COOPERATIVE OWNERSHIP AND THE FAIR LABOR STANDARDS ACT

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ABSTRACT

In some urban communities, people are coming together to fight food insecurity by opening cooperatively owned groceries in neighborhoods where traditional grocery stores have closed. Historically, some cooperatives require owners to work without pay for a few hours a week, a month, or a year as a way to foster solidarity and keep down labor costs. These owner-work programs raise legal issues, however, because generally the Fair Labor Standards Act (FLSA) requires for-profit cooperatives to pay their workers. Of course, every requirement has exceptions, and one potential exception that would allow cooperative owners to work at their grocery is classification as an owner rather than an employee covered by the FLSA. But the issue of whether a worker is an owner is much less often addressed than the issue of whether a worker is an independent contractor. The Department of Labor (DOL) and courts have not yet formulated a consistent test to govern the determination. This Article proposes a test drawing upon those traditional factors used to determine the economic reality of a worker's situation in the independent contractor setting and on other factors proposed by the DOL and courts. Each cooperative will be different, and the multi-factored test provides room to structure a cooperative in a manner that enables owners to work without pay. Generally, the thousands of consumer owners of a large cooperative grocery with a board of directors and professional management will be employees who must be paid. On the other hand, a small cooperative grocery run directly by the owners, who make financial and operations decisions, and work

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relatively independently of each other could decide not to pay any wages. Ultimately after considering all the factors, to work without pay the cooperative owners must be in business for themselves and choose to pay themselves nothing, like a sole proprietor, majority stakeholder in a closely held corporation, or true partner could.

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INTRODUCTION

Even before COVID-19 and the resultant high unemployment and nationwide shortages of some staples and foods, thousands of families living in cities throughout the United States suffered from food insecurity.[1] In some urban communities affected by food apartheid, residents have come together to form cooperatively owned groceries to substitute for the corporate groceries chains that have closed and to build wealth in the local communities.[2] Preserving or

1. *See* ALISHA COLEMAN-JENSEN ET AL., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2018, ECONOMIC RESEARCH REPORT NO. 270, 6, 15 (2019) (indicating that in 2018, 14.3 million households in the U.S. were food insecure, and 13.2% of households in principal cities were food insecure).

2. While many scholars use the term "food desert" to describe urban areas where grocery stores are absent and people have difficulty obtaining nutritious food, we use the word "food apartheid" to acknowledge that intentional redlining and disinvestment in these neighborhoods is the root cause of food insecurity. For examples of these initiatives, see generally Lori Burge & Elizabeth Underwood, *Makin' Groceries with New Orleans Food Co-op*, COOP. GROCER, Jan.–Feb. 2012, at 12; NuWaters Co-op, http://nuwaters.org/ [https://perma.cc/9A4R-Y9HG] (last visited Mar. 1, 2021); James Norton, *Cooperative Evolution: Food Coops like Seward and the Wedge Have Adapted Quickly During Troubled Times*, GROWLER (Aug. 4, 2020), https://growlermag.com/cooperative-evolution-food-coops-like-seward-and-the-wedge-have-adapted-quickly-during-troubled-times/ [https://perma.cc/N688-EYEB]; Brian Allnut, *A Black-Led Food Co-op Grows in Detroit*, CITYLAB (Jan. 21, 2019, 7:00 AM), https://www.bloomberg.com/news/articles/2019-01-21/a-black-owned-food-co-op-grows-in-detroit [https://perma.cc/46UT-34NN]; Amelia Robinson, *Gem City Market to Kick Off Construction with Block Party*, JOURNAL-NEWS (Sept. 19, 2019), https://www.journal-news.com/news/local/just-gem-city-

starting these community owned groceries is now even more imperative because traveling long distances on public transportation to reach a grocery store is a health risk. No one should have to risk their life to get to a grocery store.

Of course, cooperative groceries have existed for decades and are located in all types of communities—affluent, urban, and rural—throughout the United States.[3] Cooperatives are always designed to meet a community's needs, such as providing organic food, bulk food, or locally produced food, but they are not always designed to combat food apartheid.[4] Sometimes cooperative grocery owners require that each owner work for a small amount of time each week or month for the grocery.[5] These owner-work programs raise a wage and hour issue.[6] The Fair Labor Standards Act (FLSA) generally requires that employers, including cooperative groceries, pay a minimum wage to those who work for the business.[7] Because of the wage and hour issue, some food cooperatives abandoned their owner-work programs rather than risk engaging in potentially unlawful conduct by permitting owners to work without pay.[8]

Whether owners can rely on their own work is a key issue for cooperative groceries formed to combat food insecurity.[9] The profit margin in the grocery industry is low and contributes to the

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market-kick-off-construction-with-celebration-next-week/q95xFr3E6d9NMk3qxUtDZK/ [https://perma.cc/ZEY7-ZUWX]; Rachel Kurzius & Sasha-Ann Simons, *Residents in Southeast D.C. Look to Expand Food Options with Co-op*, WAMU (Apr. 23, 2019), https://wamu.org/story/19/04/23/residents-in-southeast-d-c-look-to-expand-food-options-with-co-op/ [https://perma.cc/ZG3M-36PV]; Leah Halliday & Michele Foster, *A Tale of Two Co-ops in Two Cities*, 9 J. AGRIC. FOOD SYS. & CMTY. DEV. 239, 239 (2020).

3. *See* UNIV. OF WISC. CTR. FOR COOPS., RESEARCH ON THE ECONOMIC IMPACT OF COOPERATIVES, 19–20 (2009).

4. *See* Andrew Zitcer, *Food Co-ops and the Paradox of Exclusivity*, 47 ANTIPODE 812, 813 (2015).

5. *See* Alexandra Schwartz, *The Grocery Store Where Produce Meets Politics*, NEW YORKER (Nov. 18, 2019), https://www.newyorker.com/magazine/2019/11/25/the-grocery-store-where-produce-meets-politics [https://perma.cc/54DN-YT2G]; *see also* Alana Joblin Ain, *Flunking out at the Food Co-op*, N.Y. TIMES (Oct. 23, 2009), https://www.nytimes.com/2009/10/25/nyregion/25coop.html [https://perma.cc/A36G-TD9R].

6. *See* Roland Hall & Bruce Mayer, *Updating Food Cooperative Member Labor Issues*, COOP. GROCER, Mar.–Apr. 2018, at 14.

7. *See, e.g.*, EMPLOYER'S GUIDE TO THE FAIR LABOR STANDARDS ACT § 245 (Susan Prince ed., Supp. May 2014); Hall & Mayer, *supra* note 6, at 14.

8. *See* Thane Joyal, *Who's Watching Member Labor in Retail Food Cooperatives*, COOP. GROCER, Jan.–Feb. 2012, at 26.

9. *See* Ain, *supra* note 5.

widespread grocery closures in urban areas.[10] While the cooperative grocery is not trying to make a profit, the owners are trying to keep the grocery open and ideally have surplus funds to invest in their community.[11] Cooperative owners rely on their own work to lower the cost of running the grocery. Some of these cooperative groceries hire local residents to work for a living wage and provide them training and benefits.[12] Training cooperative owners and employees in financial literacy, dispute resolution, leadership, and other skills needed to run a cooperatively owned business is costly. When owners donate this work without receiving pay, these costs—which are not incurred by other types of grocery stores—can be subsidized.[13]

Beyond the merely financial issue, a key component of a cooperative is that all owners are involved in decision-making and take an active role in operating the business.[14] Especially for cooperatives that are trying to build local wealth and equip residents to engage in leadership and advocate for structural change, the owners need opportunities to regularly work together and build networks and solidarity.[15] One cooperative grocery, or even a few, cannot solve the problems of food insecurity, disparate health outcomes, lack of affordable housing, or the many other effects of inequality on these

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10. *See* Tiffany C. Wright, *What Is the Profit Margin for a Supermarket?*, AZCENTRAL, https://yourbusiness.azcentral.com/profit-margin-supermarket-17711.html [https://perma.cc/93MY-554Q] (last visited Mar. 1, 2021); *see also* Mary Ellen Biery, *The 15 Least Profitable Industries in the U.S.*, FORBES (Oct. 3, 2016, 8:53 AM), https://www.forbes.com/sites/sageworks/2016/10/03/the-15-least-profitable-industries-in-the-u-s/#4dd1a9dd618a [https://perma.cc/EE88-SB43]; Catherine Brinkley et al., *If You Build It with Them, They Will Come: What Makes a Supermarket Intervention Successful in a Food Desert?*, WILEY 1, 10 (Aug. 14, 2018) (describing how low profit margins and increased operating costs led to closures in low-income neighborhoods).

11. *See* UNIV. OF WISC. CTR. FOR COOPS., *supra* note 3, at 21.

12. *See, e.g.*, *More Than Just a Job*, NEW ORLEANS FOOD CO-OP, http://www.nolafood.coop/employment-opportunites/ [https://perma.cc/ZNW5-72LD] (last visited Mar. 1, 2021); *Careers*, SEWARD CMTY. CO-OP, https://seward.coop/careers/ [https://perma.cc/7N8C-QQAG] (last visited Mar. 1, 2021); SEVANANDA NAT. FOODS MKT., https://sevananda.coop/job-listing/ [https://perma.cc/2Z7J-NKJE] (last visited Mar. 1, 2021); *What is a Co-op?*, KCFC, http://kcfc.coop/what-is-a-co-op/ [https://perma.cc/M7G6-25WL] (last visited Mar. 1, 2021); Halliday & Foster, *supra* note 2, at 245.

13. *See Food Co-op Initiative Awards $100K in Grants*, COOP. GROCER, Sept.–Oct. 2011, at 6.

14. *See* Elaine Waterhouse Wilson, *Cooperatives: The First Social Enterprise*, 66 DEPAUL L. REV. 1012, 1022 (2017).

15. *See* Dan DePasquale et al., *Forging Food Justice Through Cooperatives in New York City*, 45 FORDHAM URB. L.J. 909, 923 (2018).

urban communities.[16] But the cooperative can contribute to residents educating themselves about these issues and the necessary structural change to address them.[17] And the cooperative can contribute to residents equipping themselves to lead and advocate for their neighborhoods.[18] The cooperative can also contribute to providing good jobs and investing resources in the neighborhood.[19] The cooperative can serve as a feasible alternative economic model to a profit-driven corporate grocery chain.[20] When owners regularly donate their time and work together, they further these goals.[21]

There are three potential ways that cooperative owners can lawfully work without pay. The first is for owners to provide services and products as independent contractors rather than employees.[22] Independent contractors often perform tasks like janitorial, electrical, plumbing, and other repair work.[23] The owners could perform these tasks for free.[24] Owners could also work as independent contractors to perform similar but less common tasks, like painting murals on the building or teaching cooking classes.[25] The second way for cooperative owners to lawfully work without pay is for owners to work as volunteers rather than employees.[26] The FLSA, the courts, and the Department of Labor (DOL) impose many requirements to insure that a worker is truly a volunteer and not an employee who an employer is failing to pay.[27] Food cooperatives formed to combat food insecurity and build wealth can design their owner-work programs in

16. *See* Zitcer, *supra* note 4, at 813.
17. *See* DePasquale et al., *supra* note 15, at 923.
18. *See id.*
19. *See* KCFC, *supra* note 12.
20. *See* Brinkley et al., *supra* note 10, at 1.
21. *See* Ain, *supra* note 5.
22. *See* Laddie Lushin, *Co-op Member Labor Programs Under the Fair Labor Standards Act: A Matter of Economic Reality*, 1, 2–3 (2009) (advising that no exception for volunteers excepts members from FLSA coverage, but arguably they are excepted under the economic realities test used for independent contractors); *Employment Law*, CO-OP LAW.ORG, https://www.co-oplaw.org/governance-operations/employment-law/#Who-Can-Be-Considered-a-VOLUNTEER [https://perma.cc/D4C4-QD46] (last visited Mar. 1, 2021) (explaining that most co-ops are not nonprofits and owners cannot volunteer unless they are independent contractors, interns, or partners).
23. *See* CO-OP LAW.ORG, *supra* note 22.
24. *See id.*
25. *See id.*
26. Ariana R. Levinson & Chad Eisenback, *Cooperative Principles and Fair Labor Standards: Volunteering for Food Co-ops*, 2020 MICH. ST. L. REV. 189, 193 (2020).
27. *See id.* at 200.

a way that meets these requirements.[28] The third way owners might be able to work without pay is precisely because they are owners and not employees—and therefore not subject to the minimum wage requirements of the FLSA.[29]

This Article addresses the question raised by the third possibility. Are cooperative grocery owners who work for the cooperative protected under the FLSA as employees or treated like partners and other owners who are not subjected to the FLSA?[30] Part I more fully describes the problem we hope to address.[31] Part II provides background about cooperatives and the FLSA that is helpful to understand the issue of whether or when an owner is an employee.[32] We also describe the literature addressing a similar question in the context of other types of owners. Part III provides a detailed explanation of the authority—court opinions and administrative material—that addresses when an owner is not an employee for FLSA purposes and can work without pay.[33] Unlike the test for the much-more often addressed issue of whether a worker is an independent contractor, the courts have yet to develop a consistently used test for determining when a worker is an owner. Part IV synthesizes the authority into a multi-factored test that cooperatives can use to determine whether an owner-work program meets the FLSA requirements and that the courts and DOL can use to determine when an owner is an employee who must be paid for their work.[34] To concretely illustrate the operation of the proposed test, we also apply the test to a hypothetical cooperative grocery similar to those that have opened or are opening in areas affected by food apartheid in Part IV.[35] A brief Conclusion follows.

The main takeaways of this Article are that the owners of a medium or large cooperative grocery with a board of directors and professional management are most often found to be employees because the DOL and courts apply the FLSA broadly as a remedial statute. Therefore, the owners of these groceries must be paid for their

28. *See id.* at 189.
29. *See id.* at 198.
30. *See* Godoy v. Rest. Opportunity Ctr. of N.Y., 615 F. Supp. 2d 186, 192 (S.D.N.Y. 2009) (discussing factors that might put individuals in the owner category as opposed to the employee category).
31. *See infra* Part I.
32. *See infra* Part II.
33. *See infra* Part III.
34. *See infra* Part IV.
35. *See infra* Part IV.

work. Only in situations where a small cooperative is run directly by owners who make financial and operational decisions—rather than a board and management—and work relatively independently of each other will owners be able to work without pay. Ultimately a determination must be made as to each cooperative: Are the cooperative owners in business for themselves and able to choose to pay themselves nothing should they wish—like a sole proprietor, majority stakeholder in a closely held corporation, or true partners—or are they doing work for others that necessitates compensation?

I. PROBLEM

The large societal problem we aim to address is food apartheid. Because of historic discrimination and redlining,[36] large swathes of urban areas in the United States are left without retailers that sell healthy foods.[37] Instead, these urban areas are home to corner stores, liquor stores, and dollar stores.[38] In recent years, a large number of commercial groceries located in the urban core have closed, worsening the situation.[39] This lack of healthy food contributes to disparate health

36. Redlining is the historic practice of the federal government, banks, and other institutions to refuse to lend to people and businesses located in certain zip codes. *See* Eric Bosco*, Map of the Month, Harvard Kennedy School*, HARVARD DATA-SMART SOLUTIONS (June 15, 2017) https://datasmart.ash.harvard.edu/news/article/map-of-the-month-redlining-louisville-1062 [https://perma.cc/K7MW-C6B9] ("Redlining, the denial of services or the refusal to grant loans or insurance to certain neighborhoods based on racial and socioeconomic discrimination, can be a hard issue to understand, let alone talk about.") This intentional disinvestment contributes to grocery redlining in urban areas. Elizabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 GEO. J. 125, 127–29 (2001).

37. *See* Nathan A. Rosenberg & Nevin Cohen, *Let Them Eat Kale: The Misplaced Narrative of Food Access*, 45 FORDHAM URB. L.J. 1091, 1097, 1099 (2018).

38. *See* Victor Luckerson, *How a City Fought Run-Away Capitalism and Won*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/2019/11/15/opinion/sunday/tulsa-dollar-stores.html?action=click&module=Well&pgtype=Homepage&section=Sunday%20Review [https://perma.cc/8NMZ-LBW5]; Daniel Reyes & Marnie Thompson, *Ask Co-op Cathy: How Cooperative Grocery Stores are Bringing Food Access to Low-Income Neighborhoods*, COOP. DEV. INST. (Oct. 28, 2014), https://cdi.coop/food-coops-food-deserts-low-income-communities/ [https://perma.cc/75HT-8X3V] ("In their place remain convenience stores saturated with cheap, highly processed foods, food pantries laden with donated nonperishables, or for the fortunate few, long, expensive drives to the closest supermarket (forget public transportation).").

39. *See* Brinkley et al., *supra* note 10, at 1.

outcomes between lower and higher income areas of urban regions.[40] For instance, in Louisville, the life expectancy in the predominately Black and low income West Side is 12.6 years lower than that in the higher income, predominately white East Side.[41] In Detroit, those living in certain urban neighborhoods have a life expectancy of sixty-nine while those in a nearby suburban township's life expectancy is eighty-five.[42] In our nation's capital, those living in the Anacostia neighborhood, a predominantly Black neighborhood, have a life expectancy of 63.2 years whereas those in nearby Fairfax, Virginia, a predominantly white neighborhood, have a life expectancy of eighty-two years.[43]

One part of the solution is to open a consumer-owned or multi-stakeholder cooperative grocery.[44] A cooperative grocery can thrive where commercial groceries have closed for a variety of reasons.[45] These groceries have the monetary and social support of thousands of residents in the community who own the grocery.[46] Thousands of community residents bring money and other resources to the table that

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40. *See id.*

41. Phillip M. Bailey & James Bruggers, *Louisville's 2017 Health Report Shows Staggering Gaps Along Lines of Race and ZIP Code*, COURIER J. (Nov. 30, 2017), https://www.courier-journal.com/story/news/politics/metro-government/2017/11/30/louisville-health-equity-report-2017-takeaways/909220001/ [https://perma.cc/63ML-ALEB].

