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Before the United States House of
Representatives Committee on Education & the
Workforce

Subcommittee on Workforce Protections

Hearing on "Examining Biden's War on Independent Contractors"

April 19, 2023

Chairman Kiley, Ranking Member Adams and members of the Subcommittee:

Thank you for the opportunity to speak with you today about the important topic of independent contracting.

Let me begin with a brief overview of my background. I served as the Administrator of the Department of Labor's Wage and Hour Division (WHD) during the administration of President George W. Bush. In that role, I was responsible for the Fair Labor Standards Act regulations, policy, compliance assistance, and enforcement.

When I returned to the private sector, my focus as a wage and hour attorney was compliance. I worked with employers to identify and correct violations by conducting internal audits of employers' compliance in the areas of independent contracting, overtime exemptions, minimum wage and other non-exempt employee pay practices. When I found violations, I worked with my clients to correct their practices, including paying back wages.

I also was a founding executive of ComplianceHR where I developed applications to assess employment law compliance using expert system technology. I developed, for example, the Navigator IC and Navigator OT apps which assess independent contractor and overtime exempt status. These applications apply a series of tests and rules, based on federal and state statutes, regulations, case law and agency rulings, to user responses in an on-line questionnaire. With these apps, an employer (or an employee advocate) can quickly determine the likelihood of a violation at a much lower cost than engaging an attorney.

I am here today because I believe that compliance with independent contractor standards in this country is nearly impossible. I am an expert. I know the FLSA. I have reviewed every state independent contractor standard in the country. I have written an app that uses predictive analytics to provide a risk assessment of classifying a worker as an independent contractor. Believe me when I admit, even I cannot always tell you who is an employee and who is an independent contractor with certainty.

The Independent Workforce

Before I turn to describing the problem and suggesting a solution, let me begin with some data on independent work. There are now 64.6 million independent workers in the United States, according to MBO Partners' 2022 State of Independence Report (attached as Exhibit A), a 69 percent increase over 2020 and a 26 percent increase over 2021. Over a third of these (21.6 million) are full-time independents, an increase of 59 percent from 2020.

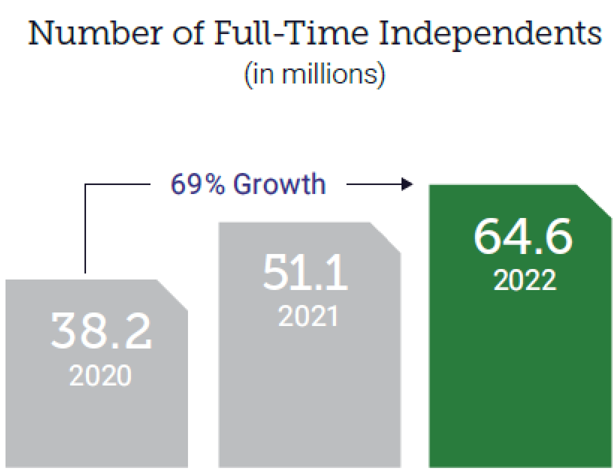
The fastest growth over the last two years are occasional independents, people who don't work a regular schedule, but work irregularly and periodically as an independent. The number of occasionals more than doubled from 2020 to 2022, from 15.8 million to 31.9 million. MBO Partners ascribes the increase in part-time and occasional independents to several factors: Many people were pushed out of full-time employment during the pandemic as businesses and schools closed. Amid rising inflation, many Americans have found that their income hasn't kept up with rising costs; part-time independent work has become crucial to making ends meet. In 2022, 71 percent of part-time and occasional independents cited the need for supplemental income as a reason for working independently.

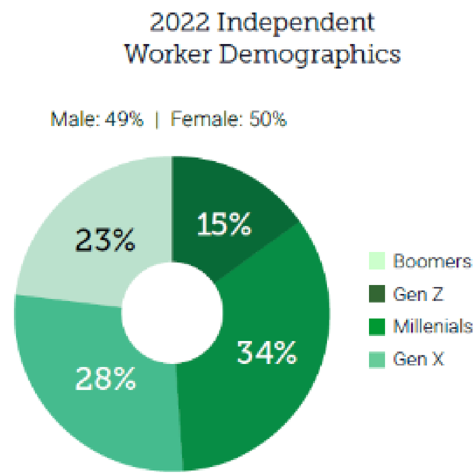
Who are the independent workers? Men and women are represented almost equally in the independent workforce and almost half are Millennials (34%) or Gen Z (15%). Between 2019 and 2022, the proportion of white independents fell while the proportion of minorities rose to 25 percent. In fact, Black Americans now make up a greater proportion of the independent workforce (14%) than of the traditional workforce (13%, according to the BLS). In short, the independent workforce is younger and growing more diverse.

