*, 982 F.3d at 1014–18 (cosmetology students might be employees for that portion of time where school may have taken unfair advantage of them by assigning tasks such as cleaning, restocking shelves, and doing laundry that were also assigned to paid support staff, and that were not included in state-mandated curriculum or school’s own curriculum, if the time were not de minimis and for the primary benefit of the school rather than the students). *See also* Eberline v. Douglas J. Holdings, Inc., 629 F. Supp. 3d 640 (E.D. Mich. 2022) (on remand from circuit court, holding (1) plaintiff cosmetology students were employees of defendant school for purposes of janitorial work performed; (2) plaintiffs were not employees providing cosmetology services to paying customers as part of their educational curriculum; and (3) a genuine dispute of fact existed as to whether plaintiffs were employees when engaged in retail salespersons). [↑](#footnote-ref-291)
291. Johnson v. National Collegiate Athletic Ass’n, 108 F.4th 163 (3d Cir. 2024); Dawson v. National Collegiate Athletic Ass’n, 932 F.3d 905 (9th Cir. 2019); Berger v. National Collegiate Athletic Ass’n, 843 F.3d 285, 291 (7th Cir. 2016). [↑](#footnote-ref-292)
292. 843 F.3d 285 (7th Cir. 2016). [↑](#footnote-ref-293)
293. *Id*. at 291. [↑](#footnote-ref-294)
294. *Id*. [↑](#footnote-ref-295)
295. *Id*. at 292. [↑](#footnote-ref-296)
296. *Id*. at 293. [↑](#footnote-ref-297)
297. Berger v. National Collegiate Athletic Ass’n, 843 F.3d 285, 294 (7th Cir. 2016). [↑](#footnote-ref-298)
298. 932 F.3d 905 (9th Cir. 2019). [↑](#footnote-ref-299)
299. *Id.* at 909. The court determined that whether providing a scholarship creates an “expectation of compensation” was irrelevant here, because the schools, not the NCAA or the Pac-12, provided the scholarships, and restrictions on earning compensation beyond scholarships did not create an expectation of compensation. [↑](#footnote-ref-300)
300. *Id.* at 911 (discussing Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983)). [↑](#footnote-ref-301)
301. *Id.* at 912 (discussing Benjamin v. B&H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017)). [↑](#footnote-ref-302)
302. 141 S. Ct. 2141, 2167 (2021) (holding argument that “colleges may decline to pay student athletes because the defining feature of college sports … is that the student athletes are not paid … is circular and unpersuasive”) (Kavanaugh, J., concurring). [↑](#footnote-ref-303)
303. Johnson, 108 F.4th 163, 177–80 (3d Cir. 2024). [↑](#footnote-ref-304)
304. *Id.* at 180. [↑](#footnote-ref-305)
305. *Id.* (quotingTenn. Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944), Tony & Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290, 301 (1985)). [↑](#footnote-ref-306)
306. 471 U.S. 290, 301, 27 WH Cases 209 (1985). [↑](#footnote-ref-307)
307. Livers v. National Collegiate Athletic Ass’n, 2018 WL 3609839 (E.D. Pa. July 26, 2018). [↑](#footnote-ref-308)
308. Fair Labor Standards Act Amendments §102, Pub. L. No. 89-601, 80 Stat. 830 (codified at 29 U.S.C. §203(r)). [↑](#footnote-ref-309)
309. *Fifth Circuit:* Wyatt v. Stickney, 344 F. Supp. 373, 381 (M.D. Ala. 1972) (holding that minimal constitutional standards require payment of minimum wage to persons confined in state mental institution), *aff’d in part, rev’d in part, and remanded* *sub nom*. Wyatt v. Aderholdt, 503 F.2d 1305 (5th Cir. 1974).

     *Seventh Circuit:* Weidenfeller v. Kidulis, 380 F. Supp. 445, 21 WH Cases 975 (E.D. Wis. 1974) (mentally disabled residents of “family group home” were employees entitled to minimum wage for work they did at home).

     *Eleventh Circuit:* Donovan v. New Floridian Hotel, 676 F.2d 468, 470–71, 25 WH Cases 645 (11th Cir. 1982) (holding that hotel’s lack of intent in creating employer-employee relationship with five former mental patients was irrelevant, and rejecting argument that patients’ performance was so poor that they did not provide benefit where “evidence indicate[d] that these individuals did perform meaningful work”); Alvear v. Salvation Army, 661 F. Supp. 3d 1314, 1316, 1326 (N.D. Ga. 2023) (denying motion to dismiss, holding allegations were sufficient that adult rehabilitation center workers “directly and substantially” benefited defendant’s stores and defendant failed to show work was “solely rehabilitative”); Walker v. Freedom Rain, Inc., 2017 WL 897592 (N.D. Ala. Mar. 7, 2017) (citing Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (finding employment relationship as a matter of law where plaintiff residents of rehabilitation treatment facility received work credits against program fees and stipend in weeks when work performed and nothing in other weeks; employer derived economic benefit from work performed such that “quid pro quo arrangement between the parties” demonstrated that relationship was not “solely rehabilitative”)).

     *D.C. Circuit:* Souder v. Brennan, 367 F. Supp. 808, 812–13, 21 WH Cases 398 (D.D.C. 1973) (holding that FLSA applies to resident patient-workers at state hospitals for mentally ill and mentally disabled who perform work that is of consequential economic benefit to hospitals and not mere therapeutic exercise). [↑](#footnote-ref-310)
310. *See*, *e.g*., Gamble v. Minnesota State-Operated Servs., 32 F.4th 666, 670–72 (8th Cir. 2022) (finding sexually dangerous civil detainees participating in vocational work akin to prisoners and thus not employees); Miller v. Dukakis, 961 F.2d 7, 8–9, 30 WH Cases 1414 (1st Cir. 1992) (finding that individuals committed to state treatment center for sexually dangerous persons were prisoners not covered by FLSA). *But cf*. King v. Carey, 405 F. Supp. 41, 22 WH Cases 841 (W.D.N.Y. 1975) (determining that civilly committed minors adjudicated delinquent were employees within meaning of FLSA). See §III.F [Employee Status; Prison Labor] of this chapter for a full discussion of the employment status of prisoners. [↑](#footnote-ref-311)
311. *See* Blair v. Wills, 420 F.3d 823, 11 WH Cases2d 493 (8th Cir. 2005) (deeming student who attended religious boarding school as condition of probation not an employee when required to perform chores that were part of educational curriculum); Williams v. Strickland, 87 F.3d 1064, 3 WH Cases2d 609 (9th Cir. 1996) (concluding resident at Salvation Army rehabilitation center who engaged in full-time work therapy was not employee where he had neither express nor implied agreement for compensation and relationship with Salvation Army was solely rehabilitative). [↑](#footnote-ref-312)
312. Klick v. Cenikor Found., 94 F.4th 362, 372 (5th Cir. 2024) (holding courts should apply “primary beneficiary” test to determine economic reality of whether rehabilitation patient is employee, examining such “non-exhaustive factors” as “plaintiffs’ expectation of compensation, the therapeutic value of the Program, whether the relationship displaces paid employees, and any other considerations that may ‘shed light on which party primarily benefits from the relationship’”); Vaughn v. Phoenix House Found., Inc., 957 F.3d 141 (2d Cir. 2020). [↑](#footnote-ref-313)
313. Vaughn v. Phoenix House Found., Inc., 957 F.3d 141, 146 (2d Cir. 2020) (applying *Glatt* factors to determine patient was the “primary beneficiary” of the work) (citing Glatt v. Fox Searchlight Pictures, Inc.*,* 791 F.3d 376 (2d Cir. 2015)). [↑](#footnote-ref-314)
314. The amendment terminated the prior regulations cited in the first edition of this treatise (29 C.F.R. §§529.1–.17). The new regulations are found at 29 C.F.R. Part 525. [↑](#footnote-ref-315)
315. 29 C.F.R. §525.3(e). [↑](#footnote-ref-316)
316. FOH §64c01. *See also* WH Op., 1973 WL 36856 (Dec. 4, 1973) (determining that persons no longer attending special school for mentally disabled who perform clerical and janitorial work of therapeutic value appeared to be in employment relationship with school); WH Op., 1975 WL 40957 (Apr. 18, 1975) (concluding that patient-workers at institution caring for sick or aged and clients of state vocational rehabilitation program are covered by FLSA if work provides consequential economic benefit to institution). [↑](#footnote-ref-317)
317. FOH §64c01. [↑](#footnote-ref-318)
318. 29 C.F.R. §§525.3(h)–(i), .12. For discussion of this topic, see Chapter 2, Operations and Functions of the Department of Labor, §V [Special Certificates Allowing Subminimum Wage]. [↑](#footnote-ref-319)
319. *First Circuit:* Miller v. Dukakis, 961 F.2d 7, 8, 30 WH Cases 1414 (1st Cir. 1992) (reporting that “courts have uniformly denied FLSA and state minimum wage law coverage to convicts who work for the prisons in which they are inmates”).

     *Second Circuit:* Danneskjold v. Hausrath, 82 F.3d 37, 3 WH Cases2d 357 (2d Cir. 1996) (deeming inmate tutor not an employee).

     *Fourth Circuit:* Harker v. State Use Indus., 990 F.2d 131, 136, 1 WH Cases2d 508 (4th Cir. 1993) (“For more than 50 years, Congress has operated on the assumption that the FLSA does not apply to inmate labor. If the FLSA’s coverage is to extend within prison walls, Congress must say so, not the Courts.”).

     *Fifth Circuit:* Loving v. Johnson, 455 F.3d 562, 11 WH Cases2d 1025 (5th Cir. 2006) (holding prisoner not an employee under FLSA).

     *Sixth Circuit:* Jones v. Chandler, 2012 WL 2049571 (E.D. Ky. June 6, 2012) (holding that a prisoner performs work as a means of rehabilitation and job training, not to produce profits for an employer, and is therefore not an “employee” covered by the FLSA).

     *Seventh Circuit:* Sanders v. Hayden, 544 F.3d 812, 813 (7th Cir. 2008) (finding inmate in secure treatment facility, civilly committed as sexually violent person, after serving prison sentence, was not employee); Vanskike v. Peters, 974 F.2d 806, 808, 30 WH Cases 1739 (7th Cir. 1992) (“[C]ourts have not extended the FLSA’s definition of ‘employee’ to cover prisoners who are assigned to work within the prison walls for the prison.”).

     *Eighth Circuit:* McMaster v. Minnesota, 30 F.3d 976, 2 WH Cases2d 294 (8th Cir. 1994) (stating that Congress did not intend FLSA to cover inmates); Wentworth v. Solem, 548 F.2d 773, 23 WH Cases 268 (8th Cir. 1977) (concluding that FLSA’s minimum wage did not apply to work in prison industry).

     *Tenth Circuit:* Franks v. Oklahoma State Indus., 7 F.3d 971, 972–73, 1 WH Cases2d 1109 (10th Cir. 1993) (holding that FLSA’s definition of “employee” did not extend to inmates).

     *Eleventh Circuit:* Gambetta v. Prison Rehab. Indus. & Diversified Enters., Inc., 112 F.3d 1119, 1123–25, 3 WH Cases2d 1633 (11th Cir. 1997).

     *Federal Circuit:* Emory v. United States, 2 Cl. Ct. 579, 26 WH Cases 349, *aff’d*, 727 F.2d 1119 (Fed. Cir. 1983). [↑](#footnote-ref-320)
320. *Fourth Circuit:* Ndambi v. Corecivic, Inc., 990 F.3d 369, 374 (4th Cir. 2021) (FLSA does not apply to “custodial detention” of civil immigration detainees even in private facility).

     *Seventh Circuit*: Bennett v. Frank, 395 F.3d 409, 10 WH Cases2d 394 (7th Cir. 2005) (holding that prisoners are not employees under the FLSA whether confined in public or private prison).

     *Tenth Circuit:* Bowring v. Bonner, 561 F. App’x 778, 779 (10th Cir. 2014) (following *Bennett* to find no FLSA coverage for inmates of private contract prisons); Carlos v. Geo Grp., Inc., 2022 BL 476127, 2022 WL 19004886 (W.D. Okla. June 7, 2022) (same). [↑](#footnote-ref-321)
321. *Second Circuit:* Carter v. Duchess Cmty. Coll., 735 F.2d 8, 26 WH Cases 1239 (2d Cir. 1984) (rejecting district court’s holding that prisoners could never be employees and remanding for further findings); King v. Carey, 405 F. Supp. 41, 22 WH Cases 841 (W.D.N.Y. 1975) (determining that juveniles in state youth camp who were “civilly committed” were covered by FLSA).

     *Fourth Circuit*: Scott v. Baltimore Cnty., 101 F.4th 336 (4th Cir. 2024).

     *Ninth Circuit:* Hale v. Arizona, 993 F.2d 1387, 1389, 1 WH Cases2d 601 (9th Cir. 1993) (en banc) (“While we do not believe that prisoners are categorically excluded from the FLSA, we hold that inmates in this case, who worked for programs structured by the prison pursuant to the state’s requirement that prisoners work at hard labor, are not ‘employees’ of the state within the meaning of the FLSA.”).

     *D.C. Circuit:* Henthorn v. Department of Navy, 29 F.3d 682, 2 WH Cases2d 289 (D.C. Cir. 1994) (rejecting proposition that FLSA can never apply to prisoners); Nicastro v. Reno, 84 F.3d 1446, 3 WH Cases2d 526 (D.C. Cir. 1996) (following *Henthorn*).

     *See also* Burleson v. California, 83 F.3d 311, 3 WH Cases2d 498 (9th Cir. 1996); Morgan v. MacDonald, 41 F.3d 1291, 2 WH Cases2d 752 (9th Cir. 1994). [↑](#footnote-ref-322)
322. *Vanskike*, 974 F.2d 806 (explaining distinction in approaches taken by courts when work performed for entity other than prison itself). *But see* *Henthorn*, 29 F.3d at 683–84 (rejecting distinction between work inside or outside prison or for public or private entities). [↑](#footnote-ref-323)
323. Scott v. Baltimore Cnty., 101 F.4th 336, 345 (4th Cir. 2024). The Fourth Circuit reversed the district court’s grant of summary judgment to defendant and remanded with instructions for the court to consider the three factors set forth in *Harker v. State Use Indus*., 990 F.2d 131, 136, 1 WH Cases2d 508 (4th Cir. 1993): (1) did the situation have the hallmarks of a true employment relationship, or did the alleged employer exercise “too much” control; (2) would FLSA coverage for the workers further the purposes of the FLSA, particularly that of deterring unfair competition with “cheap labor”; and (3) was the employer’s motivation primarily pecuniary or rehabilitative? *Id.* at 344. [↑](#footnote-ref-324)
324. *See*

     *Seventh Circuit:* *Vanskike*, 974 F.2d at 808 (determining that even where prisoner worked as knit shop pieceworker, individual was not employee under FLSA).

     *Eighth Circuit: McMaster*, 30 F.3d 976 (holding that prisoners working in prison industries not employees).

     *Tenth Circuit:* *Franks*, 7 F.3d at 972–73 (deeming prisoner in Oklahoma State Industries not employee);

     *Eleventh Circuit: Gambetta*, 112 F.3d 1119 (holding that inmates of state prisons who work for industries operated as state instrumentalities are not covered by the Act).

     *Federal Circuit: Emory*, 2 Cl. Ct. at 581 (holding that prisoner working in Federal Prison Industries program not employee under FLSA). [↑](#footnote-ref-325)
325. 993 F.2d 1387. [↑](#footnote-ref-326)
326. *Id*. at 1392–95. [↑](#footnote-ref-327)
327. *Id*. at 1395 (quoting Vanskike v. Peters, 974 F.2d 806, 810, 30 WH Cases 1739 (7th Cir. 1992)). [↑](#footnote-ref-328)
328. 41 F.3d 1291, 2 WH Cases2d 752 (9th Cir. 1994). [↑](#footnote-ref-329)
329. *Id*. [↑](#footnote-ref-330)
330. *Id*. at 1293. [↑](#footnote-ref-331)
331. Miller v. Dukakis, 961 F.2d 7, 30 WH Cases 1414 (1st Cir. 1992). [↑](#footnote-ref-332)
332. *Id*.; *see also* Sanders v. Hayden, 544 F.3d 812 (7th Cir. 2008) (civilly committed “sexually violent person” not covered by FLSA); Weissenberger v. Watters, 2007 WL 2298220 (W.D. Wis. Aug. 3, 2007) (concluding that patient involuntarily confined in treatment center for sexually violent offenders not covered by FLSA); Worsley v. Lash, 421 F. Supp. 556, 22 WH Cases 1460 (N.D. Ind. 1976) (holding that inmate working as trustee in criminal detention ward of state hospital not employee under FLSA). [↑](#footnote-ref-333)
333. Gamble v. Minnesota State-Operated Servs., 32 F.4th 666, 670–72 (8th Cir. 2022). [↑](#footnote-ref-334)
334. Vaughn v. Phoenix House Found., Inc., 957 F.3d 141, 146 (2d Cir. 2020) (applying factors set forth in *Glatt v. Fox Searchlight Pictures, Inc*., 791 F.3d 376 (2d Cir. 2015), to determine patient was the “primary beneficiary” of the work). [↑](#footnote-ref-335)
335. Copeland v. C.A.A.I.R., Inc, 2019 WL 4307125, at \*6 (N.D. Okla. Sept. 11, 2019). [↑](#footnote-ref-336)
336. Ndambi v. Corecivic, Inc., 990 F.3d 369 (4th Cir. 2021) (civil immigration detainees not employees); Alvarado Guevara v. Immigration & Naturalization Serv., 902 F.2d 394, 396, 29 WH Cases 1321 (5th Cir. 1990) (“Because of the similarity in circumstances between the prison inmates [in other cases] and Plaintiff detainees here, the reasons noted by those courts for not extending the FLSA are applicable in this case.”). [↑](#footnote-ref-337)
337. Tourscher v. McCullough, 184 F.3d 236, 243 (3d Cir. 1999); *see also* Smith v. Dart, 803 F.3d 304 (7th Cir. 2015); McGarry v. Pallito, 2010 WL 679056 (D. Vt. Feb. 27, 2010) (holding that pretrial detainees, like inmates incarcerated after conviction, are not employees). [↑](#footnote-ref-338)
338. Villarreal v. Woodham, 113 F.3d 202, 3 WH Cases2d 1665 (11th Cir. 1997) (deeming pretrial detainee forced to perform translation services not an employee); Reimoneng v. Foti, 72 F.3d 472, 3 WH Cases2d 33 (5th Cir. 1996) (determining sheriff not employer of inmates in work-release program). [↑](#footnote-ref-339)
339. *Ndambi*, 990 F.3d at 372–73. [↑](#footnote-ref-340)
340. *Second Circuit:* Carter v. Duchess Cmty. Coll., 735 F.2d 8, 26 WH Cases 1239 (2d Cir. 1984) (stating that, under economic reality test, FLSA might apply to inmate working as community college tutor for classes taught outside prison).