42. Christine MacDonald & Charles E. Ramirez, *Life Spans for Metro Detroit's Poor Among Shortest in Nation*, DET. NEWS (June 2, 2016), https://www.detroitnews.com/story/news/local/detroit-city/2016/06/02/life-span-detroits-poor-among-shortest-nation/85325864/ [https://perma.cc/U6F3-ZM8N] ("In Northville Township, a baby born today is expected to live to age 85, while 30 miles away, life expectancy in Detroit's Cass Corridor is as low as 69 years, a 16-year gap.").

43. Eric Flack & Jordan Fischer, *Interactive Map: See How Long You Can Expect to Live in the DMV*, WUSA9 (May 15, 2019), https://www.wusa9.com/article/news/how-long-will-you-live/65-ab44c931-07c1-4a01-84c1-c12bb9b7c78d [https://perma.cc/PT48-3GPA] (explaining that one systemic factor contributing to shorter life expectancy is the overwhelming majority of food deserts east of the Anacostia River).

44. *See* Brinkley et al., *supra* note 10, at 1; Levinson & Eisenback, *supra* note 26, at 195; Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1292 (2011); Paulette L. Stenzel, *Connecting the Dots: Synergies Among Grassroots Tools for Authentic Sustainable Development*, 25 FORDHAM ENVTL. L. REV. 393, 418 (2015). A multi-stakeholder cooperative is one owned by more than one class, such as consumers and workers. *See* Ariana R. Levinson et al., *Alleviating Food Insecurity Via Cooperative Bylaws*, 26 GEO. J. ON POVERTY L. & POL'Y 227, 229 (2019).

45. *See* Hall & Mayer, *supra* note 6, at 14.

46. *See* Brinkley et al., *supra* note 10, at 11.

are not available for a traditional commercial grocery.[47] Traditional commercial supermarket chains send a significant portion of profits back to shareholders who reside outside the community in which a particular store is located.[48] A cooperative grocery need only break even, and in the low-margin grocery business just breaking even is likely.[49] If a cooperative earns a surplus in any given year, that surplus is retained for future capital or other improvements, or returned to the community owners, recirculating wealth in the community.[50] Cooperative groceries, as local businesses, can more easily gauge and respond to the local community's needs and often serve a function beyond a grocery, as a hub for education and innovation in the community.[51]

One way that some cooperative groceries avoid losses in a tight profit-margin industry is for owners to volunteer their time and labor to perform tasks necessary to run the grocery, such as loading and unloading products, stocking shelves, running cash registers, and cleaning the store.[52] They may also perform other work that benefits the cooperative grocery, such as teaching cooking, dispute resolution, or financial literacy classes, or serving as ushers at a community movie

47. *See id.* (indicating cooperative models with community engagement foster supermarket usership).

48. Kroger, the supermarket chain with the largest revenue, is heavily invested in by shareholders. *See, e.g.*, Daniela Coppola, *Most Profitable Supermarket Chain Stores in the United States as of 2017, by Revenue*, STATISTA (Nov. 30, 2020) https://www.statista.com/statistics/811625/most-profitable-supermarket-chain-stores-us/ [https://perma.cc/GW8M-ZQT3]; Steve Watkins, *Kroger Stock Soars After Buffett's Investment*, CINCINNATI BUS. COURIER (Feb. 16, 2020), https://www.bizjournals.com/cincinnati/news/2020/02/16/kroger-stock-soars-after-buffett-s-investment.html [https://perma.cc/ZD89-2YMG] (indicating that Warren Buffett's conglomerate Berkshire Hathaway bought 18.9 million shares of Kroger worth $549 million, which represented 2.4% of Kroger's stock).

49. *See* Wright, *supra* note 10; *see also* Biery, *supra* note 10.

50. *See* Stenzel, *supra* note 44, at 427.

51. *See* DePasquale et al., *supra* note 15, at 923, 942 (showing education and financial know-how); *see also* Rhonda Phillips, *Food Cooperatives as Community-Level Self-Help and Development*, 6 INT'L SELF-HELP & SELF-CARE 189, 201–02 (2012).

52. *See Ask Co-op Cathy: How Cooperative Grocery Stores are Bringing Food Access to Low-Income Neighborhoods*, *supra* note 38; Hall & Mayer, *supra* note 6, at 14 (advising food cooperatives not to use volunteer programs given risks of FLSA coverage); *see also* Ronald Cotterill, *Retail Food Cooperatives: Testing the "Small Is Beautiful" Hypothesis*, 65 AM. J. AGRIC. ECON. 125, 126, 130 (1983); *see also* Zitcer, *supra* note 4, at 817–18.

screening or docents at an art display.[53] Sometimes donating time is a requirement of ownership, while in other situations, the owners receive a store discount in return for their work.[54]

When cooperative owners engage in such work, the cooperative grocery runs a risk of noncompliance with the FLSA.[55] As cooperative groceries have become aware that the DOL might require them to pay these workers, some of them have abandoned their owner-work programs.[56] The DOL takes the position that certain cooperative owners are employees protected by the FLSA minimum wage and hour protections, limiting the lawful use of owner-work programs.[57] While the courts have not specifically addressed a situation where owners of a consumer cooperative work without pay, they have found that some worker-owned cooperative owners are employees subject to the FLSA while others are not.[58] Those who are not covered are similar to partners rather than employees, and the DOL also recognizes that certain partners and other owners are not protected by the FLSA.[59]

The DOL and the courts are using a variety of different factors to assess whether a worker is an owner or partner rather than an employee protected by the FLSA.[60] No article has addressed the issue in a systemic way. We aim to synthesize the existing administrative guidance and court opinions and provide a multi-factored test that the

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53. *See* Ariana R. Levinson et al., *Alleviating Food Insecurity Via Cooperative Bylaws*, 26 GEO. J. ON POVERTY L. & POL'Y. 227, 235 (2019); Levinson & Eisenback, *supra* note 26, at 226–27, 229; Zitcer, *supra* note 4, at 824.

54. *See Ask Co-op Cathy: How Cooperative Grocery Stores are Bringing Food Access to Low-Income Neighborhoods*, *supra* note 38; Hall & Mayer, *supra* note 6, at 14 (advising food cooperatives not to use volunteer programs given risks of FLSA coverage).

55. *See* Heather Hackett, *An Open Letter to East End Food Co-op Members Regarding the Decision to End Our Volunteer Program*, EAST END FOOD COOP, https://eastendfood.coop/wp-content/uploads/2017/04/Open-Letter-to-Members.pdf [https://perma.cc/2324-2YB6] (last visited Mar. 1, 2021).

56. *See* Joyal, *supra* note 8, at 27–28 (explaining although the Supreme Court interprets the FLSA to exclude uncompensated volunteers, the exclusion is extremely narrow and cooperatives should "proceed with caution"); Martha Hotchkiss, *Three Issues Facing Our Co-op*, HAMPDEN PARK FOOD COOP., http://www.hampdenparkcoop.com/three-issues-facing-our-co-op [https://perma.cc/UHH8-NCKX] (last visited Mar. 1, 2021) (stating that the volunteer program is not in compliance because it is a for-profit cooperative).

57. *See infra* Subsection II.D.1.

58. *See infra* Subsection II.D.2–3.

59. *See* Administrator's Interpretation 2015-1, 2015 DOLWH LEXIS 1, at *3 n.2 (Dep't of Labor July 15, 2015).

60. *See id.* (commenting that an economic realities analysis is necessary for distinguishing an employee from an owner or partner).

DOL and courts can utilize to make the determination of when an owner of a cooperative grocery can work without pay. The goal is three-fold: to enable cooperative groceries to structure owner-work programs in a lawful way, to enable the DOL to distinguish when a cooperative grocery is out of compliance with the FLSA, and to enable the courts to address the cases that will inevitably arise where a cooperative grocery owner sues for wages under the FLSA.

We focus this Article on whether an owner is permitted to work without pay because they are an owner and not an employee. When cooperative groceries are structuring their work programs and when the DOL and courts are considering the legality of such programs, they must also consider whether an owner is permitted to work without pay because they are a volunteer or an independent contractor, rather than an employee, for FLSA purposes. We have previously written about the circumstances in which owners of cooperative groceries located in food deserts may work as volunteers without pay, and many articles and cases provide guidance on the distinction between an independent contractor and an employee.[61]

II. BACKGROUND

This Part explains how cooperatives are structured and the pertinent parts of the FLSA. This Part also reviews the existing literature addressing the question of when owners are not employees covered by the FLSA's protections.

A. Cooperatives

Cooperatives are entities that are owned and governed by the people who use the entity.[62] Cooperatives can be producer cooperatives where people producing a product join together to process or distribute the product.[63] They can be worker-owned

61. *See* Levinson & Eisenback, *supra* note 26, at 193; Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 ABA J. LAB. & EMP. L. 53, 58–60 (2015); David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. PUB. POL'Y 138, 152–55 (2015); Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 28 BUFF. PUB. INT. L.J. 105, 109–18 (2009).

62. *See* Wilson, *supra* note 14, at 1016.

63. *See* Levinson & Eisenback, *supra* note 26, at 195; Marc Schneiberg, *Toward an Organizationally Diverse American Capitalism? Cooperative, Mutual,*

cooperatives where the people performing work for a business own the business.[64] Or they can be owned by the consumers who purchase the products sold by a business.[65] Cooperative groceries are often owned by consumers,[66] and the consumer-owned cooperative grocery is the focus of this Article.

Like other cooperatives, basic cooperative principles define the ownership and governance structure of consumer cooperatives.[67] Each consumer owner owns one share of the cooperative.[68] The cooperative is jointly owned by all of the owners, all of whom have an equal share, unlike a traditional business where there may be one majority shareholder and other minority shareholders all with different numbers of and values to their shares.[69] Any surplus generated by the business that is not needed for reinvestment in the business, termed "patronage," is returned to owners based on their level of use of the business, typically the amount of groceries they have purchased.[70] Unlike a traditional business, the percent of shares a person owns does not determine how profits are distributed.[71]

Each consumer–owner also has one vote.[72] Each owner has an equal vote on all major decisions, unlike a typical business where a greater share entitles a shareholder to a greater vote or level of control over the business.[73] Depending on the size of the business and needs of the owners, owners may make all decisions by consensus or they may make certain major decisions by majority or super-majority vote and delegate other less critical decisions to a board and manager.[74]

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and Local, State-Owned Enterprise, 34 SEATTLE U. L. REV. 1409, 1413 (2011) (describing producer cooperative operations).

64. *See* Levinson & Eisenback, *supra* note 26, at 195.

65. *See id.*; DePasquale et al., *supra* note 15, at 918.

66. Cooperative groceries can also be owned by the workers rather than consumers or be multi-stake holder cooperatives owned by both the consumers and the workers.

67. *See* Wilson, *supra* note 14, at 1016–17.

68. *See id.* at 1023.

69. *See* KY. CTR. FOR AGRIC. & RURAL DEV., https://www.kcard.info/develop-a-cooperative [https://perma.cc/53DG-FWEA] (last visited Mar. 1, 2021).

70. *See Subchapter T and How Money Flows Through a Cooperative*, CO-OP LAW.ORG, https://www.co-oplaw.org/knowledge-base/patronage/ [https://perma.cc/CDQ2-7H2N] (last visited Mar. 1, 2021).

71. *See* Wilson, *supra* note 14, at 1029 (explaining the tax code requirement that amounts be allocated to patrons on the basis of the amount of business done with them).

72. *See id.* at 1023.

73. *See id.*

74. *See id.* at 1022.

Consumer cooperatives can be incorporated in a variety of different entity forms under a variety of state statutes.[75] Historically, before the rise of new entity forms such as the LLC, cooperatives were incorporated as corporations.[76] Today they can be incorporated as LLCs or as a membership association in the eight states that have adopted the Uniform Limited Cooperative Association Act.[77]

Other guiding principles of cooperatives include providing education for the owners and community, nondiscrimination including the equal voice of women, and transparency about financial and other matters.[78] Cooperatives are generally formed to address the needs of their owners.[79] In the situation of a grocery in a community affected by food apartheid, the need addressed is that for healthy, accessible food.[80]

B. FLSA

The FLSA is the federal law that regulates hours and rates of pay.[81] It sets the minimum wage, which is currently $7.25 an hour, and requires overtime pay for certain employees who work more than forty hours a week.[82] To be protected by the FLSA, a worker must meet the FLSA's definition of an "employee."[83] The FLSA defines an

75. *See* JOEL DAHLGREN, LEGAL PRIMER FOR FORMATION OF CONSUMER-OWNED FOOD COOPERATIVES 7–10 (2008).

76. *See* 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 68 (perm. ed., rev. vol. 1983); *id.* § 109; 6 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2537 (perm. ed., rev. vol. 1979); ISRAEL PACKEL, THE ORGANIZATION AND OPERATION OF COOPERATIVES § 6(b)(3) at 28–29 (2d. ed. 1947) (footnotes omitted).

77. *See* Levinson et al., *supra* note 53, at 230; *Limited Cooperative Association Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=22f0235d-9d23-4fe0-ba9e-10f02ae0bfd0 [https://perma.cc/5KAL-76T3] (last visited Mar. 1, 2021) (noting as well that legislation is pending in Illinois as of May 14, 2020).

78. *See The 7 Cooperative Principles*, NAT'L COOP. BUS. ASS'N, https://ncbaclusa.coop/resources/7-cooperative-principles/ [https://perma.cc/RPB2-M56P] (last visited Mar. 9, 2021).

79. *See* Wilson, *supra* note 14, at 1016.

80. *See* Levinson & Eisenback, *supra* note 26, at 196, 216.

81. *See id.* at198. *See Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV., U.S. DEP'T OF LAB., https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs14.pdf (July 2009) [hereinafter *Fact Sheet #14*].

82. *See Fact Sheet #14*, *supra* note 81.

83. *See* 29 U.S.C. § 203(e)(1).

"employee" as "any individual employed by an employer."[84] The FLSA defines "employ" as "to suffer or permit to work."[85] "Whether a particular situation is an employment relationship is a question of law," and the courts and DOL apply the definition of employee broadly to ensure protection of workers.[86]

To determine whether a worker is an employee for purposes of FLSA protections, the courts and DOL apply a multi-factored economic reality test.[87] When interpreting other employment statutes, such as the Employee Retirement Income Security Act or antidiscrimination statutes, the courts have used tests other than the economic reality test, such as the common law right-to-control test.[88] Yet Congress intended broader protection for workers under the FLSA, and the economic reality test is well-established as the appropriate legal test.[89] The economic reality test is most-often applied to determine whether a worker is an employee or an independent contractor.[90] Variations of the test have been applied to address a range of other situations, such as whether a worker is a volunteer,[91] intern or

84. *See id.*

85. *Id.* § 203(g).

86. *See* Fegley v. Higgins, 19 F.3d 1126, 1132 (6th Cir. 1994); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

87. *See* Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (citing U.S. v. Silk, 331 U.S. 704, 713 (1947)); Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947); Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

88. *See Darden*, 503 U.S. at 323; Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 489 (8th Cir. 2003); Alberty-Velez v. Corporación de P.R. para la Difusión Pública, 361 F.3d 1, 7 (1st Cir. 2004).

89. *See* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 687 (2013) (noting that the economic realities test remains in place with regard to FLSA); 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. EMP. & LAB. L. 295, 361 (2001) ("Some federal courts continue to regard the FLSA as one law that provides for coverage of a broader range of workers outside the common law notion of 'employee,' but in practice they have applied the same economic realities test that courts use for many other purposes.").

90. *See* Administrator's Interpretation 2015-1, *supra* note 59.

91. Levinson & Eisenback, *supra* note 26, at 206–07.

trainee,[92] prison laborer,[93] or welfare recipient rather than an employee.[94] While the factors differ based on context, the overarching determination is whether the worker is dependent on the putative employer.[95] In the context of determining whether a cooperative owner is an employee, the determination turns on whether the owners are in business for themselves.[96] A true owner, like a sole proprietor, majority stakeholder in a closely held corporation, or true partner, can choose to pay themselves nothing should they wish. An owner who is actually an employee works for others, which necessitates compensation.

C. Literature Addressing Whether Cooperative Owners Are Employees

Much scholarship has been written about whether owners, partners, and shareholders are employees subject to the antidiscrimination statutes.[97] Much less has been written about

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92. *See Fact Sheet # 71: Internship Programs Under the Fair Labor Standards Act*, WAGE & HOUR DIV., U.S. DEP'T OF LAB., https://www.dol.gov/whd/regs/compliance/whdfs71.htm [https://perma.cc/MP6R-RP8S] (Jan. 2018) [hereinafter *Fact Sheet #71*]; *see also* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Apr. 30, 1964).

93. *See* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 882 (2008).

94. *See* Kevin Miller, *Welfare and the Minimum Wage: Are Workfare Participants "Employees" Under the Fair Labor Standards Act?*, 66 U. CHI. L. REV. 183, 183 (1999).

