The Independent Contractor Defense –
A Unique Defense That Alters
the Traditional Analysis
In Collective and Class
Wage and Hour Actions or
Nothing New?

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The defense that the individuals suing an employer are independent contractors who are not the employed by the defendant appears, at first blush, like a unique issue in wage and hour litigation. Of course, an employer owes a duty to follow the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) only with respect to persons that it employs. 29 U.S.C. § 203(e). In asserting the defense that the plaintiffs are independent contractors, the employer is claiming that it has no obligations to adhere to any labor laws at all with respect to the plaintiffs.

Accordingly, many defendants argue that a different standard for determining whether initial conditional certification should be granted under section 16(b) of the FLSA should be applied when they assert that the plaintiffs are independent contractors. They argue that discovery is necessary prior to initial certification, and that, due to the fact specific tests employed to determine whether an individual is an employee under the FLSA or an independent contractor, certification of a collective action in independent contractor cases should rarely, if ever, be granted.

In contrast, some plaintiffs argue that conditional certification should be granted under section 16(b) merely by showing that the employer treats all plaintiffs the same as independent contractors. In other words, the plaintiffs are similarly situated by virtue of being treated as independent contractors.

A review of the legal and factual settings in which the independent contractor argument is asserted reveal that these arguments are without merit. The legal framework for the analysis with respect to whether initial conditional certification should be granted under section 16(b) of the FLSA as to whether individuals are independent contractors or employees under the FLSA is no different than in any other FLSA cases. The plaintiffs must set forth minimal evidence to establish that the individuals are employees of defendant through their job duties and by hitting some of the points set forth in the “economic realities test” that courts follow in determining whether an individual is an employee. Initial certification is not the time for discovery to be conducted nor for summary judgment to be litigated.

Indeed, independent contractor cases often present some of the shadiest, most despicable employment practices which arise under the guise that persons are not employees, but working as independent contractors. In truth, employers are simply seeking to avoid providing benefits to employees. Minimum wage and hour violations are the most basic and fundamental labor laws that employers are expected to follow. Thus, one can argue that timely notice to persons whose rights have been violated is of even greater importance in cases in which the independent contractor defense arises than in other cases.

I. Fundamental Analysis Used to Assess the Independent Contractor Defense

A business is responsible for complying with the FLSA for all workers it “employs.” Under the FLSA, an “employee” “means any individual employed by an employer,” and “employer” “includes any person acting directly or indirectly in the interest of an employer in relation to an employee.”

1 29 U.S.C. § 216(b).


In *Brock v. Superior Care*\(^5\), the court found that temporary skilled nurses, a profession frequently litigated in independent contractor cases, were “employees” of the health care service that placed them in individuals’ homes. The court expressly rejected the employer’s defense that they worked as “independent contractors” for the company. The *Brock* court used the 5-factor test adapted from *United States v. Silk*\(^6\), a case arising under the Social Security Act case, which laid out a test for differentiating between “employees” and “independent contractors.” The five factors the court explored were:

1. the degree of control exercised by the employer over the workers;
2. the workers’ opportunity for profit or loss and their investment in the business;
3. the degree of skill and independent initiative required to perform the work;
4. the permanence or duration of the working relationship, and
5. the extent to which the work is an integral part of the employer’s business.\(^7\)

This test is commonly referred to as the “economic realities” test. Other Circuits have developed similar economic realities tests to determine individuals’ employment status.\(^8\) The test is intended to ensure that “[e]conomic realities, not contractual labels, determine employment status.”\(^9\) The test is also broader than the “right to control” or “master-servant” test employed by the Internal Revenue Service to determine whether someone is an independent contractor or employee. Thus, under the FLSA more persons are considered to be “employees” to whom the protections of the FLSA apply than are considered employees under these other statutes.

**II. Fundamental Analysis Employed in Collective Action Conditional Certification**

Most courts apply a fairly lenient standard to determine whether to grant collective action certification and court-supervised notice to affected employees. It requires only a modest showing that the plaintiffs and the putative class are similarly situated and that they have been subject to a common policy or practice potentially resulting in violations of the FLSA. Section 216(b) of the FLSA governs the requirements for a collective action.\(^10\) Unlike class actions brought pursuant to Rule 23 of the Federal

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\(^5\) *Brock v. Superior Care*, 840 F.2d 1054 (2d Cir. 1988).