     *Fifth Circuit:* Watson v. Graves, 909 F.2d 1549, 1551 (5th Cir. 1990) (using economic reality factors to hold prisoners to be employees of private contractor); Alexander v. Sara, Inc., 721 F.2d 149, 26 WH Cases 900 (5th Cir. 1983) (using economic reality factors to hold that inmates working at private, profit-making lab in prison not covered by FLSA); Hudgins v. Hart, 323 F. Supp. 898, 899, 19 WH Cases 965 (E.D. La. 1971) (using economic reality factors to hold that inmates working for private employer inside prison not covered by FLSA).

     *Sixth Circuit:* Sims v. Parke Davis & Co., 334 F. Supp. 774, 782, 20 WH Cases 270 (E.D. Mich. 1971) (using economic reality factors to hold that inmates working at private drug clinic in prison not covered by FLSA), *aff’d*, 453 F.2d 1259, 20 WH Cases 288 (6th Cir. 1972).

     *Ninth Circuit:* Gilbreath v. Cutter Biological, 931 F.2d 1320, 1325, 30 WH Cases 441 (9th Cir. 1991) (employing economic reality factors to hold that inmates working at private plasma center in prison not covered by FLSA). [↑](#footnote-ref-341)
341. *Fourth Circuit:* Harker v. State Use Indus., 990 F.2d 131, 1 WH Cases2d 508 (4th Cir. 1993) (rejecting use of economic reality test for prison work).

     *Ninth Circuit:* Morgan v. MacDonald, 41 F.3d 1291, 2 WH Cases2d 752 (9th Cir. 1994) (stating that economic reality factors are helpful only after reaching determination that individual is employed and issue is identity of employer).

     *Tenth Circuit:* Franks v. Oklahoma State Indus., 7 F.3d 971, 972, 1 WH Cases2d 1109 (10th Cir. 1993) (rejecting use of economic reality factors for work performed in prison). [↑](#footnote-ref-342)
342. 931 F.2d 1320, 1324–27, 30 WH Cases 441 (9th Cir. 1991). [↑](#footnote-ref-343)
343. 931 F.2d at 1326. [↑](#footnote-ref-344)
344. 595 F.3d 610 (5th Cir. 2010). [↑](#footnote-ref-345)
345. *Id*. at 621. [↑](#footnote-ref-346)
346. 909 F.2d 1549, 1551 (5th Cir. 1990). [↑](#footnote-ref-347)
347. *Id*. at 1556; *see also* Peterson v. M.J.J., Inc., 2017 WL 4098755, at \*4 (D. Md. Sept. 13, 2017), *aff’d*, 720 F. App’x 702 (4th Cir. 2018)(prisoners working as hourly tipped workers for private employer, which operated outside of prison and served general public, and whose work was not mandated by prison were FLSA-covered employees). [↑](#footnote-ref-348)
348. *In re* Enterprise Litig., 683 F.3d 462, 469 (3d Cir. 2012). [↑](#footnote-ref-349)
349. Burrell v. Staff, 60 F.4th 25, 42–48 (3d Cir. 2023). [↑](#footnote-ref-350)
350. *Id.* [↑](#footnote-ref-351)
351. 735 F.2d 8, 26 WH Cases 1239 (2d Cir. 1984). [↑](#footnote-ref-352)
352. 735 F.2d at 15. [↑](#footnote-ref-353)
353. Doyle v. City of N.Y., 91 F. Supp. 3d 480 (S.D.N.Y. 2015). [↑](#footnote-ref-354)
354. *First Circuit*: Miller v. Dukakis, 961 F.2d 7, 30 WH Cases 1414 (1st Cir. 1992) (reasoning that sex offenders confined to state mental institutions were prisoners and had no constitutional right to minimum wage).

     *Fifth Circuit:* Loving v. Johnson, 455 F.3d 562, 11 WH Cases2d 1025 (5th Cir. 2006) (holding that prisoners have no constitutional right to compensation).

     *Sixth Circuit:* Lentz v. Anderson, 880 F. Supp. 847, 2 WH Cases2d 1206 (N.D. Ohio 1995) (determining that failure to pay minimum wage not cruel and unusual punishment).

     *Seventh Circuit:* Smith v. Dart, 803 F.3d 304 (7th Cir. 2015) (constitutional claim for failure to provide adequate food and water did not entitle pretrial detainee to minimum wage under FLSA); Vanskike v. Peters, 974 F.2d 806, 30 WH Cases 1739 (7th Cir. 1992) (holding that there is no constitutional right to be paid for prison work); Woodall v. Partilla, 581 F. Supp. 1066 (N.D. Ill. 1984) (holding that prisoners have no constitutional right to be paid for services).

     *Eighth Circuit:* Wentworth v. Solem, 548 F.2d 773, 775, 23 WH Cases 268 (8th Cir. 1977) (concluding that failure to pay minimum wage did not violate equal protection).

     *Tenth Circuit:* Adams v. Neubauer, 195 F. App’x 711 (10th Cir. 2006) (finding no constitutional right to compensation for inmates working for food contractor at state prison). [↑](#footnote-ref-355)
355. Schleicher v. Salvation Army, 518 F.3d 472, 477–78 (7th Cir. 2008) (concluding ordained minister of Salvation Army excluded from coverage and adopting rebuttable presumption that “clerical personnel” are not covered by FLSA). [↑](#footnote-ref-356)
356. *Id*. at 475; *see also* Alcazar v. Corporation of the Catholic Archbishop, 627 F.3d 1288 (9th Cir. 2010) (en banc) (adopting “ministerial exemption” with respect to state wage and hour statutes). [↑](#footnote-ref-357)
357. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 306 (4th Cir. 2004) (holding that mashgiach, or kosher supervisor, at Jewish nursing home not covered by the FLSA under ministerial exception). [↑](#footnote-ref-358)
358. Hosanna-Tabor Evangel. Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012). [↑](#footnote-ref-359)
359. FOH §10b03(b) (noting that ministerial exception found in neither the FLSA nor the regulations). [↑](#footnote-ref-360)
360. WH Op. FLSA2018-29, 2018 WL 683942 (Dec. 21, 2018). [↑](#footnote-ref-361)
361. See §III.B [Employee Status; Volunteers] of this chapter. [↑](#footnote-ref-362)
362. WH Op. FLSA2018-29, at 3. [↑](#footnote-ref-363)
363. Hosanna-Tabor Evangel. Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012). [↑](#footnote-ref-364)
364. WH Op. FLSA2018-29, at 3. [↑](#footnote-ref-365)
365. *Id*. [↑](#footnote-ref-366)
366. *Id*. [↑](#footnote-ref-367)
367. *Id*. at 3–4. [↑](#footnote-ref-368)
368. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 307 (4th Cir. 2004); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1396 (4th Cir. 1990) (concluding lay teacher at religious school does not fall within the ministerial exception); FOH §10b03(b) (“However, the fact that such a person is a member of a religious order does not preclude an employer-employee relationship with a state or secular institution.”); *cf*. Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 298 (1985) (stating “ordinary commercial businesses should not be exempted from the Act simply because they happen to be owned by religious or other nonprofit organizations”); 29 C.F.R. §779.214 (providing activities of a religious organization may be performed for a business purpose and in such cases will be treated the same as an ordinary business enterprise). *But see* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066–69 (2020) (holding the First Amendment’s Religion Clauses foreclosed the adjudication of age and disability discrimination claims filed by elementary school teachers in a Catholic school, finding that implicit in the Court’s decision in *Hosanna-Tabor* was “a recognition that educating young people in their faith, inculcating its teachings, and training them to live with their faith are responsibilities that lie at the very core of the mission of a private religious school”). [↑](#footnote-ref-369)
369. In one case, a broker created a business entity and brought overtime claims individually and on behalf of the entity. Phillips v. Carpet Direct Corp., 2017 WL 121630 (D. Colo. Jan. 10, 2017). The district court held that according to the plain language of the FLSA, a business entity could not be an employee because the definition of the term “employee” was limited to “an individual,” whereas the definition of “employer” included both individuals and entities. *Id*. at \*4. Accordingly, “Congress intended that only individuals, and not entities, be permitted to bring claims for violations of the FLSA.” *Id*. at \*5. [↑](#footnote-ref-370)
370. Escobar v. GCI Media, Inc., 2009 WL 1758712, at \*3 (S.D. Fla. June 22, 2009). [↑](#footnote-ref-371)
371. Hess v. Madera Honda Suzuki, 2012 WL 4052002 (E.D. Cal. Sept. 14, 2012) (finding that individual who served as office manager could be employee of closely held company of which she was also a co-owner and shareholder). [↑](#footnote-ref-372)
372. *Fifth Circuit:* *In re* Reyes, 814 F.2d 168, 28 WH Cases 54 (5th Cir. 1987).

     *Eleventh Circuit:* Patel v. Quality Inn S., 846 F.2d 700, 28 WH Cases 1105 (11th Cir. 1988).

     *D.C. Circuit:* Lopez v. Rodriguez, 668 F.2d 1376, 25 WH Cases 181 (D.C. Cir. 1981). [↑](#footnote-ref-373)
373. The DOL first interpreted the FLSA to cover undocumented aliens in 1942, when the WH Administrator opined that alien prisoners of war were covered by the FLSA. Since that time, the DOL has enforced the FLSA on behalf of undocumented aliens on numerous occasions. *See*, *e.g*., Donovan v. Burgett Greenhouses, 759 F.2d 1483, 27 WH Cases 164 (10th Cir. 1985); Brennan v. El San Trading Corp., 21 WH Cases 623 (W.D. Tex. 1973). [↑](#footnote-ref-374)
374. 846 F.2d 700, 28 WH Cases 1105 (11th Cir. 1988). [↑](#footnote-ref-375)
375. *Id*. [↑](#footnote-ref-376)
376. 535 U.S. 137 (2002). [↑](#footnote-ref-377)
377. U.S. Dep’t of Labor, Wage & Hour Div., Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division (July 12, 2002). [↑](#footnote-ref-378)
378. Lucas v. Jerusalem Café, LLC, 721 F.3d 927, 934–35 (8th Cir. 2013); Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1306 (11th Cir. 2013). [↑](#footnote-ref-379)
379. 721 F.3d 927. [↑](#footnote-ref-380)
380. *Id.* at 933 (internal citations and punctuation omitted). [↑](#footnote-ref-381)
381. *Id.* at 935. [↑](#footnote-ref-382)
382. *Id.* at 936 (internal quotations and citations omitted). [↑](#footnote-ref-383)
383. *Lamonica*, 711 F.3d at 1308. [↑](#footnote-ref-384)
384. *First Circuit:* Lin v. Chinatown Rest. Corp., 771 F. Supp. 2d 185 (D. Mass. 2011) (denying employer’s motion to compel discovery regarding plaintiffs’ immigration status, holding that under *Hoffman Plastic*, immigration status is not relevant to employee’s FLSA claims).

     *Second Circuit:* Saavedra v. Mrs. Bloom’s Direct, Inc., 2019 WL 4727578 (S.D.N.Y. Sept. 27, 2019) (enforcing settlement agreement in FLSA action; finding undocumented status does not prevent plaintiff from recovering payment for work performed); Akin v. Anion of Greenlawn, Inc., 35 F. Supp. 3d 239 (E.D.N.Y. 2014) (finding undocumented status does not prevent plaintiff from recovering payment for work performed).

     *Third Circuit:* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 324 n.23 (D.N.J. 2005), *aff’d on other grounds*, 691 F.3d 527 (3d Cir. 2012).

     *Seventh Circuit:* Villareal v. El Chile, Inc., 266 F.R.D. 207 (N.D. Ill. 2010) (denying employer’s motion to compel discovery regarding plaintiffs’ immigration status, holding that under *Hoffman Plastic*, immigration status is not relevant to employee’s FLSA claims).

     *Eighth Circuit:* Lucas v. Jerusalem Café, LLC, 721 F.3d 927, 934–35 (8th Cir. 2013).

     *Ninth Circuit:* Mariche v. Phoenix Oil, LLC, 2014 WL 2467964 (D. Ariz. June 3, 2014); Ulin v. Lovell’s Antique Gallery, 2010 WL 3768012 (N.D. Cal. Sept. 22, 2010) (denying defendant’s motion for summary judgment, holding that *Hoffman Plastic* did not bar recovery).

     *Tenth Circuit:* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1286 (N.D. Okla. 2006) (holding holders of B1 or B2 visas from India entitled to collect back FLSA wages for work already performed under *Hoffman Plastics* rule).

     *Eleventh Circuit:* Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1308 (11th Cir. 2013).

     See also Chapter 16, Litigation Issues. [↑](#footnote-ref-385)
385. *Second Circuit:* Rodriguez v. Pie of Port Jefferson Corp., 48 F. Supp. 3d 424 (E.D.N.Y. 2014) (denying motion to compel plaintiffs to respond to interrogatories related to plaintiffs’ immigration status); Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002) (denying discovery of plaintiffs’ immigration documents, Social Security numbers, and passports); Liu v. Donna Karan Int’l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (denying discovery of immigration status of employees); Ansoumana v. Gristede’s Operating Corp., 201 F.R.D. 81, 9 WH Cases2d 1646 (S.D.N.Y. 2001) (granting plaintiffs’ motion disallowing deposition questions as to plaintiffs’ immigration status).

     *Sixth Circuit:* Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499 (W.D. Mich. 2005) (granting protective order against employer’s discovery requests for Social Security numbers, alien registration cards, and similar immigration-related documents).

     *Seventh Circuit:* Cortez v. Medina’s Landscaping, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002) (denying motion to compel discovery regarding plaintiffs’ citizenship status).