95. *See* Brock v. Superior Care, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also* Doty v. Elias, 733 F.2d 720, 722–23 (10th Cir. 1984) ("The focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself."); Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987) (quoting Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311–12 (emphasis in original)) ("[T]he 'economic dependence' of the putative employees [is] the touchstone for this totality of the circumstances test . . . 'The five tests are aids—tools to be used to gauge the degree of dependence of the alleged employees on the business with which they are connected. It is *dependence* that indicates employee status.'").

96. *See Brock*, 840 F.2d at 1054.

97. *See generally* Stephanie M. Greene & Christine Neylon O'Brien, *Partners and Shareholders as Covered Employees Under Federal Antidiscrimination Acts*, 40 AM. BUS. L.J. 781, 783 (2003) (arguing that Congress should revise "the definition of 'employee' under federal antidiscrimination statutes in light of the diversity of judicial opinions on the issue and the proliferation of new business forms"); Stephanie M. Greene & Christine Neylon O'Brien, *Who Counts? The United*

whether owners, partners, and shareholders are employees protected by the FLSA.

Professor Richard Carlson[98] leads his article using the FLSA as a typical example of a law that is "baffling in defining who is an 'employee.'"[99] The Article, however, focuses on whether the distinction between employees and independent contractors is necessary.[100] Carlson proposes that the test of who is protected by a law should focus on the purpose and intended effect of the law rather than the status of the worker.[101] While he acknowledges in a footnote that "[o]ccasional trouble is also presented by some workers who combine characteristics of 'employees' and of . . . business 'owners,'" he addresses the "problem of workers who combine characteristics of employees and independent contractors."[102]

Professor Daniel S. Kleinberger has discussed the "perplexing question" of "whether an LLC member who provides services to the LLC can be an employee."[103] He notes that the most extensive and

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States Supreme Court Cites "Control" as the Key to Distinguishing Employers from Employees Under Federal Employment Antidiscrimination Law, 2003 COLUM. BUS. L. REV. 761, 766 (2003) (suggesting that a 2003 Supreme Court decision resolved some confusion over who qualifies as an employee "under federal employment antidiscrimination laws because it applies uniformly to all forms of business organization"); Kristin Nicole Johnson, *Resolving the Title VII Partner-Employee Debate*, 101 MICH. L. REV. 1067, 1074 (2003) (arguing that the Supreme Court should interpret the term "employee" in the primary federal anti-discrimination statute "to include partners and similarly situated executives."); Joel Bannister, *In Search of a Title: When Should Partners Be Considered 'Employees' for Purposes of Federal Employment Antidiscrimination Statutes?*, 53 U. KAN. L. REV. 257, 257 (2004) (advocating Congress amend federal anti-discrimination statutes to include some partners within the definition of an "employee"); Dawn S. Sherman, *Partners Suing the Partnership: Are Courts Correctly Deciding Who Is an Employer and Who Is an Employee Under Title VII?*, 6 WM. & MARY J. WOMEN & L. 645, 647 (2000) (proposing courts should use "a test that examines in more detail the indicia of control in a partnership rather than focusing on the financial aspects of a partnership" to determine who is an employee for purposes of the anti-discrimination statutes); Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 138 (2010) (arguing that under common law right to control test partners can fall within the definition of "employee" within federal anti-discrimination statutes).

98. *See* Carlson, *supra* note 89, at 295.

99. *See id.* at 296.

100. *See id.* at 300–01.

101. *See id.* at 300.

102. *Id.* at 297 n.8.

103. Daniel S. Kleinberger, *"Magnificent Circularity" and the Churkendoose: LCC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477, 481 (1997) (emphasis omitted).

"best-developed" case law addressing the issue of who is an employee "is inapposite."[104] That case law addresses the "distinction between independent contractors and genuine employees," which "has little relevance to deciding whether a business' owner should be protected as an employee."[105] Another source of perplexity is "the hybrid nature of an LLC (part partnership and part corporation), and the resulting difficulty in extrapolating from cases dealing with analogous issues in the context of partnerships and corporations. . . ."[106] An LLC member "who actively works for an LLC" is particularly difficult for the law to address because "case law has had difficulty handling that dichotomy in the context of well-established entities—i.e., partnerships and corporations."[107] Kleinberger points out that "case law dealing with the most analogous situations—partners in a general partnership and shareholders in a closely held corporation—is confused. The partnership cases do not clearly explain why partners are beyond the statutes' scope, and the corporation cases are contradictory."[108]

While Kleinberger acknowledges that the FLSA definition of an employee is determined by the economic reality test, his analysis focuses on the common law agency test used to make determinations under many other federal employment statutes.[109] Kleinberger proposes a rule to determine when "a business owner can provide services to the business without becoming . . . an 'employee,'" and his proposed rule is intended to operate regardless of the form in which the entity is incorporated: partnership, corporation, or cooperative.[110] The rule "describes a category of owners who represent the antipode to the common law's picture of a servant."[111] If an owner works without pay or performs tasks that are not "traditional, employee-like tasks," the owner is not an employee.[112]

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104. *See id.* at 493.
105. *Id.*
106. *Id.* at 481.
107. *Id.*
108. *Id.* at 493.
109. *See id.* (disregarding Title VII cases using economic realities test because Supreme Court held that common law agency and not economic realities test must be used for ERISA determinations; noting the Second Circuit states that the common law agency test applies outside the FLSA context, recognizing FLSA is an exception to the common law agency test).
110. *See id.* at 538–39.
111. *See id.* at 558.
112. *See id.* at 560.

If an owner works for pay on traditional tasks, then to be classified as a nonemployee, the owner must have "a substantial role in the organization's internal governance" focusing on "management of the business, not on the scope of an owner's responsibilities in carrying out the business."[113] By definition, when "an organization uses a decentralized management structure, with important decisions made by a vote or consensus of all owners, each owner has a substantial involvement in governance."[114] On the other hand, when "an organization uses a centralized management structure, with important decisions allocated to a governing elite, an owner has substantial involvement in governance only to the extent that he or she either comprises part of the elite or has a meaningful role in selecting the elite."[115] Contributing capital, while not necessary, is a factor that strongly leans toward ownership rather than employee status.[116] An owner "must have some opportunity to share in the organizations' entrepreneurial success," meaning an opportunity for financial gain.[117] The more owners there are, the more likely they are employees because numerosity may prevent "an owner from having a substantial role in the organization's governance."[118] Being shielded from liability does not indicate one is an employee. The labels parties use, such as partner, owner, or member, are not dispositive.

Our Article adds to the scholarly discourse by proposing a similar multi-factored test that is a variant of the economic reality test used under the FLSA rather than of the common law agency test used under other federal employment statutes. Our Article focuses on cooperatives rather than LLCs. Finally, under the FLSA, unlike under Kleinberger's proposal, employee status does not "presuppose[] some form of compensation."[119] The FLSA specifically addresses the concern that workers must be paid because they are employees, and whether or not they are paid is only a consideration in some contexts, such as determining when someone is a volunteer rather than an employee.[120] Our Article provides an example of when cooperative

113. *See id.* at 561.
114. *Id.*
115. *Id.*
116. *See id.*
117. *Id.*
118. *See id.*
119. *See id.* at 562.
120. *See* Levinson & Eisenback, *supra* note 26, at 198–99.

owners would be determined to be an employee, complementing the examples of owners of LLCs provided by Kleinberger.[121]

Renee Hatcher notes the "significant ambiguity as to whether worker-owners will be classified as an employee under any given regulation or if an employee relationship exists within a worker cooperative business."[122] Professor Scott Cummings briefly addresses in a footnote the issue of whether undocumented immigrants who own cooperatives incorporated as LLCs would constitute employees for Immigration Reform Control Act purposes.[123] He concludes they probably would, but notes that the law addressing whether an owner of a cooperative corporation is an employee is unsettled.[124] We have found no scholarly article addressing whether, or under what circumstances, owners of a consumer cooperative are employees subject to the FLSA and a limited number of practice-oriented articles.

III. BACKGROUND ANALYSIS

Generally, simply holding shares or an ownership interest in a company will not preclude a worker from being covered by the FLSA,[125] which makes sense given the FLSA's remedial purpose and tilt toward broad coverage. Many workers participate in a profit-sharing plan or hold a minority stake in the business for which they work, but their primary relationship with the entity is still one of employees who are dependent on those in control of the business to earn a livelihood. Indeed, the FLSA defines employers as including partnerships.[126]

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121. *See* Kleinberger, *supra* note 103, at 505–06.

122. *See* Renee Hatcher, *Solidarity Economy Lawyering*, 8 TENN. J. RACE, GENDER & SOC. JUST. 23, 35 (2019).

123. *See* Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 203 n.104 (1999).

124. *See id.*

125. *See* Hess v. Madera Honda Suzuki, No. 1:10–cv–01821–AWI–BAM, 2012 WL 4052002, at *4 (E.D. Cal. Sept. 14, 2012) (stating that a "co-owner and shareholder of a closely held corporation who works for the corporation in another capacity" can also be an employee for FLSA purposes); Aguirre v. Safe Hurricane Shutters, Inc., No. 07–22913–CIV, 2011 WL 5986817, at *2 (S.D. Fla. Oct. 29, 2011) (noting that owners can be considered employees subject to the FLSA); Hoy v. Progress Pattern Co., 217 F.2d 701, 704 (6th Cir. 1954) (holding that a stockholder relationship with a corporation does not deprive worker as status of employee for FLSA coverage).

126. *See* 29 U.S.C. § 203(a), (d).

However, some partners and business owners will not be covered by the FLSA.[127] The degree to which they control the business, their own work, the work of others, and their compensation means they are not reliant on others but instead have the ability to ensure they are granted adequate compensation for their work.[128] Again, leaving these owners out of the protections of the FLSA makes sense because they need no guarantee of minimum pay. The courts and the DOL use a totality of the circumstances, economic reality-like test to determine who is an owner rather than an employee.[129] But the factors they use are not always the same, and some opinions conflict with others as to which factors are most significant or whether certain factors matter at all to the determination.

In this Part, we review the pertinent decisions and administrative authority. We first discuss the authorities setting out the baseline proposition that generally shareholders and other owners are employees covered by the FLSA. Next, we look at some of the cases where, although it seemed a worker might be more like a partner than an employee subject to coverage of the FLSA, the courts determined the worker was an employee. Then we describe the cases where the courts determined partners and owners were not employees protected by the FLSA. Finally, we discuss those cases in which courts addressed the status of cooperative owners—finding either that the owners were or were not employees protected by the FLSA. Our goal is to summarize the governing decisions and law so that we can determine how the DOL and courts can best address the issue of when a cooperative grocery store owner is covered by the FLSA.

A. Shareholders and Other Owners Are Typically Employees Under the FLSA

When there is duality between the entity and the worker, such as with corporate shareholders, workers will likely be employees. The

127. *See, e.g.*, Wheeler v. Hurdman, 825 F.2d 257, 273 (10th Cir. 1987); Eisert v. Urick Foundry Co., 150 F. Supp. 280, 281, 283, 285 (W.D. Pa. 1957); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Apr. 5, 2004), at *9.

128. *See* Zygowski v. Erie Morning Telegram Inc., 298 F.2d 639, 639–40 (3d Cir. 1962).

129. *See* Zagaroli v. Neill, 15 CVS 2635, 2017 WL 5161852, at *8 (Sup. Ct. N.C. Nov. 7, 2017) (noting fact intensive nature of determination of whether a partner is an employee); Carlson, *supra* note 89, at 314, 327–28 (discussing lack of clear differentiation between economic reality and common law control test and how whatever test a particular court applies leads to "more or less the same multi-factored analysis").

DOL routinely classifies corporate shareholders as employees, and the courts have also so held.[130]

The DOL Wage and Hour Division (WHD) Field Operations Handbook specifically states that because "a corporation is a legal entity separate and distinct from its stockholders," a worker who owns stock enters into an employment relationship with the corporation, just as one who does not.[131] The DOL's default position is that "in the ordinary case, a corporation and a stockholder therein" become parties to an "employment relationship" and the worker must be treated as an employee "for the purposes of the FLSA."[132] Even if only stockholders work in the corporation, they are all employees.[133]

> The Field Operations Handbook . . . is an operations manual that provides [DOL WHD] investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance. The [Field Operations Handbook] was developed by the WHD under the general authority to administer laws that the agency is charged with enforcing. The Field Operations Handbook reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator. It is not used as a device for establishing interpretative policy.[134]

Nevertheless, it conveys the position the DOL will take if it is investigating a business for violation of the FLSA.

Like the DOL, the courts generally find that simply owning stock or a share of a corporation does not remove a worker from protection

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130. *See, e.g.*, Jit Shi Goh v. Coco Asian Cuisine, Inc., 2016 U.S. Dist. LEXIS 48107, at *7 (D.N.J. April 11, 2016) ("Defendants have provided no authority stating that a person who holds shares . . . cannot also be an employee for purposes of the FLSA."); Spitzmesser v. Tate Snyder Kimsey Architects, Ltd., 2011 WL 2552606, at *9 (D. Nev. June 27, 2011) (noting that the Shareholder Agreement reflected the plaintiff was a minority shareholder with voting rights, but the "status as a minority shareholder was in conjunction with his employee status and his shareholder rights were subject to significant limitation"); Paulshock v Nnovation Learning Group, Inc., 2007 WL 2412909, at *4 (M.D. Fl. Aug. 21, 2007) ("Defendants have cited no authority for the proposition that an employee who happens to be a minority shareholder is in any different position from any other employee otherwise eligible to bring an FLSA claim.").

131. *See* WAGE & HOUR DIV., DEP'T. OF LAB., FIELD OPERATIONS HANDBOOK § 2.10c03 (1993).

132. *Id.* § 2.10c02.

133. *See id.* § 2.10c03.

134. *Field Operations Handbook*, WAGE & HOUR DIV., U.S. DEP'T. OF LAB., https://www.dol.gov/whd/foh/ [https://perma.cc/W4VF-XGRN] (last visited Mar. 8, 2021).

of the FLSA.[135] For example, in one case, *Spitzmesser v. Tate Snyder Kimsey Architects, LTD*, an employee sued his former employer, an architectural firm, for violation of the FLSA, among other claims.[136] The court determined that the plaintiff had plausibly pleaded employee status and denied the employer's motion to dismiss the FLSA claim.[137] The court reasoned that the Shareholder Agreement reflected the plaintiff was a minority shareholder with voting rights, but the "status as a minority shareholder was in conjunction with his employee status and his shareholder rights were subject to significant limitation."[138]

In *Kehler v. Albert Anderson, Inc.*, a 49% minority shareholder in a closely held corporation sued for FLSA minimum wage violations, among other claims.[139] The defendant moved to dismiss the complaint arguing the plaintiff was not an employee but rather an owner.[140] The court held the plaintiff had sufficiently pleaded employee status.[141] The court listed the factors the Third Circuit relies on in economic reality cases to determine whether a worker is an independent contractor or an employee as follows:

> 1) the 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.[142]

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135. *See* Gionfriddo v. Jason Zink, LLC, 769 F. Supp. 2d 880, 894 (D. Md. 2011) (acknowledging that it is possible for a worker to be both an owner/employer and an employee entitled to FLSA protections); Hess v. Madera Honda Suzuki, No. 1:10–cv–01821–AWI–BAM, 2012 WL 4052002, at *9 (E.D. Cal. Sept. 14, 2012) (according to the court, workers would be removed as an employee if the worker was nothing more than a director, officer, and shareholder, however simply owning shares of a corporation is not enough to remove a worker from the FLSA); Aguirre v. Safe Hurricane Shutters, Inc., No. 07–22913–CIV, 2011 WL 5986817, at *1 (S.D. Fla. Oct. 29, 2011) (noting one FLSA provision explicitly excludes certain owners who would otherwise be employees).

136. *See* No. 2:10–cv–01700–KJD–LRL, 2011 WL 2552606, at *1 (D. Nev. June 27, 2011).

137. *See id.* at *9.

138. *Id.*

139. *See* No. 16-5318 2017, WL 1399628, at *4, *6 (D.N.J. April 18, 2017).

140. *See id.* at *5.

141. *See id.* (holding that the plaintiff sufficiently pled he was an employee under FLSA).

