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## The Third Circuit Searches for an "Economic Reality" in *Verma V. 3001 Castor*

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THE THIRD CIRCUIT SEARCHES FOR AN “ECONOMIC REALITY”  
IN *VERMA v. 3001 CASTOR*

“The employee/independent contractor distinction is not a bright line but a spectrum, and . . . courts must struggle with matters of degree rather than issue categorical pronouncements.”<sup>1</sup>

INTRODUCTION

A landmark moment in federal labor and employment law occurred when Congress passed the Fair Labor Standards Act (FLSA).<sup>2</sup> Since its enactment over eight decades ago, the FLSA has evolved and expanded considerably.<sup>3</sup> In its current state, the Act functions as both a sword and shield for employees by including various protections against unfair labor practices by employers, while also establishing grounds for challenging possible violations.<sup>4</sup> The FLSA not only guarantees rights such as a federal minimum wage, overtime pay, and break time, but it has also been amended to include prohibitions against unequal pay, discrimination, and

1. *McFeeley v. Jackson St. Entm’t, LLC*, 825 F.3d 235, 241 (4th Cir. 2016).

2. Fair Labor Standards Act of 1938, 29 U.S.C. § 203 (2018); *see also* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage*, 101 MONTHLY LAB. REV. 22, 22 (1978) (referring to FLSA as “a landmark law for Nation’s social and economic development”). Before signing the bill, President Roosevelt declared that, “[e]xcept perhaps for the Social Security Act, it is the most far-reaching, the most far-sighted program for the benefit of workers ever adopted.” Grossman, *supra*, at 29 (internal quotation marks omitted) (quoting Franklin D. Roosevelt, *The Continuing Struggle for Liberalism* (June 24, 1938), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 392 (2005)).

3. LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE § 1.5, Westlaw (database updated Mar. 2020) (“Since the initial passage of the Fair Labor Standards Act (FLSA), Congress has amended the FLSA 29 times as of 1991.” (footnote omitted)); *see also* Wage and Hour Division, *History: Wage and Hour Division Historical Summary*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/about/history> [<https://perma.cc/5LBU-6WFC>] (last visited May 4, 2020) (listing expansions of federal labor law with amendments to FLSA since its enactment). Some of the most notable amendments to the FLSA include the Equal Pay Act, which prohibited wage discrimination based on sex, the 1966 amendments, which included state and local government workers in the Act, and the repeated amendments increasing the federal minimum wage. *See* SCHNEIDER & STINE, *supra*.

4. *See generally* *Judicial Questions Regarding Federal Fair Labor Standards Act (Wage and Hour Act) and State Acts in Conformity Therewith*, 132 A.L.R. 1443 (1941) [hereinafter *Judicial Questions*] (compiling cases brought under the FLSA showing wide array of Act’s functionality); *see also* *Fleming v. Tidewater Optical Co.*, 35 F. Supp. 1015, 1017 (E.D. Va. 1940) (“[The FLSA] was designed to protect the laboring public generally against the practices which it outlaws . . .”).

the failure to keep records as an employer.<sup>5</sup> Importantly, these various rights and privileges are only granted to “employees,” which is not explicitly defined within the Act.<sup>6</sup> Under Sections 203(e)(1) and 203(g) of the FLSA, the term “employee” includes “any individual employed by an employer,” and the term “employ” includes individuals who “suffer or permit to work” for an employer.<sup>7</sup> Though facially broad and seemingly all-inclusive, this statutory definition does not cover all working people.<sup>8</sup> For instance, the Supreme Court has historically distinguished independent contractors from the definition of “employee”; it defines “employees” as workers who may take part in production or distribution, but take sole responsibilities for the wages and hours of their own employees.<sup>9</sup>

To an unsuspecting worker, this distinction may seem mundane; but the designation is vitally important for would-be employees hoping to benefit from FLSA protections previously mentioned, as well as protections under other statutes.<sup>10</sup> Employers, on the other hand, may be motivated to treat their workers as “independent contractors” for legal purposes to

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5. Wage and Hour Division, *Wages and the Fair Labor Standards Act*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/whd/flsa> [<https://perma.cc/5F9S-Y5K5>] (last visited May 4, 2020) (listing rights and protections under the Act).

6. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947) (“[T]here is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer–employee relationship under the Act. Provisions which have some bearing appear in the margin. The definition of ‘employ’ is broad . . . . We have decided that it is not so broad as to include those ‘who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.’” (citation omitted)).

7. Employer is defined within Section 203(d) as:

[A]ny person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 203(d) (2018).

8. *See* § 213 (enumerating types of workers not covered under FLSA); *see also* § 203(e)(2)–(4) (clarifying certain individuals who do not qualify as employee for purposes of act).

9. *See Rutherford Food Corp.*, 331 U.S. at 729 (listing precedent on issue of independent contractors under FLSA); *see also Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (“The definitions 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.”).