\(^7\) 840 F.2d at 1059.

\(^8\) See, e.g., *Real v. Driscoll Strawberry Assoc.*., 603 F.2d 748 (9th Cir. 1979); *Sec’y of Labor v. Lauritzen*, 833 F.2d 1529 (7th Cir. 1987); *Hopkins v. Cornerstone America*, 545 F.3d 338 (5th Cir. 2008). Some courts also add a factor concerning the worker’s opportunity for profit or loss. *Bolduc v. Na’Il Semiconductor Corp.*, 35 F.Supp. 2d 106 (D. Me. 1998).

\(^9\) *Real*, 603 F.2d at 755.

Rules of Civil Procedure where all affected individuals are bound by the suit unless they choose to opt-out, the FLSA mandates that putative class members "opt-in" as a prerequisite to obtaining relief under any pending suit.\textsuperscript{11}

The Supreme Court has held that trial courts have the authority to implement the collective suit provision of section 216(b) by "facilitating notice to potential plaintiffs" to allow them to opt in to the lawsuit, including ordering the defendant to produce the names and addresses of putative class members so that the notice can be provided to them.\textsuperscript{12}

Courts have developed a two-phase inquiry to address the question of whether plaintiffs are "similarly situated." The first phase takes place usually before discovery has begun, when the plaintiffs seek conditional certification and court-supervised notice. The second phase after all of the opt-in forms have been received and discovery closes, when the defendant can move to decertify the class.\textsuperscript{13} The overwhelming majority of courts have held that the burden on the plaintiffs is light; they need only demonstrate a "modest factual showing" that they are similarly situated to the putative class to gain approval at the first stage.\textsuperscript{14}

III. Collective Action Certification When the Primary Issue Is Whether the Employee Is an Independent Contractor

Although the usual test for initial certification of a section 16(b) collective action is fairly lenient and the burden on plaintiffs light, some employers have been successful in overcoming the burden by arguing that the fact-intensive inquiry of the "economic realities" test requires the court to look at more than just whether the putative class members have been subject to a common practice or policy, such as being classified as independent contractors and denied overtime pay for hours of work in excess of 40 in a workweek. This argument asserts that the court must permit the employer to conduct individualized discovery with respect to whether each plaintiff is an employee or independent contractor under the economic realities test.

Courts have taken three basic, and very different, approaches when deciding whether to certify a putative class as a collective action in cases involving the independent contractor defense. First, the court could simply certify the class using the rather low standard discussed above, because the putative class members are similarly situated in that they have all been subject to a common policy of improperly

\textsuperscript{11} \textit{Thomas v. Speedway SuperAmerica, LLC}, 506 F.3d 496 (6th Cir. 2007) ("FLSA collective actions require potential class members to notify the court of their desire to opt in to the action; in contrast, class actions governed by Fed. R. Civ. P. 23 require potential class members… to opt out of the action.").


\textsuperscript{13} \textit{Comer v. Wal-Mart Stores, Inc.}, 454 F.3d 544, 546 (6th Cir. 2006).

\textsuperscript{14} \textit{Comer}, 454 F.3d at 547 (citing \textit{Pritchard}, 210 F.R.D. at 596); \textit{see also Frye}, 2008 U.S. Dist. LEXIS 107139 at *12 ("several courts have recognized that the named plaintiffs’ burden at this stage is not a heavy one."); \textit{Swallows}, 2007 U.S. Dist. LEXIS 61130 at *2 (plaintiffs’ burden “is relatively slight at this stage because the Court is not making a substantive determination…, but simply adopting a procedure which permits notice to be given to other potential class members").
being classified as independent contractors. Other courts have adopted an intermediary approach in which they see if the employees work in similar jobs and present some evidence of being employees under the economic realities test. Other courts, though, at the urging of employers, have done more than just apply the similarly situated standard and have weighed the plaintiffs and defendants evidence applying the economic realities test to the plaintiffs and putative class members to determine at the preliminary stage whether there is a likelihood that the class was misclassified as independent contractors prior to certifying the collective action for notice. This latter approach places the employees in the position of having to conduct discovery to rebut the employer’s allegations, which ultimately defeats the purpose of conditional certification as promptly notifying the putative class of their rights.