142. *Id.*

The court noted that in other cases involving putative owners or partners, some courts had considered additional factors such as: the plaintiff's "ability to share in profits," the plaintiff's "exposure to risk" of loss, the plaintiff's possession of "managerial control," and the plaintiff's "contributions to capital [and] part ownership of partnership assets."[143] The court reasoned that the defendant in the case was a close corporation, not a partnership.[144] The majority stakeholder's ability to terminate the plaintiff evidenced his right of control, and the court explained that a minority shareholder in a closely held corporation holds a precarious position.[145] A majority shareholder is able to "dictate to the minority" shareholder how the corporation is run, and the minority shareholder's interest is difficult to value.[146] The majority stakeholder also set the amount of the stipend the plaintiff received.[147] The court noted that a person can be both a minority shareholder, with significant control, and an employee of a corporation.[148] The court concluded, "Plaintiff's management duties and sweat equity do not preclude him from being considered an 'employee' for FLSA purposes."[149]

In *Hess v. Madera Honda Suzuki*, the plaintiff was a minority shareholder in a closely held corporation who brought suit for FLSA violations.[150] The defendants argued that because the plaintiff was an owner of the business, she was not an employee.[151] The court denied the defendants' motion for summary judgment, reasoning that a genuine issue of material fact existed as to whether the plaintiff was an employee.[152] The defense argued that the plaintiff, with her husband, assumed significant business risk by investing $100,000 in the corporation and making personal guarantees for loans to the corporation.[153] She understood she might lose the investment and if the

143. *See id.*
144. *See id.* at *6.
145. *See id.* (stating that a minority shareholder of a closely held corporation is in a precarious position and that the ability to terminate the plaintiff was evidence that the plaintiff was an employee).
146. *See id.* (quoting Bostock v. High Tech Elevator Ind., 616 A.2d 1314 (N.J. Super. Ct. App. Div. 1992)).
147. *See id.* (noting that the majority stakeholder set the plaintiff's stipend amount).
148. *See id.*
149. *Id.* at *7.
150. *See* 2012 WL 4052002, at *1 (E.D. Ca. Sept. 14, 2012).
151. *See id.* at *4.
152. *See id.* at *3.
153. *See id.* at *4 (describing the risk the plaintiff took on).

business ever were profitable, it would take some time.[154] They argued she had involvement and discretion in the corporate decision-making process because she, with her husband, had 24% control of the corporation and a right to half the profits, was elected as director and CFO, paid certain expenses without consulting others, and contributed to every hiring and almost every disciplinary matter including terminations.[155] Finally, the defense argued she was entitled to benefits employees were not, such as paid days off, a company provided vehicle and fuel, and fully paid health insurance.[156]

The court rejected the defense arguments emphasizing the following factors.[157] First, the corporate form of a closely held corporation registered with the IRS as an S corporation weighed toward a finding the plaintiff was an employee.[158] The plaintiff did not have an ownership interest in the corporate assets, such as a joint account with the other shareholders of the corporation from which she could fund personal expenditures from the company assets.[159] Second, the plaintiff was only entitled to a share of the profits because of her shareholder status and not because of work performed.[160] This is unlike a partnership where partners receive a share of profits because of the work they have performed.[161] Shareholders in closely held corporations expect to earn salaries through employment, not simply "dividends on their stock."[162] They want to own and manage the corporation precisely so that they can earn money through being employed by the corporation.[163] Third, the risk of liability the plaintiff assumed "by providing personal guarantees to corporate creditors" did not transform plaintiff's shareholder limited liability into "potentially unlimited liability or even liability on the level of a non-limited liability partner."[164] Fourth, the majority shareholders, a named individual defendant and his wife, set the plaintiff's rate of pay and determined whether or not to pay her at all during any given time

154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.* at *7 (holding that the defendants' argument failed to prove the plaintiff had greater liability).
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.* at *8.
163. *See id.*
164. *Id.* at *7.

period.[165] Fifth, the majority shareholder "exerted more control over the operation of the company than any of the other officers, in part because it was understood he had the most experience" in the corporation's type of business.[166] As majority shareholders, he and his wife necessarily had more control over finances than the plaintiff did as a minority shareholder.[167] And, significantly, the plaintiff's rights as a minority shareholder were subject to significant limitation, and the majority shareholders "used their position . . . to hold a vote" to remove the plaintiff from her position as CFO.[168]

B. Contractual Partners and Members Can Be Employees for FLSA Purposes

Even where a business takes a form other than a corporation, such as a partnership or LLC, some courts have found that a partner or member–owner was an employee. Although a worker was a partner for contract purposes or had a partnership contract, the worker was an employee for purposes of the FLSA.[169] In *Maldonado Lopez v. Cajmant LLC*, the court states that the contention that "partnerships and partners cannot be held liable under the FLSA is untenable."[170] The court notes that the FLSA itself includes partnership as an entity to which the definition of employer applies.[171] The court reasons that some partners are employees and others are not, and "the question turns on the totality of the circumstances of the business relationship, not the title given to the plaintiff in the documents purportedly creating that relationship."[172]

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165. *See id.* at *9.

166. *Id.*

167. *See id.*

168. *See id.* at *10.

169. *See* Fegley v. Higgins, 19 F.3d 1126, 1132 (6th Cir. 1994) (finding that because the plaintiff never contributed the required $65,000 to the proposed business, the partnership agreement was not effective, and the plaintiff was an employee for FLSA purposes); *see also* Perry v. Furman's Lab LLC (*Perry I*), No. 17-cv-6107, 2018 WL 6576050 at *2 (E.D.N.Y. Aug. 31, 2018); Perry v. Furman's Lab LLC (*Perry II*), No. 17-cv-6107, 2018 WL 5801539 at *3 (E.D.N.Y. Nov. 6, 2018) (stating that while under the partnership agreement owning up to 40% of the company might qualify Perry as an "owner," it does not mean he is not an "employee" under the FLSA).

170. No. 15-CV-593, 2019 WL 3937667, at *4 (E.D.N.Y. July 31, 2019).

171. *See id.* at *4 ("The FLSA's definition of 'employer' applies to 'an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.'" (emphasis omitted) (citing 29 U.S.C. § 203(a))).

172. *Id.* (citing *Perry II*, 2018 WL 5801539, at *3).

For instance, in *Perry v. Furman's Lab LLC*, a barista had an oral partnership agreement to start a coffee shop.[173] The barista was to have a 40% interest and the financier a 60% interest.[174] The barista worked for two months seven days a week for 750 hours and received only some tips, but no wage and no partnership profits.[175] He then quit and sued the coffee shop and partner for FLSA wage violations.[176] The court applied a flexible "economic reality test" reviewing the totality of the circumstances.[177] The court reasoned that the barista's partner "controlled the financial aspects of the business," benefited from the barista's around the clock labor, and did not provide any proceeds of the business to the barista.[178] Implicit in the court's reasoning is that the barista worked and managed daily affairs but had no input as to the business management of the restaurant.[179] In fact, the partner denied there was any partnership agreement so as to pay nothing to the barista.[180]

Similarly, in *Harris v. Universal Contracting, LLC*, the court found that class B members of an LLC were employees.[181] As class B members, they held one membership unit of the company and had one vote.[182] No vote, however, could be held or prevail unless the majority membership unit holder agreed.[183] The court, in reliance on other cases, reasoned that a title alone is not dispositive in determining whether someone is an employee.[184] The court elected to use the six factors set out by the Supreme Court in an Americans with Disabilities Act (ADA) case, which, like the common law agency test, focuses ultimately on the factor of control.[185] An owner who acts independently and manages a business is a proprietor and not an employee, whereas someone subject to the firm's control is an

173. *See Perry II*, 2018 WL 5801539, at *1.
174. *See id.*
175. *See id.* at *1–2.
176. *See id.* at *2.
177. *See id.*
178. *See id.* at *3.
179. *See id.*
180. *See id.*
181. *See* No. 2:13-CV-00253 DS, 2014 WL 2639363, at *7 (D. Utah Jun. 12, 2014).
182. *See* Harris v. Universal Contracting, LLC, No. 2:13-CV-00253 DS, 2014 WL 2639363, at *1 (D. Utah Jun. 12, 2014).
183. *See id.*
184. *See id.* at *2.
185. *See id.* at *2–3 (citing Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003)).

employee.[186] First, the court reasoned that the LLC had the ability to hire or fire class B members because the manager of the LLC could redeem class B shares for unsatisfactory work.[187] Second, the LLC supervised and controlled the work of the class B members because team leads supervised the work, and the LLC would make "administrative decisions relating to the manner in which any [c]lass B [m]embers perform construction" work for the LLC.[188] Third, while class B members had "very flexible schedules and substantial autonomy," they reported to "the construction manager, the team leads, and the qualifiers."[189] Fourth, the class B members' vote was insignificant and managers had "broad authority . . . to determine everything from the content of the hiring paperwork, to the way in which the services will be provided by the [c]lass B members."[190] An individual class B member "has very little influence over the organization."[191] Fifth, the written agreements did not intend class B members to be employees, but this factor was outweighed by the others.[192] Sixth, the class B members shared in the profits and losses of the LLC only in a limited way.[193] "[B]y definition they are shielded from the liabilities of the LLC. A percentage of the wages due to each [c]lass B member is deducted from their earnings and held in that member's capital account," and used to pay administrative costs.[194]

C. Some Partners and Owners of Closely Held Corporations Are Not Employees

Several cases indicate that in certain situations partners and other business owners are not employees and fall outside the protection of the FLSA.[195] For instance, in *Wheeler v. Hurdman*, the court addressed the question of whether a bona fide partner in a

186. *See id.* at *3.
187. *See id.*
188. *See id.* at *4.
189. *Id.*
190. *Id.*
191. *Id.*
192. *See id.* at *1.
193. *See id.* at *5.
194. *Id.*
195. *See, e.g.*, Frank v. Palic, No. 19-cv-1893-WJM-GPG, 2019 WL 6609471, at *3 (D. Col. Dec. 5, 2019) (dismissing complaint without prejudice where allegations may indicate an employee relationship but the plaintiff's managerial role is "also consistent with a partnership role"); *see also* Steelman v. Hirsch, 473 F.3d 124, 132 (4th Cir. 2007).

general partnership accounting firm could also be an employee of the firm under the FLSA Equal Pay Act, as well as under various antidiscrimination statutes.[196] The Tenth Circuit, applied an economic reality test,[197] but focused on cases addressing Title VII rather than the FLSA,[198] and rejected all of the factors traditionally used in the economic reality test.[199] Using this approach, the court concluded the answer was no, relying heavily on general partners' unlimited liability and assumption of the risk of losses.[200]

The court further reasoned, "Other common characteristics of partnerships are profit sharing; contributions to capital; part ownership of partnership assets, including a share of assets in dissolution of the enterprise; and the right to share in management subject to agreement among the partners."[201] The court concluded that "[w]hen individuals combine to carry on business as partners all these factors introduce complexities and economic realities which are not consonant with employee status."[202] The *Wheeler* court actually de-emphasized the need for each partner to have a significant amount of control, noting that the practical needs of a business often result in partners giving up a certain amount of control over day-to-day decisions and abdicating such control to managers, teams, or committees.[203]

Rhoads v. Jones Financial Cos. is another case like *Wheeler*, where a type of FLSA claim—an Equal Pay Act gender discrimination claim—was brought alongside other discrimination claims, and the court relied primarily on discrimination rather than FLSA cases.[204] The court held that the plaintiff, who was a general partner in a financial

196. *See* 825 F.2d 257, 262 (10th Cir. 1987). The Equal Pay Act of 1963 is a subpart of the FLSA. *See* 29 U.S.C. § 201 (1963).

197. *See Wheeler*, 825 F.2d at 268–71.

198. *See id.* at 262, 271 ("This court is committed to use of an economic realities test in applying remedial social legislation but only where and to the extent appropriate."). After *Wheeler* the Supreme Court decided in *Clackamas Gastroenterology Associates, P. C. v. Wells* that the common law agency test, rather than the economic realities test, must be used to determine whether a worker is an employee covered by Title VII and other federal antidiscrimination laws. *See* Clackamas Gastroenterology Assocs. P.C. v. Wells, 538 U.S. 440, 445, 449 (2003).

199. *See Wheeler*, 825 F.2d at 272 (concluding the specific independent contractor–employee factors are "largely useless in a general partnership context").

200. *See id.* at 273, 277.

201. *Id.* at 274.

202. *Id.* at 275.

203. *See id.*

204. *See* 957 F. Supp. 1102, 1110 (E.D. Mo. 1997).

company, was not an employee.[205] The court set out "numerous indicia of partner status."[206] The plaintiff made "periodic capital contributions" resulting in a "bona fide ownership interest."[207] The plaintiff also shared in the profits and losses of the partnership.[208] She had voting rights that were not reviewed by the managing partner or an executive committee.[209] The general partners could vote the manager and executive committee out.[210] She had the right to examine the partnership's books and was referred to and signed documents as a general partner.[211] As a general partner, she was personally liable for "certain debts, obligations and liabilities."[212] The partnership did not withhold employment taxes for the plaintiff. Although she may not have exercised her rights, the plaintiff had the right to participate in management of the partnership.[213]

In *Escobar v. GCI Media, Inc.*, the plaintiff web designer sued the full-service marketing firm for which he worked for FLSA overtime violations.[214] The court granted the employer's motion for summary judgment holding that the plaintiff was a partner and not an employee.[215] The employer asserted that the plaintiff began working as a partner in 2004 after having worked as an independent contractor and was "in charge of the graphic design portion of the business."[216] The parties had no written partnership agreement, but the plaintiff attended partner meetings and represented himself as a partner to clients.[217] The court applied a modified economic reality test after explaining the test was developed to distinguish employees from independent contractors and does not work well to distinguish a partner or owner from an employee.[218] The court reasoned that the plaintiff shared in the profits of the company and he and his partner's salaries increased at the same time when greater profits were generated

205. *See id.*
206. *Id.* at 1107.
207. *Id.*
208. *See id.*
209. *See id.*
210. *See id.*
211. *See id.*
212. *See id.* at 1108.
213. *See id.*
214. *See* No. 08-21956-Civ-TORRES, 2009 U.S. Dist. LEXIS 52719, at *2 (S.D. Fla. June 22, 2009).
215. *See id.* at *1.
216. *See id.*
217. *See id.*
218. *See id.* at *10.

and when they needed more money.[219] The plaintiff assumed the risk of loss and liabilities—the plaintiff's salary decreased when business declined.[220] The plaintiff's managerial rights were exhibited by his attendance at partner meetings, his input on potential employees and partners, and the business's use of the plaintiff's internet domain "to house client web-sites."[221] The plaintiff was not terminated, but instead asked to work from home when his work performance deteriorated due to drinking at work and frequent nonbusiness trips.[222] He maintained he was a partner in written correspondence with his partner and another employee and had the power to fire employees.[223] The plaintiff's partner's high level of control over the plaintiff and most aspects of the partnership did not negate the plaintiff's partner status.[224] The plaintiff was "on call 24/7," also supporting that the long hours he worked represented his "capital contribution" to the partnership.[225]

To the extent *Wheeler* and *Rhoades* rely on cases interpreting the definition of "employee" for the purpose of Title VII and other statutes rather than those interpreting the FLSA, other courts should be reluctant to rely heavily on them, and we approach integrating the factors they rely on into our proposed test with caution.[226] Moreover, control by a supervisor, manager, board, or other employer agent is a key component of the economic reality test that aids in the overall determination of whether a particular owner is or is not dependent on their employer to earn a living.[227] To the extent these two decisions and *Escobar* neglect to consider control by others as a significant factor, our proposal suggests they are in error.

In *Golizio*, the court applied the economic reality test to determine whether the plaintiff was dependent upon the coffee-shop and restaurant business for which he worked.[228] The court considered the following five factors:

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219. *See id.* at *13.
220. *See id.*
221. *See id.* at *14.
222. *See id.* at *2.
223. *See id.* at *15.
224. *See id.* at *16.
225. *See id.* at *17.
226. *See* Wheeler v. Hurdman, 825 F.2d 257, 263–64 (10th Cir. 1987); Rhoads v. Jones Fin. Cos., 957 F. Supp 1102, 1106, 1109–10 (E.D. Mo. 1997).
227. *See* Golizio v. Antonine Holding, Inc., No. 96–3142, 1997 WL 47781, at *3 (E.D. La. Feb. 5, 1997).
228. *See id.*

> 1) the degree of control exercised by the alleged employer; 2) the extent of the relative investments of the worker and alleged employer; 3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; 4) the skill and initiative required in performing the job; and 5) the permanency of the relationship.[229]

The court recognized this test is not directly on point to the determination of whether an owner is an employee because it is normally used to determine if a worker is an independent contractor.[230] The court determined that the first factor, addressing degree of control, slightly favored the defendant.[231] The court reasoned that "[w]hile the evidence . . . does not indicate who is in control of the methods of payment, the hours of operation, and the merchandise sold," it "does indicate that plaintiff had control over the advertising" and other aspects of the business' management.[232] As to the second factor, extent of investment, the court determined the factor weighed in favor of the defendant.[233] The plaintiff had invested $150,000 into the company and owned one-third of the outstanding shares.[234] As to the third factor, the opportunity for profit or loss, the court concluded that the "plaintiff's investment was more akin to an entrepreneur than to a wage earning employee."[235] The court reasoned the plaintiff made a risky investment seeking a return because the stock-purchase agreement stated "plaintiff was to share on a pro rata basis on any bonus, insurance, and other perks commensurate with the number of shares outstanding."[236] The court admonished that "[b]y becoming a stockholder in a closely held corporation, plaintiff took a risk in an investment," and the "company's delinquent invoices and financial statements" would affect the ability to distribute profits to or pay plaintiff.[237] As to the fourth factor, skill and initiative, the court concluded that the plaintiff's role as day-to-day business manager "involved skill, initiative, and substantial responsibility" so that the factor favored the defendant.[238] As to the fifth and final factor, permanency of the relationship, the court held it clearly favored the

229. *See id.*
230. *See id.*
231. *See id.*
232. *Id.*
233. *See id.* at *4.
234. *See id.*
235. *Id.*
236. *See id.*
237. *See id.*
238. *See id.*

defendant.[239] The court reasoned that the "plaintiff made a substantial investment of time and money into a venture he hoped would be long and profitable."[240] The court concluded that the plaintiff was an independent contractor and not an employee.[241]

Relying on the court's application of the economic reality test in this unpublished decision is risky because the court misapplied the permanency of relationship factor.[242] Correctly applied, the factor indicates a worker is an employee when a more permanent relationship exists, not the reverse.[243] The court also arguably misapplied the factor addressing the level of skill because a day-to-day manager does not have a specific skill like a plumber or electrician, which is contemplated by the economic reality test when determining if a worker is an independent contractor.