10. *See Rutherford Food Corp.*, 331 U.S. at 728–29 (concluding unsuspecting workers deserve protection from employers seeking to label employees as independent contractors); *see also* Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 569 (1996) (“In addition, misclassified workers have no access to federally-mandated benefits and standards, including unemployment benefits, workers’ compensation, pension regulation through ERISA, health and safety standards, antidiscrimination laws, federal disability insurance, and protection under the Fair Labor Standards Act (FLSA).”).

avoid significant costs in the form of wages or other benefits.<sup>11</sup> These competing interests have resulted in countless courtroom battles, one of which the Third Circuit recently decided in *Verma v. 3001 Castor, Inc.*<sup>12</sup> The matter involved a class of adult entertainment club dancers that sued the club owner under the FLSA for unpaid minimum wages and overtime compensation.<sup>13</sup> The club owner considered the dancers as “independent contractors,” rather than “employees,” and did not pay them any wages or overtime.<sup>14</sup> The dancers tasked the court with deciding whether the club owner properly classified them as independent contractors.<sup>15</sup> The court remarked that, despite the binary nature of this judgment, “the employee/independent contractor distinction is not a bright-line rule but a spectrum.”<sup>16</sup> The court conducted a holistic assessment of the working relationship between the two parties to determine where exactly dancers at an adult entertainment club fall on the “spectrum” of employment.<sup>17</sup>

This Casebrief will address the Third Circuit’s most recent attempt at making the difficult, fact-based distinction between independent contractors and employees in *Verma v. 3001 Castor, Inc.* The court correctly applied the well-established “economic realities” test, simplifying the complex relationship between the dancers and the club, and reached arguably the most equitable resolution available. The reasoning in this court’s opinion, however, exposed the detrimentally unpredictable nature of the economic realities test.<sup>18</sup> This uncertainty stems from the FLSA’s failure to clearly define the differences between an employee and an independent contractor.<sup>19</sup> The judiciary has attempted to bridge the statutory

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11. Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 560–61 (2019) (commenting on business’ rationale for contractor–employee distinction).

12. 937 F.3d 221 (3d Cir. 2019); see generally *Judicial Questions*, *supra* note 4 (noting cases where distinction was at issue).

13. *Verma*, 937 F.3d at 225 (bringing claims under 29 U.S.C. §§ 206(a), 207(a), 216(b), and analogous state laws under Pennsylvania Minimum Wage Act (PMWA)).

14. *Id.* at 229 (referencing Castor’s act of requiring dancers to sign agreement stating they were “independent contractors”).

15. *Id.*

16. *Id.* at 232 (internal quotation marks omitted) (quoting *McFeeley v. Jackson St. Entm’t, LLC*, 825 F.3d 235, 241 (4th Cir. 2016)).

17. *Id.* (“As the economy evolves, courts continue to grapple with the challenge of placing novel economic relations on the correct point in the spectrum. In many cases that judgment is difficult, and we express sympathy for the district judges making these fact-intensive judgments under such a flexible standard.”).

18. See *supra* Part II for further discussion of the court’s holding and analysis.

19. See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMPL. & LAB. L. 295, 296 (2001) (“Employment laws by their very terms depend on the identification of an employee and an employment relationship. However, these laws are frequently baffling in defining who is an ‘employee’ or what constitutes ‘employment.’ A typical example is the Fair Labor Standards Act (FLSA), which defines ‘employee’ as ‘any individual employed by an employer.’” (footnote omitted)).

gap between employees and independent contractors over time with the economic realities test's six-factor balancing analysis. Despite these efforts, this glaring gap in one of the premiere statutes in federal labor and employment law harms employers, employees, and independent contractors by drawing a veil of uncertainty over various working relationships. *Verma* illuminates problems resulting from vagueness in the FLSA, including (1) employees' unawareness of their rights under the Act; and (2) risks to businesses in the form of harsh penalties for unintentionally misclassifying works. Congress should address these issues because the judiciary is ill-equipped to develop its own test that consistently and fairly differentiates between complex employment relationships while also fulfilling the intent of the FLSA.<sup>20</sup>

### I. BACKGROUND

Federal law largely dictates both the rights and responsibilities of employers and their workforce. Under the FLSA, workers who are considered employees are entitled to benefits including a federal minimum wage and overtime pay.<sup>21</sup> Independent contractors are not employees for the purposes of the FLSA; therefore, the Act does not statutorily grant these various benefits.<sup>22</sup> Employers are often motivated to avoid the requirements because they are so costly.<sup>23</sup> Some employers have even targeted the independent contractor exemption by intentionally misclassifying their workforce as independent contractors, even if they are more accurately described as employees.<sup>24</sup> These designation battles have led to the development of the economic realities test, which most courts have adopted by to reach an accurate resolution.<sup>25</sup>

The Supreme Court in *Rutherford Food Corp. v. McComb*<sup>26</sup> originally set forth the prototype for the economic realities test, but the Court described

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20. *See id.* at 298–99 (noting that although it has generally been left to the courts to determine employment relationships, they have failed to do so clearly or consistently).