     *Eighth Circuit:* *Lucas*, 721 F.3d at 934 (affirming suppression of evidence related to workers’ immigration status). [↑](#footnote-ref-386)
386. *Lovell’s Antique Gallery*,2010 WL 3768012, at \*8–9 (denying employer’s motion for summary judgment arguing that employee presented false immigration documents and therefore could not recover, stating “*Hoffman* [*Plastics*] did not preclude compensatory damages for time already worked on the basis that the employee presented false documents” and also rejecting employer’s argument that liquidated damages were precluded by *Hoffman Plastics* finding that liquidated damages were compensatory, and were not paid for work not performed, as in *Hoffman Plastics*); *see also* Portillo v. Permanent Workers, LLC, 793 F. App’x 255, 260 (5th Cir. 2019) (prevailing plaintiff was not judicially estopped from recovering fees because he misrepresented his immigration status, but drastically reducing fee award in light of the small recovery, $1,305, and that the litigation may have been avoided but for the misrepresentation); Mariche v. Phoenix Oil, LLC, 2014 WL 2467964 (D. Ariz. June 3, 2014) (recovery not barred by “unclean hands” by using false Social Security number);Ulin v. ALAEA-72, Inc., 2011 WL 723617 (N.D. Cal. Feb. 23, 2011) (concluding, after trial, that recovery was not barred by employee’s use of false documents because employer failed to meet burden that it was actually deceived by such false documents, where it had not asked for work authorization documents until three years after hire and a manager had assisted employees in obtaining false documents). [↑](#footnote-ref-387)
387. *Lamonica*, 711 F.3d at 1309. *Accord* Bautista Hernandez v. Tadala’s Nursery, Inc., 34 F. Supp. 3d 1229 (S.D. Fla. 2014). [↑](#footnote-ref-388)
388. In the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. §1801 *et seq.*, the definition of “employ” is the same as the definition of “employ” under the FLSA. 29 U.S.C. §203(g); 29 U.S.C. §1802(5). Moreover, the MSPA regulations make it clear that the terms “employer” and “employee” are to have the same meaning under both statutes. *See* 29 C.F.R. §500.20(h)(4). MSPA’s adoption of the FLSA definition of employment “was deliberate and done with the clear intent of adopting the ‘joint employer’ doctrine as a central foundation of this new statute … .” H.R. Rep. No. 97-885, 97th Cong., 2d Sess., at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4552. This treatise does not address MSPA, its regulations, or its case law, but we call it to the reader’s attention because many joint employer cases under MSPA are analyzed in the same manner as joint employment cases under the FLSA. [↑](#footnote-ref-389)
389. The issue of successorship liability is discussed in Chapter 16, Litigation Issues. [↑](#footnote-ref-390)
390. 29 U.S.C. §203(e)(1). [↑](#footnote-ref-391)
391. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (quoting 29 U.S.C. §203(g)). See Chapter 8, Compensable Hours, for a discussion of the meaning of “suffer or permit.” [↑](#footnote-ref-392)
392. *See, e.g.,* Rescission of Joint Employer Status Under The Fair Labor Standards Rule, 86 Fed. Reg. 40,939 (July 29, 2021) (setting forth history of DOL’s joint employment pronouncements). [↑](#footnote-ref-393)
393. 414 U.S. 190 (1973). [↑](#footnote-ref-394)
394. 331 U.S. 722, 6 WH Cases 990 (1947). [↑](#footnote-ref-395)
395. Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 917–18 (9th Cir. 2003). [↑](#footnote-ref-396)
396. *Id.* [↑](#footnote-ref-397)
397. *Id.* *See also* Astudillo v. Fusion Juice Bar Inc., 2023 WL 3802754, at \*8 (E.D.N.Y. Mar. 23, 2023) (holding two corporate entities operating two nearby juice bars were “interdependent on each other” and were owned, operated, and managed by a single individual, they constituted a single employer with joint and several liability). [↑](#footnote-ref-398)
398. 414 U.S. 190 (1973). [↑](#footnote-ref-399)
399. *Id*. at 195. [↑](#footnote-ref-400)
400. *Id.*  [↑](#footnote-ref-401)
401. 331 U.S. 722, 6 WH Cases 990 (1947). [↑](#footnote-ref-402)
402. 704 F.2d 1465, 1470 (9th Cir. 1983). [↑](#footnote-ref-403)
403. *Id*. (citations omitted). [↑](#footnote-ref-404)
404. *Id*. [↑](#footnote-ref-405)
405. *Id*. [↑](#footnote-ref-406)
406. *Id*. [↑](#footnote-ref-407)
407. Baystate Alternative Staffing v. Herman,163 F.3d 668 (1st Cir. 1998). [↑](#footnote-ref-408)
408. *In re* Enterprise Rent-A-Car Wage & Hour Emp. Practices Litig., 683 F.3d 462 (3d Cir. 2012). [↑](#footnote-ref-409)
409. Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014). [↑](#footnote-ref-410)
410. Zheng v. Liberty Apparel Co., 355 F.3d 61, 72, 9 WH Cases2d 336 (2d Cir. 2003). [↑](#footnote-ref-411)
411. Salinas v. Commercial Interiors, Inc., 848 F.3d 125 (4th Cir. 2017). [↑](#footnote-ref-412)
412. Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403 (7th Cir. 2007). [↑](#footnote-ref-413)
413. Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276 (11th Cir. 2016). [↑](#footnote-ref-414)
414. 331 U.S. 722, 6 WH Cases 990 (1947). [↑](#footnote-ref-415)
415. 163 F.3d 668 (1st Cir. 1998). [↑](#footnote-ref-416)
416. *Id*. at 675. [↑](#footnote-ref-417)
417. *Id*. at 675–76. [↑](#footnote-ref-418)
418. *Id*. at 676. [↑](#footnote-ref-419)
419. *Id*. Regarding the employer status of the agencies’ corporate officers and managers, the court held that the district court had failed to determine whether they had “controlled [the agencies’] purse-strings or made corporate policy” and therefore remanded the case for further findings on these matters. *Id*. at 679. [↑](#footnote-ref-420)
420. Brown v. J&W Grading, Inc., 390 F. Supp. 3d 337 (D.P.R. 2019). [↑](#footnote-ref-421)
421. 355 F.3d 61 (2d Cir. 2003). [↑](#footnote-ref-422)
422. 355 F.3d 61, 72, 9 WH Cases2d 336 (2d Cir. 2003). [↑](#footnote-ref-423)
423. Zheng v. Liberty Apparel Co., Inc., 2002 WL 398663 (S.D.N.Y. Mar. 13, 2002), *vacated*, 355 F.3d 61, 72, 9 WH Cases2d 336 (2d Cir. 2003). [↑](#footnote-ref-424)
424. These factors had been used by the Second Circuit in *Carter v. Duchess Community College*, 735 F.2d 8, 26 WH Cases 1239 (2d Cir. 1984). [↑](#footnote-ref-425)
425. 355 F.3d at 72–76. [↑](#footnote-ref-426)
426. 331 U.S. 722 (1947). [↑](#footnote-ref-427)
427. *Zheng*, 355 F.3d at 72. [↑](#footnote-ref-428)
428. Barfield v. New York City Health & Hosps. Corp., 537 F.3d 132, 13 WH Cases2d 1721 (2d Cir. 2008) (applying *Zheng* factors to find that hospital was joint employer of a nurse who worked at the hospital but was paid by multiple referral agencies, citing the hospital’s ability to hire and fire agency-referred nurses and schedule them, as well as the nurse’s exclusive work for the hospital, using its equipment, and on work integral to the hospital’s operations); Byer v. Periodontal Health Specialists of Rochester, PLLC, 2021 BL 289661, 2021 WL 3276725, at \*2 (2d Cir. Aug. 2, 2021) (applying *Zheng* and *Barfield* to alleged horizontal joint employment situation); Grenawalt v. AT&T Mobility LLC, 642 F. App’x 36 (2d Cir. 2016) (applying *Zheng* factors to determine that reasonable juror could find retail store was joint employer of security guards where security firm that employed security guards served only defendant retail store, guards worked almost exclusively at defendant’s stores, and guards were primarily supervised by defendant’s store managers). [↑](#footnote-ref-429)
429. 683 F.3d 462 (3d Cir. 2012). [↑](#footnote-ref-430)
430. *Id.* at 469. [↑](#footnote-ref-431)
431. Yue Yu v. McGrath, 597 F. App’x 62 (3d Cir. 2014). *See also* Thompson v. Real Estate Mortg. Network, 748 F.3d 142 (3d Cir. 2014) (expressly relying on “*Enterprise* test” to hold sufficient facts alleged to satisfy joint employer standard with respect to related companies). [↑](#footnote-ref-432)
432. Talarico v. Public P’ships LLC, 837 F. App’x 81, 86 (3d Cir. 2020) (reversing district court grant of summary judgment in favor of employer where some *Enterprise* factors weighed in favor of joint employment status) (quoting *Enterprise*, 683 F.3d at 469). [↑](#footnote-ref-433)
433. 848 F.3d 125 (4th Cir. 2017). [↑](#footnote-ref-434)
434. *Id*. at 137–38. [↑](#footnote-ref-435)
435. *Id*. at 137 (citing 1961 version of 29 C.F.R. §791.2(a)). [↑](#footnote-ref-436)
436. *Id*. at 129–39. [↑](#footnote-ref-437)
437. *Id*. at 141–42. [↑](#footnote-ref-438)
438. *Id*. at 149. [↑](#footnote-ref-439)
439. *Id*. [↑](#footnote-ref-440)
440. Hall v. DirecTV, LLC*,* 846 F.3d 757, 767 (4th Cir. 2017) (reversing grant of motion to dismiss claims of satellite TV technicians and directing district court to examine whether the defendant and other entities had “shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions” of the technicians’ work, and then evaluate whether the technicians were independent contractors or employees in the context of the entire work arrangement, rather than as to each defendant). [↑](#footnote-ref-441)
441. Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014) (applying four-factor “economic reality test” to reverse jury verdict finding franchisor liable as joint employer of franchisee’s employee, where there was insufficient evidence on all four factors); Gray v. Powers, 673 F.3d 352 (5th Cir. 2012) (applying four-factor test to determine individual owner of club not a joint employer of bartender employed by the club); Williams v. Henagan, 595 F.3d 610 (5th Cir. 2010) (applying *Bonnette* factors to determine that occasional work inmates performed for mayor’s private benefit did not reflect economic reality resembling sustained employment relationship); Watson v. Graves, 909 F.2d 1549, 1551 (5th Cir. 1990) (applying *Bonnette* factors to determine that inmates in work release program working for private construction business operated by sheriff’s family were “employees” of that business under FLSA). [↑](#footnote-ref-442)
442. While Federal Rule of Appellate Procedure 32.1 authorizes citations to unpublished decisions, under Sixth Circuit Rule 32.1(b), only “published” decisions are binding on subsequent panels. [↑](#footnote-ref-443)
443. Rhea v. West Tenn. Violent Crime & Drug Task Force, 825 F. App’x 272, 277 n.4 (6th Cir. 2020) (relying on 29 C.F.R. §791.2(a)(1) for factors to consider in evaluating joint employment, including power to hire and fire, supervision and control of employee work schedule and conditions of employment to a substantial degree, determination of employee’s rate and method of payment, and maintenance of employee’s employment records). [↑](#footnote-ref-444)
444. Crowell v. M Street Ent., LLC, 670 F. Supp. 3d 563 (M.D. Tenn. 2023) (applying Sixth Circuit’s four-factor test utilized in other employment contexts as set forth in *Swallows v. Barnes & Noble Book Stores, Inc*. 128 F.3d 990 (6th Cir. 1997); finding restaurant management company was joint employer); Narjes v. Absolute Health Servs., Inc., 2018 WL 3208180 (N.D. Ohio June 29, 2018) (utilizing two tests, one emphasizing interrelation of operations as set forth in *International Longshoremen’s Ass’n, AFL-CIO, Local Union No. 1937 v. Norfolk Southern Corp*., 927 F.2d 900 (6th Cir. 1991), with respect to the Railway Labor Act, and one focusing on exercise of authority, control, and supervision as set forth in *Sanford v. Main Street Baptist Church Manor, Inc*., 327 F. App’x 587, 594 (6th Cir. 2009), with respect to Title VII); Sutton v. Community Health Sys., Inc., 2017 WL 3611757, at \*3 (W.D. Tenn. Aug. 22, 2017) (discussing competing tests under *Metropolitan Detroit Bricklayers District Council v*. *J*.*E*. *Hoetger & Co*., 672 F.2d 580, 584 (6th Cir. 1982) (four-factor test applied to actions under §301 of the Labor Management Relations Act), and *Sanford v. Main Street Baptist Church Manor, Inc*., 327 F. App’x 587, 594 (6th Cir. 2009) (three-factor test applied under Title VII)); Bey v. WalkerHealthCareIT, LLC, 2018 WL 2018104, at \*6–9 (S.D. Ohio May 1, 2018) (applying four *Metropolitan Detroit* factors: (1) interrelation of operations between companies; (2) common management; (3) centralized control of labor relations; and (4) common ownership). [↑](#footnote-ref-445)
445. Smith v. Guidant Global Inc.,2019 WL 6728359 (E.D. Mich. Dec. 11, 2019) (noting that Sixth Circuit has not articulated a test to determine joint employment but federal courts within Michigan have relied on *Bonnette* factors; declining to adopt Fifth Circuit’s “economic realities” test); Parrott v. Marriott Int’l Inc., 2017 WL 3891805, at \*2 (E.D. Mich. Sept. 6, 2017) (noting that Sixth Circuit has not articulated a test to determine joint employment but federal courts within Michigan have relied on *Bonnette* factors); Dowd v. DirecTV, LLC, 2016 WL 28866, at \*4 (E.D. Mich. Jan. 4, 2016) (finding satellite provider and subcontractors joint employers after analysis of *Bonnette* factors). [↑](#footnote-ref-446)
446. Reyes-Trujillo v. Four Star Greenhouse, Inc., 513 F. Supp. 3d 761, 780–83 (E.D. Mich. 2021) (after lengthy analysis of tests for determining joint employment in Sixth Circuit, relying on multi-factor test for evaluating economic realities of direct employment relationships set forth in *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019)). [↑](#footnote-ref-447)
447. Martinez v. First Class Interiors of Naples, LLC, 2022 BL 160046, 2022 WL 1462965, at \*19–20 (M.D. Tenn. May 6, 2022) (considering power to hire and fire, supervision and control, determination of rate and method of payment, maintenance of employment records, *and* other economic reality factors set forth in *Ellington v. City of E. Cleveland*, 689 F.3d 549 (6th Cir. 2012), including whether worker is integral part of operations, extent of worker’s economic dependence on defendant, and defendant’s control over working conditions). [↑](#footnote-ref-448)
448. 495 F.3d 403 (7th Cir. 2007) (holding workers recruited to detassel and rogue corn plants by labor recruiter were jointly employed by seed company; applying test from *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)). [↑](#footnote-ref-449)
449. 331 U.S. 722 (1947). [↑](#footnote-ref-450)
450. Kim v. Stonex Grp. Inc., 2022 BL 414706, 2022 WL 17082574 (N.D. Ill. Nov. 18, 2022) (noting that Seventh Circuit has not articulated test to determine joint employment but courts within circuit have relied on the four *Bonnette* factors); Heuberger v. Smith*,* 2017 BL 315019, 2017 WL 3923271, at \*12 (N.D. Ind. Sept. 7, 2017) (same). [↑](#footnote-ref-451)
451. Larson v. Isle of Capri Casinos, Inc., 2018 WL 6495074 (W.D. Mo. Dec. 10, 2018) (applying four-factor test and Eighth Circuit’s strong presumption that parent company is not employer of subsidiary’s employees); Childress v. Ozark Delivery of Mo. LLC, 95 F. Supp. 3d 1130 (W.D. Mo. Mar. 5, 2015) (finding company providing human resources services to package delivery company was joint employer); Thornton v. Charter Commc’ns LLC, 2014 WL 4794320 (E.D. Mo. Sept. 25, 2014) (finding cable provider not joint employer of cable technicians). [↑](#footnote-ref-452)
452. 704 F.2d 1465, 1470 (9th Cir. 1983). [↑](#footnote-ref-453)
453. 29 C.F.R. Part 791, 85 Fed. Reg. 2820 (Jan. 16, 2020). [↑](#footnote-ref-454)
454. Ray v. Los Angeles Cnty. Dep’t of Pub. Soc. Servs., 52 F.4th 843, 847–51 (9th Cir. 2022) (applying *Bonnette*factors to determine that county defendant was joint employer of in-home health care workers, even though county did not have power to hire or fire workers and did not issue their paychecks, because county contributed to their wages, set wage rates and method of payment, and determined type and amount of services provided); Hale v. Arizona, 993 F.2d 1387, 1 WH Cases2d 601 (9th Cir. 1993) (en banc) (applying *Bonnette* factors to determine that entities operating as various “arms” of department of corrections could be considered single “employer” that had control over hiring and firing, rate and method of payment, and employment records); Gilbreath v. Cutter Biological, 931 F.2d 1320, 1324–27, 30 WH Cases 441 (9th Cir. 1991) (applying *Bonnette* factors to determine that prison inmates did not have employment relationship with private contractor under FLSA where department of corrections retained power to hire or fire, to approve assignments, and to determine rate and method of payment). [↑](#footnote-ref-455)
455. 111 F.3d 633 (9th Cir. 1997). [↑](#footnote-ref-456)
456. Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). [↑](#footnote-ref-457)
457. *Torres-Lopez*, 111 F.3d at 640 (citing *Bonnette*, 704 F.2d 1465, but also listing factors contained in MSPA regulations and factors derived from *Rutherford Foods* and *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979), which are cited to in the MSPA regulations, including “whether the work was a specialty job on the production line, … whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes, … whether the premises and equipment of the employer are used for the work, … whether the employees had a business organization that could or did shift as a unit from one worksite to another, … whether the work was piecework and not work that required initiative, judgment or foresight, … whether the employee had an opportunity for profit or loss depending upon the alleged employee’s managerial skill, … whether there was permanence in the working relationship … and whether the service rendered is an integral part of the alleged employer’s business”) (internal punctuation and citations omitted). [↑](#footnote-ref-458)
458. Gutierrez v. New Hope Harvesting, 2022 BL 366851, 2022 WL 17217440 (C.D. Cal. Sept. 21, 2022) (applying *Bonnette* and *Torres-Lopez* factors and finding strawberry sellers were not joint employers of farm workers); Edmonds v. Amazon.com, Inc., 2020 WL 1875533, at \*3–4 (W.D. Wash. Apr. 15, 2020) (applying both *Bonnette* and *Torres-Lopez* factors in driver case); Johnson v. Serenity Transp., Inc.,2017 WL 1365112 (N.D. Cal. Apr. 14, 2017) (applying both *Bonnette* and *Torres-Lopez* factors in driver case); Perez v. Lantern Light Corp., 2015 WL 3451268 (W.D. Wash. May 29, 2015) (applying both *Bonnette* and *Torres-Lopez* factors in telecommunications case); Montoya v. 3PD, Inc., 2014 WL 3385116 (D. Ariz. July 10, 2014) (applying *Torres-Lopez* factors to supplement analysis under *Bonnette* in case brought by delivery drivers); Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc., 2014 WL 183956 (C.D. Cal. Jan. 14, 2014). [↑](#footnote-ref-459)
459. Solis v. Circle Grp., LLC, 2017 WL 1246487 (D. Colo. Apr. 5, 2017) (denying motion to dismiss plaintiff construction workers’ claims after applying *Bonnette* four-factor test for joint employment); Boxum-Debolt v. Taylor, 2016 WL 7014020 (D. Kan. Dec. 1, 2016) (denying summary judgment for defendant based on four-factor economic realities test, by which jury could find plaintiffs employed jointly by state and county). [↑](#footnote-ref-460)
460. Sanders v. Glendale Rest. Concepts, LP, 2020 BL 356463, 2020 WL 5569786, at \*3–4 (D. Colo. Sept. 17, 2020). [↑](#footnote-ref-461)
461. Merrill v. Pathway Leasing LLC, 2018 WL 2214471, at \*6 (D. Colo. May 14, 2018) (rejecting *Bonnette*). [↑](#footnote-ref-462)
462. 29 U.S.C. §1801. [↑](#footnote-ref-463)
463. Layton v. DHL Express (USA), Inc., 686 F.3d 1172, 1176–78 (11th Cir. 2012) (finding DHL not joint employer with its third-party contractor who supplied couriers to deliver DHL’s packages based on eight-factor economic reality test set forth in *Aimable v. Long & Scott Farms*, 20 F.3d 434, 437 (11th Cir. 1994), including (1) nature and degree of control; (2) degree of supervision, direct or indirect; (3) power to determine pay rates or methods of payment; (4) right, directly or indirectly, to hire, fire, or modify employment conditions; (5) preparation of payroll and payment of wages; (6) ownership of facilities where work occurred; (7) performance of specialty job integral to the business; and (8) investments of the purported employer and contractor). *See also* Lovett v. SJAC Fulton IND I, LLC, 2016 WL 4425363 (N.D. Ga. Aug. 22, 2016) (granting defendant’s motion for summary judgment after applying eight factors articulated in *Layton*, as well as the four-factor economic reality test). [↑](#footnote-ref-464)
464. 20 F.3d 434, 437 (11th Cir. 1994). [↑](#footnote-ref-465)
465. 843 F.3d 1276 (11th Cir. 2016). [↑](#footnote-ref-466)
466. *Id*. at 1294 (citing Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994)). [↑](#footnote-ref-467)
467. *Id*. (citing authoritative cases). *See also* Ayala v. Nissan N. Am., Inc., 2024 BL 41802, 2024 WL 489723 (11th Cir. Feb. 8, 2024) (applying *Aimable* factors to affirm summary judgment in favor of defendant car manufacturer where none of the factors weighed in favor of joint employment of automotive technicians working for individual car dealerships). [↑](#footnote-ref-468)
468. Ivanov v. Sunset Pools Mgmt., Inc., 567 F. Supp. 2d 189 (D.D.C. 2008) (applying *Zheng* factors—*Zheng v. Liberty Apparel Co*., 355 F.3d 61, 9 WH Cases2d 336 (2d Cir. 2003)—to grant defendant’s motion for summary judgment where evidence showed it had no part in hiring process of lifeguards it recruited for pool management company). [↑](#footnote-ref-469)
469. Orozco v. Plackis, 757 F.3d 445, 452 (5th Cir. 2014) (granting franchisor’s motion for judgment as a matter of law following trial where none of the four factors for establishing joint employment was met). [↑](#footnote-ref-470)
470. *Third Circuit:* DiFlavis v. Choice Hotels Int’l, Inc. 2020 WL 610778, at \*5–10 (E.D. Pa. Feb. 6, 2020); Chen v. Domino’s Pizza, Inc., 2009 WL 3379946 (D.N.J. Oct. 16, 2009) (collecting cases for proposition that “courts have consistently held that the franchisor/franchisee relationship does not create an employment relationship between a franchisor and a franchisee’s employees”).

