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SUPREME COURT OF THE STATE OF WASHINGTON

RANDY ANFINSON, JAMES GEIGER and STEVEN HARDIES,
individually and on behalf of others similarly situated,

Respondents,

v.

FEDEX GROUND PACKAGE SYSTEMS, INC.,

Petitioner.

FILED
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STATE OF WASHINGTON
[Signature]

AMICUS CURIAE BRIEF OF THE
DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

This case involves the question of how to determine whether an individual is an employee under the Washington Minimum Wage Act, Chapter 49.46 RCW (MWA). RCW 49.46.010(3) defines “employee” as “any individual employed by an employer” RCW 49.46.010(2) defines “employ” as “to permit to work.” These definitions do not articulate a test to use to determine whether there is an employment relationship.

For over a half of a century, federal authority has looked not to the right to control test, but rather to the economic realities of the relationship between the worker and the business in order to determine whether the worker is in fact economically dependent on the business and therefore an employee.¹ The Department of Labor & Industries (L&I) uses the economic realities test developed under the analogous federal minimum wage law, the Fair Labor Standards Act (FLSA), to determine whether an individual is an employee or an independent contractor. L&I uses the economic realities test because it best fulfills the remedial purposes of the MWA to protect workers from substandard wages.

II. IDENTITY AND INTEREST OF AMICUS

L&I is responsible for administering and enforcing “all laws

¹ The history of the right to control test is discussed at length in Plaintiffs’ briefs and will not be repeated here. For instance *see* Br. Appellants at 17-20.

respecting the employment and relating to the health, sanitary conditions, surroundings, hours of labor, and wages of employees employed in business and industry.” RCW 43.22.270(4). L&I interprets, administers, and enforces the MWA. RCW 49.48.040.

L&I routinely receives inquiries from employers and employees regarding how to determine when a worker is an employee or an independent contractor for purposes of the MWA. Additionally, L&I routinely receives complaints from workers alleging that they were misclassified as independent contractors when they should have been treated as employees under the MWA. In response, L&I investigates these claims through the Wage Payment Act and attempts to resolve the claim through investigation and enforcement. RCW 49.48.083.

L&I provides this amicus brief to inform the Court about its interpretation of the statutory definition of “employee” under the MWA and the basis for its interpretation. L&I has a significant interest in ensuring that the case law interpreting the definition of “employee” under the MWA is consistent and predictable².

III. SPECIFIC ISSUE ADDRESSED BY AMICUS CURIAE

Whether the economic realities test is the appropriate test to determine whether a worker is an employee under the MWA.

² L&I provides this amicus for the limited purpose of addressing the proper interpretation of the definition of “employee” under the MWA.

IV. ARGUMENT

A. The Economic Realities Test Is the Correct Standard to Apply to Determine Whether a Worker Is an Employee Under the MWA or Whether the Worker Is an Independent Contractor

The United States Supreme Court and all federal circuits use the economic realities test to determine if a worker is in fact economically dependent on the business and is therefore an employee under the FLSA. See *Goldberg v. Whitaker House Coop, Inc.*, 366 U.S. 28, 32-33, 81 S. Ct. 933, 6 L. Ed. 2d 100 (1961); *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2nd Cir. 1988); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382-83 (3rd Cir. 1985); *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304-05 (4th Cir. 2006); *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008); *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984); *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534-35 (7th Cir. 1987); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989); *Brouwer v. Metro. Dade Cy*, 139 F.3d 817, 819 (11th Cir. 1998).

This Court has a long history of looking to federal authority for guidance in interpreting and defining terms in the MWA given that the

MWA is based on the FLSA.³ *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 862 fn.6, 93 P.3d 108 (2004); *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 885, 64 P.3d 10 (2003); *Clawson v. Grays Harbor Coll. Dist. No. 2*, 148 Wn.2d 528, 539, 61 P.3d 1130 (2003); *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000); *Drinkwitz v. Alliant Techsys, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000).