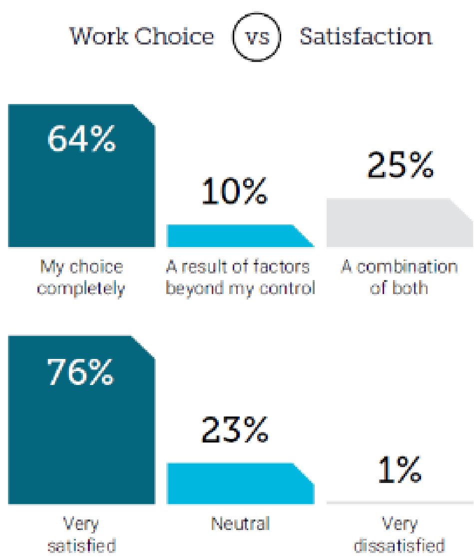
For most (64 percent), working independently is their choice entirely, not a necessity, according to MBO Partners. Only 10% join the independent workforce because of factors beyond their control – job loss or the inability to find a traditional job. Most (74 percent) are very satisfied with their choice to work independently; 84 percent are happier working on their own; 67% feel more secure working independently; and 80 percent say that working on their own is better for their health.

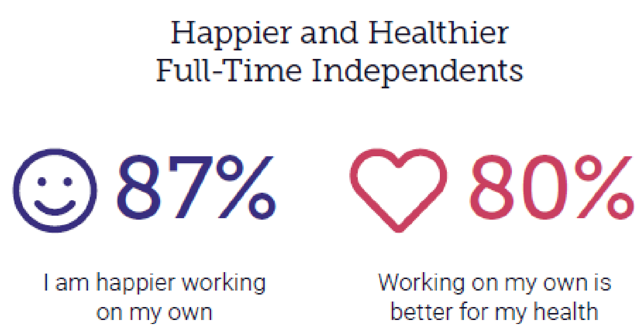
There are challenges to working independently – it's not the right choice for everyone. But the most cited challenges in the MBO Partners' survey may not be what first come to mind: Not enough predictable income (43%) and concerns about the next gig (32%). Less than 30 percent of independent workers surveyed by McKinsey & Company in 2022 reported challenges such as access to affordable healthcare, housing, transportation, and childcare – but the employees surveyed reported the same challenges at just 5 to 10 points lower. The lack of overtime pay is not cited as a challenge in any study I have found.

MBO Partners' State of Independence in America 2022









The War on Independent Contracting

In sum, 64.6 million Americans take part in the independent workforce – full-time, part-time, or occasionally – most because they want to; not because they have no other choice. Most independent workers report being happier, healthier, more secure, and more optimistic about the future.

The independent workforce is the right choice for many workers. Unfortunately, too many federal and state regulators want to take that choice off the table completely for all workers. As the independent workforce grows, some regulators seem determined to force us all into traditional jobs by broadening the definition of an "employee" and restricting standards for working as an independent contractor.

There is a war on independent contracting, but why? Two reasons, in my opinion.

First, a misperception that independent contractors are exploited because they are not eligible for overtime, don't have access to employer-provided health care, and are not covered by workers' compensation and other employment law protections. Of course, this assumes that independent workers are somehow unaware that they are not protected by these laws and were bamboozled or forced into working independently. It is not irrational for workers to choose the freedom and flexibility of independent work over being controlled by an employer, even if that choice means giving up some security.

Second, as always, follow the money. Governments believe they are losing tax revenue. Some older studies estimated that the federal government and some states lose 10 of millions, even billions, of dollars each year because collecting taxes from independent workers is more difficult without the payroll deduction collection mechanism. While the methodologies for such surveys are open to question, even if true, the solution should not be to force workers into an employment relationship. Also, labor unions lose revenue when workers choose independent work because independent contractors cannot join unions and pay union dues.

Legal Chaos

The war on the independent workforce is perpetuated by the chaos of the legal standards for determining who is an employee and who is an independent contractor. By my last count, [1] there are no less than 100 different federal and state statutes regulating independent contracting under at least six different types of employment and tax laws: wage and hour, workers' compensation, equal employment opportunity, workplace safety, unemployment tax, and income tax. Not all the laws are totally different, but most have some differences, small or large. Also, both the federal government and many state governments have different standards in different statutes.

[1] Appendix, McCutchen & MacDonald, *Ready, Fire, Aim: How State Regulators are Threatening the Gig Economy and Millions of Workers and Consumers* (Jan. 2020), available at www.uschamber.com/assets/archived/images/ready_fire_aim_report_on_the_gig_economy.pdf.