     *Fourth Circuit*: Elsayed v. Family Fare LLC, 2020 BL 300994, 2020 WL 4586788, at \*4–8 (M.D.N.C. Aug. 10, 2020) (finding franchisor not joint employer of franchisee or franchisee’s employees after examining Fourth Circuit joint employment factors set forth in *Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017)).

     *Fifth Circuit:* Reese v. Coastal Restoration & Cleaning Servs., Inc., 2010 WL 5184814 (Dec. 15, 2010) (granting franchisor’s motion for summary judgment on issue of joint employment where franchise agreement did not establish that franchisor met four-factor economic realities test set forth in *Williams v. Henagan*, 595 F.2d 610, 620 (5th Cir. 2010)).

     *Seventh Circuit:* Brunner v. Liautaud, 2015 WL 1598106 (N.D. Ill. Apr. 8, 2015) (finding that enforcement of quality control and brand uniformity by franchisor’s CEO did not manifest employment relationship).

     *Ninth Circuit:* Gessele v. Jack in the Box, Inc., 2016 WL 7223324 (D. Or. Dec. 13, 2016) (holding defendant/franchisor Jack in the Box, Inc., was not joint employer of franchise employees); Singh v. 7-Eleven, Inc., 2007 WL 715488 (N.D. Cal. Mar. 8, 2007) (franchisor was not joint employer of franchisee’s employees under four *Bonnette* factors).

     *Eleventh Circuit:* Rodriguez v. America’s Favorite Chicken Co., 2017 WL 1684543 (N.D. Ala. May 3, 2017) (granting franchisors’ motion to dismiss after examining joint employment factors and franchisor agreement). [↑](#footnote-ref-471)
471. *Second Circuit:* Cordova v. SCCF, Inc., 2014 WL 3512838 (S.D.N.Y. July 16, 2014) (franchisor could be joint employer if plaintiff established complaint allegations, including that plaintiffs’ work as delivery persons was integral to chain restaurant and that franchisor supervised plaintiffs’ work); Olvera v. Bareburger Grp. LLC, 73 F. Supp. 3d 201 (S.D.N.Y. 2014);Cano v. DPNY, Inc., 287 F.R.D. 251 (S.D.N.Y. 2012) (franchisor could be joint employer if plaintiff proved facts alleged in complaint, including that franchisor promulgated and implemented compensation system that tracked hours and wage, trained employees, monitored employee performance, implemented hiring policies, and had right to inspect premises to ensure compliance with policies).

     *Fourth Circuit:* Shupe v. DBJ Enters., LLC, 2015 WL 790451 (M.D.N.C. Feb. 25, 2015) (complaint stating that franchisor exercised significant control over day-to-day operations through “Code of Conduct” it required all franchisees and franchisee employees to follow alleged sufficient factual basis to survive motion to dismiss on joint employer status).

     *Eleventh Circuit:* Wilson v. GoWaiter Franchise Holdings, LLC, 2014 WL 1092307 (N.D. Ga. Mar. 18, 2014) (complaint alleging joint enterprise between franchisor and franchisee sufficient to demonstrate possibility that franchisor was joint employer). [↑](#footnote-ref-472)
472. Ansoumana v. Gristede’s Operating Corp., 255 F. Supp. 2d 184 (S.D.N.Y. 2003) (deeming drugstore chain joint employer with labor contractor whose employees delivered purchases to customer residences), *reaff’d on reconsideration*, 255 F. Supp. 2d 197 (S.D.N.Y. 2003). [↑](#footnote-ref-473)
473. *Sixth Circuit:* Doe v. Cin-Lan, Inc., 2009 WL 2568516 (E.D. Mich. Aug. 18, 2009) (holding that nude dancer could be jointly employed by two corporate entities where one corporation provided consulting services to and exercised supervisory authority over other, and where there was overlap of ownership and officers between two corporations); Pierce v. Coleman Trucking, Inc., 2005 WL 2338822 (N.D. Ohio Sept. 23, 2005) (deeming two related asbestos removal companies to be joint employers).

     *Ninth Circuit:* Davis v. Four Seasons Hotel Ltd., 810 F. Supp. 2d 1145, 1159 (D. Haw. 2011) (“Although additional entities may be involved in the operation of the Maui and Hualalai resorts and may also have or have had power to control the Plaintiffs as banquet servers, a worker may be employed by more than one entity at the same time.”).

     *Eleventh Circuit:* Cornell v. CF Ctr., LLC, 410 F. App’x 265 (11th Cir. 2011) (affirming judgment that interrelated corporations were joint employers within meaning of FLSA and applying factors set out in *Antenor v*. *D & S Farms*, 88 F.3d 925 (11th Cir. 1996)). [↑](#footnote-ref-474)
474. Beck v. Financial Tech. Corp., 2017 WL 5668388, at \*3 (N.D. Ala. Nov. 27, 2017) (allegations sufficient to show control by owners); Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253 (S.D.N.Y. 2011) (holding that owner’s son was joint employer with restaurant where he supervised wait staff, but that owner and owner’s wife, a wholesale food importer and distributor, were not employers). [↑](#footnote-ref-475)
475. Buenaventura v. Champion Drywall, Inc., 2012 WL 1032428 (D. Nev. Mar. 27, 2012) (applying *Bonnette* test and allowing individual liability against some corporate employees but rejecting it for others); Speert v. Proficio Mortg. Ventures, LLC, 2011 WL 2417133 (D. Md. June 11, 2011) (branch manager actively involved in running location could be liable as individual defendant). [↑](#footnote-ref-476)
476. *Fifth Circuit:* Wirtz v. Lone Star Steel Co., 405 F.2d 668 (5th Cir. 1968) (applying five-factor test to determine subcontractors’ employees were also employed by steel mill); Powell v. Collier Constr. Co., 2005 BL 41515, 2005 WL 2429245 (W.D. La. Sept. 30, 2005) (applying *Silk* factors—United States v. Silk, 331 U.S. 704 (1947)—to determine that subcontractors’ employees were jointly employed by mold remediation defendant).

     *Ninth Circuit:* Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997) (holding that developer/general contractor was joint employer of subcontractor’s employees); Lemus v. Timberland, 2011 BL 445488, 2011 WL 7069078 (D. Or. Dec. 21, 2011) (applying both *Bonnette* factors and factors set out in *Torres-Lopez, supra;* Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983); Chao v. Westside Drywall, Inc., 709 F. Supp. 2d 1037 (D. Or. 2010) (holding that jury could reasonably conclude defendant and its subcontractors were joint employers of plaintiffs).

     *Tenth Circuit:* Solis v. Circle Grp., LLC, 2017 WL 1246487 (D. Colo. Apr. 5, 2017) (finding triable issue as to whether county employed plaintiffs). [↑](#footnote-ref-477)
477. Rankin v. PTC Alliance LLC, 2022 BL 287001, 2022 WL 3447307 (W.D. Pa. Aug. 17, 2022) (denying motion to dismiss where plaintiff adequately alleged that private equity company’s officers exercised sufficient control over direct employer). [↑](#footnote-ref-478)
478. *Third Circuit:* Ortiz v. Paramo, 2008 WL 4378373, at \*4–6 (D.N.J. Sept. 19, 2008) (finding that farmer and labor camp operator were joint employers of farmworkers).

     *Seventh Circuit:* Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403 (7th Cir. 2007) (holding workers recruited to detassel and rogue corn plants by labor recruiter were jointly employed by seed company; applying test from *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)).

     *Tenth Circuit:* Hodgson v. Okada, 472 F.2d 965, 969 (10th Cir. 1973) (finding farm owners joint employer with crew leader of farmworkers where they had the right to direct daily labor, supervised the work, and benefited from the work).

     *Eleventh Circuit:* Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276 (11th Cir. 2016) (harvesters jointly employed by labor contractor and owner of citrus farm); Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996) (finding joint employment in farm labor context under MSPA). [↑](#footnote-ref-479)
479. *Supreme Court*: Falk v. Brennan, 414 U.S. 190 (1973) (holding real estate management company to be employer of the maintenance workers along with building owners where it substantially controlled terms and conditions of maintenance work).

     *Third Circuit:* Mattus v. Facility Sols., Inc., 2005 WL 3132190 (D.N.J. Nov. 21, 2005) (permitting janitors employed by subcontractor to amend their complaint to add FLSA claim against Wal-Mart based on six-factor test).

     *Seventh Circuit:* Vega v. Contract Cleaning Maint., Inc., 2004 WL 2358274 (N.D. Ill. Oct. 18, 2004) (denying United Parcel Service’s motion to dismiss on joint employment issue as to employees of janitorial service contractor). [↑](#footnote-ref-480)
480. *First Circuit:* Chesley v. DirecTV, Inc., 2015 WL 3549129 (D.N.H. June 8, 2015) (in case brought by satellite installers, applying four-factor economic realities test from *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998), to determine that plaintiffs sufficiently alleged joint employment based on allegations focused on defendants’ control over their work schedules and conditions of employment).

     *Fourth Circuit:* Alston v. DirecTV, Inc., 254 F. Supp. 3d 765 (D.S.C. 2017) (denying summary judgment for defendant in satellite technician case; applying two-step framework set forth in *Salinas v*. *Commercial Interiors, Inc*.,848 F.3d 125 (4th Cir. 2017), and *Hall v*. *DirecTV, LLC*,846 F.3d 757 (4th Cir. 2017)); Deras v. Verizon Md., Inc., 2010 WL 3038812 (D. Md. July 30, 2010) (holding that workers employed by subcontractor for purpose of doing work for telecommunications company set forth sufficient allegations to show that company and subcontractor operated as joint employers).

     *Sixth Circuit:* Keeton v. Time Warner Cable, Inc., 2011 WL 2618926 (S.D. Ohio July 1, 2011) (denying codefendant’s motion for summary judgment that it was not joint employer because employees produced evidence that codefendant set employees’ daily routes, which raised issue of fact as to centralization of labor relations and interrelatedness of operations).

     *Ninth Circuit:* Perez v. Lantern Light Corp., 2015 WL 3451268 (W.D. Wash. May 29, 2015) (granting plaintiffs’ motion for summary judgment that satellite provider was joint employer). [↑](#footnote-ref-481)
481. Schultz v. Capital Int’l Sec., Inc., 460 F.3d 595, 11 WH Cases2d 1386 (4th Cir. 2006) (applying *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), factors and 29 C.F.R. §791.2(b) to find that security agents were jointly employed by agency and Saudi Arabian prince); Karr v. Strong Detective Agency, 787 F.2d 1205, 1208, 27 WH Cases 988 (7th Cir. 1986) (a detective agency and a warehouse operations firm were joint employers where the detective agency placed one of its employees in the warehouse as a worker to spy on the activities of warehouse employees and the employee was paid by both the detective agency and the warehouse operations, but the undercover employee was not entitled to overtime payments from detective agency when paid overtime by its joint employer client manufacturing company despite additional work of writing reports). [↑](#footnote-ref-482)
482. Williams v. King Bee Delivery, LLC, 199 F. Supp. 3d 1175 (E.D. Ky. 2016) (denying motion to dismiss plaintiff courier’s claims against alleged joint employer for whom deliveries performed). [↑](#footnote-ref-483)
483. Zheng v. Liberty Apparel Co., Inc., 2009 WL 1383488 (S.D.N.Y. May 18, 2009), *aff’d*, 617 F.3d 182 (2d Cir. 2010) (clothing companies joint employers with clothing contractor companies); Lin v. Great Rose Fashion, Inc., 2009 WL 1544749, at \*15 (E.D.N.Y. June 3, 2009) (applying *Zheng* test to find that plaintiff garment workers had standing to sue managerial staff as “employers” under FLSA); Zheng v. Liberty Apparel Co., Inc. 556 F. Supp. 2d 284, 287 (S.D.N.Y. 2008) (examining factors set forth in *Zheng v. Liberty Apparel Co., Inc*., 355 F.3d 61 (2d Cir. 2003),to deny defendants’ motion for summary judgment in light of genuine disputes of material fact as to whether plaintiffs’ work was integral to defendant’s production, the degree of supervision, and whether plaintiffs worked predominantly or exclusively for defendant); Chen v. Street Beat Sportswear, Inc., 364 F. Supp. 2d 269 (E.D.N.Y. 2005) (applying *Zheng* analysis to deny summary judgment to defendant in garment industry subcontractor context); Bureerog v. Uvawas, 922 F. Supp. 1450, 3 WH Cases2d 383 (C.D. Cal. 1996) (using four-part economic reality test to determine joint employment in garment industry context). [↑](#footnote-ref-484)
484. Dixon v. Zabka, 2014 WL 6084351 (D. Conn. Nov. 13, 2014) (applying *Carter* *v. Duchess Community College*, 735 F.2d 8, 26 WH Cases 1239 (2d Cir. 1984), and *Zheng* factors to find vacuum manufacturer joint employer of door-to-door salespeople but not appointment setters). [↑](#footnote-ref-485)
485. Velez v. New Haven Bus Serv., Inc., 2015 WL 75361 (D. Conn. Jan. 6, 2015) (considering *Carter* and *Zheng* factors, as well as totality of circumstances, to find sufficient evidence to establish joint employment relationship and deny summary judgment for Yale University as joint employer of bus drivers). [↑](#footnote-ref-486)
486. Senne v. Kansas City Royals Baseball Corp., 591 F. Supp. 3d 453, 510–29 (N.D. Cal. 2022) (finding that Major League Baseball was joint employer of minor league baseball players); Johnson v. National Collegiate Athletic Ass’n, 561 F. Supp. 3d 490, 500–505 (E.D. Pa. 2021) (student athletes sufficiently alleged that NCAA was their joint employer). [↑](#footnote-ref-487)
487. Ray v. Los Angeles Cnty. Dep’t of Pub. Soc. Servs., 52 F.4th 843, 847–51 (9th Cir. 2022) (applying *Bonnette* factors to find county jointly employed home health care workers). [↑](#footnote-ref-488)
488. Reese v. Coastal Restoration & Cleaning Servs., Inc., 2010 WL 5184841 (S.D. Miss. Dec. 15, 2010) (applying factors set out in *Williams v*. *Henagan*, 595 F.3d 610, 620 (5th Cir. 2010),and concluding that employee of independent franchise was not jointly employed by franchisor). [↑](#footnote-ref-489)
489. *Third Circuit:* Kroeck v. UKG, Inc., 2022 BL 333704, 2022 WL 4367348 (W.D. Pa. Sept. 21, 2022) (determining third-party payroll software provider was not joint employer).

     *Fifth Circuit:* Hopkins v. Texas Mast Climbers, L.L.C., 2005 WL 3435033 (S.D. Tex. Dec. 14, 2005) (ruling after bench trial that neither holding company nor payroll company was joint employer).