21. *See generally* 29 U.S.C. §§ 206, 207 (2018).

22. *See, e.g.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

23. Griffith, *supra* note 11, at 560–61 (explaining employers' incentives to misclassify workers for legal purposes).

24. *See, e.g.*, Jeff Berman, *FedEx to Settle Driver Misclassification Lawsuit for \$240 Million*, LOGISTICS MGMT. (June 17, 2016), [https://www.logisticsmgmt.com/article/fedex\\_to\\_settle\\_driver\\_misclassification\\_lawsuit\\_for\\_240\\_million](https://www.logisticsmgmt.com/article/fedex_to_settle_driver_misclassification_lawsuit_for_240_million) [https://perma.cc/NS4X-BNPC].

25. Middleton, *supra* note 10, at 577 (“Courts have long considered the economic dependence of the worker on the employer as the key concept in determining a worker’s status as an employee for purposes of the FLSA and have evaluated each of the factors of the traditional common-law employee/independent contractor test in that light. This test has come to be known as the ‘economic realities’ test.” (footnote omitted)).

26. 331 U.S. 722 (1947)

the test primarily in dicta.<sup>27</sup> The Court explained that “the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.”<sup>28</sup> The Ninth Circuit refined the Supreme Court’s analysis into a more formalized balancing test in *Real v. Driscoll Strawberry Associates, Inc.*<sup>29</sup> Now recognized as the economic realities test, the Ninth Circuit identified six specific factors to weigh in distinguishing between employees and independent contractors:

- (1) [T]he degree of the alleged employer’s right to control the manner in which the work is to be performed;
- (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanence of the working relationship; and
- (6) whether the service rendered is an integral part of the alleged employer’s business.<sup>30</sup>

Neither the Supreme Court nor the Department of Labor have officially recognized any singular test or rule for making the determination, but both have acknowledged variations of the economic realities test as a means of analyzing a working relationship.<sup>31</sup> No single factor is dispositive; rather, courts must consider and weigh all factors against each other in reaching a conclusion.<sup>32</sup>

The Third Circuit first adopted the economic realities test in *Donovan v. DialAmerica Marketing, Inc.*<sup>33</sup> The Third Circuit identified the applicable law as the “Sureway Cleaners Test”—the Ninth Circuit’s further refined version of the factors originally set forth in *Real v. Driscoll Strawberry*.<sup>34</sup> The

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27. *See id.* at 730.

28. *Id.*

29. 603 F.2d 748 (9th Cir. 1979).

30. *Id.* at 754.

31. Wage and Hour Division, *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T LAB. (July 2008), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship> [<https://perma.cc/E6T9-W9GC>] (listing seven factors Supreme Court has considered in past, which reflect six factors from *Real* and one concerning “degree of independent business organization and operation”).

32. *See Real*, 603 F.2d at 754 (establishing balancing test for deciding whether workers are independent contractors or employees).

33. 757 F.2d 1376 (3d Cir. 1985).

34. 603 F.2d 748 (9th Cir. 1979); *see also DialAmerica*, 757 F.2d at 1382–83 (“Recently, the Court of Appeals for the Ninth Circuit . . . refined the test for ‘employee’ status originally set forth initially by the Supreme Court in *Rutherford*. This test lists six specific factors for determining whether a worker is an “employee”. . . . We now adopt it as the standard for determining ‘employee’ status under the FLSA, and we will proceed to analyze the district court’s decision in relation thereto.” (citations omitted)). The Third Circuit adopted the named ver-

court adopted this version of the test for two reasons: (1) it closely resembled the standard set by the Supreme Court in *Rutherford*, and (2) the Ninth Circuit successfully used this test.<sup>35</sup> In *Donovan*, the Third Circuit further noted that, when analyzing the “circumstances of the whole activity,” it should also be considered “whether, as a matter of economic reality, the individuals ‘are dependent upon the business to which they render service.’”<sup>36</sup> This is a pseudo-step seven and an inverse analysis of *Real’s* original step six; it attempts to gauge how much each side relies upon the other for conducting business.

Whenever a dispute over worker classification arises in the Third Circuit, the court will always employ the economic realities test.<sup>37</sup> Courts do not permit employers to circumvent the application of the test by binding their workers to a false designation through contractual obligation.<sup>38</sup> As was the case in *Verma*, employers will sometimes have their workers sign an agreement explicitly stating that they are serving as an independent contractor.<sup>39</sup> The FLSA works to trump employment contracts like these when they fail to meet the minimum standards of the Act.<sup>40</sup> These baseline standards cannot be waived even with the written consent of the employee.<sup>41</sup> Legislators recognized the unequal bargaining power in an employee–employer relationship and included compulsory standards to protect rightful employees from insufficient wages and excessive hours.<sup>42</sup>

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sion of the Ninth Circuit’s test, but the six listed factors were identical to those set forth in *Real*. See *DialAmerica*, 757 F.2d at 1382–83.