Yes, a single person can be an employee under wage and hours law but an independent contractor under workers' compensation law. A single person can be an employee in one state and an independent contractor in another.

This chaos opens the door to abuse – even tyranny. Regulators can choose at will from a menu of different definitions, some broad, some narrow. This reduces predictability and opens the door to favoritism, ideological enmity, or even whimsy. The war will continue until that chaos is ended. Only Congress can do that.

Let's start by reviewing independent contractor standards under the federal Fair Labor Standards Act. The FLSA only covers employees, not independent contractors. Thus, identifying whether a worker is an employee is the essential preliminary question for all FLSA protections. Yet, the FLSA's definitions, unchanged since the Act was passed in 1938, are circular at best. "Employee" is defined as "any individual employed by an employer."[2] "Employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[3] And "employ" means "to suffer or permit to work."[4] Well, that is helpful. Not.

Less than a decade after the FLSA was enacted, the Supreme Court had to step in to cobble together some sort of functional definition. In a series of cases from 1944 to 1947,[5] the Court found that the definitions of employee under the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act was broader than the common law which determined employee status "solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker."[6] But the Supreme Court also recognized that laws were "not intended to stamp all persons as employees."[7] Even a broad definition of employee "does not mean that all who render service to an industry are employees."[8]

The Court thus acknowledged that independent contractors are not employees protected by the FLSA.[9] To distinguish between employees and independent contractors, the Court developed what is known today as the "economic reality" test: Employees are "those who as a matter of economic reality are dependent upon the business to which they render service."[10] The Supreme Court cases discussed the types of facts that would be relevant to determine economic dependence in addition to the common law control factor: permanency of the relationship, the skill required for the work, the investment in facilities for work, the opportunities for profit or loss, and whether the worker was part of an integrated

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[2] 29 U.S.C. 203(e).
[3] 29 U.S.C. 203(d).
[4] 29 U.S.C. 203(g).
[5] *Bartels v. Birmingham,* 332 U.S. 126 (1947) (SSA); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (FLSA); *United States v. Silk*, 331 U.S. 704 (1947) (SSA); *Walling v. Portland Terminal Co*., 330 U.S. 148 (1947) (FLSA); *NLRB v. Hearst Publications*, Inc., 322 U.S. 111 (1944).
[6] *Bartels,* 332 U.S. at 130.
[7] *Walling*, 330 U.S. at 152.
[8] *Silk*, 331 U.S. at 712.
[9] *Rutherford Food*, 331 U.S. at 729.
[10] *Bartels*, 332 U.S. at 130.

unit of production. The Court cautioned, however, that no single factor is determinative, and no list of factors is complete. Rather, the totality of the situation controls.[11]

Following these Supreme Court decisions, Congress responded quickly to amend the definition of "employee" in the NLRA and the SSA to bring back the common law control test. In 1947, Congress amended the NLRA's definition of "employee" to clarify that the term "shall not include any individual having the status of an independent contractor."[12] In 1948, Congress amended the SSA to exclude from employment "any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor."[13] The Supreme Court interpreted both amendments to "apply general agency principles in distinguishing between employees and independent contractors."[14] Congress did not similarly amend the FLSA, and the Supreme Court later affirmed that economic reality remained the test for employment under the FLSA.[15]

The current federal law, then, applies the common law control test to all federal statutes except the FLSA. However, the different agencies responsible for enforcing different statutes have adopted different multi-factor tests under the common law.

The Internal Revenue Service, for example, acknowledges the general common law rule that a person is an independent contractor if "the payer has the right to control or direct only the result of the work and not what will be done and how it will be done."[16] The IRS used to apply a 20-factor test to determine control, and many state tax laws still use that test. But, in its "Topic No. 762" publication, the agency now groups most of its 20 factors under three categories:

> **Behavioral Control** covers facts that show if the business has a right to direct and control what work is accomplished and how the work is done, through instructions, training, or other means.
>
> **Financial Control** covers facts that show if the business has a right to direct or control the financial and business aspects of the worker's job. This includes:
> - The extent to which the worker has unreimbursed business expenses
> - The extent of the worker's investment in the facilities or tools used in performing services
> - The extent to which the worker makes his or her services available to the relevant market
> - How the business pays the worker, and
> - The extent to which the worker can realize a profit or incur a loss
>
> **Relationship of the Parties** covers facts that show the type of relationship the parties had. This includes:
> - Written contracts or oral agreements describing the relationship the parties intended to create
> - Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay
> - The permanency of the relationship, and