     *Ninth Circuit:* Dianda v. PDEI, Inc., 2010 WL 1677539 (9th Cir. Apr. 27, 2010) (affirming district court’s decision that talent payroll company was not employer because company did not supervise, hire, terminate, or communicate with worker and did not provide instructions or direction concerning commercial in which worker was appearing).

     *Eleventh Circuit:* Beck v. Boce Grp., L.C., 391 F. Supp. 2d 1183 (S.D. Fla. 2005) (applying *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996), and finding that servers were not jointly employed by payroll services company) [↑](#footnote-ref-490)
490. *Second Circuit:* Yongfu Yang v. An Ju Home, Inc., 2020 BL 246210, 2020 WL 3510683, at \*3–5 (S.D.N.Y. June 29, 2020) (general contractor not employer of subcontractor’s employees where general contractor met only one factor of formal control test, requiring employees to sign in and out and setting the work schedule).

     *Fifth Circuit:* Quintanilla v. A&R Demolition, Inc., 2005 BL 65811, 2005 WL 2095104 (S.D. Tex. Aug. 30, 2005) (finding no joint employment on construction site as to general contractor and employees of subcontractor), *motion for reconsideration denied*, 2006 BL 68599, 2006 U.S. Dist. LEXIS 39198 (S.D. Tex. 2006).

     *Ninth Circuit:* Almaraz v. Vision Drywall & Paint, LLC, 2014 WL 2003188 (D. Nev. May 15, 2014) (general contractor not joint employer of subcontractor’s employees where only subcontractor exercised day-to-day control). [↑](#footnote-ref-491)
491. *Third Circuit*: Roper v. Verizon Commc’ns Inc., 2020 WL 7123316, at \*29 (E.D. Pa. Dec. 4, 2020) (granting summary judgment for holding company, relying on multi-factor test articulated by Third Circuit in *In re Enterprise Rent-A-Car Wage & Hour Emp. Prac. Litig.*, 683 F.3d 462, 468 (3d Cir. 2012)); Fischer v. Federal Express Corp., 509 F. Supp. 3d 275, 288–90 (E.D. Pa. 2020) (employees of Federal Express were not jointly employed by FedEx Ground based on *Enterprise* factors).

     *Fifth Circuit:* Joaquin v. The Coliseum Inc., 2016 WL 3906820 (W.D. Tex. July 13, 2016) (granting motion to dismiss related entities in bartender case, applying four factors outlined in Fifth Circuit’s decision in *Gray v*. *Powers*, 673 F.3d 352 (5th Cir. 2012)).

     *Sixth Circuit:* Gonzalez v. HCA, Inc., 2011 WL 3793651 (M.D. Tenn. Aug. 25, 2011) (applying four-factor Sixth Circuit test, finding that parent and its subsidiary hospitals did not have common management or interrelation of operations in that individual hospitals determined hiring, firing, promoting, and disciplining of their employees; finding no joint employer relationship).

     *Ninth Circuit:* Nissenbaum v. NNH Cal Neva Servs. Co., LLC, 985 F. Supp. 2d 1245 (D. Nev. 2013) (lender in possession of company subject to receivership not joint employer with that company).

     *Eleventh Circuit:* Tafalla v. All Fla. Dialysis Servs., Inc., 2009 WL 151159 (S.D. Fla. Jan. 21, 2009) (physician group not joint employer of nurses operating dialysis center) [↑](#footnote-ref-492)
492. Patel v. Wargo, 803 F.2d 632, 634–35, 27 WH Cases 1457 (11th Cir. 1986) (affirming district court’s finding that principal shareholder and president/vice president of employer were not employers under FLSA); Buenaventura v. Champion Drywall, Inc., 2012 WL 1032428 (D. Nev. Mar. 27, 2012) (applying *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), test and allowing individual liability against some corporate employees but rejecting it for others). [↑](#footnote-ref-493)
493. Sales v. Bailey, 2014 WL 3897726 (N.D. Miss. Aug. 8, 2014) (holding that owner of tree clearing company was joint employer despite formation of sham company that hired plaintiffs after their termination); Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253 (S.D.N.Y. 2011) (holding that owner’s son was joint employer with restaurant where he supervised wait staff, but that owner and owner’s wife, a wholesale food importer and distributor, were not employers). [↑](#footnote-ref-494)
494. Moreau v. Air France, 343 F.3d 1179 (9th Cir. 2003) (concluding airline’s supervision of subcontractor’s workers not indicative of joint employment when in the form of instructions through a service provider as opposed to direct control of terms and conditions of employment); Avila v. SLSCO Ltd., 2022 BL 86765, 2022 WL 784062, at \*19 (S.D. Tex. Mar. 15, 2022) (general contractor not joint employer of subcontractor’s employee based on factors from *Wirtz v. Lone Star Steel Co.* and *Gray v. Powers*); Castellanos v. Saints & Santos Constr., LLC, 2017 WL 1739151 (E.D. La. May 4, 2017) (granting summary judgment to subcontractor construction company in economic realities analysis); Artis v. Asberry, 2012 WL 5031196 (S.D. Tex. Oct. 16, 2012) (finding prime contractor was not joint employer of drivers based on five-factor test). [↑](#footnote-ref-495)
495. Gonzalez-Sanchez v. International Paper Co., 346 F.3d 1017, 8 WH Cases2d 1876 (11th Cir. 2003) (determining migrant workers hired by farm labor contractors to plant tree seedlings not joint employees of paper company); Martinez Mendoza v. Champion Int’l Corp., 340 F.3d 1200, 8 WH Cases2d 1617 (11th Cir. 2003) (finding paper manufacturer not a joint employer of migrant employees of farm labor contractors). [↑](#footnote-ref-496)
496. *Second Circuit:* Jean-Louis v. Metropolitan Cable Commc’ns, Inc., 838 F. Supp. 2d 111 (S.D.N.Y. 2011) (cable installers not jointly employed by cable company); Lawrence v. Adderley Indus., Inc., 2011 WL 666304 (E.D.N.Y. Feb. 11, 2011) (telecommunications company did not exercise sufficient control over technician employed by contractor to be deemed joint employer).

     *Fourth Circuit:* Jacobson v. Comcast Corp., 740 F. Supp. 2d 683 (D. Md. 2010) (finding cable technicians employed by subcontractor to install cable services not joint employees of cable provider).

     *Fifth Circuit:* Crosby v. Cox Commc’ns, Inc., 2017 WL 1549552 (E.D. La. May 1, 2017) (in installer and technician case, granting motion to dismiss); Gremillion v. Cox Commc’ns La., 2017 WL 1321318 (E.D. La. Apr. 3, 2017) (granting summary judgment for cable company, finding it was not joint employer after analysis of four factors).

     *Eighth Circuit:* Thornton v. Charter Commc’ns, LLC, 2014 WL 4794320 (E.D. Mo. Sept. 25, 2014) (finding cable technicians supplied by contractor not jointly employed by cable provider).

     *Ninth Circuit:* Valdez v. Cox Commc’ns Las Vegas, Inc., 2012 WL 1203726 (D. Nev. Apr. 11, 2012) (“every court to address this issue ultimately has found no joint employment for cable installers at the summary judgment stage under factual circumstances fairly similar” to those at issue in plaintiff’s suit). [↑](#footnote-ref-497)
497. Affo v. Granite Bay Care, Inc., 2013 WL 2383627 (D. Me. May 30, 2013) (applying factors set forth in *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 677 (1st Cir. 1998), to find that nonprofit was not joint employer of in-home caregivers); Godlewska v. Human Dev. Ass’n, Inc., 916 F. Supp. 2d 246 (E.D.N.Y. 2013) (public entities carrying out Medicaid functions not joint employer of home health care attendants employed by nonprofit contractor), *aff’d*, 561 F. App’x. 108 (2d Cir. 2014). [↑](#footnote-ref-498)
498. *Second Circuit:* Grenawalt v. AT&T Mobility, LLC, 2013 WL 1311165 (S.D.N.Y. Apr. 2, 2013) (security guards hired by third-party contractors not jointly employed by AT&T where AT&T exercised neither formal nor functional control).

     *Seventh Circuit:* Hugee v. SJC Grp., Inc., 2013 WL 4399226 (N.D. Ill. Jan. 22, 2014) (security officers employed only by subcontractor).

     *Eleventh Circuit:* Diaz v. U.S. Century Bank, 2013 WL 2046548 (S.D. Fla. May 14, 2013) (holding bank was not joint employer of security officers employed by security guard company, where company could rotate officers to different clients and bank had no control over compensation). [↑](#footnote-ref-499)
499. *Sixth Circuit*: Politron v. Worldwide Domestic Servs., LLC, 2011 WL 1883116, at \*2 (M.D. Tenn. May 17, 2011) (after reviewing Sixth Circuit’s joint employment test as well as those of Fourth, Ninth, Second, and Fifth Circuits, concluding that restaurant chain was not joint employer of after-hours cleaners employed by contracted cleaning company).

     *Tenth Circuit:* Sanchez v. Simply Right, 2017 WL 2222601 (D. Colo. May 22, 2017) (granting summary judgment for defendant movie theater on joint employment issue in janitor case after applying eight factors under totality-of-the-circumstances analysis). [↑](#footnote-ref-500)
500. Layton v. DHL Express (USA), Inc., 686 F.3d 1172 (11th Cir. 2012) (DHL not joint employer of delivery drivers); Saravia v. Dynamex, Inc.,2016 WL 7048963 (N.D. Cal. Dec. 4, 2016) (granting summary judgment for corporate owner of corporation alleged to employ delivery driver); Molina v. Hentech LLC, 2015 WL 1242790 (M.D. Fla. Mar. 18, 2015) (car rental company not employer of drivers employed by contractor to pick up and deliver rental cars) (citing *Layton*, 686 F.3d 1172); Montoya v. 3PD, Inc., 2014 WL 3385116 (D. Ariz. July 10, 2014) (Home Depot not joint employer of delivery drivers working for contractor). [↑](#footnote-ref-501)
501. Ashley v. Youngblood, 2017 WL 2672752, at \*7–8 (E.D. Cal. June 21, 2017) (county board of supervisors not joint employer of sheriff’s deputy even if it failed to allocate sufficient budget to sheriff’s department to pay employees properly under FLSA where it did not exercise any control over plaintiff); Jones v. Hamic, 875 F. Supp. 2d 1334 (M.D. Ala. 2012), *aff’d sub nom*. Jones v. Ward, 574 F. App’x 843 (11th Cir. 2013) (finding county personnel board was not joint employer of county administrator where it did not exercise day-to-day control and had no independent authority over employment conditions). [↑](#footnote-ref-502)
502. Katz v. DNC Servs. Corp., 2019 WL 4752056, at \*6 (E.D. Pa. Sept. 27, 2019) (organizers employed by state political party not jointly employed by national political party). [↑](#footnote-ref-503)
503. Livers v. National Collegiate Athletic Ass’n*,* 2018 WL 2291027, at \*10–12 (E.D. Pa. May 17, 2018) (dismissing FLSA claims brought by student athlete against colleges that he did not attend, because those schools did not exercise significant control over him, despite their agreement to abide by same NCAA rules governing college he actually attended). [↑](#footnote-ref-504)
504. The Ninth Circuit in *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 8 WH Cases2d 1865 (9th Cir. 2003), has called this type of joint employment, where a company has contracted for workers who are directly employed by an intermediary company, “vertical joint employment.” *Id.* at 917. *See also Liu v. Donna Karan Int’l, Inc.,* 2001 WL 8595, 6 WH Cases2d 1142 (S.D.N.Y. Jan. 2, 2001), where plaintiff garment workers sued both their immigrant-owned sewing shop employers and Donna Karan International (DKI), the company to which significant amounts of the produced goods were provided. The plaintiffs asserted each was liable as a joint employer of plaintiffs. The district court denied DKI’s Rule 12(b)(6) motion to dismiss, applied the economic realities test, and determined that the plaintiffs’ allegation sufficiently alleged joint employment under the expansive rules established in the then-applicable version of 29 C.F.R. §791.2(a). [↑](#footnote-ref-505)
505. 29 C.F.R. §791.2(b) (citations omitted) (1961). The Ninth Circuit in *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 917, 8 WH Cases2d 1865 (9th Cir. 2003), has called this type of joint employment “horizontal joint employment.” In that case, two in-home health services providers had closely coordinated operations. The employers shared a single scheduler for employees, and all employees signed employment agreements with both companies. The same person oversaw the work of both companies’ employees. Employees, however, received separate paychecks from each of the two companies. And even though employees received separate paychecks from each of the two companies, the Ninth Circuit found the two companies to be “joint employers” because they “were not completely disassociated with respect to the employment of the individuals at issue” and were operated under common control, such that hours worked for both companies had to be aggregated for purposes of determining entitlement to overtime compensation. 346 F.3d at 918. [↑](#footnote-ref-506)
506. *Second Circuit:* Guaraca v. Cafetasia Inc., 2018 WL 4538894 (S.D.N.Y. Sept. 20, 2018) (where managers at alleged separate restaurants coordinated with each other to allocate plaintiff’s time between restaurants, evidence sufficient to defeat defendants’ motion for summary judgment on issue of “horizontal” joint employment under the 1961 version of the regulations); Murphy v. Heartshare Human Servs. of N.Y., 254 F. Supp. 3d 392, 397–404 (E.D.N.Y. 2017) (relying on factors set forth in 1961 version of 29 C.F.R. §791.2(b); refusing to dismiss action based on allegations that plaintiffs worked for both employers at different times, defendants coordinated work assignments, and defendants did not pay overtime when plaintiffs worked over 40 hours per week for both defendants combined); Teri v. Spinelli, 980 F. Supp. 2d 366, 375 (E.D.N.Y. 2013) (holding on summary judgment that attorney was joint employer of debt collection agents employed by debt collection agency where “as here, ‘there is an arrangement between the employers to share the employee’s services’ and one ‘employer is acting directly or indirectly in the interest of the other employer’”) (quoting 29 C.F.R. §791.2 (1961)).

     *Fourth Circuit:* Salinas v. Commercial Interiors, Inc., 848 F.3d 125 (4th Cir. 2017) (relying on the DOL’s 1961-era interpretations, holding that any other focus would ignore the regulatory command that employers are joint unless they are “completely disassociated”); Schultz v. Capital Int’l Sec., Inc.*,* 460 F.3d 595, 603 (4th Cir. 2006) (finding security company and Saudi prince that workers were hired to protect were joint employers under 1961 version of 29 C.F.R. §791.2(b)).

     *Fifth Circuit:* Martinez v. Ranch Masonry, Inc., 2018 WL 1579476, at \*4–5 (S.D. Tex. Apr. 2, 2018) (relying on factors set forth in 1961 version of 29 C.F.R. §791.2(b) to find after bench trial that worker paid for first 40 hours of labor for one entity and then paid on piece-rate basis as alleged independent contractor for second entity was jointly employed by both entities and was entitled to overtime compensation for hours worked over 40).

     *Ninth Circuit:* Chao v. A-One Med. Servs., Inc*.*, 346 F.3d 908, 917 (9th Cir. 2003) (relying on regulation to determine when two entities are engaged in “horizontal” joint employment; multi-factor test used to determine “vertical” joint employment not applicable in such situations).

     *Tenth Circuit:* Zachary v. ResCare Okla., Inc., 471 F. Supp. 2d 1175 (N.D. Okla. 2006) (concluding that parent organization of organization that provided residential, training, educational, and support services was joint employer).