35. See *DialAmerica*, 757 F.2d at 1382–83 (discussing implementation of test); *id.* at 1383 (“The *Sureway Cleaners* test has been previously cited with approval by this court in dicta.”)

36. *Id.* at 1382 (first internal quotation marks omitted) (quoting *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981)) (adopting additional element of overall analysis that courts tended to consider in conjunction with six-factor test).

37. See *id.* (adopting economic realities test as precedent).

38. Griffith, *supra* note 11, at 594 (“In a similar vein to the above, the FLSA’s legislative history compellingly portrays that businesses’ self-serving labels and contractual terms are not relevant to the FLSA’s reach . . . . The Congress that enacted the FLSA feared that business formalities would unintentionally push some businesses out of the FLSA’s regulatory zone. Thus, the mere labeling, or existence of a contractual term indicating that a worker is an ‘independent contractor,’ carries no weight in the determination of whether a FLSA-recognized employment relationship exists.” (footnote omitted)).

39. See *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 225 (3d Cir. 2019) (noting all contracts included clause stating dancers were independent contractors).

40. See, e.g., *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945) (providing guidance on rationale behind FLSA’s minimum mandates).

41. *Id.* at 707.

42. See *id.* at 707 n. 18 (discussing legislative debate about unprotected working population); see also *Dynamex Operations W., Inc. v. Super. Ct.*, 416 P.3d 1, 32 (Cal. 2018) (“Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers’ fundamental need to earn income for their families’ survival may lead them to accept work for substandard wages or working conditions.”).

The court does not give any weight to the text of a contract in determining the true role of a worker, but this has not been incorporated into the balancing test.<sup>43</sup>

The final determination as to whether an individual is an employee or independent contractor is undoubtedly a legal conclusion, but this conclusion is heavily fact-based.<sup>44</sup> As was the case in the relationship between the class of dancers and their purported employer in *Verma*, the courts will probe and rely on very specific facts about the nature of the relationship that exists between two parties, input these facts into the relevant test factors, and attempt to reach a conclusion that most closely, and fairly, resembles the “economic reality” of the relationship.

## II. FACTS, PROCEDURAL HISTORY, AND NARRATIVE ANALYSIS

In 2013, Priya Verma filed a class action suit against her employer, Castor, alleging a failure to pay minimum and overtime wages under the FLSA and analogous state laws.<sup>45</sup> Verma’s class consisted of twenty-two women who had worked at some point as dancers at Castor’s adult entertainment club in Philadelphia, Pennsylvania: the Penthouse Club.<sup>46</sup> Castor’s contended that these dancers were independent contractors, both in fact and by contract, and therefore not entitled to these wages.<sup>47</sup> In a decisive victory for Verma, the District Court for the Eastern District of Pennsylvania entered final judgment on a jury verdict, awarding the class more than \$4.5 million.<sup>48</sup> The district court concluded that, due in large part to the club’s significant control over the dancers and its “dominat[ion] [of] the key levers driving the dancers’ opportunity for profit,” the facts lopsidedly weighed in favor of classifying the dancers as employees.<sup>49</sup>

The case arrived at the Third Circuit after appeal by Castor.<sup>50</sup> The Third Circuit, in applying the economic realities test adopted in *DialAmerica*, began with a thorough analysis of the economic relations between Castor and the class of dancers.<sup>51</sup> The Third Circuit found that five of the

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43. *Verma*, 937 F.3d at 229 (noting inquiry into whether worker signed agreement stating they are an independent contractor is not factored into analysis because purpose of FLSA is to protect workers by overriding contractual relations).

44. *See, e.g.*, *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1292 (3d Cir. 1991) (discussing importance of fact findings in determination of nature of working relationship).

45. *Verma*, 937 F.3d at 225.

46. *See id.* at 226.

47. *Verma v. 3001 Castor, Inc.*, No. 13–3034, 2014 WL 2957453, at \*4 (E.D. Pa. June 30, 2014), *aff’d*, 937 F.3d 221 (3d Cir. 2019).

48. *Verma*, 937 F.3d at 226.

49. *Verma*, 2014 WL 2957453, at \*10.

50. *Verma*, 937 F.3d at 224.