Both the FLSA and the MWA define the term “employee” broadly and identically. “Employee” means “any individual employed by an employer[.]” RCW 49.46.010(3); 29 U.S.C. § 203(e)(1). Likewise, the FLSA and the MWA have nearly identical definitions of the term “employ.”⁴

Since 1947, federal authority has looked beyond the right to control, the test originally used to determine employment relationship, and instead has looked to the circumstances of the whole activity between the worker and the putative employer in determining whether the worker is in fact an employee under the FLSA. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947) (recognizing the

³ Washington enacted the MWA in 1959. Laws of 1959, ch. 294. It was generally patterned after FLSA, 29 U.S.C. § 201, which was enacted in 1938. See *Drinkwitz v. Alliant Techsys, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000).

⁴The FLSA defines “employ” as “to suffer or permit to work.” 29 U.S.C. § 203(g). The MWA defines “employ” as “to permit to work.” RCW 49.46.010(3). Because “suffer” means “to allow or permit” (*Black’s Law Dictionary* 1570 (9th ed. 2009)), the two definitions of “employ” are substantively identical.

FLSA was passed to eliminate low wages and long hours that were detrimental to the health and well-being of workers and using circumstances of the whole activity to determine employment status to further those goals). The Court rejected the more narrow right to control test when determining employment status under the FLSA, the Social Security Act, and the National Labor Relations Act in order to better accomplish the purposes of the legislations. *Goldberg*, 366 U.S. at 32-33 (FLSA); *Nat'l Labor Relations Bd. v. Hearst Publ'ns*, 322 U.S. 111, 126-28, 64 S. Ct. 851, 88 L. Ed. 1170 (1944) (National Labor Relations Act); *United States v. Silk*, 331 U.S. 704, 712-14, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947)⁵ (“[A] constricted interpretation [employee under the Social Security Act] . . . would only make for a continuance . . . of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid immediate burdens at the expense of the benefits sought by the legislation.”).

The Court turned to the economic realities test to advance the purposes of social legislation:

[T]he relationship of employer-employee . . . was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his

⁵ Both *Hearst* and *Silk* were overruled in part in that Congress subsequently changed the definition of “employee” under the NLRA and the Social Security Act. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324-25, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992).

business by the worker or workers. Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.

Bartels v. Birmingham, 332 U.S. 126, 130, 67 S. Ct. 1547, 91 L. Ed. 1947 (1947) (Social Security Act); see *Goldberg*, 366 U.S. at 32-33.

Just as with the FLSA, the MWA is designed to set minimum standards for wages and to protect employees from substandard wages. This protects the “health, safety and welfare” of Washington citizens. RCW 49.46.005. Consistent with its remedial purpose, this Court has directed courts construing the MWA to heed the “terms and spirit” of the act. *Drinkwitz*, 140 Wn.2d at 301. This Court has recognized the Legislature’s policy declaration in RCW 49.46.005 as emphasizing the “importance of minimum wage protections for Washington employees in order to encourage Washington employment opportunities.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 711, 153 P.3d 846 (2007). Adoption of the economic realities test best furthers the remedial purposes of the MWA.

In order to determine whether a worker is an employee under the MWA, the economic realities test is superior to the right to control test because it takes into account the myriad factors that determine an employer-employee relationship. The right to control is but one factor in

this test. Compare this to the right to control test, which rests exclusively on whether the putative employer controls or has the right to control the worker. This distinction is not merely semantic and has economic consequences for workers and employers.

The economic realities test determines whether a worker is in business for his or herself or is dependent on someone else's business:

The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves.

Brock, 840 F.2d at 1059. This is the appropriate focus because if a worker is not economically dependent on someone else's business as a matter of economic reality, then it is not necessary to extend the protections against substandard wages to that worker. If, however, workers depend upon someone else's business for the opportunity to render service and are not in business for themselves, then the Legislature has mandated minimum standards to protect these workers. *See* RCW 49.46.005.

B. The Economic Realities Test Is a Multi Factor Test Where No One Factor Is Dispositive

The economic realities test used by the majority of the federal circuits consists of six factors, applied on a case-by-case basis:

- 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;

- 2) the worker's opportunity for profit or loss depending upon the worker's managerial skill;
- 3) the worker's investment in equipment or materials required for the task, or employment of helpers;
- 4) whether the service the worker renders 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.