     *Eleventh Circuit:* Layton v. DHL Express (USA) Inc., 686 F.3d 1172, 1175 (11th Cir. 2012) (finding DHL not joint employer of delivery drivers under 1961 version of 29 C.F.R. §791.2 and multi-factor test set forth in *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994)). [↑](#footnote-ref-507)
507. 29 C.F.R. Part 791. *See*Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020). [↑](#footnote-ref-508)
508. The court struck down the portion of the final rule applying to vertical employment relationships, finding that this portion of the rule violated the Administrative Procedure Act because (1) it ignored the broad definitions in the FLSA, conflicting with that statute; (2) the DOL failed to adequately justify its departure from its previous interpretations and to account for some of the final rule’s important costs; and (3) it was arbitrary and capricious. New York v. Scalia, 490 F. Supp. 3d 748, 775–95 (S.D.N.Y. 2020). However the district court saved one part of the final rule that set forth a test for horizontal joint employment (citing a 2016 administrator’s interpretation, 2016 WL 284582, at \*2 (Jan. 20, 2016)) because the final rule makes no “non-substantive revisions” to existing law for horizontal joint employer liability and “[t]hey can function independently from the changes to vertical joint employer liability.” 490 F. Supp. 3d at 795. [↑](#footnote-ref-509)
509. 86 Fed. Reg. 40,939 (July 29, 2021); 29 C.F.R. Part 791. [↑](#footnote-ref-510)
510. 86 Fed. Reg. at 40,954. [↑](#footnote-ref-511)
511. WH Admin. Interpretation No. 2014-1 at 8, n.8 (Mar. 27, 2014); see also WH Admin. Interpretation No. 2014-2 (June 19, 2014) (applying economic realities test to varying hypothetical scenarios regarding the potential joint employer status of public entities with respect to home care workers in consumer-directed, Medicaid-funded programs). [↑](#footnote-ref-512)
512. WH Admin. Interpretation No. 2014-1 at 8–9. In a different context, the Supreme Court ruled that a collective bargaining relationship, standing alone, did not establish an employment relationship between providers and the state agency. Harris v. Quinn, 573 U.S. 616, 621–23 (2014). [↑](#footnote-ref-513)
513. WH Admin. Interpretation No. 2014-1 at 8. [↑](#footnote-ref-514)
514. WH Op., 2001 WL 1558966 (May 11, 2001). [↑](#footnote-ref-515)
515. *Id*. [↑](#footnote-ref-516)
516. *Id*.; *see also* WH Op. FLSA2005-17NA, 2005 WL 6219105 (June 14, 2005) (opining that health care facilities with different owners, but with a common business name and common management company, were joint employers); WH Op. FLSA2005-15, 2005 WL 2086804 (Apr. 11, 2005) (opining that health care facilities owned by single parent holding company with separate hiring and payroll system but shared president and board of directors, personnel policies, and administrative support departments were joint employers). [↑](#footnote-ref-517)
517. WH Op., 1998 WL 852807 (May 15, 1998). [↑](#footnote-ref-518)
518. WH Admin. Interpretation No. 2016-1 (Jan. 20, 2016). [↑](#footnote-ref-519)
519. *Id*. at 4. [↑](#footnote-ref-520)
520. *Administrator Interpretations Letter—Agriculture,* U.S. Dep’t of Labor, Wage & Hour Div., https://www.dol.gov/whd/opinion/adminIntrprtnAgriculture.htm (last visited Apr. 4, 2020). [↑](#footnote-ref-521)
521. 29 U.S.C. §203(d). [↑](#footnote-ref-522)
522. *Id*. §203(a). The statute defines person as “an individual, partnership, association, trust, legal representative, or any organized group of persons.” *Id*. [↑](#footnote-ref-523)
523. *See* cases cited herein, including*,* for example, *Donovan v. Agnew*, 712 F.2d 1509, 1514, 26 WH Cases 466 (1st Cir. 1983) (concluding that corporate officers with significant ownership interests who participated in decision to keep operating despite financial adversity and who controlled employee compensation were employers with personal liability under FLSA, and dismissing bankrupt corporate employer); Mangahas v. Eight Oranges, Inc., 2022 BL 372788, 2022 WL 10383029 (S.D.N.Y. Oct. 18, 2022) (denying spouse’s motion to dismiss, holding spouse could be joint employer where she was listed on ownership documents and complaint alleged her direct involvement in overseeing restaurants); Ravelombonjy v. Zinsou-Fatimabay, 632 F. Supp. 3d 239, 259 (S.D.N.Y. 2022) (applying totality of circumstances test and finding ambassador’s wife was a joint employer with husband ambassador despite not determining rate and method of pay or maintaining employment records when she had the power to hire and fire and “supervised [worker’s] work schedule and conditions of employment”). [↑](#footnote-ref-524)
524. Fields v. Bastech, Inc., 2020 WL 832102 (S.D. Ohio Feb. 20, 2020) (rejecting defendant corporation’s cross claim against its former CEO suing for unpaid wages). [↑](#footnote-ref-525)
525. *First Circuit:* Manning v. Boston Med. Ctr. Corp., 725 F.3d 34 (1st Cir. 2013); Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668 (1st Cir. 1998); Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983) (examining “economic reality”).

     *Second Circuit:* Irizarry v. Catsimatidis, 722 F.3d 99, 107 (2d Cir. 2013).

     *Fifth Circuit:* Gray v. Powers, 673 F.3d 352, 357 (5th Cir. 2012).

     *Sixth Circuit:* DOL v. Cole Enters., Inc., 62 F.3d 775, 778 (6th Cir. 1995); Fegley v. Higgins, 19 F.3d 1126, 1131 (6th Cir. 1994).

     *Eighth Circuit:* Wirtz v. Pure Ice Co., 322 F.2d 259 (8th Cir. 1963).

     *Tenth Circuit:* Donovan v. Tavern Talent & Placements, 1986 WL 32746, at \*7 (D. Colo. Jan. 8, 1986).

     *Eleventh Circuit:* Lamonica v. Safe Hurricane Shutters, 711 F.3d 1299, 1313 (11th Cir. 2013); Moore v. Appliance Direct, Inc., 708 F.3d 1233, 1237 (11th Cir. 2013); Patel v. Wargo, 803 F.2d 632, 637–38 (11th Cir. 1986). [↑](#footnote-ref-526)
526. *Second Circuit:* *Irizarry*, 722 F.3d at 115–16 (examining totality of circumstances, including whether individual had power to hire and fire, supervised and controlled employee work schedules or conditions of employment, determined rate and method of payment, or maintained employment records).

     *Fourth Circuit:* Diaz v. Corporate Cleaning Sols. LLC, 2016 WL 1321419 (D. Md. Apr. 5, 2016) (applying four-factor economic realities test to find complaint plausibly alleged that defendants exercised sufficient control over plaintiffs to be considered employers).

     *Fifth Circuit: Gray*, 673 F.3d at 357 (“[a]n individual’s operational control can be shown through his power to hire and fire, ability to supervise, power to set wages, and maintenance of employment records,” though not every element need be present).

     *Eleventh Circuit:* Mendoza v. Discount CV Joint Rack & Pinion Rebuilding, Inc., 101 F. Supp. 3d 1282 (S.D. Fla. 2015) (finding owner and president who hired and fired employees, had authority over day-to-day operations including hours, and negotiated employee pay was employer). [↑](#footnote-ref-527)
527. *Third Circuit:* Thompson v. Real Estate Mortg. Network, 748 F.3d 142 (3d Cir. 2014) (adopting test for individual liability set forth in cases addressing “the analogous context of the Family and Medical Leave Act”) (quoting Haybarger v. Lawrence Cnty. Adult Prob. & Parole, 667 F.3d 408, 417 (3d Cir. 2012)).

     *Seventh Circuit:* Rogers v. AT&T Servs., Inc., 2014 WL 4361767 (N.D. Ill. Sept. 3, 2014) (in misclassification case, finding supervisor not “employer” because he had no role in classifying employee as nonexempt).

     *Eighth Circuit:* Hill v. Walker, 737 F.3d 1209, 1216 (8th Cir. 2013) (holding that individual official of public agency only liable as FLSA “employer” if official was “responsible in whole or part for the alleged violation”). [↑](#footnote-ref-528)
528. Lamonica v. Safe Hurricane Shutters, 711 F.3d 1299, 1313 (11th Cir. 2013) (noting that “while control need not be continuous, it must be both substantial and related to the company’s FLSA obligation”); *see also* Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 678 (1st Cir. 1998) (while analysis “focuse[s] on the role played by the corporate officers in causing the corporation to undercompensate employees,” evidence of general operational control is also important and may be sufficient because it may suggest that the individual has sufficient control over company’s financial affairs to “cause the corporation to compensate (or not to compensate) employees in accordance with the FLSA”). [↑](#footnote-ref-529)
529. *First Circuit:* *Agnew*, 712 F.2d at 1514.

     *Second Circuit:* *Irizarry*, 722 F.3d at 105 (sufficient evidence to find on summary judgment that chairman and CEO of supermarket chain was “employer” under FLSA where “overarching concern” was whether he “possessed the power to control the workers in question”).

     *Third Circuit:* *Thompson*, 748 F.3d at 153–54 (allegations against co-owner/officers sufficient to demonstrate “workplace authority”).

     *Fifth Circuit:* Donovan v. Sabine Irrigation, 695 F.2d 190, 194–95, 25 WH Cases 1142 (5th Cir. 1983) (deeming non-shareholder corporate president who, while not located onsite, controlled corporation’s business and financial affairs to be “employer”).

     *Sixth Circuit:* Department of Labor v. Cole, 62 F.3d 775 (6th Cir. 1995) (corporate CEO with significant ownership interest who controls significant functions of the business, determines salaries, and makes hiring decisions has operational control and is employer).

     *Eleventh Circuit:* *Lamonica*, 711 F.3d at 1314 (reasonable jury could find that 22.5% shareholders who were present at the company about one week per month and promised employees they would try to get them paid “exercised control over significant aspects of the company’s day-to-day functions, including compensation of employees or other matters in relation to an employee”) (citing Alvarez Perez v. Sanford-Orlando Kennel Club, 515 F.3d 1150, 1160 (11th Cir. 2008); Patel v. Wargo, 803 F.2d 632, 638 (11th Cir. 1986)).

     *Cf*. Falk v. Brennan, 414 U.S. 190, 195, 21 WH Cases 418 (1973) (holding real estate management partnership was joint employer with building owners of maintenance employees over whose work it had substantial control). [↑](#footnote-ref-530)
530. Irizarry v. Catsimatidis, 722 F.3d 99, 110 (2d Cir. 2013) (individual may be liable “if his or her role within the company, and the decisions it entails, directly affect the nature or conditions of the employees’ employment”). [↑](#footnote-ref-531)
531. Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983). [↑](#footnote-ref-532)
532. First Circuit: Id. at 1512–14.

     *Second Circuit:* Irizarry v. Catsimatidis, 722 F.3d 99, 103 (2d Cir. 2013).

     *Sixth Circuit:* Dole v. Elliott Travel & Tours Inc., 942 F.2d 962, 965 (6th Cir. 1991).

     *Seventh Circuit:* Alvarez-Castor v. Dog Gone Good Food, Inc., 2015 WL 7888963, at \*2 (N.D. Ill. Dec. 4, 2015). [↑](#footnote-ref-533)
533. *Irizarry*, 722 F.3d at 110. [↑](#footnote-ref-534)
534. *Id.* at 111–16. [↑](#footnote-ref-535)
535. Donovan v. Grim Hotel, 747 F.2d 966, 971–72, 26 WH Cases 1647 (5th Cir. 1984). [↑](#footnote-ref-536)
536. *First Circuit:* Manning v. Boston Med. Ctr. Corp., 725 F.3d 34 (1st Cir. 2013) (allegations against CEO sufficient where complaint alleged that she “exercised authority to establish company-wide policy regarding employment-related matters and made significant decisions regarding the allocation of financial resources”); Chao v. Hotel Oasis, Inc., 493 F.3d 26 (1st Cir. 2007) (holding president who was in charge of directing employment practices was properly liable individually as an employer); Baystate Alternative Staffing v. Herman, 163 F.3d 668, 5 WH Cases2d (1st Cir. 1998) (remanding issue as to liability of two corporate officers for review of factors set forth in *Agnew*, 712 F.2d 1509); Cheng v. IDEAssociates, Inc., 2000 WL 1029219, 6 WH Cases2d 654 (D. Mass. July 6, 2000) (finding that executives may be personally liable under the FLSA as employers because they had significant control over day-to-day functions of the company); Herman v. Hector I. Nieves Transp., Inc., 91 F. Supp. 2d 435, 6 WH Cases2d 1469 (D.P.R. 2000) (finding that president and secretary-treasurer who actively controlled and managed the company by regulating its personnel were employers).

     *Second Circuit:* Irizarry v. Catsimatidis, 722 F.2d 99, 111–16 (2d Cir. 2013) (owner and CEO of grocery store chain); Herman v. RSR Sec. Servs., Ltd., 172 F.3d 132, 5 WH Cases2d 257 (2d Cir. 1999) (determining that attorney who was chairman of the board and had authority to hire employees and sign paychecks was an employer); Agerbrink v. Model Serv. LLC, 155 F. Supp. 3d 448, 457 (S.D.N.Y. 2016) (allowing joinder of company’s COO as individual defendant, noting that there were sufficient allegations that COO had “operational control” of LLC and exerted “power over personnel decisions … with respect to Plaintiff and similarly situated fit models”); Chao v. Vidtape, Inc., 196 F. Supp. 2d 281, 8 WH Cases2d 1327 (E.D.N.Y. 2002) (holding (1) that president who was sole shareholder of company was an employer in his individual capacity because he had the power to hire, fire, and supervise employees and set schedules and pay rates; (2) that his brother was also an employer because he exercised much of this authority in the absence of the president and later was president himself; but (3) that the president’s father was not an employer because he was neither an officer nor a shareholder); Moon v. Kwon, 2002 WL 31011866, 8 WH Cases2d 90 (S.D.N.Y. Sept. 9, 2002) (finding that president of hotel was an employer since he played intimate role in day-to-day operations of hotel); Samborski v. Linear Abatement Corp., 1999 WL 739543 (S.D.N.Y. Sept. 22, 1999) (holding that president and sole owner of company had “operational control” of the company and therefore was an employer in his individual capacity).

     *Third Circuit:* Thompson v. Real Estate Mortg. Network, 784 F.3d 142 (3d Cir. 2014) (reversing trial court dismissal of individual officers and 50% owners as FLSA employers based on allegations that they made decisions with respect to day-to-day operations, hiring, firing, work schedules, pay policies, and compensation).

     *Fifth Circuit:* Chapman v. A.S.U.I. Healthcare and Dev., 562 F. App’x 182, 185 (5th Cir. 2014) (finding vice president and program manager was statutory employer because she “exercised substantial control” over workers’ employment); Carmack v. Park Cities Healthcare LLC, 321 F. Supp. 3d 689 (N.D. Tex. 2018) (granting summary judgment to plaintiff where president had power to hire and fire, managed payroll process, set pay rates, and oversaw updating of employee agreements, policies, and procedures); Roche v. S-3 Pump Serv., Inc., 154 F. Supp. 3d 441 (W.D. Tex. 2016) (granting summary judgment finding CEO/owner was employer based on evidence of operational control; denying summary judgment as to co-CEO/owner (spouse of CEO) who had little to do with operations); Joaquin v. The Coliseum Inc., 2016 WL 7352006 (W.D. Tex. Dec. 19, 2016) (in bartender case, applying four factors outlined in *Gray v. Powers*, 673 F.3d 352, 357 (5th Cir. 2012), and denying president/part owner’s motion to dismiss); White v. NTC Transp., Inc., 2013 WL 5430512 (N.D. Miss. Sept. 27, 2013) (CEO and 51% owner was employer where he had control over employment conditions); Mohammadi v. Nwabuisi, 2013 WL 1966746 (W.D. Tex. May 10, 2013) (finding that husband-and-wife team were joint employers where wife was sole owner and husband, who was CEO, had operational control over the employees and compensation system); Solis v. Universal Project Mgmt., Inc., 2009 WL 4043362 (S.D. Tex. Nov. 19, 2009) (holding that lack of ownership interest did not preclude president and vice president from being liable as employers).

     *Sixth Circuit:* Department of Labor v. Cole Enters., Inc.,62 F.3d 775 (6th Cir. 1995) (affirming finding that president and 50% shareholder who issued checks, controlled employment records, and determined employment practices including firing, hiring, and rates of pay and hours of work was employer); *Elliott Travel & Tours*, 942 F.2d at 966 (corporate president who was involved in business operations, “controlled the purse strings,” and determined employee salaries was employer even though general manager handled many day-to-day issues); Parks v. Central USA Wireless, LLC, 2019 WL 4743648 (S.D. Ohio Sept. 29, 2019) (entering summary judgment for plaintiffs where CEO and sole member was “top man” of corporation that operated solely for his profit; fact that he delegated day-to-day control to others not relevant); Myers v. Memorial Health Sys. Marietta Mem. Hosp., 2019 WL 1125665 (S.D. Ohio Mar. 12, 2019) (CEO and CFO were employers of nurses where they exercised operational control).

     *Seventh Circuit:* Solis v. International Detective & Protective Serv., Ltd, 2011 WL 2038734 (N.D. Ill. May 24, 2011) (granting Department of Labor’s motion for summary judgment, holding president and chief operating officer to be employers); Kelley v. Stevens Auto Sales, 2009 WL 2762765 (N.D. Ind. Aug. 27, 2009) (holding that company president was employer where he had operational control over plaintiff’s employment); Harper v. Wilson, 302 F. Supp. 2d 873 (N.D. Ill. 2004) (holding employer’s corporate officers personally liable for unpaid overtime of janitor because they have an obligation to ensure that nonexempt employees are compensated as FLSA requires).

     *Eighth Circuit:* White v. 14051 Manchester, Inc., 2014 WL 1091707, at \*22–24 (E.D. Mo. May 30, 2014) (holding that corporate officers who signed checks and were in charge of human resources and legal matters were employers); Perez-Benites v. Candy Brand, LLC, 2011 WL 1978414 (W.D. Ark. May 20, 2011) (holding that “corporate officer with operational control of the corporation’s day-to-day functions [was] an employer within the meaning of the FLSA”); Chao v. Bauerly, LLC, 2005 WL 1923716 (D. Minn. Aug. 11, 2005) (finding that corporate officer with operational control of a company is an employer).

     *Ninth Circuit:* Lambert v. Ackerley, 180 F.3d 997, 5 WH Cases2d 677 (9th Cir. 1999) (deeming CEO and COO personally liable for punitive damages in FLSA retaliation action where they were personally involved in decisions to refuse to pay overtime wages); Acosta v. Austin Elec. Servs. LLC, 2018 WL 5982709 (D. Ariz. Nov. 14, 2018) (president and 20% owner was employer where he had power to hire and fire, maintained employment records, and had significant control over compensation including entitlement to benefits); Collinge v. IntelliQuick Delivery, Inc., 2018 WL 1088811, at \*11–18 (D. Ariz. Sept. 8, 2018) (corporate officers were joint employers where they had power to hire and fire, dictated terms under which drivers worked—including negotiating contracts with customers for pay rates and delivery times—and ordered deductions from driver pay); De Guzman v. Parc Temple, LLC, 537 F. Supp. 2d 1087 (C.D. Cal. 2008) (holding individual who was president and secretary, owned 70% of the business, hired the plaintiff, and set his work schedules and other terms of employment was an employer under the FLSA); Stewart v. Intem, Inc., 2000 WL 1140517, 85 FEP Cases 1467 (D. Or. June 19, 2000) (following Ninth Circuit authority that president who exercises control over the nature and structure of the employment relationship, or has economic control over the relationship, is employer under FLSA).

