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Walsh's Wrong Turn: The Labor Department's Misguided Revitalization of the 'Integral' Factor

The fact that an independent contractor is "important" does not make him or her an employee.

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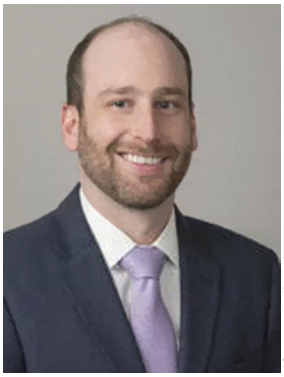
For seven decades, courts and the U.S. Department of Labor have used a multifactor test to determine whether a worker is "economically dependent" on a company (and thus an employee) or in business for herself (and thus an independent contractor) under the Fair Labor Standards Act. One of those factors—whether the work is "part of the integrated unit of production"—has received relatively little attention, until recently. Over the past decade, some courts and Labor Department officials, including Secretary Marty Walsh, have tried to reframe the inquiry as whether the work is "important" to the company's business.



(Courtesy photo)

Andrew G.I. Kilberg of Gibson, Dunn & Crutcher.

The debate is not mere semantics. Millions of Americans are independent contractors, who perform work that is "important" to the companies they contract with. Changing the test from "integration" to "importance" threatens to deprive them of the ability to work as independent contractors and would lead to greater inconsistency and less predictability in the legal treatment of relationships between workers and companies.

The integration factor is drawn from the Supreme Court's 1947 holding in *Rutherford Food Corp. v. McComb* that workers at a Kansas City, Missouri, meatpacking plant were employees because they "did a specialty job on the production line" that was "a part of the integrated unit of production." But articulation of that factor blurred and shifted over time. Instead of considering whether a worker is part of an "integrated unit of production," some courts began considering "the importance of the services rendered to the company's business," as the U.S. Court of Appeals for the Fourth Circuit said in *McFeeley v. Jackson Street Entertainment, LLC* in 2016.

(Photo: Ed Brown via Wikimedia Commons)

U.S. Department of Labor headquarters in Washington, D.C.

(Courtesy photo)

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Under former Secretary Eugene Scalia, DOL analyzed the "integrated unit of production" factor as part

of a broader rulemaking in January 2021. The Scalia rule adopted the factors used by the courts but sharpened their articulation and clarified their application to improve consistency and encourage predictability for workers and companies. As the rule explained, the case law demonstrates that the nature and degree of control over work and the individual's opportunity for profit or loss are the most probative factors and typically carry greater weight. DOL thus emphasized that those two factors often will outweigh other factors when applied to the facts of a given case. The Scalia rule also adopted the Supreme Court's original instruction to consider whether the work performed is part of an integrated unit of production. (As a Labor Department official, Kilberg was involved in the drafting of the rule.)

Progressives and labor unions criticized the rule. DOL under secretary Walsh promptly rescinded the rule in May 2021, claiming with little analysis or support that Secretary Scalia's rule "impermissibly narrow[ed]" the scope of the FLSA. In doing so, Walsh's Labor Department explained that the "'integral part' factor" includes "consideration of whether the work is central or important."

But the importance of work to a company says nothing about the worker's dependence on the company. Nor is it clear how courts should determine whether work is important to a company. As Judge Frank Easterbrook explained back in 1987, "Everything the employer does is 'integral' to its business—why else do it?" Moreover, things that are "important" to a company's product are often contracted out to independent businesses. Manufacturers, for example, often rely on machines and components built, produced, and maintained by other companies. When framed as a barometer of "importance," the factor is both vague and overbroad.

Proponents of an "importance" test invoke a sentence in another 1947 Supreme Court opinion, *U.S. v. Silk*, which noted the workers at issue were "from one standpoint an integral part of the businesses." That wrongly assumes that the court used "integral" to mean "important." According to the 1934 edition of Webster's New International Dictionary, one definition of "integral" at the time was "[e]ssential to completeness," which is much different than mere "importance." "Integral" also was defined as "constituent, as a part," and "integrant"; the latter, in turn, meant "[m]aking part of a whole" or "necessary to constitute an entire thing." "Integral part" is thus better understood as "integrated part": work that is not just important, but a necessary, constituent part of an integrated process. That reading fits better with *Rutherford Food*'s use of "part of the integrated unit of production." Over time, the Supreme Court's "integrated" factor became diluted into "important."

The Scalia rule, on the other hand, was faithful to *Rutherford Food* and the primary objectives of the FLSA classification test. Whether a worker is part of an integrated unit of production can be evidence of the worker's mobility, which may weigh on the worker's economic (in)dependence. According to the Scalia rule, this framing of the factor allows it to support a finding of employee status even where the worker performs "seemingly peripheral functions," because "[w]hat matters is the extent of … integration." Determining integration is not always easy, and the Scalia rule explained that it "is not always useful," depending on the case. But assessing whether work is "integrated" is easier and more objective than asking whether work is "important."

The Scalia rule would have increased consistency and returned to a faithful application of Supreme Court precedent. Withdrawal of the rule is unwelcome for companies and workers who need clear and predictable rules. There is one silver lining however: Courts need not defer to DOL's articulation of the economic dependence test. Instead, they are free to follow the Supreme Court's original instruction—and to consult and consider the Scalia rule's structure and the analysis provided in the rule's preamble. It is not too late for courts to correct Walsh's wrong turn.

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