Sureway, 656 F.2d at 1370; *see Brock*, 840 F.2d at 1058-59; *DialAmerica*, 757 F.2d at 1382-83; *Schultz*, 466 F.3d at 304-05; *Brandel*, 736 F.2d at 117; *Lauritzen*, 835 F.2d at 1534-35; *Dole v. Amerilink Corp.*, 729 F. Supp. 73, 75-76 (E.D. Mo. 1990); *Snell*, 875 F.2d at 805. This is the same test used by L&I to determine employment status.⁶

The existence and degree of each factor is a question of fact, while the conclusion to be drawn from these factors is a question of law. *Brock*, 840 F.2d at 1059. Because no single factor is determinative, the court's appraisal depends on assessing the "circumstances of the whole activity." *Rutherford*, 331 U.S. at 730.

⁶ WAC 296-126-002(2)(c), which is related to a different act, the Industrial Welfare Act, defines "employee" and excludes from that definition "[i]ndependent contractors where said individuals control the manner of doing the work and the means by which the result is to be accomplished." L&I does not use this narrow language for the purpose of determining whether a worker is an employee under the MWA because of the similar purposes, language and shared history of the FLSA and the MWA. Likewise, L&I does not use the right to control test used in *Ebling Gove's Cove, Inc.*, 34 Wn. App. 495, 663 P.2d 132 (1983), which applied it to a dispute arising under RCW 49.52 and not under the MWA.

Similar to the courts, the Department engages in a weighing analysis of all the factors rather than limiting the consideration to just one factor. *See e.g. Brock*, 840 F.2d 1054; L&I Economic Realities Technical Bulletin (Technical Bulletin).⁷ For instance, the more control an employer exerts control over the worker and work activities, the more likely the worker is an employee. *See e.g. Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979). However this is not dispositive.

L&I directs its staff in the Technical Bulletin to consider and weigh all six factors in combination with each other. In this way, the Department considers the totality of the circumstances rather than isolated facts to determine whether the worker is economically dependent upon the business. Further, L&I disagrees with FedEx Ground's (FedEx) assertion that L&I's Technical Bulletin "actually supports Instruction 9 by recognizing that control is the most important factor of the non-exclusive factors[.]" FedEx Petition For Review at 10. FedEx misquotes the Technical Bulletin as stating the first factor on the degree of control "is the *most* important" *Id.* (emphasis added). The Technical Bulletin actually states "case law suggests that the first factor on the degree of

⁷ Plaintiffs filed the Technical Bulletin with the Court of Appeals through its Statement of Additional Authorities dated July 12, 2010. L&I attaches a copy of its current Technical Bulletin, which has only one minor difference, the current version does not contain "DRAFT DATED 4/25/2008" which is listed on the version filed by plaintiffs.

control by the business over the worker is *very* important.”⁸ Technical Bulletin (emphasis added). The Bulletin reinforces throughout the document that all factors must be considered and weighed in combination with each other and expressly does not place more weight on any one factor. Technical Bulletin at 1, 3-8.

The facts related to one factor may militate towards a holding that a worker was an independent contractor, but the court may nonetheless hold that the worker was an employee, or vice versa. *See, e.g., DialAmerica*, 757 F.2d at 1387 (even though workers were generally subject to little supervision in their work as home researchers, court applying the test as a whole determined they were employees). Even where there is a relatively little control, an individual may still be an employee. *See id.*

Particular deference is given to an agency’s interpretations of the statutes it administers that are within the agency’s specialized expertise.

⁸ The Technical Bulletin provides:

The question to be is[sic] answered is: is the worker economically dependent on the business, or is the worker, as a matter of economic fact, in business for him or herself? This relationship can be difficult to determine. The Economic Realities Test includes six factors that should be considered in each case. An evaluation of the relationship cannot be based on isolated factors or upon a single characteristic, but depends upon all of the circumstances. All factors must be considered and weighed in combination with each other. Even the obvious presence or absence of an individual factor is not determinative, although case law suggests that the first factor on the degree of control by the business over the worker is very important.