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[11] *Bartels,* 332 U.S. at 130; *Rutherford*, 331 at 730; *Silk,* 331 U.S. at 716
[12] Labor Management Relations (Taft-Hartley) Act, 1947, Public Law 80-101, sec. 101, 61 Stat. 136, 137-38 (1947).
[13] Social Security Act of 1948, Public Law 80-642, sec. 2(a), 62 Stat. 438 (1948).
[14] *NLRB v. United Ins. Co. of Am*., 390 U.S. 254, 256 (1968)
[15] *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961).
[16] Independent Contractor Defined, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined; *see also https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee*

- The extent to which services performed by the worker are a key aspect of the regular business of the company.[17]

Another IRS publication just revised last month adds, subtracts, and modifies the factors:

Behavioral Control

These facts show whether there is a right to direct or control how the worker does the work. A worker is an employee when the business has the right to direct and control the worker. The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work. For example:

Instructions – if you receive extensive instructions on how work is to be done, this suggests that you are an employee. Instructions can cover a wide range of topics, for example:

- how, when, or where to do the work
- what tools or equipment to use
- what assistants to hire to help with the work
- where to purchase supplies and services

If you receive less extensive instructions about what should be done, but not how it should be done, you may be an independent contractor. For instance, instructions about time and place may be less important than directions on how the work is performed.

Training – if the business provides you with training about required procedures and methods, this indicates that the business wants the work done in a certain way, and this suggests that you may be an employee.

Financial Control

These facts show whether there is a right to direct or control the business part of the work. For example:

Significant Investment – if you have a significant investment in your work, you may be an independent contractor. While there is no precise dollar test, the investment must have substance. However, a significant investment is not necessary to be an independent contractor.

Expenses – if you are not reimbursed for some or all business expenses, then you may be an independent contractor, especially if your unreimbursed business expenses are high.

Opportunity for Profit or Loss – if you can realize a profit or incur a loss, this suggests that you are in business for yourself and that you may be an independent contractor.

Relationship of the Parties

These are facts that illustrate how the business and the worker perceive their relationship. For example:

Employee Benefits – if you receive benefits, such as insurance, pension, or paid leave, this is an indication that you may be an employee. If you do not receive benefits, however, you could be either an employee or an independent contractor.

Written Contracts – a written contract may show what both you and the business intend. This may be very significant if it is difficult, if not impossible, to determine status based on other facts.[18]

Note that the revised standard here states: "The business does not have to actually direct or control the way the work is done – as long as the employer has the right to direct and control the work." Whether a

[17] Topic No. 762, Independent Contractor vs. Employee, https://www.irs.gov/taxtopics/tc762

[18] Independent Contractor or Employee, Publication 1779 (Rev. 3-2022), https://www.irs.gov/pub/irs-pdf/p1779.pdf.

contractual right to control which is never exercised shows independent contractor status has been controversial and in flux at many federal agencies.

The EEOC addresses independent contracting in its enforcement guidance on "Application of EEO Laws to Contingent Workers" issued in 1997.[19] The EEOC, like the IRS, begins with the common law control test: "The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself." The EEOC considers 16 factors when determining control:

1. The firm or the client has the right to control when, where, and how the worker performs the job;
2. The work does not require a high level of skill or expertise;
3. The firm or the client rather than the worker furnishes the tools, materials, and equipment;
4. The work is performed on the premises of the firm or the client;
5. There is a continuing relationship between the worker and the firm or the client;
6. The firm or the client has the right to assign additional projects to the worker;
7. The firm or the client sets the hours of work and the duration of the job;
8. The worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;
9. The worker has no role in hiring and paying assistants;
10. The work performed by the worker is part of the regular business of the firm or the client;
11. The firm or the client is itself in business;
12. The worker is not engaged in his or her own distinct occupation or business;
13. The firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;
14. the worker is considered an employee of the firm or the client for tax purposes (i.e., the entity withholds federal, state, and Social Security taxes);
15. the firm or the client can discharge the worker; and
16. the worker and the firm or client believe that they are creating an employer-employee relationship.

The National Labor Relations Board applies a 10 factor test as articulated in the Restatement (Second) of Agency § 220 when determining independent contractor status:

1. The extent of control which, by the agreement, the master may exercise over the details of the work;
2. Whether or not the one employed is engaged in a distinct occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
4. The skill required in the particular occupation;
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
6. The length of time for which the person is employed;
7. The method of payment, whether by the time or by the job;
8. Whether or not the work is part of the regular business of the employer;
9. Whether or not the parties believe they are creating the relation of master and servant;
10. Whether the principal is or is not in the business.