51. *Id.* at 229 (“Whether a worker is an employee or an independent contractor under the FLSA or PMWA is a mixed question of fact and law. . . . The fact component is the combination of disputed and undisputed facts that comprise the



six factors heavily favored the dancers being characterized as employees under the FLSA.<sup>52</sup> First, the court found that, despite some minor choices exercised by the dancers—such as the number of hours worked, which shifts to take, and the ability to accept and reject specific customers—Castor had “overwhelming” control over the manner in which work was performed.<sup>53</sup> This control extended to determining shift times, dictating the dancers’ appearances, selecting the songs, and especially setting the price on everything within the club.<sup>54</sup> Second, the court explained that the dancers’ control over their personal profits and losses based on their own personal efforts did not constitute “managerial skill” discussed in the second factor of the economic realities test.<sup>55</sup> These managerial skills are more entrepreneurial than “hustle” or “initiative” that a dancer or another worker in a generic employer–employee relationship may exhibit.<sup>56</sup> In its discussion of factor four of the test, the Third Circuit, in accordance with established precedent, dismissed Castor’s argument that “dancing skills” could be considered “special skills” that would indicate a worker’s ability to take up business by themselves.<sup>57</sup>

The Third Circuit decided factors three and six weighed in favor of treating the dancers as employees without much difficulty. The court found the minimal “investment” in stage time by the dancers paled in comparison to Castor’s investment in the business of the club.<sup>58</sup> Castor’s investment included maintenance of the premises, licensing fees, food and alcohol, and beyond.<sup>59</sup> Finally, Castor essentially conceded that the

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economic relations between the worker and the alleged employer.” (citation omitted)).

52. *Id.* at 232.

53. *Id.* at 230 (“On balance, the control factor weighs strongly in favor ‘employee’ status.”).

54. *Id.* The control analysis included less concrete facts as well the way the club “closely reviewed their attendance, appearance, demeanor, and customer service,” which could result in fines for the dancers. *Id.* at 225.

55. *Id.* at 231. The dancer earnings fluctuated only based on the amount of their tips. They did not have control over most of the revenue drivers like the rates for private dances or food prices. *Id.* at 225.

56. *Id.*; see also *McFeeley v. Jackson St. Entm’t, LLC*, 825 F.3d 235, 241 (4th Cir. 2016) (stating courts have almost “universally rejected” argument that dancers control their opportunities for losses and profits because they can “hustle” to increase tips and dance fees); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) (deciding night clubs play more significant roles in increasing dancer tips than dancers hustle or initiative).

57. *Verma*, 937 F.3d at 231 (“We refuse to recognize these as ‘special skills’ that weigh in favor of independent contractor status. Although we have not drawn a bright line between ‘special’ and other skills for purposes of our six-factor test, we do not believe ‘appearance,’ ‘social skills,’ and ‘hygiene’ qualify.”); see also *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 345 (5th Cir. 2008) (explaining general set of skills required for manager to effectively manage are not “specialized skills” because they are abilities common to all effective managers).

58. *Verma*, 937 F.3d at 231.

59. See *id.* The only “investment” by the dancers cited by Castor was their stage-rental fees each shift. *Id.*

dancers are an integral part of their business.<sup>60</sup> The court credited Castor for not attempting to argue that they were drawing customers with their food and drink offerings.<sup>61</sup> Not every factor, however, was decided so easily in the dancers' favor.

The fifth factor, addressing the degree of permanence of the working relationship, came down on Castor's side, supporting an independent contractor classification. The court recognized that the dancers, as a class, make up a particularly transient group.<sup>62</sup> According to the court, the average dancer worked only 14 of the possible 109 workweeks under examination at Castor's club.<sup>63</sup> Additionally, none of the twenty-two dancers in the class worked more than forty hours per week for Castor.<sup>64</sup> This suggests that the dancers likely take advantage of the fact that they are free to work at other venues, including any of Castor's local competitors.<sup>65</sup> The Third Circuit agreed with the district court by finding this factor favored Castor.<sup>66</sup> Nevertheless, the court downplayed any possible conflict in the final determination by citing prior Fourth and Fifth Circuit opinions that assigned very little weight to this specific factor under similar circumstances.<sup>67</sup>

The Third Circuit affirmed the rulings of the district court and sustained the jury verdict.<sup>68</sup> It found that after a holistic assessment, in which five of the six considered factors went in favor of the plaintiffs, this case was "not a hard one."<sup>69</sup> The one factor in favor of Castor did "not cut so strongly in that direction as to come close to outweighing the other five," and it stated these dancers were not independent contractors as a matter of "economic reality."<sup>70</sup>

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60. *Id.* at 232 ("The last factor weighs clearly in favor of an employee relationship. Castor markets the Club as an 'adult gentleman's club.' Its primary offering to customers is topless female dancers . . .").

61. *Id.* The court wryly commented that, "[t]o its credit, Castor does not argue that anyone comes to the Club for the food, drinks, or any reason other than to see the dancers." *Id.*

62. *See id.* at 231.

63. *Id.* at 231.

64. *Id.*

65. *Id.* at 231–32.

66. *Id.* at 232.