Schneider v. Snyder's Foods, Inc., 116 Wn. App. 706, 716, 66 P.3d.640 (2003). As the agency charged with interpreting, administering, and enforcing the MWA, L&I asks this Court to hold that the economic realities test best furthers the purposes of the MWA and is the proper test to apply to determine employment status under the MWA.

Use of the right to control test is in conflict with the goals of the MWA because it results in a narrower application of the MWA. The economic realities test is a more inclusive test better suited to protecting Washington workers from substandard wages.

C. The Trial Court's Instruction Nine Did Not Properly Apply the Economic Realities Test But Instead Improperly Focused on Only One Factor (Control) As Determinative of the Employment Status

The Court of Appeals correctly held that instruction nine improperly focused on only one factor as determinative of the employment status and did not apply the economic realities test. Instruction nine specifically instructed jurors to determine FedEx's control over the details of the plaintiffs' performance of the work.

You must decide whether the class members were employees or independent contractors when performing work for FedEx Ground. This decision requires you to determine whether FedEx Ground controlled, or had the right to control, the details of the class members' performance of the work.

CP 2195 (emphasis added). The instruction then informed the jurors how to decide whether FedEx controlled or had the right to control the details of the class members' performance of the work:

In deciding *control or right to control*, you should consider all the evidence bearing on the question, and you may consider the following factors, among others[.]

Id. (emphasis added). The instruction then listed eight factors for the jury to consider and stated, “[n]either the presence nor the absence of any individual factor is determinative.” *Id.* The instruction did not mention economic realities or dependence.

The economic realities test assesses whether the worker is an employee as a matter of economic reality. There can be little control over the workers' performance of the work but the worker nonetheless can be an employee. *See DialAmerica*, 757 F.2d at 1387. Here, however, the court subsumed the various “factors” under the general umbrella of “control,” which is inconsistent with the proper application of the economic realities test.

Here, the test used was the right to control test. Using the instruction, the jury considered the worker's opportunity for profit or loss to determine if FedEx controlled or had the right to control the performance of the work. Likewise, using the instruction, the jury considered whether the service rendered was an integral part of FedEx

Ground's business to determine if FedEx controlled or had the right to control the performance of the work. None of these factors were considered to determine if the worker was economically dependent on the business as a matter of economic reality. In the economic realities test, all of the factors are evaluated. To consider the factors listed in the instruction for the purpose of determining "control" is inconsistent with this requirement.

To apply instruction nine means that the control factor is dispositive. Instruction nine narrows the definition of employee under the MWA, which is contrary to the mandate to liberally construe this remedial law for the benefit of the employee. *See Drinkwitz*, 140 Wn.2d at 301.

V. CONCLUSION

L&I asks this Court to hold that the economic realities test is the correct standard to apply when determining whether workers are employees or independent contractors under the MWA.

RESPECTFULLY SUBMITTED this 9th day of January, 2012.

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Washington State Department of
Labor & IndustriesEmployment Standards Program
TECHNICAL BULLETIN #11**November 10, 2009****Economic Realities Test****Introduction & Disclaimer**

This technical bulletin is designed to aid department staff in regard to the employer/employee relationship between workers and businesses. This bulletin is intended as a guide in the interpretation and application of relevant statutes, regulations, and policies. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

Not all workers are employees as they may be independent contractors. Businesses may want to enter into an independent contractor relationship with workers so that the workers are not considered employees under wage and other laws. These businesses need to be sure they have a true independent contractor relationship with those workers. If they do not, the workers could be determined to be employees and subject to the Minimum Wage Act, RCW 49.46, and other laws. The L&I Employment Standards Program offers this Economic Realities Test to help staff evaluate whether there is an independent contractor or employer/employee relationship.

The question to be answered is: is the worker economically dependent on the business, or is the worker, as a matter of economic fact, in business for him or herself? This relationship can be difficult to determine. The Economic Realities Test includes six factors that should be considered in each case. An evaluation of the relationship cannot be based on isolated factors or upon a single characteristic, but depends upon all of the circumstances. All factors must be considered and weighed in combination with each other. Even the obvious presence or absence of an individual factor is not determinative, although case law suggests that the first factor on the degree of control by the business over the worker is very important.