In *Eisert v. Urick Foundry Co.*, the court considered all the evidence to determine whether two minority shareholders were covered employees and determined they were not.[244] The plaintiffs each had a 20% share in the corporation, and a father, son, and daughter each had 20%.[245] Before incorporating, the business had been a partnership.[246] Eventually, after incorporation, the family pushed the two plaintiffs out of the business.[247] The court held the plaintiffs were not employed by the corporation because they had commenced their relationship with the other shareholders as equal partners and had acted as equal partners without ever being hired or engaged to perform services.[248] The court explained that the plaintiffs had "elected themselves officers and directors by virtue of their ownership of stock and by agreement with the other owners."[249] The plaintiffs were understood by all five shareholders to be "corporate executives at the

239. *See id.*
240. *Id.*
241. *See id.*
242. *See* id.
243. *See* Guerra v. Teixeira, Civil Action No. TDC-16-0618, 2019 U.S. Dist. LEXIS 12074, at *31 (D. Md. Jan. 25, 2019) (explaining that plaintiff's full-time employment for four years weighed in favor of employee status).
244. *See* 150 F. Supp. 280, 281, 283, 285 (W.D. Pa. 1957).
245. *See id.* at 281.
246. *See id.*
247. *See id.* at 281–83 (noting how the addition of a general manager to the business, the directors' decision to not re-elect the plaintiffs as vice presidents, and the lessening of the plaintiffs' authority all deteriorated the plaintiffs' relationship with the family to the point the plaintiffs' situation became intolerable).
248. *See id.* at 284.
249. *Id.*

top level."[250] As to the nature and extent of the plaintiffs' duties, the court found the duties were owner and "proprietary functions."[251] The court held that the plaintiffs were not discharged but instead "by mutual agreement they simply stopped reporting at the executive offices."[252] The actual relationship between the shareholders was one of partnership where even once business declined, the shareholders jointly resolved to forego salaries.[253] The court concluded, "It is clear that the plaintiffs were proprietors of the partnership and of the corporation and are not entitled to be both proprietors and employees within the meaning of the Fair Labor Standards Act."[254]

In *Zygowski v. Erie Morning Telegram Inc.*, the court held that the plaintiff assumed "all the rights, privileges and prerogatives of the owner of the business" and was not an employee.[255] The plaintiff's wife was the sole stockholder of the company.[256] After they married, he acted as her alter ego and was in complete charge of the business.[257] He had unrestricted management authority.[258] "He hired and discharged employees, kept all the books, handled the office work, supervised all operations, and prepared and filed corporate tax returns."[259] The plaintiff paid himself and self-determined the amounts and timing of the payments.[260]

The DOL has also recognized that a "true owner or partner" is not an employee subject to the FLSA.[261] In 2004, the DOL in an opinion letter stated, "in general, whether an individual is a true owner or partner as opposed to an employee depends on whether he or she acts independently and participates in management or instead is subject to the control of the organization."[262] And more recently, in a 2015 DOL Wage and Hour Opinion Letter, the DOL stated the DOL had "seen an increasing number of instances where employees are labeled . . . 'owners,' 'partners,' or 'members of a limited liability

250. *See id.*
251. *See id.* at 285.
252. *See id.*
253. *See id.*
254. *Id.* at 286.
255. *See* 298 F.2d 639, 640 (3d Cir. 1962).
256. *See id.* at 639.
257. *See id.* at 639–40.
258. *See id.* at 640.
259. *Id.* at 640.
260. *See id.*
261. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Apr. 5, 2004), at *9.
262. *Id.*

company."[263] The DOL recognized that, in these situations "the determination of whether the workers are in fact FLSA covered employees is"—just as in the independent contractor misclassification cases—"made by applying an economic realit[y] analysis."[264]

D. Law Addressing When Cooperative Owners Are or Are Not Employees

Having addressed more generally how courts and the DOL determine whether an owner or partner is subject to the FLSA's protections, in this Section, we discuss those cases in which the DOL and the courts have addressed the status of cooperative owners. Only the DOL has specifically addressed a situation involving a consumer-owned cooperative grocery.[265] After describing the DOL's position, we describe court decisions addressing producer and worker-owned cooperatives.[266] Just as we can work by analogy from the law distinguishing between partners and corporate owners who are and are not employees, we can discern relevant factors from these cooperative cases.

1. *The DOL's Material Simply Reinforces the Baseline Proposition That Owners Can Be Employees Protected by the FLSA*

The DOL has not specifically addressed whether workers of a particular cooperative were or were not employees, but has noted that the same principles used to make that determination about other types of owners will be used to make the determination about cooperative owners.[267] In a 1965 DOL Wage and Hour Opinion Letter, the DOL addressed an agricultural cooperative and recognized that when determining if a worker is an employee, cooperatives are treated in the same way as "any other business organizations, such as corporations, partnerships, or individual enterprises."[268] A 1997 letter, the only

263. Administrator's Interpretation 2015-1, *supra* note 59.

264. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (July 15, 2015), at *3 n.2.

265. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 21, 1997), at *1.

266. *See, e.g.*, Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 28–29 (1961).

267. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Sept. 27, 1965), at *1.

268. *See id.*

authority addressing a cooperative grocery, similarly emphasizes that cooperatives will be treated like other entities.[269] The cooperative indicated that owners "stock shelves, sweep floors, slice meat, and operate cash registers in the store in exchange for discounts on purchases."[270] The discounts were used by the members at any time during the two-week period after they were earned.[271] Accordingly, the cooperative "ask[ed] if [their] practice violat[ed] the minimum wage provisions of the FLSA."[272] The letter simply concluded, citing to the *Goldberg v. Whitaker House Cooperatives, Inc*. decision discussed in the next Subsection, that "part ownership . . . in a cooperative does not preclude the existence of an employer-employee relationship."[273] The letter does not address the factors used to determine when an owner is or is not an employee protected by the FLSA, but rather reinforces the default rule that shareholders can be employees protected by the FLSA.[274]

Section 10c02 in the Field Operations Handbook does explain several of the factors used to determine when a cooperative owner is protected by the FLSA.[275] The manual distinguishes ownership that "establishes a mutual agency analogous to a partnership" or identifies the owner "so closely with the cooperative that they cannot become, respectively employer and employee" from the ordinary situation where a cooperative owner is an employee.[276] In making the determination, the DOL considers the following factors to indicate an owner is an employee: (1) whether the cooperative has a corporate form of organization; (2) the "usual incidents of" an "employment relationship," such as a governing board or officer controlling the "work performed," the hours worked, and "selection for and discharge from the job"; and (3) whether outsiders exercise "financial or managerial control" or provide the cooperatives "capital or management services," particularly when these outsiders are the wholesalers or manufacturers who "purchase or dispose of the products of the cooperative."[277]

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269. *See generally* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 21, 1997).
270. *Id.* at *1.
271. *See id.*
272. *Id.*
273. *Id.*
274. *See id.*
275. *See* WAGE & HOUR DIV., DEP'T. OF LAB., *supra* note 131, § 10c02.
276. *See id.*
277. *See id*.

2. *In Circumstances Where a Cooperative Owner Resembles a Minority Corporate Shareholder, Courts Have Found Cooperative Owners Are Employees*

Several courts, including the Supreme Court, have determined that particular workers in a producer or worker-owned cooperative were employees.[278] In *Goldberg v. Whitaker House Cooperatives, Inc*., the Supreme Court addressed whether the cooperative members were "employees" within the meaning of the FLSA.[279] The Court held the members were employees subject to the DOL regulations prescribed "to prevent the circumvention or evasion of [the FLSA] and to safeguard the minimum wage rate."[280] In *Goldberg*, the respondent was a cooperative incorporated to manufacture, sell, and deal in knitted, crocheted, and embroidered goods.[281] Its members made such goods in their homes and delivered them to the cooperative, and the cooperative paid them periodically "an advance allowance" pending sale of the goods and distribution of any net proceeds to the members, which were similar to patronage dividends.[282] The members manufactured what the cooperative desired and received the compensation it dictated.[283] The members could be expelled from membership for substandard work or failure to obey the cooperative's regulations.[284] The Supreme Court stated in its rationale:

> There is no reason in logic why these members may not be employees. There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act. For the corporation would "suffer or permit" them to work whether or not they owned one share of stock or none or many. We fail to see why a member of a cooperative may not also be an employee of the cooperative.[285]

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278. *See, e.g.*, McComb v. Homeworkers' Handicraft Coop., 176 F.2d 633, 639–40 (4th Cir. 1949) (explaining how a company dissolved and became cooperative to avoid application of FLSA); Goldberg v. Whitaker House Coops., Inc., 366 U.S. 28, 29 (1961) (applying the FLSA to members of a cooperative).
279. *See* 366 U.S. at 29.
280. *See id.* at 30.
281. *See id.*at 29.
282. *See id.* at 30.
283. *See id.*
284. *See id.* at 29.
285. *Id.* at 32.

The Court went on to explain that the members seemed to be both "members" and "employees."[286] It was the cooperative that was affording them "the opportunity to work, and paying them for it."[287] However immediate or remote their right to "excess receipts" may be, they work in the same way as they would if they had an individual proprietor as their employer.[288] The members were not self-employed, nor were they independent.[289] They sold their products on the market for whatever price they could command.[290] "They [were] regimented under one organization, manufacturing what the organization desired and received the compensation the organization dictates."[291] Apart from formal differences, they were engaged in the same work they would be doing whatever the outlet was for their products.[292] The management "fixe[d] the piece rates at which they worked; the management [could have] expel[led] them for substandard work or for failure to obey the regulations."[293] The management, in other words, "[could] hire or fire the homeworkers," and the homeworkers lacked control and depended on the cooperative management.[294] The Court concluded that because the "economic reality" rather than "technical concepts" is the test of employment, these homeworkers were employees.[295]

In *Fleming v. Palmer*, members of a worker-owned cooperative were not being paid wages required by the FLSA.[296] The Palmers, who were the prior owners before the implementation of the FLSA and current managers of the company, argued that the cooperative members were owners and not employees subject to the FLSA.[297] The court focused on whether the cooperative was controlled by the Palmers, or by the worker–owners, reasoning that control is determinative of whether an owner is an employee for the purposes of

286. *See id.*
287. *See* Mitchell v. Whitaker House Coop., Inc., 275 F.2d 362, 366 (1st Cir. 1960) (Aldrich, J., dissenting).
288. *See Goldberg*, 366 U.S. at 32.
289. *See id.* at 32.
290. *See id.*
291. *Id.*
292. *See id.* at 33.
293. *Id.*
294. *Id.*
295. *See id.* (quoting United States v. Silk, 331 U.S. 704, 713 (1947)); Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947).
296. *See* 123 F.2d 749, 751 (1st Cir.1941).
297. *See id.*

the FLSA.[298] The cooperative bylaws provided for each member to have one share of stock and established a patronage system based on the quantity and quality of the work done by the member.[299] Except for the initial board, the board of directors was elected by the members, and the board or managers could terminate a member who did not demonstrate a "cooperativist spirit."[300] The general assembly of all the members could override the termination.[301] While the appeal is pending, a member lost the right to vote, and several other circumstances deprived a member of the right to vote.[302] The board of directors could delegate to the general manager imposing discipline, the distribution of work, and suspension of membership.[303] Once the cooperative was formed and running, no decision of the manager, Palmer, was overruled by either the worker executive committee or the board of directors.[304] At the first member annual assembly, held fourteen months after formation of the cooperative, only 183 of 1,335 members were eligible to vote.[305]

The court held that Palmer controlled the cooperative.[306] "He actively participated in the organization of the cooperative for the express purpose of avoiding the Fair Labor Standards Act."[307] He spoke and acted as the person who could determine whether or not the cooperative was in or out of business.[308] In fact, he had "the power of life and death over the cooperative and could dictate terms to it."[309] He could terminate the business at any time because it owed him a large contractual debt.[310] As manager, he could discipline and remove workers from membership.[311] The department with the largest number of workers was less represented on the board of incorporators than were smaller departments.[312] Only a minority of members had the right to vote.[313] Those who could vote had little choice as to whom they

298. *See id.*
299. *See id.* at 754.
300. *See id.* at 755.
301. *See id.*
302. *See id.*
303. *See id.* at 756.
304. *See id.* at 758.
305. *See id.* at 759.
306. *See id.*
307. *Id.*
308. *See id.*
309. *Id.*
310. *See id.*
311. *See id.*
312. *See id.* at 760.
313. *See id.*

could vote for, and the initial board controlled "to a very great degree the selection of the successor board."[314] The court noted that the cooperative was "a far cry from the cooperative of which the late Justice Brandeis was thinking when he said" that "Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control . . . . They may prefer the way of cooperation."[315] He emphasized the "fundamental difference between capitalistic enterprise and the co-operative—between economic absolutism and industrial democracy. . . ."[316]

3. *Where Cooperative Owners Functioned More Similarly to Partners Than Mere Shareholders, Courts Have Found Owners Are Not Employees*

In *Wirtz v. Construction Survey Cooperative*, the court found that members of a worker-owned cooperative were not employees.[317] "The members of the Cooperative constituted a small, closely-knit partnership of intelligent technicians [who worked] together as a unit to improve their economic lot as a unit."[318] The cooperative was not organized to avoid the application of the FLSA, but existed in the same form long before the FLSA.[319] The members were not regimented and conducted themselves as self-employed, independent craftsmen.[320] They came and went as they pleased and worked or did not work at will.[321] No corporate structure was involved, and the cooperative did not have officers, officials, or a board of directors.[322] All the members shared the losses as well as the profits on a monthly basis.[323] No member received a salary; the terms of remuneration were determined by vote of the entire membership.[324] No one could be expelled and each member had an equal voice in management, and unanimous

314. *See id.*
315. *Id.* at 761.
316. *Id.* (quoting Liggett Co. v. Lee, 288 U.S. 517, 579 (1933)).
317. *See* Wirtz v. Constr. Survey Coop., 235 F. Supp. 621, 624 (D. Conn. 1964).
318. *Id.*
319. *See id.*
320. *See id.*
321. *See id.*
322. *See id.*
323. *See id.*
324. *See id.*

consent was necessary on all decisions.[325] A member could sell his services to an outside employer and yet remain a member of the cooperative, receiving compensation on his labor investment for any work he may perform in the cooperative.[326] Any member could resign and thereafter join the cooperative without restriction or penalty.[327]

The court stated that "if the cooperative were genuinely synallagmatic, no employer–employee relationship can exist and the Act is not applicable."[328] The court also stated, "No traditional, mechanical application of the usual tests to determine the employment relationship will suffice; rather, the court is required to sift the linguistic chaff of labels and scrutinize the kernel of the economic reality of the situation."[329] This statement suggests that the courts will use the economic reality test not only to determine if a worker is an independent contractor but also to determine whether a worker is in a mutual relationship, which does not function as an employer–employee relationship for purposes of the FLSA.[330] However, the court's reasoning is focused on the presence of a mutual cooperative relationship rather than an employment relationship and not on applying the typical factors of the economic reality test.[331] The court concluded that "[t]he Cooperative lacks all the indicia of an employment situation, and the [c]ourt finds no factual basis to conclude that the persons involved require the protection of the" FLSA.[332] The court reasoned "that [two of the members] exerted some measure of leadership over the groups," but "this was due to their longer experience, more extensive knowledge, and driving interest rather than due to positions of control or power."[333] What little guidance they supplied was by consent not authority."[334] Thus, the cooperative members did not require the protection of the FLSA.[335]

In *Godoy v. Restaurant Opportunity Center*, another court more recently found that members of a nonprofit who were working together to start a worker-owned cooperative restaurant were not

325. *See id.*
326. *See id.*
327. *See id.*
328. *Id.*
329. *Id.*
330. *See id.*
331. *See id.*
332. *Id.*
333. *Id.* at 624–65.
334. *See id.*
335. *See id.* at 624.

employees protected by the FLSA.[336] The court noted the "absence . . . of any coherent standard of 'economic reality' for supposed application to partners" in a business and concluded that "the specific independent contractor/employee factors . . . are largely useless in a general partnership context."[337] The court reasoned these were people working "for and together with a not-for-profit corporation toward the co-ownership of a business."[338] "Given the equity agreement between plaintiffs and defendants, the court [found] that the relationship between the parties in this case [was]" close to a partnership.[339] While the plaintiffs were not, as yet, partners of the business they were working with the defendants to create, the plaintiffs devoted hundreds of hours of work in explicit exchange for co-ownership of the business.[340] The court noted that the "parties' agreement that plaintiffs would be co-owners of the restaurant was repeated many times orally and in writing."[341] In a December 4, 2004 letter to an investor, the nonprofit wrote that members of the cooperative would contribute sweat equity converted to cash equivalent in stock.[342] The court reasoned the plaintiffs were not employees, but were similar to partners in a firm.[343] They "assume[d] the risks of loss and liabilities" of the venture and had a real opportunity to share in its profits upon success.[344] "Plaintiffs' hours of sweat-equity represented their capital contribution to the business, and one that would earn [plaintiffs] equity in the [restaurant]."[345] The plaintiffs had management responsibilities as members of the board of directors of the cooperative committee which managed "the restaurant's planning and development phase."[346] "Taken together, the balance of these 'economic realities' weighs against the existence of an employment relationship."[347]

336. *See* Godoy v. Rest. Opportunity Ctr., 615 F. Supp. 2d 186, 194–95 (S.D.N.Y. 2009).
337. *Id.* at 194 (quoting Wheeler v. Hurdman, 825 F.2d 257, 271–72 (10th Cir. 1987)).
338. *Id.*
339. *Id.*
340. *See id.*
341. *Id.* at 195.
342. *See id.*
343. *See id.*
344. *See id.* at 197.
345. *Id.* at 195.
346. *See id.*
347. *Id.*

IV. PROPOSAL

In the first Section of this Part, we propose a set of factors, drawn from the administrative materials and court cases, for cooperatives, the DOL, and the courts to consider when determining whether a worker in a consumer cooperative is an owner rather than an employee. In the second Section, we then apply the test to a hypothetical but representative cooperative grocery.