67. *See* *McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 244 (4th Cir. 2016) (downplaying degree of permanence factor in challenges brought by exotic dancers due to nature of their work); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) (reasoning although the dancers have impermanent relationship with club in question, this factor is not determinative).

68. *Verma*, 937 F.3d at 233.

69. *Id.* at 232 ("[W]e easily conclude the dancers were 'dependent upon the business to which they render service.'" (quoting *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991))).

70. *Id.*

## III. CRITICAL ANALYSIS

Although the circuit court appropriately applied the existing economic realities test in reaching a positive result for the class of dancers, this decision demonstrates serious flaws with the test and, more broadly, illustrates the impact of the lack of guidance from the FLSA on courts.<sup>71</sup> It is unclear which factors a court will focus most of its analysis on and which factors it will disregard with little more than a mention.<sup>72</sup> These inconsistencies in the application of an otherwise well-developed test result in difficulties for businesses that genuinely seek to operate with an independent workforce for legitimate reasons.<sup>73</sup> It is not only businesses that fall victim to this uncertainty, but also workers who benefit from the freedom and flexibility that comes with working independently outside the scope of a traditional employee–employer relationship.<sup>74</sup>

The Third Circuit in *Verma* produced positive results both legally and policy-wise for the class of dancers, especially for a profession that has historically been taken advantage of by their employers.<sup>75</sup> Other circuit courts have issued precedential opinions in cases involving employers unlawfully denying the right to a minimum wage and compensated overtime to classes of dancers—much like the class in *Verma*.<sup>76</sup> The Third Circuit in *Verma* accurately applied and conformed with other circuit courts' reasoning in these similarly situated cases. Nevertheless, courts should not have to conduct an elaborate balancing test in order to simply classify a worker under an already existing statute.

The main problem for courts, businesses, and workers originates from the lack of clarity in the FLSA. The area of labor and employment has

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71. Carlson, *supra* note 19, at 298–99 (emphasizing difficulty courts have in relaying FLSA guidance).

72. *Id.* at 335 (expressing concern about unpredictability of judicial decision resulting from ambiguous working relationships and lack of clear guidance).

73. Margot Roosevelt, *Are You An Employee or a Contractor? Carpenters, Strippers and Dog Walkers Now Face That Question*, L.A. TIMES (Feb. 23, 2019, 5:00 AM), <https://www.latimes.com/business/la-fi-dynamex-contractors-20190223-story.html> [permalink unavailable] (discussing how law-abiding business owners are struggling to interpret employer–employee relationship).

74. *Id.* (discussing barber who started working as independent contractor because it allowed them to take college classes while working, but now, as an employee, makes less money per hour and are required to work nine-hour days).

75. See Erin Mulvaney & Andrew Wallender, *Strippers Winning Employee Status Challenges Gig Economy's Norms*, BLOOMBERG L. (Oct. 21, 2019, 6:04 AM), <https://news.bloomberglaw.com/daily-labor-report/strippers-winning-employee-status-challenges-gig-economys-norms> [<https://perma.cc/J9C7-HYE4>] (“Exotic dancers generally don’t get paychecks. . . . And they’re not guaranteed anything. They have no rights to minimum wage or overtime. They can’t sue for sexual harassment or discrimination, or form a union. That’s because the strip club business is typically built on classifying its workers as contractors rather than employees.”).

76. See, e.g., *McFeeley v. Jackson St. Entm’t, LLC*, 825 F.3d 235, 241 (4th Cir. 2016); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993).

seen an increase over time in rules and statutory guidance.<sup>77</sup> A greater number of codified standards for people to reference usually results in more clarity and predictability.<sup>78</sup> Federal labor and employment law is one of the more robust statutory areas beyond the FLSA, with crucial statutes such as the Occupational Health and Safety Act (OSHA), the Employee Retirement Income Security Act (ERISA), the National Labor Relations Act (NLRA), and numerous others that regulate workplaces. It is incumbent upon the legislature to rectify this problem with clearer statutory guidelines.<sup>79</sup> The guidelines do not necessarily have to be purely definitional. It may be difficult to succinctly describe or differentiate between the traits an “employee” may exhibit as opposed to an “independent contractor” in a few lines of statutory text, but as it stands now, the FLSA provides nothing more than a circular description of “employee.”<sup>80</sup> This difficulty is precisely why the courts, and those directly affected by the laws, deserve additional guidance.