Questions have been included for each factor that should be asked to help evaluate the relationship between the business and worker. These questions are not inclusive of all that might need to be asked. If application of the Economic Realities Test does not reveal a clear employer/employee or independent contractor relationship, please contact L&I's Central Office.

Factor 1: The degree of control that the business has over the worker

- *To what extent does the business control the worker?*
 - Is there a written contract setting out the terms and conditions of the work to be done?
 - Does the business determine the rate and method of pay?
 - Does the business maintain employment records, payroll records, tax records, or time cards?
- *To what extent does the worker operate independently?*
 - Did the worker present a bid or other document offering his or her services as an independent contractor or contractor or business?
 - Does the worker invoice the business on the worker's own invoice created or printed for that purpose?
- *Does the business control when the work is performed?*
 - Does the business set, supervise and control work schedules?
 - Does the worker consult daily with the business about his or her daily schedule?
 - Does the worker have to ask permission to take a day off?
 - Does the worker have any leave or benefit provided if he or she takes a day off?
- *Does the business control where the work is performed?*
 - Where is the work performed?
 - Who decides where the work is performed?
- *To what extent does the business supervise the worker?*
 - Does the business control the scope, manner, quality, and by whom the work is performed?
 - Can the worker perform the work based on the worker's own skill and ingenuity rather than on a required format from the business?
 - Can the business discharge employees of the worker?
 - What percentage of the worker's time is supervised?
 - Where is the worker supervised?
 - Does the business evaluate the worker's performance?
 - To what extent can the business discipline the worker for poor performance?
 - Is the worker required to attend meetings with other workers? If so, what is discussed at the meetings?
 - Can the business cancel the contract at its discretion? If so, on how much notice?
- *Does the business have the power to hire, fire, or transfer the worker?*
- *Can the worker employ helpers?*
 - Must the employees of the worker be approved by the business?
 - Is it necessary for the worker to hire helpers to do part or all of the work?
- *Does the business impose any rules or standards of conduct?*
 - If so, what rules are imposed by the business?
 - Is there a consequence if the worker breaks a rule?
 - Does the business have the right to discipline the worker for breaking rules?
 - Is there a dress code?

- *Does the business prohibit the worker from working for competitors or other businesses at the same time?*

Case law suggests that the more control the business exerts over the worker and work activities, the more likely the worker is an employee. However, all six factors should be considered and weighed in combination with each other in each case.

Factor 2: The worker's opportunity for profit or loss dependent on the worker's managerial skill

- *Does the worker exercise managerial skill in controlling business expenses?*
 - Does the worker consider him or herself a business?
 - Does the worker have a business license?
 - Does the worker have to register with the IRS or a state agency for tax/business purposes?
 - Does the worker file his or her own taxes?
 - Does the worker keep his or her own books or records?
 - Does the worker have a place of business outside his or her home?
 - Does the worker invest in the business?
 - Does the worker deduct business expenses?
 - Does the worker lease/rent equipment or space from the business?
 - Does the worker or the business control advertising?
 - Does the worker or the business control maintenance of the facilities?
 - Does the worker or the business control aesthetics of the facilities?
 - Does either the worker or the business accept the risk of nonpayment for services?
- *Does the worker have the opportunity to earn more?*
 - Is the worker allowed to set his or her own rates/prices for services?
 - Is the worker able to increase his or her commission based on their own initiative?
 - Does the business cap compensation?
- *How is the worker paid?*
 - Is the worker paid on a flat-fee basis?
 - Is the worker paid on a set rate?
 - Is the worker paid on a piece rate?
 - Is the worker paid on a commission basis?
- *Does the worker have the opportunity to increase the amount of work performed?*
 - Can the worker increase profit through increased efficiency or skill?
 - Can the worker increase efficiency through investment in equipment?
 - Can the worker seek new customers through advertising and referrals?
 - Is the worker responsible for obtaining new customers?
 - Can the worker make his or her own appointments with customers?
 - Can the worker refuse to serve a customer/client?
 - Can the worker keep his or her own customers/clients?