As discussed previously, and courts frequently point out, the standard for conditional class certification is a “relatively modest one.” In essence, the plaintiffs need show only that they are “similarly situated” to the proposed class with respect to the employer’s policy that allegedly violates the FLSA. It is only later, after notice and discovery, that the second step, the “decertification” step that the court generally looks at the underlying claims in detail as to whether the employer’s policy violates the FLSA and/or has been uniformly applied. The court then “engages in a more stringent inquiry into the propriety and scope of the collective action.”

Because the standard at the initial, conditional certification stage is normally a lenient one, the most common approach taken by courts in independent contractor cases is to determine only whether the putative class members are similarly situated with respect to the employers treatment of them as independent contractors and the types of jobs that they perform. For instance, in Labrie v. UPS Supply Chain Solutions, Inc., a group of UPS drivers in California sought certification as a collective action. The defendant argued that certification was inappropriate, because, inter alia, “the determination of whether an individual is properly classified as an independent contractor is an inherently fact-specific inquiry that is not prone to group adjudication because it requires detailed, individualized proof of the employment relationship of approximately 2,500 drivers who worked in 45 states with over 200 dispatchers.” The court, though, declined to address the fact-specific nature of the economic realities test and instead rejected the defendant’s argument that the court needed to probe the facts, finding that that was a step

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15 See, e.g., Coats v. Nashville Limo Bus, 2011 WL 308403 (M.D. Tenn. Jan. 27, 2011)(class conditionally certified of truck drivers transporting autos to car dealerships without any analysis of the economic realities test.)Edwards v. Multiband Corp., 2011 WL 117232 (D. Minn. January 13, 2011)(no economic analysis and class conditionally certified); Lewis v. ASAP Land Express, 2008WL 2152049 (D. Kan. May 21, 2008)(“plaintiffs have satisfied the light burden to provide substantial allegations that they were together the victims of a single policy or plan” where “they were not paid overtime,” and no economic realities test whatsoever.).


17 Id. at *15.
that necessarily occurs at the decertification, and not the notice, phase.\textsuperscript{18} The court noted that all of the putative class members performed the same job duties on behalf of UPS so any analysis of whether they were independent contractors would be similar.

In \textit{Scovil v. FedEx},\textsuperscript{19} a recent case involving FedEx delivery drivers, the court granted the plaintiffs motion for initial conditional certification and declined the defendant’s invitation to permit discovery and an exhaustive review of all of the factors in the economic realities test. Instead, the court noted the lenient standard that applies at the conditional certification stage, and explained, “I do not find it useful to try to reconcile the divergent cases. I will have to deal with the economic realities factors conclusively when I determine ultimately whether the drivers are employees or independent contractors, but the question for me now is simpler: whether the drivers in the proposed class are similarly situated. I will use certain of the economic realities factors as they are useful to that inquiry and as the record at this stage makes possible.” The court then noted that the putative plaintiffs all performed similar job duties, they all drove trucks displaying the FedEx log and wore FedEx uniforms, reported to FedEx terminal managers and were subject to a common FedEx policy of being misclassified as independent contractors. The court concluded that this evidence was sufficient to support notice to the putative plaintiff class of FedEx delivery drivers in Maine.

In a case conditionally certifying a class of employees hired by a company to perform clean-up in the wake of Hurricane Katrina, the court based its decision to certify on affidavits of plaintiffs hired for one subcontractor and allegations that the company treated all of the workers including all other subcontractors the same way.\textsuperscript{20} The court explained that if there were significant differences among the class members that affected whether they were similarly situated with respect to their status as employees or independent contractors this could be dealt with at the decertification stage:

\begin{quote}

It is true that the Plaintiffs present no affidavits of workers employed by other subcontractors besides C.L.S., but a review of the Defendants’ pay records and agreements to subcontract will easily reveal whether a common plan existed to improperly pay overtime salaries. It seems appropriate to certify the collective action at this time and revisit the question later after some discovery. If the allegations regarding the C.L.S. and [the defendant] contract prove to be true, it would be reasonable to conclude that [the defendant] may also have engaged in these same practices with other subcontractors. It is unlikely that the other subcontractors’ workers received a different rate of pay or did substantially different work. If sufficient evidence is not developed to demonstrate that the
\end{quote}