However, this standard appears to be in a state of flux. In December 2021, the NLRB issued a Notice and Invitation to File Briefs in the case *The Atlanta Opera Inc.*, 371 NLRB No. 45 (2021), requesting amicus

[19] https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary

briefs on whether it should continue to apply the current independent contractor standard in *SuperShuttle DFW, Inc.* 367 NLRB No. 75 (2019), or apply the prior standard in *FedEx Home Delivery*, 361 NLRB 610 (2014). The difference between the two cases seems to be the weight to give the "control" factor and a new "entrepreneurial opportunity" factor. Forty-two amicus briefs were filed: some endorsing *SuperShuttle,* others seeking a return to *FedEx*, and some seem to ask the NLRB to abandon the common law altogether and move towards California's AB 5 test. As of this writing, the NLRB has not issued a decision. The continuing controversy at the NLRB further supports Congressional action on independent contracting.

State law is even worse, starting with California's Assembly Bill 5. Some have suggested that Congress adopt that California law. I seriously question whether those people have actually *read* AB 5.

The history of AB 5 is worth reviewing. Before 2018, independent contractor status under California's wage orders was determined using the 13-factor multifactor *Borello* test:

1. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
2. Whether the work is a regular or integral part of the employer's business;
3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;
5. Whether the service provided requires a special skill;
6. The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
7. The worker's opportunity for profit or loss depending on their managerial skill;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job;
11. Whether the worker hires their own employees;
12. Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
13. Whether or not the worker and the potential employer believe they are creating an employer-employee relationship (this may be relevant, but the legal determination of employment status is not based on whether the parties believe they have an employer-employee relationship).[20]

[20] *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations,* 48 Cal.3d 341 (Cal. 1989).

The California Supreme Court in its 2018 Dynamex decision rejected that approach and instead adopted a test with three required factors, sometimes known as an "ABC test." Under the new test, a person is considered an independent contractor only if:

(A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) The worker performs work that is outside the usual course of the hiring entity's business; and

(C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

The *Borello* test remained in effect for other California laws such as workers' compensation and unemployment insurance. Only Massachusetts had adopted a similarly restrictive rule.

To say *Dynamex* was controversial seems an understatement. But as a legislative "fix", Assembly Bill 5 was a failure – adding more complexity and uncertainty to the law. AB 5 adopted the *Dynamex* ABC test and applied that test to the California Labor Code, Unemployment Code, and wage orders. The bill did not define any of the key terms in the new test or answer any of the many questions that the regulated community had about how the new test would apply in the real world.

In addition, the final bill as passed included "exceptions" – although calling these "special rules" would be more accurate – for about 40 industries. Under AB 5, the 13 *Borello* factors continue to apply to:

- Insurance agents
- Physicians and surgeons
- Dentists
- Podiatrists
- Psychologists
- Veterinarians
- Lawyers
- Architects
- Engineers
- Private investigators
- Accountants
- Securities broker-dealers
- Investment advisers
- Direct sales salesperson
- Commercial fishermen
- Newspaper carriers
- Real estate licensees
- Licensed repossession agencies
- Motor club services

The *Borello* 13-factor balancing test also continues to apply to persons providing "professional services" but only if *all* of six additional factors are met:

1. The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity. Nothing in this subdivision prohibits an individual from choosing to perform services at the location of the hiring entity.
2. If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.
3. The individual has the ability to set or negotiate their own rates for the services performed.
4. Outside of project completion dates and reasonable business hours, the individual has the ability to set the individual's own hours.
5. The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

6. The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

Professional services under AB 5 that must meet these six required factors *before* then being evaluated under the 13-factor *Borello* test include:

Marketing	Licensed tax agents	Newspaper cartoonists
Human resources	Payment processers	Estheticians
Travel agent services	Photographers	Electrologists
Graphic design	Photojournalists	Manicurist
Grant writer	Writers	Barber
Fine artist	Editors	Cosmetologist

Construction subcontractors must meet seven required criteria to be evaluated under *Borello* rather than AB 5:

1. The subcontract is in writing.
2. The subcontractor is licensed by the Contractors State License Board and the work is within the scope of that license.
3. If the subcontractor is domiciled in a jurisdiction that requires the subcontractor to have a business license or business tax registration, the subcontractor has the required business license or business tax registration.
4. The subcontractor maintains a business location that is separate from the business or work location of the contractor.
5. The subcontractor has the authority to hire and to fire other persons to provide or to assist in providing the services.
6. The subcontractor assumes financial responsibility for errors or omissions in labor or services as evidenced by insurance, legally authorized indemnity obligations, performance bonds, or warranties relating to the labor or services being provided.
7. The subcontractor is customarily engaged in an independently established business of the same nature as that involved in the work performed.