Case law suggests that when the worker's opportunity for profit is not limited by a business, and the worker controls his or her own business expenses, the worker is more likely an independent contractor. However, all six factors should be considered and weighed in combination with each other in each case.

Factor 3: The worker's investment in equipment or material

- *Whose responsibility is it to supply the equipment or material for the job?*
- *Is the worker's investment in equipment and materials substantial?*
 - Does the worker supply his or her own tools or equipment?
 - Does the worker supply his or her own materials?
 - Does the worker pay rent for using the business's facility?
- *Does the worker advertise independently?*
 - What name or logo is on any advertisements or business cards?
 - Does the worker control the content of the advertising?
- *How significant is the worker's investment in relation to the business' investment?*
 - Does the business supply the necessary equipment or materials for the worker?
 - Does the business provide transportation?
 - Does the business provide advertising/business cards/website for the worker?
 - Does the business control the content of the advertising?

Case law suggests that when the worker's investment in equipment or materials is substantial, the worker is more likely an independent contractor. However, all six factors should be considered and weighed in combination with each other in each case.

Factor 4: The degree of skill required for the job

- *What is the worker's job title?*
- *What are the worker's job duties?*
- *Does the worker show self sufficiency or independence?*
 - Does the worker use specialized skills in an independent manner?
 - Is the worker particularly skilled at the work he or she is hired to perform?
 - Does the worker perform work of an independently established trade (such as carpentry, construction, electrical) of the same nature as the business?
 - Does the business tell the worker when, where, and/or how to do the work?
 - How much initiative, skill, judgment or foresight is required by the worker for him or her to produce quality work?
 - Does the worker perform a skill at a high enough level that the worker could run his or her own business?
- *What level of education, training, and experience is required for the job?*
 - What is the level of education, training, and experience of the worker?
 - Does the worker require certification or a license to do the job?
 - Did the worker start with little or no job experience or skills?
 - Does the worker receive any on-the-job training by the business?
 - If so, how extensive is the training?

Case law suggests that when a worker brings special skills to a job and employs those skills in an independent manner, the worker is more likely an independent contractor. However, all six factors should be considered and weighed in combination with each other in each case.

Factor 5: The degree of permanence of the working relationship

- *How permanent is the working relationship?*
 - Is the working relationship continuous (more permanent) or of a limited term?
 - How long has the worker worked for the business?
 - Is the work seasonal in nature?
 - Does the worker have to give notice before ceasing work for the business?
 - Can the business discharge the worker without notice?
- *Could the worker remain in business if his or her relationship with the business ended?*
 - Could the worker continue to do the same type of work after he or she stopped working for the business?
 - Is the worker allowed to work for other businesses within the same industry?
 - Does the worker work for other businesses? If so, how many?
 - How often does the worker work for other businesses?
 - Can the worker take his or her own clients with him or her if the worker no longer works for the business?

Case law suggests that when a limited term working relationship exists, the worker is more likely an independent contractor, unless the nature of the work is seasonal. However, all six factors should be considered and weighed in combination with each other in each case.

Factor 6: The degree to which the services rendered by the worker are an integral part of the business

- *To what extent are the services performed by the worker an integral part of the business?*
 - Does the worker perform the primary type of work that the business performs for its clients or customers?
 - How often does the worker perform the primary work of the business?
 - Does the worker regularly perform tasks that are part of the normal operations of the business?
 - Does the worker perform a discrete job that is one part of the business's overall process of production?
 - Does the worker perform work similar to that performed by employees of the business?
 - Does the worker supervise any of the business's employees?
 - Is the success or continuation of the business dependent on the performance of certain services by the worker?
 - What percentage of the business's revenue depends on services provided by the worker?

Case law suggests that when the services performed by a worker are integral to the business, the worker is more likely an employee. However, all six factors should be considered and weighed in combination with each other in each case.

Economic Realities Six-Part Test vs. Worker's Compensation and Prevailing Wage Six-Part Test:

This technical bulletin does not explore the six-part test used by the L&I Worker's Compensation Program or Prevailing Wage Program to evaluate whether a business must pay insurance premiums or prevailing wages for certain workers. The test used by those programs is governed under a different statutory scheme, RCW 51.08.195 and RCW 39.12.012.