A. Proposed Variant Economic Reality Test Designed to Distinguish Cooperative Owners Who Are Not Employees from Those Who Are

This Section first discusses which of the traditional economic reality factors used to distinguish an independent contractor from an employee are helpful to retain in the ownership context. The Section then examines the utility of other factors courts have utilized in the ownership context. Finally, we set out the factors of our proposed test.

1. *Factors Drawn from Traditional Economic Reality Test*

As recognized by several courts, not all of the factors of the traditional economic reality test used to determine if a worker is an independent contractor or an employee are helpful to determine if a worker is an owner rather than an employee.[348] We recommend considering the following factors from the traditional test used by the DOL:[349]

1) The worker's opportunity for profit or loss depending on their managerial skill;[350]

2) The extent of the relative investments of the employer and the worker;[351]

3) Whether the work performed requires special skills and initiative;[352] and

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348. *See* Wheeler v. Hurdman, 825 F.2d 257, 272 (10th Cir. 1987); Golizio v. Antonine Holding, Inc., No. 96–3142, 1997 WL 47781, at *3 (E.D. La. Feb. 5, 1997); *Godoy*, 615 F. Supp. 2d at 187.

349. *See* Administrator's Interpretation, *supra* note 59.

350. *See id.* at 19–24.

351. *See id.* at 24–29.

352. *See* Wirtz v. Constr. Survey Coop., 235 F. Supp. 621, 621 (D. Conn. 1964) (holding that intelligent technicians were owners and not employees of cooperative).

4) The degree of control exercised or retained by the employer.[353]

At least one court has focused the relative investment factor on whether the purported partner invested in work materials.[354] While focusing on investment in work materials may be helpful in some cases, in most, a focus on the type and extent of investment in the business will more pointedly indicate that a worker is an owner rather than an employee.

In terms of degree of control, the DOL has explained that "whether an individual is a true owner or partner as opposed to an employee depends on whether [the owner] acts independently and participates in management or instead is subject to the control of the organization."[355] The DOL has elaborated that control by a governing body or a designated officer over the work performed, the owner's hours of labor, and selection for and discharge from the job indicate employer control suggesting the owner is an employee.[356] Courts have also looked at a variety of sub-factors to determine whether the employer controls the owner as an employee.[357] At least one court has expanded on the degree of control factor by specifically considering whether the employer controls the manner of work,[358] supervises the work,[359] and has the power to hire and fire the worker.[360] Another court found owners were not employees where they were not regimented and conducted themselves as self-employed, independent

353. *See, e.g.*, Fleming v. Palmer, 123 F.2d 749, 751 (1st Cir. 1941).

354. *See* Kehler v. Albert Anderson, Inc., No. 16-5318, 2017 WL 1399628, at *5 (D.N.J. Apr. 17, 2017).

355. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Family Medical Leave Act (Apr. 5, 2004), at *9; *see also* Eisert v. Urick Foundry Co., 150 F. Supp. 280, 284 (W.D. Pa. 1957) (holding that the plaintiffs, shareholders in a corporation, who acted as equal partners were not employees).

356. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 21, 1997); *see also Fleming*, 123 F.2d at 755–56.

357. *See* Steelman v. Hirsch, 473 F.3d 124, 131 (4th Cir. 2007); *Eisert*, 150 F. Supp. at 283–85; Wirtz v. Constr. Surv. Coop., 235 F. Supp. 621, 623 (D. Conn. 1964); Hess v. Madera Hondu Suzuki, No. 1:10–cv–01821–AWI–BAM, 2012 WL 4052002, at *9, *10 (E.D. Cal. Sept. 14, 2012).

358. *See* Carlson, *supra* note 89, at 338–39 ("Employer control over the details of the work has been the factor most courts place at the heart of any test of worker status . . .").

359. *See* Steelman v. Hirsch, 473 F.3d 124, 131 (4th Cir. 2007).

360. *See Eisert*, 150 F. Supp. at 283–85 (reasoning that the plaintiffs were not hired by anyone and were not discharged, but instead elected to stop reporting to executive offices).

craftsmen.[361] They came and went as they pleased and worked or did not work at will.[362] Another court emphasized that majority shareholders have more control over operations and finances while minority shareholders are "subject to significant limitation."[363]

We propose that the following factors from the traditional test, which have been applied by courts, are not helpful in most circumstances:

1) Extent to which the work is an integral part of the employer's business;[364] and
2) Permanency of the relationship.[365]

In many situations, a partner or owner of a business has a long-term relationship with the business, similar to a long-term relationship that an employee may have.[366] In the independent contractor setting, having a brief relationship for one or two projects tends to indicate that a worker is not an employee, while having a continuing employment relationship indicates that a worker is an employee.[367] With an owner or partner, they are not likely to have a temporary relationship, though they may only occasionally work for the business they own. Likewise, in the independent contractor setting, work that is tangential to the core business, such as painting a building or fixing a plumbing problem, indicates independent contractor status, while performing work that is integral and regularly performed by the business indicates employee status. On the other hand, partners and owners likely perform work that is necessary to the business, such as networking, advertising,

361. *See* Wirtz v. Constr. Surv. Coop., 235 F. Supp. 621, 623 (D. Conn. 1964); *see also Steelman*, 473 F.3d at 127 (noting that owners–partners perform same duties and no bargained for exchange of labor for wages).

362. *See Wirtz*, 235 F. Supp. at 624.

363. *See* Hess v. Madera Hondu Suzuki, No. 1:10–cv–01821–AWI–BAM2012, WL 4052002, at *9, *10 (E.D. Cal. Sept. 14, 2012).

364. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947); (explaining that workers were employees in part because work was "part of the integrated unit of production"); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1385 (3d Cir. 1985) ("[W]orkers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer.").

365. *See* Kleinberger, *supra* note 103, at 514–15 (noting that permanency of relationship is not helpful to determine whether an LLC member is an owner or employee because the owner is integrated into the business); Wheeler v. Hurdman, 825 F.2d 257, 272 (10th Cir. 1987) (citing the length of time a worker has worked for a business as unhelpful in determining who is a partner).

366. *See, e.g.*, *Steelman*, 473 F.3d at 132.

367. *See id.* at 129, 131.

handling finances, providing training, or doing necessary mundane tasks. They do so to keep the business they own viable and, hopefully, increase their wealth and receive a profit rather than to earn wages for daily living needs.

2. *Factors Drawn from Cases Presenting the Issue of Whether an Owner Is an Employee*

Of course, the test is one of the economic reality of the circumstances given the totality of factors, so consideration of additional or different factors is permissible. In the context of determining whether a worker is excepted from the FLSA as a partner or owner, courts have considered the following additional factors as indicating nonemployee status, which we also recommend considering. We have modified some of them to address the cooperative owner, rather than the partnership situation. The list is exhaustive to account for different situations, but not all factors will apply to every determination.

1) The worker is an official partner or owner of an incorporated entity or acknowledges that they are a partner or owner, or holds themselves out to third-parties as a partner or owner;[368]

2) The owners of the cooperative effectively constitute a small, closely knit partnership;[369] they work "together as a unit to improve their economic lot as a unit";[370]

3) Owners take on liabilities and risks of the business; liability is not limited;[371]

4) Owner's profits are conditional on actions of the other partners or owners of the cooperative, or there is significant profit sharing;

368. This analysis should also be helpful for consumer owners in multi-stakeholder cooperatives.

369. *See* Wirtz v. Constr. Surv. Coop., 235 F. Supp. 621, 621 (D. Conn. 1964); Eisert v. Urick Foundry Co., 150 F. Supp. 280, 284–86 (W.D. Pa. 1957) (corporate shareholders functioned as partners jointly electing officers and directors and jointly resolving to forego salaries when business declined).

370. *See Wirtz*, 235 F. Supp. at 624; *see also Steelman*, 473 F.3d at 125.

371. *See* Hess v. Madera Hondu Suzuki, No. 1:10–cv–01821–AWI–BAM2012, WL 4052002, at *7 (E.D. Cal. Sept. 14, 2012).

5) Owners make contributions to capital or contribute "sweat equity," work hours in lieu of capital that equate to a share in the business;[372]

6) Owners maintain part ownership of business assets, including a share of assets in dissolution of the enterprise;[373]

7) Owners possess the right to share in management subject to agreement among the owners;[374]

8) No owner receives a salary;[375] or terms of remuneration are determined by vote of the entire membership,[376] or the owner has unlimited access to the business's funds and determines their own salary;[377]

9) "No one may be expelled,"[378] and any owner may resign and thereafter join the cooperative without restriction or penalty;[379]

10) Each member has an equal voice in management and unanimous consent is necessary on all decisions;[380]

11) A member may sell his services to an outside employer and yet remain a member of the cooperative;[381]

12) Leadership is not by those in positions of power, but by those with longer experience, more extensive knowledge, and "driving interest" rather than due to positions of control or power;[382] guidance is supplied by "consent not authority;"[383] and

372. Escobar v. GCI Media, Inc., No. 08-21956-Civ., 2009 WL 1758712, at *5 (S.D. Fla. June 22, 2009). *Cf. Eisert*, 150 F. Supp. at 281, 282 (reasoning that two partners who brought experience to the business and paid for their shares via profit deductions performed as top-level corporate executives, representing the corporation in union negotiations and performing other proprietary duties).

373. *See* Wheeler v. Hurdman, 825 F.2d 257, 274 (10th Cir. 1987).

374. *See Escobar*, 2009 WL 1758712, at *1.

375. *See Wirtz*, 235 F. Supp. at 624.

376. *See id.*

377. *See* Zygowski v. Erie Morning Telegram, Inc., 298 F.2d 639, 640 (3d Cir. 1962).

378. *Wirtz*, 235 F. Supp. at 624.

379. *See id.*

380. *See id.*

381. *See id.*

382. *See id.* at 624–25. *But see* Hess v. Madera Honda Suzuki, No. 1:10-cv-01821-AWI-BAM, 2012 WL 4052002, at *9 (E.D. Cal. Sept. 14, 2012) (finding that the minority shareholder was an employee where the majority shareholder "exerted more control over the operation of the company than any of the other officers, in part because it was understood he had the most experience").

383. *Wirtz*, 235 F. Supp. at 625.

13) The owner is in control of the business with unrestricted management authority, such as hiring and firing, keeping books, handling office work, and supervising operations.[384]

As to taking on the liabilities and risk of the business, being subject to suit by other partners is a specific consideration leaning toward partner rather than employee status.[385]

On the other hand, courts and the DOL have considered the following factors to indicate an owner is an employee:

1) Whether, like a corporation, the cooperative is a legal entity separate and apart from its shareholders;[386]

2) The cooperative has officers, officials, or a board of directors;[387]

3) The owner is a minority shareholder;[388]

4) The shareholder expects to earn a salary through employment, not simply dividend on stock;[389]

5) The owner's shareholder rights are subject to significant limitation;[390]

6) The value of the minority interest is unclear;[391]

7) The majority shareholder dictates to the minority shareholder how the company is run;[392]

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384. Zygowski v. Erie Morning Telegram, Inc., 298 F.2d 639, 640 (3d Cir. 1962).

385. *See* Wheeler v. Hurdman, 825 F.2d 257, 274 (10th Cir. 1987).

386. *See* WAGE & HOUR DIV., DEP'T OF LAB., *supra* note 131, § 10c02 ("Among the circumstances which may be taken to indicate that a cooperative is an entity separate and distinct from its worker-members, are a corporate form of organization."); *see also* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 21, 1997).

387. *See Wirtz*, 235 F. Supp. at 624.

388. *See* Spitzmesser v. Tate Snyder Kimsey Architects, Ltd., No. 2:10-cv-01700-KJD-LRL, 2011 WL 2552606, at *9 (D. Nev. June 27, 2011).

389. *See* Hess v. Madera Honda Suzuki, No. 1:10-cv-01821-AWI-BAM, 2012 WL 4052002, at *8 (E.D. Cal. Sept. 14, 2012).

390. *See Spitzmesser*, 2011 WL 2552606, at *9; *see also* Fleming v. Palmer, 123 F.2d 749, 760 (1st Cir.1941) (explaining that the majority of owners had no vote and those who did were highly restricted in who they could vote in as board members and had less representation for owners from larger departments).

391. *See* Kehler v. Albert Anderson, Inc., No. 16-5318, 2017 WL 1399628, at *6 (D.N.J. Apr. 18, 2017).

392. *See id.*

8) The majority shareholder sets the amount of stipend the minority shareholder receives;[393]

9) The share of profit is dependent on shares held rather than work performed;[394]

10) The managerial duties involve daily affairs rather than business management;[395]

11) "[T]he exercise of financial or managerial control or the furnishing of capital or management services by outsiders, especially if such outsiders are wholesalers, manufacturers, or others who purchase or dispose of the products of the cooperatives;"[396] and

12) The cooperative owes a large amount of money to its manager, such that the manager controls whether the company stays in business.[397]

One court has described the significance of the corporate form by contrasting a closely held S corporation with a partnership.[398] In a partnership, partners have a joint account from which they can fund personal expenditures, whereas in the corporation, a shareholder has no ownership interest in the corporate assets.[399]

While *Goldberg* specifically addresses a cooperative, the nature of that cooperative, a producer cooperative by which homeworkers bundled their goods for sale on the market, means that the factors used by the Court cannot be simply and unthinkingly transferred to the consumer cooperative context.[400] Several of the factors used by the

393. *See id.*; *Hess*, 2012 WL 4052002, at *9.

394. *See Hess*, 2012 WL 4052002, at *7.

395. *See* Kehler v. Albert Anderson, Inc., No. 16-5318, 2017 WL 1399628, at *7 (D.N.J. Apr. 18, 2017) ("Plaintiff's management duties and sweat equity do not preclude him from being considered an 'employee' for FLSA purposes."); *Perry II*, No. 17-cv-6107 (ENV)(RLM), 2018 WL 5801539, at *3–4 (E.D.N.Y. Nov. 6, 2018) (holding that a partner with 40% interest who worked at a start-up restaurant 750 hours over two months is an employee and implying that a partner who worked and managed daily affairs but had no input as to the business management of the restaurant is an employee); *see also* Daniel S. Kleinberger, *"Magnificent Circularity" and the Churkendoose: LCC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477, 560, 583–87 (1997) (If an owner works for pay on traditional tasks, then to be classified as a nonemployee, the owner must have "a substantial role in the organization's internal governance" focusing on "management of the business, not on the scope of an owner's responsibilities in carrying out the business.").

396. *See* WAGE & HOUR DIV., DEP'T. OF LABOR, *supra* note 131, § 10c02.

397. *See* Fleming v. Palmer, 123 F.2d 749, 759 (1st Cir. 1941).

398. *See Hess*, 2012 WL 4052002, at *7.

399. *See id.*

400. *See* 366 U.S. 28, 29 (1961).

Court are part of the assessment of whether the employer or other owners control the potential nonemployee owner or whether the owner has control unlike an employee. The Court considered whether the cooperative owners:

1) Work in the same way as they would if they had an individual proprietor as their employer;[401]
2) Are regimented under one organization;[402]
3) Produce or manufacture what the organization desired;[403]
4) Receive the "compensation the organization dictates;"[404] and
5) Work at rates fixed by management.[405]

While the degree to which the owner either has control over the business or is controlled by others is a key factor in any economic-reality inquiry, examining whether owners are regimented under one organization and produce or manufacture what the organization dictates are not helpful inquiries in the consumer cooperative setting. Like partners, cooperative grocery owners will work closely together as one organization and produce the service or product they agree upon. How much control each owner has over the decisions about products and services and how much freedom they have to work on their own schedule in their own way will be more determinative than simply whether they work closely with others or whether they produce the services needed by the business.

The Court also considered whether the cooperative owners sell items they produce on the market for whatever price they can command.[406] Of course partners and owners sell whatever product or service they provide at market rates, so this factor is probably not a good indicator as to whether consumer owners are or are not employees.[407]

401. *See id.* at 32; *see also Fleming*, 123 F.2d at 752 (noting that pre-FLSA business remained the same as before incorporating as worker-owned cooperative, and the prior owners switched to be the cooperative manager).
402. *See* Goldberg v. Whitaker House Coops., Inc., 366 U.S. 28, 32 (1961).
403. *See id*.
404. *See id.*
405. *See id.* at 33.
406. *See id.*
407. *See id.* at 29.

3. *Overall Recommended Factors to Consider When Determining Whether a Cooperative Grocery Owner Is an Employee*

The bottom line remains whether, considering all of the circumstances, the worker is in reality an employee of the cooperative grocery. The ultimate determination is whether these are owners in business for themselves, who can choose to pay themselves nothing should they wish, like a sole proprietor, majority stakeholder in a closely held corporation, or partners; or whether they are doing work for others that necessitates compensation. When factors point different directions, resulting in a close call, the worker should be classified as an employee due to the remedial nature of the FLSA.