There's more. To fall under Borello, rather than AB 5, people or entities who provide services through a referral agency have an additional ten required criteria to meet. And even business-to-business relationships are scrutinized; a business entity must be meet 12 required elements:

1. The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. The business service provider is providing services directly to the contracting business rather than to customers of the contracting business.
3. The contract with the business service provider is in writing.
4. If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.
5. The business service provider maintains a business location that is separate from the business or work location of the contracting business.
6. The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

7. The business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.
8. The business service provider advertises and holds itself out to the public as available to provide the same or similar services.
9. The business service provider provides its own tools, vehicles, and equipment to perform the services.
10. The business service provider can negotiate its own rates.
11. Consistent with the nature of the work, the business service provider can set its own hours and location of work.
12. The business service provider is not performing the type of work for which a license from the Contractor's State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

What a mess.

Just a few days after AB 5 went into effect, legislators began introducing bills to amend the law. By early 2020, there were 31 different bills seeking to modify or repeal AB 5.[21] On September 4, 2020, Governor Newsom signed AB 2257 into law. AB 2257 made nine different changes to the special rules for "business-to-business" relationships, which I won't detail here. Changes were also made for freelance writers and photographers, including dropping the 35-per-year submission limit. AB 2257 also added 26 new industries and jobs to the list covered by *Borello,* some with additional required elements:

- Recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineers, musicians engaged in creating sound recordings, vocalists, photographers working on album covers, and other press and publicity photos relating to recordings, and independent radio promoters;
- Musicians or musical groups for the purpose of a single-engagement live performance event;
- An individual performance artist;
- Licensed landscape architects;
- Freelance translators;
- Registered professional foresters;
- Home inspectors;
- Persons who provide underwriting inspections, premium audits, risk management or loss-control work for the insurance industry;
- Manufactured housing salespersons;
- Persons engaged in conducting international and cultural exchange visitor programs;
- Competition judges with specialized skill sets;
- Digital content aggregators who serve as licensing intermediaries for digital content;
- Specialized performer hired to teach a master class for no more than one week; and
- Feedback aggregators.

AB 5 and AB 2257 together created special rules for about 66 different industries and professions. But there was one more special industry rule to come: Proposition 22, passed by a 59 percent margin in the November 2020 elections. Under Prop 22, app-based drivers are independent contractors if the network company does not unilaterally prescribe their schedule or a minimum number of hours; does not require drivers to accept any specific ride or delivery request to maintain access to the network; and

[21] Sarchet, Paretti & Lotito, *Independent Contractor Issues in California: Summer 2020 Update* (Sept. 1, 2020)

allows drivers to work for other network-based companies or hold other jobs. In addition, Prop 22 guarantees that drivers be paid no less than 120% of minimum wage for the time that they are engaged, as well as payment per mile. Network companies must also provide health care subsidies and insurance coverage to drivers, develop anti-harassment policies, provide drivers with mandatory safety training, and conduct criminal background checks on network drivers.[22]

To call California's regime for regulating independent contractors Byzantine is an insult to the Byzantine Empire: It's more intricate, more confusing, more convoluted than even the federal law. Anyone who thinks this is a model to emulate has been consuming too much of one of California's agricultural products – and not grapes or almonds. California does nothing to create clear and certain rules. It is a model to avoid, not emulate.

No other state has independent contractor laws as complicated as California, which by my count has nine different tests for independent contractor status: the ABC test in AB 5, the *Borello* 13-factor balancing test, and seven tests in specific industries which combine required elements and the *Borello* multifactor balancing test.[23] But California is not the only state that has more than one rule. Many states have more than one test: A multifactor balancing test under the tax law, for example, an economic reality test for wage-hour laws, and an ABC test for unemployment. Some states, like Maine and Wisconsin, also have complex standards that combine required criteria with a balancing test. A singly state can have four or five different tests under different laws, adding to the chaos that is independent contracting law. Without the intervention of Congress, the chaos likely will get worse as there are currently as many as 40 independent contractor bills pending in over 20 states.

The DOL's Latest Proposed Regulations

The DOL's latest proposed independent contracting regulations do nothing to reduce the chaos.