     *Tenth Circuit:* Schneider v. Landvest Corp, 2006 WL 322590 (D. Colo. Feb. 9, 2006) (finding that defendant corporate officer was employer where he had authority over pay practices, was personally involved with overtime compensation requests, and intervened in pay matters involving hours recorded on time sheets).

     *Eleventh Circuit:* Moore v. Appliance Direct, Inc., 708 F.3d 1233 (11th Cir. 2013) (CEO and majority shareholder who guided company policy and was “ultimate decision maker” at company personally liable); Lyles v. Burt’s Butcher Shoppe & Eatery Inc., 2011 WL 4915484 (M.D. Ga. Oct. 17, 2011) (finding at trial that corporate officer with operational control over restaurant and its employees was employer); De Leon-Granados v. Eller & Sons Tree, Inc., 581 F. Supp. 2d 1295, 1303–07 (N.D. Ga. 2008) (holding that individual who was president and sole corporate officer was employer). [↑](#footnote-ref-537)
537. *Manning*, 725 F.3d at 47. [↑](#footnote-ref-538)
538. *Id.* at 47. [↑](#footnote-ref-539)
539. *Id.* at 49. [↑](#footnote-ref-540)
540. *Second Circuit:* Vasto v. Credico (USA) LLC, 2016 WL 4147241 (S.D.N.Y. Aug. 3, 2016) (granting motion to dismiss complaint brought by president of defendant corporation, examining formal control test articulated by *Carter v*. *Dutchess Community College,* 735 F.2d 8 (2d Cir. 1984), as well as “operational control” and “potential power” factors); Coley v. Vanguard Urban Improvement Ass’n, Inc., 2014 WL 4793825 (E.D.N.Y. Sept. 24, 2014) (dismissing claims against chairman of board of directors, who did not have power to hire or fire, did not supervise or control schedules, and did not control wages).

     *Third Circuit:* Sandom v. Travelers Mortg. Servs., 752 F. Supp. 1240, 1251, 30 WH Cases 228 (D.N.J. 1990) (refusing to permit individual corporate officer to be named defendant in Environmental Protection Agency suit where plaintiff failed to allege which officers had operational control of day-to-day functions).

     *Fourth Circuit:* Kelly v. Hospitality Ventures LLC, 2017 WL 3880318, at \*5 (E.D.N.C. Sept. 5, 2017) (allegation that defendant was, among other things, “founder” insufficient to confer employer status without any allegations about operational control).

     *Fifth Circuit:* Joaquin v. The Coliseum Inc.,2016 WL 3906820 (W.D. Tex. July 13, 2016)(granting motion to dismiss president of corporation where plaintiffs failed to plead facts relevant to economic realities test); Branum v. Richardson, 2014 WL 795080 (S.D. Miss. Feb. 27, 2014) (individual board of directors members not liable as employers where they acted collectively and lacked authority to individually control terms of plaintiffs’ employment).

     *Seventh Circuit:* Foday v. Air Check Inc., 2018 WL 3970142 (N.D. Ill. Aug. 20, 2018) (CEO not employer even though he hired new payroll company to issue checks and was responsible for acquisition of new accounts because these duties did not relate to plaintiffs’ compensation arrangement or purported FLSA violation (rounding and automatic break deductions)); Reed v. Mycopharma, Inc., 2000 WL 1131953 (N.D. Ill. Aug. 9, 2000) (finding that part-time president of company was not an employer where he did not directly supervise employees and was not responsible, in whole or in part, for the alleged FLSA violation).

     *Ninth Circuit:* Orquiza v. Walldesign, Inc., 2013 WL 3027765 (D. Nev. June 14, 2013) (vice president not employer where he did not hire or fire, control work, set rate and manner of pay, or maintain employment files); Solis v. Velocity Exp., Inc., 2010 WL 2990293 (D. Or. July 26, 2010) (holding corporate officers, including individual who was former chief executive officer and chairman and individual who was former chief operating officer and president, not to be employers, based on lack of significant ownership interest and lack of relationship between corporate officers’ decisions and alleged FLSA violations); Lopez v. G.A.T. Airline Ground Support, Inc., 2010 WL 2839417 (S.D. Cal. July 19, 2010) (granting summary judgment for chief executive officer because he did not have operational control over significant aspects of day-to-day functions).

     *Eleventh Circuit:* Ojeda-Sanchez v. Bland Farms, LLC, 2010 WL 3282984 (S.D. Ga. Aug. 18, 2010) (granting summary judgment for general manager and chief financial officer because he lacked sufficient operational control). [↑](#footnote-ref-541)
541. Manning v. Boston Med. Ctr. Corp., 725 F.3d 34, 48 (1st Cir. 2013). [↑](#footnote-ref-542)
542. *First Circuit:* Acosta v. Special Police Force Corp., 371 F. Supp. 3d 60 (D.P.R. 2019) (owner who was also president and treasurer was employer where he had operational control over significant aspects of business and was personally involved in payroll process despite delegating day-to-day functions to line level supervisors).

     *Second Circuit:* Hisami Abe v. Uezu Corp., 2023 BL 90444, 2023 U.S. Dist. LEXIS 46541 (S.D.N.Y. Mar. 18, 2023) (holding 50% owner who had power to hire, fire, set schedules, and set compensation was employer); Mangahas v. Eight Oranges, Inc., 2022 BL 372788, 2022 WL 10383029 (S.D.N.Y. Oct. 18, 2022) (denying spouse’s motion to dismiss, holding spouse could be joint employer where she was listed on ownership documents and complaint alleged her direct involvement in overseeing restaurants); Weng v. New Shanghai Deluxe Corp., 2022 BL 360441, 2022 WL 5434997 (S.D.N.Y. Oct. 7, 2022) (after trial, finding owner was employer where he handed workers checks, ordered them to work late, bank account on which paychecks cut in owner’s name); Bedasie v. Mr. Z Towing, Inc., 2017 WL 1135727 (E.D.N.Y. Mar. 24, 2017) (determining that 50% owner/vice president was employer because he had power to hire and fire employees, supervise and control work schedules, determine rates of pay, and maintain employment records); Velasquez v. U.S. 1 Farm Mkt., Inc., 2016 WL 2588160 (D. Conn. May 3, 2016) (holding company owner was employer as matter of law where he was directly responsible for determining rate of plaintiffs’ pay and was partially responsible for decision to pay them “off the books” without overtime); Inclan v. New York Hospitality Grp., Inc., 95 F. Supp. 3d 490 (S.D.N.Y. 2015) (finding sole owner was employer where he exercised operational control and oversight over restaurant, including pay policies, and exercised authority over hiring, firing, and setting wages); Kim v. Kum Gang, Inc., 2015 WL 2222438 (S.D.N.Y. Mar. 19, 2015) (sole owner of corporation that owned restaurant found liable as employer after trial, where he actively supervised all aspects of business and set all corporate policies); Alladin v. Paramount Mgmt., LLC, 2013 WL 4526002 (S.D.N.Y. Aug. 27, 2013) (owner with “power to control the workers in question” was employer); Solis v. Cindy’s Total Care, Inc., 2012 WL 28141 (S.D.N.Y. Jan. 5, 2012) (contrasting individual liability for owner of business with no individual liability for her husband; although he handed out paychecks to employees, posted break schedules on the wall, and sat at check-out register, this was not sufficient to show operational control); Torres v. Gristede’s Operating Corp, 2011 WL 4571792 (S.D.N.Y. Sept. 9, 2011) (granting summary judgment, finding sole owner, president, and CEO to be “employer,” and rejecting defendant’s argument that, although he had “absolute control” of company operations, he had no direct control over the employees at issue); Lanzetta v. Florio’s Enters., Inc., 763 F. Supp. 2d 615 (S.D.N.Y. 2011) (entering judgment after bench trial, holding owner and his son liable as employers based on supervisory control); Gortat v. Capala Bros., Inc., 257 F.R.D. 353, 367–69 (E.D.N.Y. 2009) (granting summary judgment in favor of employees, holding that two 50% shareholders were employers where they enjoyed substantial control over employees); Yang v. ACBL Corp., 427 F. Supp. 2d 327 (S.D.N.Y. 2005) (holding owner of corporate employer individually liable for FLSA violations based on his operational control of corporation); Ansoumana v. Gristede’s Operating Corp., 255 F. Supp. 2d 184, *reaff’d on reconsideration*, 255 F. Supp. 2d 197 (S.D.N.Y. 2003) (finding that individual owners of delivery contracting service were joint employers because they exercised operational control of the daily functions of the company).

     *Third Circuit:* Thompson v. Real Estate Mortg. Network, 748 F.3d 142 (3d Cir. 2014) (allegations that co-owner and president made decisions concerning day-to-day operations, including pay policies and compensation, sufficient to withstand motion to dismiss individual defendants); Perez v. American Future Sys., Inc., 2015 WL 8973055 (E.D. Pa. Dec. 16, 2015) (granting summary judgment against owner and CEO with final authority for compensation and other employment decisions).

     *Fourth Circuit:* Bolling v. PP&G, Inc., 2015 WL 9255330 (D. Md. Dec. 17, 2015) (owner/manager set pay methods); Jin v. Any Floors, Inc., 2012 WL 777501 (E.D. Va. Mar. 5, 2012) (owner who paid plaintiff’s wages and directly benefited from her failure to pay plaintiff was personally liable for FLSA violations); Baxley v. S.B. Mulch, Inc., 2011 WL 12089 (D.S.C. Jan. 4, 2011) (holding owners liable as employers based on their day-to-day operational control).

     *Fifth Circuit:* Kimbrough v. Khan, 2020 BL 314005, 2020 WL 4783509, at \*4 (N.D. Tex. Aug. 18, 2020) (granting summary judgment to plaintiffs where individual defendant was sole owner and CEO, made all hiring and compensation decisions, was responsible for all employment policies, and controlled all employment records); Dunphy v. Project Aristocrat Life Found., 2019 WL 6069184 (S.D. Tex. Nov. 15, 2019) (granting summary judgment to plaintiffs where co-owners were responsible for hiring managers, coaching performance, and paying waitstaff); Martinez v. Tri-State Enters., LLC, 2018 WL 6038188 (N.D. Miss. Nov. 16, 2018) (owner but not owner’s family members was employer where he possessed power to hire and fire, supervised and controlled employee work schedules, determined rate and method of payment, and maintained employment records); Hernandez v. Trendy Collections, LLC, 2018 WL 4103723 (N.D. Tex. Aug. 29, 2018) (granting summary judgment to plaintiff where owner and president possessed authority to hire, fire, and supervise employees); Martinez v. Ranch Masonry, Inc., 2018 WL 1579476, at \*4–5 (S.D. Tex. Apr. 2, 2018) (individual owners were joint employers because they controlled work schedules, determined pay rates, hired, fired, and maintained employment records).

     *Sixth Circuit:* Gilbo v. Agment, LLC, 2020 WL 759548 (N.D Ohio Feb. 14, 2020) (sole owner of club who controlled and managed day-to-day operations was joint employer); Acosta v. CPS Foods, Ltd., 2017 WL 5157238, at \*4–5 (N.D. Ohio Nov. 3, 2017) (individual owner of restaurant’s parent company was joint employer where he changed payroll practices, corrected time entries, supervised servers, and could send them home early, even though he did not have hiring authority); Russano v. Premier Aerial & Fleet Inspections, LLC, 2016 WL 4138231(E.D. Mich. Aug. 4, 2016) (denying summary judgment to 50% owner and president who controlled day-to-day operations of business, including directing employees and determining their wages); Visner v. Michigan Steel Indus., Inc., 2015 WL 4488524 (E.D. Mich. July 23, 2015) (sole owner who exercised considerable operational control and “controlled the purse strings” was jointly liable as employer despite not making hiring decisions); Lopez-Gomez v. Jim’s Place LLC, 2015 WL 4209809 (W.D. Tenn. July 10, 2015) (50% owner who exercised managerial control including setting wages was employer); Williams v. Hooah Sec. Servs. LLC, 2011 WL 5827250 (W.D. Tenn. Nov. 18, 2011) (granting summary judgment for employees, holding individual owner/operators of security company made hiring and firing decision, determined plaintiffs’ compensation and work schedules, set company’s employment policies, and negotiated customer contracts); Bauer v. Singh, 2010 WL 5088126 (S.D. Ohio Dec. 7, 2010) (granting summary judgment for employees, holding that part owner and general manager was employer because, among other things, he directly supervised plaintiffs); Strange v. Wade, 2010 WL 3522410 (S.D. Ohio Sept. 8, 2010) (holding that part owner was employer).

     *Seventh Circuit:* Castaneda v. TD Stout Preservation, Inc., 2012 WL 463718 (S.D. Ind. Feb. 10, 2012) (after bench trial, finding that former owner who had sold 85% of his ownership interest was “employer” because he had been sole owner and CEO during portion of statutory period and after sale he had remained corporate officer, directing plaintiff’s work, signing paychecks, and running business).

     *Eighth Circuit:* Ghess v. Haid, 2020 WL 7010383, at \*9–10 (E.D. Ark. Nov. 27, 2020) (determining after trial that three owners were employers where they worked at store with plaintiff and exercised operational control, including power to hire and fire, supervise, and set schedule and pay rates); Kohli v. Mahesh Invs. of Little Rock LLC, 2015 WL 1637625 (E.D. Ark. Apr. 13, 2015) (finding that part owner who had, and exercised, power to terminate plaintiff’s employment was employer); Brown v. L&P Indus., LLC, 2005 WL 3503637 (E.D. Ark. Dec. 21, 2005) (determining company owner could be held personally liable under FLSA where, although he lived out of state, he was in daily phone contact with personnel, held final authority on company functions, and made final decision to terminate plaintiff).

     *Ninth Circuit:* Ulin v. ALAEA-72, Inc., 2011 WL 723617 (N.D. Cal. Feb. 23, 2011) (holding individual who was both owner and store manager liable after trial on merits); Martinez v. Antique & Salvage Liquidators, Inc., 2011 WL 500029 (N.D. Cal. Feb. 8, 2011) (denying summary judgment for owner, holding that he could be liable as employer); Solis v. Best Miracle Corp., 709 F. Supp. 2d 843 (C.D. Cal. 2010) (finding owner’s husband to be employer because he exercised significant economic control over employees), *aff’d*, 464 F. App’x 649 (9th Cir. 2011).

     *Tenth Circuit:* Guereca v. Cordero, 487 F. Supp. 3d 1138, 1148–50 (D.N.M. 2020) (finding allegations as to two of four control factors—that owner-managers determined rate of pay and had power to hire and fire—sufficient to survive motion to dismiss); Perez v. ZL Rest. Corp., 81 F. Supp. 3d 1062 (D.N.M. 2014) (holding owner liable as employer where he had exclusive control over personnel decisions and scheduling and was responsible for setting amount and manner of payment); Garcia v. Palomino, 738 F. Supp. 2d 1171 (D. Kan. 2010) (denying part owner’s motion for summary judgment, holding that he could be liable as employer); Chellen v. John Pickle Co., Inc., 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (deeming company owner liable under economic reality test where he had personally recruited plaintiffs from India and was directly involved in decision making regarding deficient wages).

     *Eleventh Circuit:* Olivas v. A Little Havana Check Cash, Inc., 324 F. App’x 839, 844–46 (11th Cir. 2009) (reversing district court’s ruling before trial that co-owner was not “employer” because reasonable jury could conclude that he was in charge of day-to-day operations and exercised direct supervision of employees, particularly when other owner was out of country); Hurst v. Youngelson, 354 F. Supp. 3d 1362 (N.D. Ga. 2019) (finding on summary judgment that club owner was employer where club owner made initial decision to classify plaintiff as independent contractor rather than employee and maintained oversight over club); Bujalski v. Kozy’s Rest., Inc., 2017 WL 57344 (N.D. Ala. Jan. 1, 2017) (denying summary judgment to alleged owner of restaurant after examining operational control factors);Schumann v. Collier Anesthesia, P.A., 2016 WL 6276848 (M.D. Fla. Oct. 27, 2016), *reh’g denied*, 2017 WL 1391461 (M.D. Fla. Apr. 12, 2017) (denying summary judgment to individual defendants (president and shareholders) after examining operational control over employees); Henderson v. 1400 Northside Drive, Inc., 2016 WL 3125012 (N.D. Ga. June 3, 2016) (holding individual owner who acted as CEO and CFO qualified as employer, focusing on his operational control over employees); De Luna-Lopez v. A Lawn and Landcare Servs. Co., LLC, 2013 WL 4504767 (N.D. Tex. July 29, 2013) (owner who set schedule, determined rate of pay, provided tools, and exercised control over work was employer); Gonzalez v. Metropolitan Delivery Corp., 2012 WL 1442668 (S.D. Fla., Apr. 26, 2012) (because sole owners had primary financial control over company and made budgetary decisions, court granted plaintiffs summary judgment on issue of owners’ status as employers); Melgar v. M.I. Quality Lawn Maint., Inc., 2011 WL 589992 (S.D. Fla. Feb. 10, 2011) (holding individual who was both owner and president liable because he took active role in day-to-day operations of corporate defendants, even though he did not directly supervise plaintiffs); Solano v. A Navas Party Prod., Inc., 728 F. Supp. 2d 1334 (S.D. Fla. 2010) (denying summary judgment, holding that co-owner could be liable if he had direct supervisory control over plaintiff’s supervisor, even though record established he was not fully involved in day-to-day operations and did not exercise authority to make employment-related decisions); Exime v. E.W. Ventures, Inc., 591 F. Supp. 2d 1364, 1376 (S.D. Fla. 2008) (holding owner/officer of dry cleaning business who supervised plaintiff and managed day-to-day operations liable as individual defendant).