If these factors are present in the owner's circumstances, they suggest the owner is not an employee:

1) The worker's opportunity for profit or loss depends on their managerial skill;[408]

2) The owner is significantly invested in the business compared to other employees;[409]

3) The owner's work requires special skills and initiative, particularly of the type owners often perform, such as financial stewardship of the business and marketing;[410]

4) The owner exercises control over the business;

i. The owner acts independently and participates in management[411] or shared management;[412]

ii. The owner has unrestricted management authority, such as hiring and firing, keeping books, handling office work, and supervising operations;[413]

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408. Kehler v. Albert Anderson, Inc., No. 16-5318, 2017 WL 1399628, at *5 (D.N.J. Apr. 18, 2017).

409. *See id.*

410. *See* Wirtz v. Constr. Survey Coop., 235 F. Supp. 621, 624 (D. Conn. 1964).

411. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Family Medical Leave Act (Apr. 5, 2004), at *9; *see also* Eisert v. Urick Foundry Co., 150 F. Supp. 280, 284 (W.D. Pa. 1957) (concluding that the plaintiffs, shareholders in a corporation, who acted as equal partners were not employees).

412. *See, e.g.*, Escobar v. GCI Media, Inc., No. 08–21956–Civ., 2009 WL 1758712, at *1 (S.D. Fla. June 22, 2009) (noting that the plaintiff was in charge of a portion of the business).

413. Zygowski v. Erie Morning Telegram, Inc., 298 F.2d 639, 640 (3d Cir. 1961).

iii. The owner is not regimented and conducts him or herself as a self-employed, independent craftsman;[414]

iv. The owner comes and goes at their own discretion;[415]

v. The owner can work or not work at will;[416]

vi. The owner controls operations and finances.[417]

5) The worker is an official partner or owner of an incorporated entity or acknowledges that they are a partner or owner and holds themselves out to third parties as a partner or owner;[418]

6) The owner of the cooperative effectively constitute a small, closely knit partnership;[419] they work together as a unit to improve their economic lot as a unit;[420]

7) The owner takes on liabilities and risk of the business; liability is not limited;[421]

8) The owner's profits are conditional on actions of the other partners or owners of the cooperative, or there is significant profit sharing;[422]

9) The owner makes contributions to capital or contributes "sweat-equity," works hours in lieu of capital that equate to a share in the business;[423]

10) The owner maintains part ownership of business assets, including a share of assets in dissolution of the enterprise;

11) No owner receives a salary;[424] or terms of remuneration were determined by vote of the entire membership,[425] or the owner has

414. *See Wirtz*, 235 F. Supp. at 623; *see also* Steelman v. Hirsch, 473 F.3d 124, 126 (4th Cir. 2007) (discussing that owners–partners perform the same duties and no bargained-for exchange of labor for wages).

415. *See Wirtz*, 235 F. Supp. at 624.

416. *See id.*

417. *Zygowski*, 298 F.2d at 640.

418. *See Escobar*, 2009 WL 1758712, at *1. This analysis should also be helpful for consumer owners in multi-stakeholder cooperatives.

419. *Wirtz*, 235 F. Supp. at 624; Eisert v. Urick Foundry Co., 150 F. Supp. 280, 284–85 (W.D. Pa. 1957).

420. *Wirtz*, 235 F. Supp. at 624; *see also Steelman*, 473 F.3d at 125–26.

421. Hess v. Madera Honda Suzuki, No. 1:10–cv–01821–AWI–BAM, 2012 WL 4052002, at *7 (E.D. Cal. Sept. 14, 2012).

422. *Escobar*, 2009 WL 1758712, at *4.

423. *Escobar*, 2009 WL 1758712, at *5. *Cf. Eisert*, 150 F. Supp. at 281, 282 (reasoning that two partners who brought experience to the business and paid for their shares via profit deductions performed as top-level corporate executives, representing the corporation in union negotiations and performing other proprietary duties).

424. *Wirtz*, 235 F. Supp. at 624.

425. *Id.*

unlimited access to the business's funds and determines their own salary;[426]

12) No one may be expelled,[427] and any owner may resign and thereafter join the cooperative without restriction or penalty;[428]

13) Each owner has an equal voice in management and unanimous consent is necessary on all decisions;[429]

14) An owner may sell his services to an outside employer and yet remain an owner of the cooperative;[430] and

15) Leadership is not by those in positions of power or control, but by those with longer experience, more extensive knowledge, and "driving interest."[431] "Guidance is supplied by consent not authority."[432]

If these factors are present in the owner's circumstances, they suggest the owner is an employee:

1) Other owners are more significantly invested in the business;[433]

2) Other owners or managers exercise control over the owner;[434]

i. The majority shareholder dictates to the minority shareholder how the company is run;[435]

ii. The majority shareholder sets the amount of stipend the minority shareholder receives,[436] or management fixes the amount of wages or compensation of the owner;[437] and

iii. A governing body, designated officer, or manager controls and supervises the work performed;

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426. Zygowski v. Erie Morning Telegram, Inc., 298 F.2d 639, 640 (3d Cir. 1961).

427. *Wirtz*, 235 F. Supp. at 624.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 625. *But see* Hess v. Madera Hondu Suzuki, No. 1:10–cv–01821–AWI–BAM, 2012 WL 4052002, at *4 (E.D. Ca. Sept. 14, 2012) (finding that a minority shareholder was an employee where a majority shareholder "exerted more control over the operation of the company than any of the other officers, in part because it was understood he had the most experience").

432. *Wirtz*, 235 F. Supp. at 625.

433. *See* Kehler v. Albert Anderson, Inc., No. 16-5318, 2017 WL 1399628, at *6 (D.N.J. Apr. 17, 2017).

434. *See, e.g.*, Fleming v. Palmer, 123 F.2d 749, 762 (1st Cir. 1941).

435. *See Kehler*, 2017 WL 1399628, at *6.

436. *Id.*; *Hess*, 2012 WL 4050002, at *9.

437. *See* Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 32 (1961).

iv. A governing body, designated officer, or manager sets the owner's work schedule;[438]

v. A governing body, designated officer, or manager has the power to hire and fire the owner;[439]

vi. The owners produce or manufacture what the organization desires.

3) The cooperative is a legal entity separate and apart from its shareholders;[440]

4) The cooperative has officers, officials, or a board of directors;[441]

5) The owner is a minority shareholder;[442]

6) The shareholder expects to earn a salary through employment, not simply dividend on stock;[443]

7) The owner's shareholder rights are subject to significant limitation;[444]

8) The value of the minority interest is unclear;[445]

9) The share of profit is dependent on shares held rather than work performed;[446]

10) The managerial duties involve daily affairs rather than business management;[447]

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438. *See* Administrator's Interpretation 2015-1, 2015 DOLWH LEXIS 1, at *39 (Dep't of Labor July 15, 2015) (stating that employer control over schedules "indicates that the worker is an employee"); *see also Fleming*, 123 F.2d at 758 (explaining that the manager decides "distribution of work" when there is insufficient work for all workers).

439. *See Fleming*, 123 F.2d at 755.

440. WAGE & HOUR DIV., DEP'T. OF LAB., *supra* note 131, §§ 10c02–10c03 ("Among the circumstances which may be taken to indicate that a cooperative is an entity separate and distinct from its worker-members, are a corporate form of organization.").

441. *See* Wirtz v. Constr. Surv. Coop., 235 F. Supp. 621, 624 (D. Conn. 1964).

442. *See* Spitzmesser v. Tate Snyder Kimsey Architects, Ltd., No. 2:10-cv-01700-KJD-LRL, 2011 WL 2552606, at *9 (D. Nev. June 27, 2011).

443. *See* Hess v. Madera Honda Suzuki, No. 1:10-cv-01821-AWI-BAM, 2012 WL 4052002, at *8 (E.D. Cal. Sept. 14, 2012).

444. *See Spitzmesser*, 2011 WL 2552606, at *9; *see also Fleming*, 123 F.2d at 760 (explaining that the majority of owners had no vote and those who did were highly restricted in who they could vote in as board members, with less representation for owners from larger departments).

445. *See* Kehler v. Albert Anderson, Inc., No. 16-5318, 2017 WL 1399628, at *6 (D.N.J. Apr. 18, 2017) (citing Bostock v. High Tech Elevator Indus., Inc., 616 A.2d 1314, 1320 (N.J. Super. Ct. App. Div. 1992)).

446. *See id.* at *7.

447. *See id. See Perry II*, No. 17-cv-6107 (ENV)(RLM), 2018 WL 5801539, at *3–4 (E.D.N.Y. Nov. 6, 2018) (holding that a partner with 40% interest who worked

11) "[T]he exercise of financial or managerial control or the furnishing of capital or management services by outsiders, especially if such outsiders are wholesalers, manufacturers, or others who purchase or dispose of the products of the cooperatives;"[448] and

12) The cooperative owes a large amount of money to its manager, such that they control whether the company stays in business.[449]

B. Application of Test to an Illustrative Cooperative Grocery and Owner-Work Program

In this Part, we apply the proposed variant economic reality test to an example case in order to demonstrate how the test would work when applied by the DOL and courts, and how a cooperative might best structure an owner-work program to enable owners to work without pay because they are owners rather than employees.[450]

The hypothetical but representative cooperative grocery is a large full-scale grocery store in an urban neighborhood. The grocery is incorporated as a limited cooperative association (LCA) and has thousands of consumer members. Each member owns one share of the cooperative and has one vote. Per its bylaws, these members elect a board of directors from among the owners. Major decisions—such as whether to open a second store, purchase major property, file bankruptcy, or close—are decided by a vote of the full membership. Other decisions are made by the board of directors or delegated to management. The board of directors hires a manager, who hires other supervisory staff and employees. There are many employees who work regular shifts and are paid a living wage. These employees may or may not be consumer owners.

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at a start-up restaurant 750 hours over two months is an employee and implying that a partner who worked and managed daily affairs but had no input as to the business management of the restaurant is an employee); *see also* Daniel S. Kleinberger, *"Magnificent Circularity" and the Churkendoose: LCC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477, 560, 583–87 (1997) (If an owner works for pay on traditional tasks, then to be classified as a nonemployee, the owner must have "a substantial role in the organization's internal governance" focusing on "management of the business, not on the scope of an owner's responsibilities in carrying out the business").

448. *See* WAGE & HOUR DIV., DEP'T. OF LAB., *supra* note 131, § 10c02.

449. *See* Fleming v. Palmer, 123 F.2d 749, 759 (1st Cir. 1941).

450. In certain instances, owners can also work without pay as volunteers or independent contractors.

In addition to these employees, consumer owners, who are employed elsewhere, volunteer to work certain shifts or perform certain tasks. They may come in early in the morning to stock shelves or late in the evening to help clean the store. If an employee is out sick or taking a personal day, they might cover by working at the cash register. They may work as a greeter for a short time during the workday, welcoming shoppers who enter and answering questions they have. For these tasks, they select when and what work they would like to perform, but they report to a volunteer coordinator, supervisor, or employee who directs them as to which product to stock where or which register to operate. They also perform tasks such as teaching a cooking class, outreach to recruit new consumer–members, assisting the elderly with shopping, or providing transportation to the grocery. Further details of the operations and the owners' role within the owner-work program are fleshed out as to each factor below.

We first apply our proposed factors that indicate an owner is an employee, and then apply our proposed factors that indicate an owner is not an employee. We then weigh the total balance of these factors using the FLSA's remedial purpose to protect as many workers as possible as a tie-breaker. Ultimately, the DOL or courts are exploring the factors to determine whether the cooperative owners are in business for themselves and can choose to pay themselves nothing should they wish—like a sole proprietor, majority stakeholder in a closely held corporation, or true partners—or whether they are doing work for others that necessitates compensation.

1. *Factors That Normally Indicate Employee Status Suggest the Cooperative Owners Are Not Employees*

The factors that indicate an owner is an employee protected by the FLSA support the position that the cooperative owners are not employees. Many of the factors that indicate employee status under the FLSA are not present in the situation of this cooperative grocery. Others do not strongly point toward employee status. Only two factors definitively tilt toward employee status. Those factors are structural—the cooperative as separate entity with a board of directors and managers.

1) Other owners are more significantly invested in the business.

Every owner has the same share, one vote, and the duty to volunteer for periodic shifts working at the store. This factor tilts toward owner status.

2) Other owners or managers exercise control over the owner.[451]

There is no majority shareholder. Instead, all owners jointly run the grocery. The grocery manager—as well as the board of directors—does manage and control the work performed at the grocery. All other owners are equal and, ultimately, decide who is on the board. The owners select their own volunteer shifts and which duties they would prefer. The owners can be removed from ownership by the board, and perhaps someone would be asked to no longer work shifts. The owners are not paid for their work. The amount of patronage each owner receives is calculated by a formula based on how much they shopped at the grocery. The formula is set by the board but limited by the bylaws. Management does control the owner's work, but ultimately, the factor does not weigh strongly in either direction because owners have significant control as well.

3) The cooperative is a legal entity separate and apart from its shareholders.[452]

Yes, the grocery is an LCA, which is an entity separate and apart from the member-owners. This factor weighs toward employee status.

4) The cooperative has officers, officials, or a board of directors.[453]

Yes, the cooperative has an elected board of directors, which elects its officer and hires management. This factor also weighs toward employee status.

5) The owner is a minority shareholder.[454]

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451. *See, e.g.*, *Fleming*, 123 F.2d at 751.

452. *See* WAGE & HOUR DIV., DEP'T. OF LAB., *supra* note 131, § 10c02; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 21, 1997) ("Among the circumstances which may be taken to indicate that a cooperative is an entity separate and distinct from its worker-members, are a corporate form of organization.").

453. *See* Wirtz v. Constr. Surv. Coop., 235 F. Supp. 621, 624 (D. Conn. 1964).

454. *See* Spitzmesser v. Tate Snyder Kimsey Architects, Ltd., No. 2:10-cv-01700-KJD-LRL, 2011 WL 2552606, at *9 (D. Nev. June 27, 2011).

The owner is technically a minority shareholder, but there are no majority shareholders. All owners have an equal share and an equal vote. This factor, thus, is indeterminate.

6) The shareholder expects to earn a salary through employment, not simply dividend on stock.[455]

The owners do not expect to earn a salary through employment. They expect to contribute to the business financially and with their labor and, in return, to receive a patronage amount of surplus earned based on the amount of shopping they do. This factor weighs against employee status.

7) The owner's shareholder rights are subject to significant limitation.[456]

The owners have the right to vote on major decisions and on who is a member of the board of directors. They can remove the board. They delegate authority on other decisions to the board and the management the board hires. This factor is indeterminate because the owners have significant control but do not make regular decisions about operations.

8) The value of the minority interest is unclear.[457]

The value for which the interest was purchased, any additions to it, and patronage added is clear. An owner knows the value of their internal capital account. This factor leans toward nonemployee status.

9) The share of profit is dependent on shares held rather than work performed.[458]

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455. *See* Hess v. Madera Honda Suzuki, No. 1:10-cv-01821-AWI-BAM, 2012 WL 4052002, at *8 (E.D. Cal. Sept. 14, 2012).

456. *See Spitzmesser*, 2011 WL 2552606, at *9; *see also Fleming*, 123 F.2d at 760 (explaining that the majority of owners had no vote and those who did were highly restricted in who they could vote in as board members, with less representation for owners from larger departments).

457. *See* Kehler v. Albert Anderson, Inc., No. 16-5318, 2017 WL 1399628, at *6 (D.N.J. Apr. 18, 2017) (citing Bostock v. High Tech Elevators Indus., Inc., 616 A.2d 1314, 1320 (N.J. Super. Ct. App. Div. 1992)).

458. *See id.* at *7.

The share of the profit depends neither on shares held or work performed. It depends on patronage of the business: what amount of purchases an owner makes from the grocery. Again, this factor is indeterminate.

10) The managerial duties involve daily affairs rather than business management.[459]

The owners do not perform managerial duties through the owner-work program, though they do when voting on the board and making other major business decisions. This factor is indeterminate because the work performed is not managerial at all, but the owners do have responsibility for the management of the business and selection of the board.

11) Outsiders have financial or managerial control or furnish capital or management services.[460]

The cooperative does not hire third parties to manage the business. The board and management do so. This factor weighs against employee status.

12) The cooperative owes a large amount of money to its manager, such that they control whether the company stays in business.[461]

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459. *See id.* ("Plaintiff's management duties and sweat equity do not preclude him from being considered an 'employee' for FLSA purposes."); *Perry II*, No. 17-cv-6107 (ENV)(RLM), 2018 WL 5801539, at *3–4 (E.D.N.Y. Nov. 6, 2018) (holding that a partner with 40% interest who worked at a start-up restaurant 750 hours over two months is an employee and implying that a partner who worked and managed daily affairs but had no input as to the business management of the restaurant is an employee); *see also* Daniel S. Kleinberger, *"Magnificent Circularity" and the Churkendoose: LCC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477, 560, 583–87 (1997) (If an owner works for pay on traditional tasks, then to be classified as a nonemployee, the owner must have "a substantial role in the organization's internal governance" focusing on "management of the business, not on the scope of an owner's responsibilities in carrying out the business").

460. WAGE & HOUR DIV., DEP'T. OF LAB., *supra* note 131, § 10c02.

461. *See Fleming*, 123 F.2d at 759.