Under existing Supreme Court precedent, the DOL must work within the economic reality test. However, the analysis to determine whether an individual is "economically dependent" is not set. We know that the analysis requires balancing of some number of factors, and that no one factor is determinative. But different courts have adopted different factors – some have five factors, others six factors; even similar factors are not quite the same from court to court and different courts balance the factors differently.[24] DOL's informal guidance also has been inconsistent. Fact Sheet 13, revised March 2022, lists seven factors:

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[22] Sarchet, Lotito & Paretti, *California's Proposition 22: Impacts in the Golden State and Beyond* (Nov. 4, 2020)
[23] Professional services, construction, referral agencies, business-to-business relationships, data aggregators, competition judges, and app-based drivers.
[24] *Compare, e.g., Hargrave v. AIM Directional Servs.*, No. 21-40496 (5th Cir. May 11, 2022) (five factors); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015) (six factors); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988) (five factors); *Donovan v. Dial America Marketing Inc.*, 757 F.2d 1376, 1381 (3rd Cir. 1985) (6 factors).

1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.[25]

But the now-withdrawn Administrator's Interpretation No. 2015-1 only listed six factors:

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect the worker's opportunity for profit or loss?
3. How does the worker's relative investment compare to the employer's investment?
4. Does the work performed require special skill and initiative?
5. Is the relationship between the worker and the employer permanent or indefinite?
6. What is the nature and degree of the employer's control?[26]

The DOL sometimes recognized that many workers were not employees under the FLSA. At other times, the DOL stated that "most workers are employees under the FLSA's broad definitions."[27] If the DOL can't consistently articulate a standard, how can the public comply with whatever standard is the flavor of the day?

That was the sorry state of FLSA law for 75 years – inconsistent case law and inconsistent guidance from the DOL leading to inconsistent results for business and workers alike.

Finally, on January 7, 2021, after notice and comment rulemaking, the DOL published its first regulations on independent contracting setting forth the analysis it would apply to determine economic dependence.[28] Under the regulations, DOL looks at two core factors:

1. The nature and degree of control over the work
2. The worker's opportunity for profit or loss

If those factors point in opposite directions, one showing independent contractor status and the other employment, then DOL would look at the three additional factors:

1. The amount of skill required
2. The degree of permanence of the relationship
3. Whether the work is part of an integrated unit of production

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[25] Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship
[26] https://www.blr.com/html_email/ai2015-1.pdf.
[27] *Id.* at 9.
[28] https://www.regulations.gov/document/WHD-2020-0007-1801.

Without changes to the FLSA definitions, DOL could go no further within the "broader than common law," economic reality framework established by the Supreme Court 75 years ago.

These regulations were set to go into effect on March 8, 2021. But, between publication of the final rule and the effective date, President Biden was inaugurated. On March 4, 2021, the DOL formally delayed the effective date of the regulations, and on May 5, 2021, rescinded the regulations. The DOL went through the motions of following the procedures required by the Administrative Procedures Act by first publishing a notice to delay and a final rule to delay the effective date, and then publishing a proposal to rescind and a final rule to rescind the regulations. But, strangely, the DOL only accepted comments on whether the regulations should be retained or rescinded – an up or down vote. The agency did not allow the public to suggest any alternatives – different factors, different weights for the factors. The Trump regulations or no regulations; that was our only choice.

The DOL's recission of the regulations was challenged, and on March 14, 2022, a federal district court in Texas found that the DOL's up or down vote process violated federal law.[29] The DOL had been arbitrary and capricious in withdrawing the regulations, the court held, because it refused to consider any alternatives to total withdrawal of the regulations and "left regulated parties without consistence guidance." The court held that the regulations "became effective on March 8, 2021, the rule's original effective date, and remains in effect."

Thus, the 2021 regulations have been and continue to be binding on the DOL when investigating and enforcing the FLSA. Whether the DOL has been applying those regulations, however, seems unlikely. The DOL's misclassification web site, www.dol.gov/whd/flsa/misclassification, includes a notice of the court's decision. But the 2021 regulations are nowhere to be found. Instead, the page has a link to Fact Sheet 13 and its list of seven factors – which is not the current law and has not been for over two years. The DOL's web site is providing erroneous information and misleading the public.

In addition, I recently took part in a final conference with the DOL for an investigation of a home care registry in Florida, with both an investigator from the Wage & Hour Division and an attorney from the Solicitor's Office. Although they acknowledged the new regulations, the discussion focused entirely on the many and varied factors that the DOL considered before those regulations were adopted. In fact, the final conference was eerily like another meeting I had with the Solicitor's Office in 2020 on another investigation of a Florida nurse registry. Nothing seems to have changed even though the new regulations have been in effect for over two years.

The DOL has proposed to replace the Trump regulations.[30] Its latest regulatory agenda lists May 2023 for publication of a final rule. As they must, and as in the Trump regulations, the proposed regulations retain the economic reality test for employment status: "The Act's definitions are meant to encompass

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[29] *Workplace Innovation v. Walsh* (March 14, 2022, E.D. Tex.).