\textsuperscript{18} \textit{Id.} at *17 (“The court finds that SCS’s arguments raise issues primarily going to the merits and are more appropriately addressed on a motion to decertify or motion for summary judgment once notice has been given, the deadline to opt-in has passed, and discovery is closed.”); \textit{See also, Lemus v. Burnham Painting and Drywall Corp.}, 2007 U.S. Dist. LEXIS 46785, *15-16 (“Plaintiffs have made substantial allegations that defendants Burnham and Centennial had a policy or plan which deprived the plaintiffs of overtime pay in violation of the FLSA. The fact intensive inquiries concerning whether the plaintiffs are independent contractors or employees for purposes of the FLSA and detailed analysis of whether the plaintiffs are sufficiently similarly-situated to maintain the class are more appropriately decided after the notice has been given, the deadline to opt in has passed, and discovery has closed.”)


\textsuperscript{20} \textit{Lima v. Int’l Catastrophe Solutions, Inc.}, 493 F. Supp. 2d 793 (E.D. La. 2007).
other subcontractors were not involved in the same alleged scheme or practice, the Court may decertify the collective action as to those parties after sufficient discovery is conducted.21

At least one court has found that the argument that the issue of whether class members are employees or independent contractors requires an individualized assessment at the initial certification stage “borders on specious.”22 In that case, the notice dealt with only one location and not a nation- or region-wide class. Because “members of the proposed class all hold the same job title, have the same job responsibilities, work at the same location, and, by extension, are subject to the same ownership and management” there was no reason for an individualized inquiry at any stage, according to the court.23 This individual assessment would, according to the court, perhaps be appropriate, “where workers have different job titles and responsibilities.”24

Even that, though, was not enough for another court, which, conditionally certified a class of telecommunications technicians who had been paid on a piece-rate seeking unpaid overtime even though some had been classified as independent contractors and others were employees.25 The court held that, “The fact that certain of those technicians may have to demonstrate that they were improperly categorized as independent contractors as part of proving their claims does not mean that they cannot be included in the same class with other technicians who were paid an hourly wage.”26

As one court pointed out in a case conditionally certifying a collective action for a nationwide class of loan originators, employers, in making the argument that the fact-intensive approach is warranted at the early stage of conditional certification, are attempting to inject issues that are not appropriate at such an early stage of litigation. “Every case which defendant cites in support of its argument was decided in the context of a motion for summary judgment, not a motion for conditional certification. The Court will not reach the merits of plaintiffs’ claims on the motion for conditional certification, particularly when defendant’s argument is more appropriately raised in a motion to dismiss or a motion for summary judgment.”27

The reason the Labrie court in the UPS case, and others that have taken a similar approach, have declined to permit discovery under the economic realities test at the conditional certification phase is that they have found that the employer has applied a policy uniformly to a group of individuals performing the same or similar job duties for the employer, with the plaintiffs presenting allegations that at least some of the factors under the economic realities being the same for the putative class members. This is the

21 Id. at 799-800.
23 Id. at *13.
24 Id. at *9.
26 Id. at *7-8.
majority view with respect to recent cases.  

As, the court in *Montoya v. S.C.C.P. Painting Contractors, Inc.* pointed out, in conditionally certifying a group of painters classified as independent contractors, the employer “is arguing that all of its workers were independent contractors – that is, it claims they were treated as subcontractors who were not entitled to overtime pay. Plaintiffs make the point that if all the employees were wrongly treated in the same way, this should be a factor in favor of a similarly situated finding.”

However, some courts have permitted discovery and engaged in a detailed analysis of the economic realities test prior to certification at the initial certification stage. For example, in *DeMauro v. Limo, Inc.*, the plaintiffs sought to represent a proposed collective action of sedan drivers. In assessing the plaintiffs’ motion for initial certification, the court initially mechanically repeated the well-established law that the plaintiffs need only show that they are “similarly situated” and that the standard is “fairly lenient.” Yet, the court then departed sharply from most decisions to state that affidavits from employees “do not carry the day,” because the underlying issue is whether the class members are employees or independent contractors. The court then determined that in an independent contractor case, conditional certification is usually inappropriate because, “[E]ach individual who seeks to join this case will be examined separately in order to determine whether such individual is an employee or an independent contractor. This necessarily individualized assessment eviscerates all notions of judicial economy that would otherwise be served by conditional class certification.”

The court in *In re FedEx Ground Package System* made a similar decision, implying that collective action certification is never appropriate in independent contractor cases. After running through the factors of the economic realities test, the court, without applying the test to the facts, succinctly denied certification.