Some states within the Third Circuit have been tackling this issue themselves and could serve as a valuable guide for reform at the federal level. Specifically, New Jersey aggressively tackled employee misclassification issues with a spate of new bills in 2019 and 2020.<sup>81</sup> In particular, a New Jersey bill introduced in November 2019 attempted to clarify the distinction between employee and independent contractor by implementing a default rule.<sup>82</sup> If New Jersey legislature passed the bill, all individuals permitted or suffered to work would be considered employees for the purposes of state employment laws.<sup>83</sup> To consider a worker as an independent contractor, the bill requires that the worker meet three factors (otherwise known as the “ABC” test):

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77. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 378 (2002) (“Until the mid-1960s, the [National Labor Relations Act] and the Fair Labor Standards Act were the only two federal statutes that comprehensively regulated the workplace. That situation has changed dramatically as Congress has adopted a host of more recent employment-related statutes.” (footnote omitted)).

78. See Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382 (1985) (“[A] rule has a hard empirical trigger and a hard determinate response.”). Unlike legal standards, which include some level of judicial discretion, parties may easily predict the outcome in the event of a violation of a rule. See *id.* at 382–83.

79. See Carlson, *supra* note 19, at 368 (“Clear rules and equitable coverage demand more than outdated nineteenth century notions of status.”).

80. See *id.* at 296 (addressing circular definition of “employee” in FLSA).

81. See Gene Marks, *New Jersey Laws Will Make It Harder for Small Businesses to Use Independent Contractors*, PHILA. INQUIRER, <https://www.inquirer.com/economy/new-jersey-independent-contractors-law-small-business-20200226.html> [<https://perma.cc/J4Q2-UF6J>] (last updated Feb. 26, 2020).

82. See S. 4204, 218th Leg. (N.J. 2019).

83. See *id.* (“[T]he bill provides that, for the purposes of all State employment laws, individuals who are suffered or permitted to work are employees, not independent contractors, and are subject to the provisions of those laws, and entitled to all remedies for any violations of those laws . . .”).

- a. The individual has been and will continue to be free from control or direction over the performance of the service, both under contract of service and in fact; and
- b. The individual's service is either outside the usual course of the business for which such service is performed, or the work is performed outside of all the places of business of the enterprise for which such service is performed; and
- c. The individual is customarily engaged in an independently established trade, occupation, profession or business.<sup>84</sup>

Obvious parallels exist between the ABC test and the economic realities test. The proposed New Jersey model, however, provides far more effective guidance to courts than the current state of the FLSA. The default classification as a basis for all employment relationships not only provides a level of clarity and certainty for the employee and employer, but also forces the employee and employer to be aware of the exceptions. Additionally, the three factors are available—plain in the statute—and are more succinct than the economic realities test. The New Jersey model is also superior in application. Even if an employer is aware of the factors in an economic realities analysis, the result remains difficult to predict because of the lack of clarity in the balancing of the test.<sup>85</sup> Conversely, the ABC test clearly states that employer must affirmatively prove all three factors for the “independent contractor” designation to be valid.”<sup>86</sup>

States within the Third Circuit have received push back for some of these attempts at reform, but they are generally far less radical than recent changes in other states.<sup>87</sup> The California Supreme Court set a new test in April 2018 in *Dynamex Operations West, Inc. v. Superior Court*<sup>88</sup> that assumes any worker is an employee if (1) their job is central to a company's core business, or (2) their boss directs how work is accomplished.<sup>89</sup> This immediately altered the classification of a massive number of workers across industries from construction workers and truckers to coders and hairdressers.<sup>90</sup> Even if it is unlikely that the Supreme Court would alter the FLSA with a sweeping decision, Congress could still examine state-level changes and craft a better federal policy. Statutory changes like that of New Jersey can serve as a guidepost for legislators seeking to effectuate change.

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84. *Id.*

85. See *supra* notes 71–74 and accompanying text (discussing impact of discretion in application of test).

86. S. 4204, 218th Leg. (N.J. 2019).

87. For further discussion about recent attempts to reform in other states, see *supra* notes 81–84 and accompanying text.

88. 416 P.3d 1 (Cal. 2018).

89. See *id.* at 40.

90. See Roosevelt, *supra* note 73 (analyzing impact of *Dynamex* decision on California workers).

## IV. IMPACT

The decision in *Verma* resulted in overwhelming positive change for the class of dancers. Data shows that, since the decision, dancers have been leading a recent charge against strip clubs for employees' rights beyond the dancers who brought suit.<sup>91</sup> Hundreds of workers have sued alleging misclassification, and although few have made it to trial, dancers have often emerged victorious—including three appellate court victories.<sup>92</sup> These cases, including *Verma*, may serve as a leading indicator for millions of gig economy workers taking up the same battle.