     *D*.*C*. *Circuit:* Ayala v. Tito Contractors, Inc., 82 F. Supp. 3d 279 (D.D.C. 2015) (holding owner that had authority to hire and fire employees, was in charge of wage administration, and authorized overtime hours was employer). [↑](#footnote-ref-543)
543. Moore v. Appliance Direct, Inc., 708 F.3d 1233 (11th Cir. 2013). [↑](#footnote-ref-544)
544. Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1313–14 (11th Cir. 2013). [↑](#footnote-ref-545)
545. *Second Circuit:* Guangfu Chen v. Matsu Fusion Rest. Inc., 2022 BL 264792, 2022 WL 3018105, at \*5 (S.D.N.Y. July 29, 2022) (that owner’s wife had “final say” in owner’s absence insufficient to make her employer); Perez v. Ak Café of N.Y. LLC, 2021 BL 296852, 2021 WL 3475593, at \*2–3 (S.D.N.Y. Aug. 6, 2021) (part owner not employer even though present at café several times a week and occasionally directed plaintiff to perform work tasks, where plaintiff failed to provide evidence as to frequency of instructions or context in which owner assigned tasks); Ocampo v. 455 Hosp. LLC, 2021 BL 355227, 2021 WL 4267388, at \*5–9 (S.D.N.Y. Sept. 20, 2021) (even though partial owner was present at hotel on a regular basis and frequently toured facilities, owner was not employer where he never hired, fired, supervised, or controlled work schedules or pay rates); Garcia v. Village Red Rest. Corp., 2017 WL 1906861 (S.D.N.Y. May 8, 2017) (granting summary judgment for defendant restaurant’s president and sole shareholder after finding no evidence demonstrating that president exercised operational authority over restaurant or indirectly influenced employees’ terms of employment); Chen v. DG&S NY, Inc., 2016 WL 5678543 (E.D.N.Y. Sept. 29, 2016) (granting summary judgment for defendant restaurant owner and manager after applying four-factor economic realities test); Tapia v. BLCH 3rd Ave. LLC, 2016 WL 4581341 (S.D.N.Y. Sept. 1, 2016) (holding that restaurant owners were not individually liable because they did not exercise operational control over plaintiffs); Salinas v. Starjem Rest. Corp., 123 F. Supp. 3d 442 (S.D.N.Y. 2015) (after bench trial, concluding CEO and majority shareholder could not be held individually liable after application of four-factor economic realities test).

     *Fourth Circuit*: Guillen v. Armour Home Improvement, Inc., 2022 BL 58661, 2022 WL 524986, at \*5–8 (D. Md. Feb. 22, 2022) (finding wife of owner who assisted with administrative tasks including maintenance of employment records but did not hire or fire, supervise employee work schedules or conditions of employment, or determine method or rate of payment, was not an employer).

     *Sixth Circuit:* Perez v. Sophia’s Kalamazoo, LLC, 2015 WL 7272234 (W.D. Mich. Nov. 17, 2015) (granting summary judgment in favor of 50% owner and president who did not oversee day-to-day activities; authority to hire and fire, if unexercised, is not sufficient to establish employer status).

     *Seventh Circuit:* Cardenas v. Grozdic, 67 F. Supp. 3d 917 (N.D. Ill. 2014) (holding that owner, who did not set plaintiff’s work schedule or payment arrangement and had no relationship with him, was not employer).

     *Eighth Circuit:* Wirtz v. Pure Ice Co., Inc., 322 F.2d 259 (8th Cir. 1963) (majority stockholder who failed to exercise any control over company not employer).

     *Tenth Circuit:* Lopez v. Next Generation Constr. & Envtl., LLC, 2016 WL 6600243 (D. Colo. Nov. 8, 2016) (granting summary judgment in favor of alleged founder, owner, and CEO after analyzing operational control factors).

     *D*.*C*. *Circuit:* Al-Quraan v. 4115 8th St. NW LLC, 113 F. Supp. 3d 367 (D.D.C. 2015) (granting motion to dismiss where allegations failed to provide specific allegations to support claim against owner). [↑](#footnote-ref-546)
546. *Second Circuit:* Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253 (S.D.N.Y. 2011) (holding on summary judgment that owner was not employer); Bravo v. Eastpoint Int’l, Inc., 2001 WL 314622, 7 WH Cases2d 28 (S.D.N.Y. Mar. 30, 2001) (dismissing garment company owner Donna Karan personally where plaintiffs “allege no fact which would tend to establish her power to control the plaintiff workers”).

     *Third Circuit:* Crossley v. Elliot, 2011 WL 1107868 (D.V.I. Mar. 25, 2011) (granting summary judgment for employer, holding that part owners were not employers based on lack of sufficient day-to-day operational control).

     *Fifth Circuit:* Gray v. Powers, 673 F.3d 352 (5th Cir. 2012) (affirming district court’s grant of summary judgment finding no individual liability for one of several owners who exercised collective power in hiring and firing general managers but did not have individual authority to control employment terms of lower-level employees like plaintiff; merely being a member or officer of a corporation did not impute personal liability); Rodriguez v. Tarland, 2019 WL 6684140 (N.D. Tex. Dec. 6, 2019) (following *Gray*).

     *Eighth Circuit:* Hembree v. Mid-Continent Transp., Inc., 2011 WL 5841313 (W.D. Mo. Nov. 21, 2011) (defendant who was 50% owner and accountant successfully raised “silent partner defense” in summary judgment where court found that there was no showing that “partner” had approved of compensation policies or that expression was anything more than spoken acquiescence in something already decided by other managers).

     *Ninth Circuit:* Orquiza v. Walldesign, Inc., 2013 WL 3027765 (D. Nev. June 14, 2013) (owner/founder not employer where he did not exercise control over working conditions); Lopez v. G.A.T. Airline Ground Support, Inc., 2010 WL 2839417 (S.D. Cal. July 19, 2010) (granting summary judgment for co-owners because they did not have operational control over significant aspects of day-to-day functions).

     *Eleventh Circuit:* Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 515 F.3d 1150 (11th Cir. 2008) (affirming district court’s order setting aside jury verdict against individual owner of the corporate employer because owner was neither involved in the day-to-day operations of the business nor responsible for the supervision of the employees); Santos v. Cuba Tropical, Inc., 829 F. Supp. 2d 1304 (S.D. Fla. 2011) (granting individual defendant’s summary judgment motion, finding that part owner was not active in day-to-day operations of the corporation nor did he exercise operational control); Ojeda-Sanchez v. Bland Farms, LLC, 2010 WL 3282984 (S.D. Ga. Aug. 18, 2010) (granting summary judgment for owner because he lacked sufficient operational control). [↑](#footnote-ref-547)
547. *Gray*, 673 F.3d at 354–56. [↑](#footnote-ref-548)
548. Tapia v. BLCH 3rd Ave LLC, 906 F.3d 58, 62 (2d Cir. 2018). [↑](#footnote-ref-549)
549. Carter v. Dutchess Cmty. Coll., 735 F.2d 8 (2d Cir. 1984). [↑](#footnote-ref-550)
550. *Tapia*, 906 F.3d at 62. [↑](#footnote-ref-551)
551. *Id.* [↑](#footnote-ref-552)
552. *Id.* [↑](#footnote-ref-553)
553. *Second Circuit:* Balczyrak-Lichosyt v. Soniya Hotel LLC, 2018 WL 4861393 (E.D.N.Y. Sept. 28, 2018) (50% shareholder who served as general manager was employer because he had authority to hire and fire, controlled work schedules and employment conditions, was responsible for determining rate and method of payment, and maintained employment records); Wing v. East River Chinese Rest., 884 F. Supp. 663, 667 (E.D.N.Y. 1995) (stating proposition but refusing to apply it in ancillary attorneys’ fee dispute in FLSA case brought only against corporation).

     *Fifth Circuit:* Donovan v. Brown Equip. & Serv. Tools, 666 F.2d 148, 155–56 (5th Cir. 1982) (applying proposition in FLSA wage dispute brought against shareholder and his corporation); Wolfe v. Tobacco Express II, Inc., 26 F. Supp. 3d 560 (S.D. Miss. 2014) (holding that shareholder who made all staffing decisions and was involved in day-to-day management of employees was “employer”); Hodgson v. Royal Crown Bottling Co., 324 F. Supp. 342, 347, 19 WH Cases 894 (N.D. Miss. 1970) (holding manager who owned 50% of company’s stock and completely controlled operation was “employer” under FLSA), *aff’d*, 465 F.2d 473, 20 WH Cases 867 (5th Cir. 1972).

     *Eighth Circuit:* Perez-Benites v. Candy Brand, LLC, 2011 WL 1978414 (W.D. Ark. May 20, 2011) (granting summary judgment for employees, holding shareholders were employers based on their operational control). [↑](#footnote-ref-554)
554. Berrios v. Nicholas Zito Racing Stable, Inc., 849 F. Supp. 2d 372, 393–94 (E.D.N.Y. 2012); Torres v. Gristede’s Operating Corp., 2011 WL 4571792 (S.D.N.Y. Sept. 9, 2011). *But see* Santos v. Cuba Tropical, Inc., 829 F. Supp. 2d 1304, 1312 (S.D. Fla. 2011) (part owner not liable because no evidence of active involvement in operation of business). [↑](#footnote-ref-555)
555. Patel v. Wargo, 803 F.2d 632, 637, 27 WH Cases 1457 (11th Cir. 1986) (holding that “[t]o be personally liable, an officer must either be involved in the day-to-day operation or have some direct responsibility for supervision of the employee” and that individual defendant “did not take such an active role as to be held personally responsible” despite his status as president, director, a principal stockholder, and temporary executive director of corporation); Camara v. Kenner, 2018 WL 1596195, at \*7 (S.D.N.Y. Mar. 28, 2018) (“passive investor” with no role in day-to-day operations not joint employer); Ojeda-Sanchez v. Bland Farms, 2010 WL 3282984 (S.D. Ga. Aug. 18, 2010) (granting summary judgment for owner and sole shareholder because he lacked sufficient operational control). [↑](#footnote-ref-556)
556. *Second Circuit:* Guerra v. Trece Corp., 2020 BL 463891, 2020 WL 7028955, at \*9–11 (S.D.N.Y. Nov. 30, 2020) (granting plaintiff’s summary judgment motion where manager had authority to hire and fire, set work schedule, paid employees in cash or checks he signed, and had some involvement in record keeping); Granada v. Trujillo, 2019 WL 367983 (S.D.N.Y. Jan. 30, 2019) (at pleading stage, plaintiff properly alleged that company’s general counsel was employer by alleging that counsel instructed, ordered, and directed the performance of tasks); Kim v. Kum Gang, Inc., 2015 WL 2222438 (S.D.N.Y. Mar. 19, 2015) (payroll and personnel supervisors found to be employers at trial based on control over false time records); Copantitla v. Fiskardo Estiatorio, Inc., 788 F. Supp. 2d 253 (S.D.N.Y. 2011) (granting summary judgment, holding that owner’s son was employer based on his supervisory control over plaintiffs).

     *Third Circuit:* Solis v. A-Mortgage Corp., 914 F. Supp. 2d 778 (W.D. Pa. 2013) (“consultant” who was husband of president was joint employer under test set forth in *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462 (3d Cir. 2012)).

     *Fourth Circuit:* Speert v. Proficio Mortg. Ventures, LLC, 2011 WL 2417133 (D. Md. June 11, 2011) (branch manager actively involved in running location could be liable as individual defendant).

     *Fifth Circuit:* Alba v. Brian Loncar, P.C., 2004 WL 1144052 (N.D. Tex. May 20, 2004) (determining individual lawyer with no ownership interest could be employer of law firm employees where evidence suggested he was corporate officer, conducted monthly meetings, directed employees, exercised control over firing, and distributed memoranda on employee matters).

     *Sixth Circuit:* Bauer v. Singh, 2010 WL 5088126 (S.D. Ohio Dec. 7, 2010) (granting summary judgment for employees, holding that general manager was employer based on his operational control, including directly supervising each plaintiff).

     *Seventh Circuit:* Arteaga v. Lynch, 2013 WL 5408580 (N.D. Ill. Sept. 26, 2013) (manager liable as FLSA employer when he instructed employees to work without pay).

     *Eighth Circuit:* Saunders v. Ace Mortg. Funding Inc., 2007 WL 4165294 (D. Minn. Nov. 16, 2007) (holding, on summary adjudication motion, that two individuals with economic stake in the enterprise who hired and fired employees and made the decision to implement the compensation plan at issue were employers).

     *Eleventh Circuit*: Spears v. Bay Inn & Suites Foley, LLC, 2022 BL 261089, 2022 WL 2980022 (S.D. Ala. July 27, 2022) (manager employee of hotel found to be an employer because he was responsible for “significant aspects” of the day-to-day operations and directly supervised plaintiff on daily tasks). [↑](#footnote-ref-557)
557. *First Circuit:* Manning v. Boston Med. Ctr. Corp., 725 F.3d 34 (1st Cir. 2013) (noting that First Circuit has not yet extended FLSA liability to individual who lacks ownership interest in company and is not a high level corporate officer or member of the company’s board of directors; allegations concerning former HR director that did not support inference that he controlled purse strings or made decisions about allocations of financial resources insufficient to state claim).

     *Second Circuit:* Vasquez v. Mobileshack, Inc., 2023 BL 233512, 2023 WL 4421872 (S.D.N.Y. July 10, 2023) (owner’s brother was not an employer where evidence showed that on a single occasion he hired an employee but no other facts indicated he hired or fired employees, set rates of pay, directed work conditions/schedules, or maintained employment records); Hong v. Quest Int’l Limousine, Inc., 2021 BL 200119, 2021 WL 2188149, at \*2–7 (S.D.N.Y. May 28, 2021) (dispatcher was not employer where he played no role in hiring or firing, had minimal discretion over job assignments, and only signed checks rarely); Kaplan v. Wings of Hope Residence, Inc., 2020 WL 616630 (E.D.N.Y. Feb. 7, 2020) (supervisors were not employers where they had no control over pay or employment records and did not control overall work or personnel conditions although they gave employee specific instructions on how to handle certain situations); Loo v. I.M.E. Rest., Inc., 2018 WL 4119234 (E.D.N.Y. Aug. 29, 2018) (granting summary judgment for cashier who was owner’s wife where the only evidence of operational control was that she granted employees permission to take days off); Bedasie v. Mr. Z Towing, Inc., 2017 WL 1135727 (E.D.N.Y. Mar. 24, 2017) (determining that office manager was not employer where she did not have power to make hiring and firing decisions or set rates of pay unilaterally); Sexton v. American Golf Corp., 2015 WL 5884825 (E.D.N.Y. Oct. 8, 2015) (applying four-factor test from *Carter v*. *Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), to determine that “regional director” was not employer, particularly as he had no responsibility for challenged classification decision).

     *Fourth Circuit*: Lovo v. American Sugar Refining, Inc., 2018 WL 3956688, at \*16–17 (D. Md. Aug. 17, 2018) (mid-level manager with no equity interest in company was not employer).

     *Fifth Circuit:* Martin v. Spring Break ’83 Prods., LLC, 688 F.3d 247, 253–54 (5th Cir. 2012) (producers and directors of movie not liable as individual employers where none of the “economic realities” factors was present); Baxter v. McClelland, 2010 WL 4577658 (S.D. Tex. Nov. 5, 2010) (granting summary judgment for employer, holding that neither college athletic director nor coach employed athletic trainer because neither exercised substantial control over trainer’s employment, even though together they did exercise such control).

     *Sixth Circuit:* Miller v. Food Concepts Int’l, LP, 2017 WL 1163850 (S.D. Ohio Mar. 29, 2017) (granting summary judgment for general and regional managers of chain restaurants after analyzing economic reality test and totality of the circumstances).

     *Seventh Circuit:* Solsol v. Scrub, Ind., 2018 WL 4095103 (N.D. Ill. Aug. 28, 2018) (VP of operations and general manager not employers because they failed to actually exercise control in a manner that caused the alleged violations); Rogers v. AT&T Servs., Inc., 2014 WL 4361767 (N.D. Ill. Sept. 3, 2014) (in misclassification case, finding supervisor not “employer” because he had no role in classifying employee as nonexempt).

     *Eighth Circuit:* Hill v. Walker, 737 F.3d 1209 (8th Cir. 2013) (although supervisor’s action in terminating employee resulted in employer allegedly not paying accrued compensatory time, supervisor was not liable as “employer” under FLSA where she did not control employee’s compensation or make the decision not to pay her for the accrued compensatory time); Stockdall v. TG Invs., Inc., 2015 WL 9303105 (E.D. Mo. Dec. 22, 2015) (holding plaintiffs failed to prove that personal assistant to president was their employer within meaning of FLSA based on analysis of four-factor economic reality test).

     *Ninth Circuit:* Collinge v. IntelliQuick Delivery, Inc., 2018 WL 1088811, at \*13 (D. Ariz. Sept. 8, 2018) (managers who did not control number of hours worked or method of payment were not joint employers); *In re* Allstate Ins. Co. Fair Labor Standards Litig., 2007 WL 2274802 (D. Ariz. Aug. 7, 2007) (holding managers not employers under the economic reality test).

     *Eleventh Circuit:* Demore v. Klone Enters., 2017 WL 2123986 (S.D. Fla. Apr. 25, 2017) (granting summary judgment in favor of supervisors who had no ownership interest in company and no control over plaintiff’s work schedule and salary). [↑](#footnote-ref-558)
558. *See* *Manning*, 725 F.3d at 50. [↑](#footnote-ref-559)