[The court must take into consideration the actual history of the parties’ relationship, necessitating an individualized examination of the multiple factors relating to each drivers’ employment. Because the evidence pertaining to such factors varies in material respects

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28 See, e.g., Scovil v. FedEx, supra; Putnam v. Galaxy Marketing, Inc. 2011 U.S. Dist. LEXIS98282 (D. Iowa August 23, 2011)(conditionally certifying class of Dish network satellite cable installers); Spellman v. Eagle Express, Inc. 2011 U.S.Dist. LEXIS 53521 (E.D. Pa. May 18, 2011)(conditionally certifying delivery drivers over 3 state area); Carrera v. UPS Supply Chain Solutions, 201 WL 1303151 (S.D. Fla. March 31, 2011)(conditionally certifying class of delivery drivers through Florida); *In re Penthouse Executive Clbu Comp. Litig.*, 2010 WL 4340255 (S.D.N.Y. Oct. 27, 2010)(Since employees performed same job duties and performed same services for same ownership group, one would expect class treatment or the class procedure under the FLSA would be rarely granted.)


31 *Id.* at *9-10.

32 *Id.* at *13.

throughout the proposed class, there is a lack of substantial similarity among the putative class members sufficient to justify treatment as a collective action.\textsuperscript{34}

What is odd about \textit{Limo, Inc.} and the \textit{FedEx} decisions is that the courts fail to point to what it is about the economic realities test or the independent contractor test in general that would justify a more detailed inquiry into each putative plaintiff’s arrangement with defendant than in other FLSA cases. Neither case reflects evidentiary differences among individuals that is legally material to the independent contractor analysis. To the contrary, FedEx and the Limo companies tend to use uniform policies and practices when using drivers for their services, and it is undisputed that the job duties and responsibilities of the putative class members in each case were similar, if not the same.

Similarly, in \textit{Bamgbose v. Dela-T Group, Inc.}, the court applied the economic realities test to the proposed class, which consisted of health care workers whom the defendant treated as independent contractors. The court rejected conditional certification explaining that in assessing whether to grant initial certification, “The Court cannot only look to Delta-T’s uniform classification of the workers or its common payment procedures, intranet, and phone system. Instead, it must determine whether the proof to demonstrate that the workers are ‘employees’ or ‘independent contractors’ applied to the class as a whole.”\textsuperscript{35} A particular stumbling block for the proposed class in \textit{Bamgbose}, was that the proposed class included multiple different job titles and responsibilities, and apparently the court felt that those differences would affect the analysis of whether each employee was an independent contractor or employee. The court found that only one factor of the economic realities test favored certifying the collective action, “whether the service rendered is an integral part of Delta-T’s business.”\textsuperscript{36} Because of this, the court declined to certify the broad class:

The record demonstrates that the healthcare workers have a wide array of skills, responsibilities, and experiences with Delta-T and its clients. Evaluation of whether the healthcare workers are employees or independent contractors, based on the current record, would not be possible on a collective basis because it would require the Court to examine the healthcare workers’ distinct relationships with Delta-T and its various clients.\textsuperscript{37}

When courts do opt to go beyond the lenient test for initial certification and delve into each of the factors for the economic realities test, it is not necessarily a death knell for the proposed class’s certification. In some instances, the court will reject the lenient approach favored by most courts, delve into the underlying claim, and will conditionally certify the class. In some cases, the court will grant summary judgment for the representative plaintiffs while conditionally certifying the class.

In \textit{Kerce v. West Telemarketing Corp.}, the court stated that it should not reach the merits of the case at the conditional certification stage, yet the court then addressed each factor of the economic

\textsuperscript{34} \textit{Id.} at 1083.


\textsuperscript{36} \textit{Id.} at 671.

\textsuperscript{37} \textit{Id.} at 669.
realities test in determining that the plaintiffs’ claims were similar to those of the other proposed class members. The case involved telemarketing workers who worked out of their homes and whom the company claimed operated as independent contractors. Because all of the factors “lend credence to the notion that the home agents were economically dependant on West and none of them suggest that the members of the proposed class were in business for themselves” the court certified the class of in-home telemarketing agents. The court found it particularly noteworthy that the putative class members only had control over relatively trivial daily tasks, the defendant provided a script to the class members to use in soliciting its products, and the putative class members could not suffer an economic loss in their jobs because they did not supply any of their own equipment or incur any upfront costs.