The gig economy continues to grow in the United States according to every traceable metric, though new and complex job classifications added each year make it more difficult to track.<sup>93</sup> Multiple research firms have confirmed the rise. The ADP Research Institute reports that in the past ten years (2010–2019), the share of gig workers in organizations has grown by 15%, now registering at one in six workers in a given organization.<sup>94</sup> That means there are six million more gig workers than a decade ago, and these metrics do not include seasonal or side jobs.<sup>95</sup> The Brookings Institute has looked specifically at these more difficult to trace workers by analyzing the “rides and rooms” industries.<sup>96</sup> Brookings identified millions of “nonemployer firms” that comprise of individuals earning a living by themselves through apps like Uber and Airbnb.<sup>97</sup> The number of these “businesses” has risen to nearly twenty-four million in 2014.<sup>98</sup> This rise has implications within the Third Circuit, as the Philadelphia metro area has seen a rise of over 30% in the “rides” industry and 6% in

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91. See Mulvaney & Wallender, *supra* note 75 (“Hundreds of dancers have sought to change this [independent contractor] model, outlined in a surging of lawsuits in recent years. The cases—filed at a rate of one every four days so far [in 2019]—argue such common practices leave workers vulnerable . . .”).

92. *Id.*

93. Ian Hathaway & Mark Muro, *Tracking the Gig Economy: New Numbers*, BROOKINGS (Oct. 13, 2016), <https://www.brookings.edu/research/tracking-the-gig-economy-new-numbers/#cancel> [<https://perma.cc/G85R-9FQM>] (discussing complexity and challenge of tracking expansion of gig economy).

94. *ADP Research Institute Report Reveals the Gig Workforce is Filling a Void in the Tight Labor Market*, ADP RES. INST. (Feb. 4, 2020, 8:30 AM), <https://www.prnews.wire.com/news-releases/adp-research-institute-report-reveals-the-gig-workforce-is-filling-a-void-in-the-tight-labor-market-300998593.html> [<https://perma.cc/KMM7-SWCW>].

95. Greg Iacurci, *The Gig Economy Has Ballooned By 6 Million People Since 2010. Financial Worries May Follow*, CNBC, <https://www.cnbc.com/2020/02/04/gig-economy-grows-15percent-over-past-decade-adp-report.html> [<https://perma.cc/5TFD-8SWX>] (last updated Feb. 4, 2020, 1:02 PM).

96. See Hathaway & Muro, *supra* note 93 (predicting successful litigation in exotic dancer cases may lead to litigation in similarly situated industries).

97. See *id.* (determining most “businesses” in rides and rooms industries are sole proprietors).

98. *Id.*

the “rooms” industry.<sup>99</sup> Additionally, the Pittsburgh metro area has seen a rise of 85% and 11% in those industries respectively.<sup>100</sup>

Workers in both industries likely face the next frontier of employment rights that dancers currently wage against strip clubs. In fact, some attorneys who have succeeded in these strip club misclassification suits have turned their focus on the Lyfts and Instacarts of the world.<sup>101</sup> Uber carefully crafts their working relationships with their contractors around FLSA standards and likely has been framing these relationships around decisions like *Verma* for guidance on circuit court reasoning. Uber has held strong in its belief that their drivers are independent contractors because the drivers have the freedom to decide where and when to use their platform.<sup>102</sup> They also stress the fact that drivers have the freedom to work for competitors and must provide their own car.<sup>103</sup> These points clearly mirror the economic realities test and demonstrates Uber’s strategy for taking on challengers in the courts.

So far, the Third Circuit has demonstrated a willingness to carefully scrutinize gig employment relationships. In March 2020, the Third Circuit vacated and remanded a district court ruling that granted summary judgment in favor of Uber.<sup>104</sup> The court found genuine issues of material fact regarding the economic realities test, specifically pertaining to the “right to control” and “opportunity for profit and loss” factors.<sup>105</sup> Concerns about these specific factors draw direct comparisons to *Verma*, indicating that these cases are more alike than they are different. These actions by the Third Circuit provide a valuable glimpse into how these cases may proceed for Uber and many other gig companies, but deep uncertainty remains for both sides. The FLSA’s ambiguities will continue to create a vacuum of uncertainty for workers and industries that will only worsen as novel economic relations continue to grow and play a larger role in the economy.

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99. *Id.* The “Philadelphia metro area” for purposes of this research included parts of Pennsylvania, New Jersey, Maryland, and Delaware.

100. *Id.*

101. *See, e.g.*, Lauren Smiley, *What Strippers Can Teach Uber*, MATTER (Apr. 20, 2015), <https://medium.com/matter/what-strippers-can-teach-uber-1f5b15e5b427> [<https://perma.cc/87SK-L57Y>].

102. *See* Jacob Passy, *Uber Doesn’t Want Its Drivers to Be Employees—Here’s Why That Matters*, MARKETWATCH (Apr. 15, 2019, 7:30 PM), <https://www.marketwatch.com/story/uber-doesnt-want-its-drivers-to-be-employees-heres-why-that-matters-2017-11-13> [<https://perma.cc/HK98-TWM3>] (explaining Uber’s reasoning for classifying workers as independent contractors).

103. *Id.*

104. *See* *Razak v. Uber Tech., Inc.*, 951 F.3d 137 (3d Cir. 2020).

105. *Id.* at 145–47.