The manager is a full-time employee who is paid a salary and does not loan money to the cooperative. This factor weighs against employee status.

13) Totality.

Many of the factors that indicate employee status under the FLSA are not present in the situation of this hypothetical cooperative grocery. Others do not strongly point toward employee status. Only two factors definitively tilt toward employee status. In totality, these factors suggest the cooperative owners are not employees.

Table 1: Totality of Factors Do Not Support Employee Status

Employee Status	For	Against	Neutral
Other's investment is greater		X	
Controlled			X
Separate legal entity	X		
Board of directors	X		
Minority shareholder			X
Expectation of salary		X	
Limited shareholder rights			X
Shares determine profit			X
Unclear value of interest		X	
Manage daily affairs			X
Third party control		X	
$ owed management		X	
Totality	**2**	**5**	**5**

2. *Factors That Normally Indicate Owner Status Suggest the Owners Are Not Owners*

While the factors indicating employee status lean against that determination, the factors that indicate owner status, rather than employee, point toward the opposite determination—against owner status and in favor of employee status. Only five factors suggest the cooperative owners who "volunteer" their work are owners rather than employees, while six suggest they are not, and four are indeterminate.

1) The worker's opportunity for profit or loss depends on their managerial skill.[462]

The owners' opportunity for profit is tied to managerial skill to the extent they have one vote on the board of directors and make other major decisions, which affect the profit. However, most of the opportunity is tied to how much they shop at the store because patronage rebates are determined based on use—here shopping in the store. How often one shops is not related to managerial skill and neither are the types of work the owners perform. This factor weighs against owner status.

2) The owners are significantly invested in the business compared to other employees.[463]

All owners have one share and are equally invested in the business, lessening the utility of this factor in this scenario. It weighs neither for nor against owner status.

3) The owners' work requires special skills and initiative, particularly of the type owners often perform, such as financial stewardship of the business and marketing.[464]

While the owners participate in the financial stewardship and marketing, the types of work involved in the owner-work program—stocking shelves, running cash registers, and assisting the elderly—do not require special skills. This factor weighs against owner status.

462. *See Kehler* 2017 WL 1399628, at *5.
463. *See* WAGE & HOUR DIV., DEP'T. OF LAB., *supra* note 131, § 10c03.
464. *See* Wirtz v. Constr. Surv. Coop., 235 F. Supp. 621, 624 (D. Conn. 1964).

4) The owners exercise control over the business.[465]

Each owner exercises some control over the business because they each have an equal share and an equal vote in the cooperative. Shared management and control is a basic cooperative foundation. However, as to employees and other owners, one owner does not have management authority, such as hiring and firing, setting hours, supervising operations, or controlling financing. Because the owner-work program is mandatory, the owner has no freedom not to work, but they do volunteer at their own selected shift or time. Ultimately, the level of control that one owner exercises is more similar to a minority shareholder who is restricted by the votes of other owners and the authority of managers than of a controlling partner. This factor, thus, weighs against owner status.

5) The worker is an official partner or owner of an incorporated entity or acknowledges that they are a partner or owner,[466] and holds themselves out to third parties as a partner or owner.

The owners sign a membership agreement, acknowledge that they are owners of the cooperative, and hold themselves out as such. This factor weighs toward owner status.

6) The owners of the cooperative effectively constitute a small, closely knit partnership;[467] they work "together as a unit to improve their economic lot as a unit."[468]

The owners do work together as equals, utilizing the one share-one vote and other cooperative principles. However, they are not a small, closely knit group of workers. Rather they are a large group of committed community members who improve their community's economic and food security through their work together. Ultimately, this factor does not weigh strongly toward or against owner status.

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465. *See* WAGE & HOUR DIV., DEP'T. OF LAB., *supra* note 131, § 10c02.

466. This analysis should also be helpful for consumer owners in multi-stakeholder cooperatives.

467. *See Wirtz*, 235 F. Supp. at 624; *see also* Eisert v. Urick Foundry Co., 150 F. Supp. 280 284–86 (W.D. Pa. 1957) (reasoning that corporate shareholders functioned as partners jointly electing officers and directors and jointly resolving to forego salaries when business declined).

468. *Wirtz*, 235 F. Supp. at 624; *see also* Steelman v. Hirsch, 473 F.3d 124, 125 (4th Cir. 2007).

7) The owners take on liabilities and risk of the business; liability is not limited.[469]

The LCA is an entity form in which liability is limited to the cooperative. Individual owners cannot be held liable for the cooperative's debts, obligations, or other liabilities. This factor weighs against owner status.

8) The owners' profits are conditional on actions of the other partners or owners of the cooperative or there is significant profit sharing.

The owners do depend on the other owners to run the business well and make a surplus so that they receive patronage dividends. They also have the equivalent of significant profit sharing through the patronage system. This factor leans toward owner status.

9) The owners make contributions to capital or contribute "sweat equity," work hours in lieu of capital that equate to a share in the business.[470]

The owners each pay for one share of the business contributing capital. In addition, the requirement of volunteering to work at the cooperative is "sweat equity," work hours that all owners put into the business given the small amount of capital each has provided. This factor weighs toward owner status.

10) The owners maintain part ownership of business assets, including a share of assets in dissolution of the enterprise.

Each owner has an account containing the amount they initially paid to join the cooperative and with a portion of any patronage allocations over the years credited to them based on the amount of

469. *See* Hess v. Madera Honda Suzuki, No. 1:10-cv-01821-AWI-BAM, 2012 WL 4052002, at *7 (E.D. Cal. Sept. 14, 2012); UNIF. LTD. COOP. ASS'N ACT § 504 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2007).

470. *See* Escobar v. GCI Media, Inc., No. 08-21956-Civ, 2009 WL 1758712, at *6 (S.D. Fla. June 22, 2009); *cf. Eisert*, 150 F. Supp. at 281, 282 (reasoning that two partners who brought experience to the business and paid for their shares via profit deductions performed as top-level corporate executives, representing the corporation in union negotiations and performing other proprietary duties).

shopping they did for the year. When the business dissolves, they are entitled to those assets. They do not have any ownership interest in the cooperative's other assets even upon dissolution of the cooperative. This factor is indeterminate, leaning neither toward nor against owner status.

11) No owner receives a salary; or "terms of remuneration were determined by vote of the entire membership," or the owner has unlimited access to the business's funds and determines their own salary.[471]

No owner receives a salary for working in the owner-work program. This factor weighs toward owner status.

12) No one may be expelled, and any owner may resign and thereafter join the cooperative without restriction or penalty.[472]

An owner can be expelled as an owner for acting in a manner detrimental toward the cooperative as determined by the board of directors. If expelled, they will no longer be part of the work program. This factor leans against owner status.

13) Each member has an equal voice in management and unanimous consent is necessary on all decisions.[473]

While each owner has an equal voice in selecting the board and on major business decisions, majority rule rather than unanimous consent determines the decision. Additionally, many operational and financial decisions are made by the board of directors and the manager they appoint. This factor leans neither for nor against owner status.

14) A member may sell his services to an outside employer and yet remain a member of the cooperative.[474]

The owners are in no way restricted from working elsewhere, including stocking shelves, running cash registers, assisting the

471. *Wirtz*, 235 F. Supp. at 624; Zygowski v. Erie Morning Telegram, Inc., 298 F.2d 639, 640 (3d Cir. 1962).

472. *See Wirtz*, 235 F. Supp. at 623–24.

473. *See id.*

474. *See id.* at 624.

elderly, or providing transportation for other groceries or businesses. This factor leans toward owner status.

15) Leadership is not by those in positions of power but by those with "longer experience, more extensive knowledge, and 'driving interest' rather than due to positions of control or power."[475]

Leadership is by those in power, such as the board of directors and managers although leadership also comes from a volunteer coordinator and employees who are skilled at whatever job the owner is doing for that volunteer period. This factor leans against owner status.

16) Totality.

While the factors that indicate employee status suggested, in total, that the cooperative owners are not employees, the factors that indicate owner status, rather than employee status, weigh slightly against owner status. Only five factors suggest the cooperative owners who "volunteer" their work are owners rather than employees, while six suggest they are not, and four are indeterminate.

475. *See id.* at 624–25; *see also* Hess v. Madera Honda Suzuki, No. 1:10-cv-01821-AWI-BAM, 2012 WL 4052002, at *9 (E.D. Cal. Sept. 14, 2012) (finding that a minority shareholder was an employee whereas a majority shareholder "exerted more control over the operation of the company than any of the other officers, in part because it was understood he had the most experience").

Table 2: Totality of Factors Do Not Support Owner Status

Owner Status	For	Against	Neutral
Profit from managerial skill		X	
Significant comparative investment			X
Special skills		X	
Control		X	
Acknowledge that owner	X		
Cohesive unit			X
Liability and risk		X	
Profit sharing	X		
Capital contribution	X		
Asset ownership			X
No salary	X		
Equal voice			X
Inability to expel		X	
Outside work	X		
Leadership by power		X	
Totality	**5**	**6**	**4**

3. *Weighing the Totality of the Factors Suggests the Cooperative Owners Are Employees Protected by the FLSA*

Whether the owners in this hypothetical representative cooperative grocery who work in its owner-work program are employees protected by the FLSA is a close call. More factors in total—ten—point toward the owners being owners not covered by the FLSA than the owners being employees covered by the Act—eight. An additional eight factors do not weigh strongly one way or the other. A judge could decide that based on the preponderance of the factors, the owners are in business for themselves, not covered by the FLSA, and entitled to pay themselves nothing for their work. Because of the remedial nature of the FLSA, however, the DOL and many courts would likely ultimately determine that owners who work in the owner-

work program are employees who must be paid minimum wage under the FLSA's protections.

Because it is a close case, a large cooperative grocery could tinker with aspects of the owner-work program, such as making it truly volunteer rather than required, permitting owners to perform the work whenever they wish, and including only tasks that do not require supervision of the owners' work, such as assisting the elderly, providing transportation, and teaching cooking classes. Implementing these aspects of an owner owner-work program would increase the likelihood that a judge would find enough factors pointed toward owner status rather than employee status and permit the owners to work without pay.[476]

CONCLUSION

Food insecurity affects millions of people, and across the country communities are forming cooperative groceries to help combat the problem.[477] The need for these groceries has only increased with the health risk of public transportation due to COVID-19.[478] One

476. While those owners on the cooperative's board of directors may be independent contractors or owners while performing their director duties, their work for an owner-work program will likely be assessed in the same way as that of other owners. While we have been unable to locate FLSA determinations, tax rulings and cases support the conclusion that the duties will be separately analyzed. 13 JACOB MERTENS, MERTENS LAW OF FEDERAL INCOME TAXATION § 47A:10, Westlaw (database updated Jan. 2021) ("Corporate directors serving on a corporation's board of directors are not employees although any director acting as a corporate officer and performing services as an employee is an employee."); *see also* Blodgett v. Comm'r, 104 T.C.M. (CCH) 500, at *24 (2012) (holding that the trustee of a community bank was an independent contractor); Rev. Rul. 57-246, 1957-1 C.B. 338 ("Whether a director of a corporation can be an employee of the corporation depends primarily upon whether or not he performs services which are not directorial in nature, and whether or not those services are performed under an employer-employee relationship.").

477. *See* COLEMAN-JENSEN ET AL., *supra* note 1, at 6; *see also, e.g.*, DePasquale et al., *supra* note 15, at 918; Leandra Nichola, *Supporting Food Security*, TPSS CO-OP, https://tpss.coop/supporting-food-security/ [https://perma.cc/2GSB-42EA] (last visited Mar. 1, 2021); PLAINFIELD CO-OP , PLAINFIELD CO-OP STRATEGIC PLAN (Oct. 2016); Erbin Crowell, *Your Local Food Co-ops: Supporting Food Security Since 1844*, NEIGHBORING FOOD CO-OP ASS'N, http://nfca.coop/healthyfoodaccess/ [https://perma.cc/SY63-NQNF] (last visited Mar. 1, 2021); Nigel Roberts, *New Generation of Black-Led Co-ops Want to End Food Insecurity*, THE ROOT (Dec. 19, 2019, 1:30 PM), https://www.theroot.com/new-generation-of-black-led-co-ops-want-to-end-food-ins-1840411111 [https://perma.cc/3GXN-GZXF].

478. *See* Jessica Giesen, *To Eliminate Food Inequality, We Must Confront the Past*, LAW360 (Aug. 23, 2020, 8:02 PM), https://www.law360.com/articles/1297882

way some cooperatives stay afloat is through owner-work programs.[479] Owners are required to work a short shift every week or month for the business.[480] These owner-work programs raise the issue of whether the owners can lawfully work without pay or whether they are employees protected by the FLSA's minimum wage requirements.[481]

In this Article, we addressed the question of whether cooperative owners are not employees and can work without pay, by using a similar legal argument to one some courts have used to determine that partners are not employees protected by the FLSA.[482] We explored the various DOL materials and court opinions addressing the issue of what type of owners, or when owners, are excluded from the protection of the FLSA and can work without pay.[483] No consistent view has emerged, and courts consider a variety of different factors to make this determination about whether a particular partner or owner is an employee.[484] Having reviewed the legal authority and adapted it to accommodate the legal structure of a cooperative, which is not a partnership or closely held company, we devised a multi-factored economic reality test that courts and the DOL can use to determine

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/to-eliminate-food-inequality-we-must-confront-the-past [https://perma.cc/5BT2-VHLF]; *see also* Andrew Yawn, *Food Insecurity During Covid-19 Stirs Memories of Katrina for New Orleans' Ninth Ward*, TENNESSEAN (May 19, 2020, 5:00 AM), https://www.tennessean.com/story/news/american-south/2020/05/19/coronavirus-new-orleans-food-desert-ninth-ward-food-insecurity/5184730002/ [https://perma.cc/LZ9B-ZP2X]; Lela Nargi, *Community Food Co-ops Are Thriving During the Pandemic*, CIV. EATS (May 15, 2020), https://civileats.com/2020/05/15/community-food-co-opcooperatives-are-thriving-during-the-pandemic/ [https://perma.cc/4Z46-5Q4U].

479. *See* Anne Quito, *Brooklyn's Legendary Food Co-op Shows How Community Organizations Can Thrive in a Pandemic*, QUARTZ (Apr. 15, 2020), https://qz.com/1832454/how-new-yorks-park-slope-food-coop-is-handling-coronavirus/ [https://perma.cc/M99R-KLX4].

480. *See id.*

481. *See, e.g.*, Hall & Mayer, *supra* note 6, at 15 (advising food cooperatives not to use volunteer programs given risks of FLSA coverage); Joyal, *supra* note 8, at 26–28 (explaining although the Supreme Court interprets the FLSA to exclude uncompensated volunteers, the exclusion is extremely narrow and co-ops should "proceed with caution"); Martha Hotchkiss, *Three Issues Facing Our Co-op*, HAMPDEN PARK CO-OP, http://www.hampdenparkcoop.com/three-issues-facing-our-co-op [https://perma.cc/V3PF-WLQ9] (last visited Mar. 1, 2021) (describing how an owner-work program was not in compliance because it was a for-profit co-op); Letter from Heather Hackett, Mktg. & Member Servs. Manager, E. End Food Co-op, to East End Food Co-op Members.

482. *See supra* Part IV.

483. *See supra* Section IV.C.

484. *See id.*

when cooperative owners are employees.[485] Those forming cooperative groceries, including those forming cooperative groceries to address food apartheid in urban areas, can consider these factors when they adopt and structure their owner-work program, and in some situations may succeed in creating a program where owners lawfully work without pay because of their ownership status.

But in many instances where the cooperative is large and directed by a board and professional management, the bylaws restrict the type of decisions made by the full cooperative membership, the duties owners perform are not managerial or do not require high skill, or liability of owners is limited, the DOL and courts are likely to find these owners are employees and must be paid minimum wage for hours worked.[486] The FLSA is a remedial statute, designed to broadly require payment for work, and the DOL and courts should and will err on the side of coverage.[487] Doing so protects owners who are members of cooperative groceries located in high socioeconomic neighborhoods that can afford to pay for work and ensures these groceries do not unfairly compete with noncooperative groceries in the area by undercutting labor costs simply because they are a cooperative. Cooperative groceries, like any type of grocery or business, can lawfully utilize services and products of owners who are independent contractors, such as those owning janitorial, electrical, or plumbing companies, that they donate for free.[488] For cooperative groceries established in urban areas as part of the solution to combat food apartheid, the best way to set up an owner program will be to set it up so that it is truly voluntary for owners to participate or not and meets the DOL and court requirements for treating a worker as a volunteer rather than an employee.[489] The truly voluntary program permits the cooperative grocery to supplement the additional costs it has by virtue of its location and role in the community and to foster solidarity among owners. Yet it is not so broad as to permit any

485. *See supra* Part IV.

486. *See id.*

487. *See, e.g.*, Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 296 (1985); Brock v. Superior Care, Inc., 840 F.2d 1054, 1058 (2d Cir. 1988).

488. *See* Lushin, *supra* note 22, at 1; *see also* Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311 (11th Cir. 2013) (holding independent contractors are not "within the FLSA's ambit"); CO-OPLAW.ORG, *supra* note 22 (explaining that most co-ops are not nonprofits and owners cannot volunteer unless they are independent contractors, interns, or partners).

489. *See* Levinson and Eisenback, *supra* note 26, at 230.

cooperative grocery with any mission in any location to mandate owners work without pay.