[30] *Proposed Rule, Employee or Independent Contractor Classification under the Fair Labor Standards Act* (Oct. 13, 2022), *available at* https://www.regulations.gov/document/WHD-2022-0003-0001.

as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work."[31] Next, the DOL proposes to assess six factors to determine economic dependence:

> (1) *Opportunity for profit or loss depending on managerial skill*. This factor considers whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.
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> (2) *Investments by the worker and the employer*. This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and show employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker's investments should be considered on a relative basis with the employer's investments in its overall business. The worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status.
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> (3) *Degree of permanence of the work relationship*. This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for 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, rather than the workers' own independent business initiative, this factor is not indicative of independent contractor status.
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> (4) *Nature and degree of control*. This factor considers the employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the employer's control over the worker include whether the employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the employer's control over the worker include whether the employer uses technological means of supervision (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands on workers' time that do not allow them to work for others or work when they choose. Whether the employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service

[31] Proposed 29 CFR §795.105.

standards may be indicative of control. More indicia of control by the employer favors employee status; more indicia of control by the worker favors independent contractor status.

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

(6) *Skill and initiative*. This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the employer to perform the work. Where the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.[32]

The proposed regulations further provide that: "Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case. Moreover, these six factors are not exhaustive."[33]

In other words, as proposed, the DOL can consider any facts it wants and give those facts whatever weight it wants. The DOL can decide never to give any weight to the common law control factor ever again. Under such a rule – which isn't actually a rule at all – the DOL can use any criteria, including California's AB 5 test or for that matter a Ouija Board.

The lack of clarity and certainty is profound.

A Proposed Solution

> "It is comforting to know that 'economic reality' is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But 'reality' encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision." [34]

Over 120 tests under different statutes in different states. The common law "control" test, other multi-factor balancing tests, the economic reality test, ABC-style tests like AB 5 with two, three and more mandatory requirements. 6 factors, 7 factors, 10 factors, 16 factors, 20 factors, and more. Under this opaque, complex, and chaotic morass of laws, factors and facts, how can any normal human being have

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[32] Proposed § 795.105(b).
[33] Proposed § 795.105(a)(2); see also proposed § 795.105(b)(7).
[34] *Sec'y. of Labor, U.S. Dept. v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J. concurring).

any idea who is an employee and who is an independent contractor? As Judge Easterbrook observed, "we might as well examine the facts through a kaleidoscope."

I have thought about this problem for over 20 years, and this is the conclusion I have reached: We need a single, clear, and simple rule – using objective criteria to the extent possible – nationwide, for all laws.

Employees are best protected when they understand what the law requires and are paid correctly in the first instance. Receiving back wages after months or years of a DOL investigation or litigation is cold comfort, especially to the vulnerable low wage worker. Most employers want to comply with the law and pay their employees correctly. But doing so is exceedingly difficult to impossible if the law is complicated or unclear, if you need to hire an expert attorney to tell you what the law is.

Now some would say: "Okay, so change the law so nearly everyone is an employee. Let's adopt California's approach to severely limit when workers can be classified as independent contractors. A black and white rule that only the most highly skilled, highly compensated professionals can be independent workers."

Two responses: *First*, California did not succeed in ensuring that only highly skilled, highly compensated individuals qualify as independent contractors. California voters protected the independent contractor status of app-based drivers by voting 59 percent in favor of Proposition 22.

Second, such an approach would deprive millions of Americans of their chosen way of life. Those millions are both high income and low, 50 percent are women, 49 percent are Millennials and or Gen Z, and 25 percent are minorities.

What should that clear and simple rule look like? I suggest we look to objective criteria – such as a contract stating that the worker is an independent contractor and the right to work for multiple businesses – and the common law "control" test. Control is the factor that most distinguishes an employee from an independent contractor. An independent worker is, just that, independent – in control of how their own work is performed. It is this flexibility that millions of independent workers value most. This change could be accomplished by replacing every definition of "employee" and "employer" in every federal statute with the following:

> The term "employee" means a person who provides services to an employer for compensation but does not include an independent contractor.
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> The term "employer" means a person who pays an employee for services but does not include a person who contracts with an independent contractor.
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> An "independent contractor" is a person who has entered into a written agreement to provide services as an independent contractor, is not prohibited from providing services to multiple businesses and controls the

> manner of his or her work. The contract to provide services may allow control over the results of the work or require the parties to comply with state or federal laws or regulations.

Such definitions would need to preempt state law definitions or the chaos that is state independent contractor laws will continue.

My proposal would mean less well-compensated work for employment law experts like me. But it will provide clarity and certainty for millions of Americans.