Similarly, in Quinteros v. Sparkle Cleaning, the court conditionally certified a class of movie theater janitors, whom the employer had classified as independent contractors and who had been denied overtime pay. The defendant employer argued that the court could not order certification and notice, because the proposed class members were not employees. The court looked at the factors of the economic realities test and easily rejected the defendant’s argument relying on factors such as that the defendant set the plaintiffs’ schedules and instructed them how and where to work, the plaintiffs’ did not provide any equipment, the plaintiffs’ were paid hourly and had no opportunity for profit or loss, the plaintiffs’ job required no high degree of skill or technical expertise, and the plaintiffs did not work for other employers. Having already determined that the plaintiffs were employees, the court granted the conditional collective action certification after finding that “there is a company wide policy by Defendant Sparkle regarding their overtime pay.”

In Gayle v. Harry’s Nurses Registry, the defendant opposed initial collective action certification on the basis that the putative class were independent contractors and the economic realities test requires too many fact specific inquiries to permit a finding that they were similarly situated. The court rejected the employer’s argument and granted partial summary judgment on the issue of liability in favor of the plaintiffs finding that the class members, home health aides, were employees and not independent contractors. Because the court already applied the economic realities test to the plaintiffs’ claims and defendants “admit[ed] that they treat all of their nurses as independent contractors” there was little additional analysis that the court needed to do with respect to the employees’ employment status.

39 Id. at 1362.
40 Id. at 1361.
42 Id. at 767.
43 Id. at 769-770.
44 Id. at 772.
The single coherent theme from these decisions that address the independent contractor defense in collective actions is that most courts will require the plaintiffs to allege at least some factors of the economic realities test as being the same for the putative class. The greater the number of different job duties at issue, the greater the burden on the plaintiffs to identify which of the factors of the economic realities test bind the putative class. Nonetheless, the courts are firmly holding that merely because an employer alleges that employees are independent contractors does not alter the lenient burden of proof for plaintiffs at the conditional certification stage early in the litigation.

IV. Class Action Certification

Another wrinkle in independent contractor cases crops up when, in addition to an FLSA collective action, the plaintiffs have alleged a state law wage and hour claim that is permitted to proceed as an “opt-out” class action under F.R.C.P. 23. Under the class action rule, the court is required to apply the four-part test pursuant to F.R.C.P. 23(a), and also the additional requirement that common factors predominate over individualized factors under F.R.C.P. 23(b)(3). Interestingly, although the standard that applies to class actions using F.R.C.P. 23 is purportedly much higher than that applied to opt-in collective actions, the caselaw in wage and hour cases involving the independent contractor defense applies a similar level of scrutiny to collective action decisions in which the court applied the economic realities test, discussed above.

In Edwards v. Publishers Circulation Fulfillment, Inc., the court rejected class action certification in a case filed by drivers classified as independent contractors. The court looked at the four elements under F.R.C.P. 23(a): (1) numerosity, (2) the presence of common issues, (3) typicality, and (4) adequate representation by class counsel as well as whether common facts would predominate over individual claims as well as whether the class action is “superior to other available methods for fairly and efficiently adjudicating the controversy.” As opposed to the standard in FLSA opt-in collective actions, the Edwards court, at the outset of its analysis made it clear that the federal rules required a “rigorous analysis.” Although the court quickly determined that there was no issue regarding numerosity and that plaintiffs’ counsel was adequate, the decision turned on:

whether the members of the alleged class were misclassified as independent contractors rather than as employees is common, or in other words, susceptible of proof by classwide evidence and the closely related questions whether common issues predominate and whether plaintiffs’ claims are typical of those of the class as a whole.

In answering these questions, the court, applying a right to control test under New York wage and hour law, and not an economic realities test, rejected the plaintiffs’ reliance on both a form Independent Contractor Agreement that all of the class members allegedly had to sign as well as allegedly common training procedures. Because the agreements only concerned “the results to be achieved, and not the

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47 Id. at 183.
48 Id.
49 Id.
means to accomplish those results," the court found that there was no control displayed in the agreements. Finding that "Plaintiffs have failed to provide any indication that the employment status of the putative class members could be proven through common evidence," the court rejected certification.

Though the standard for class action certification in independent contractor cases may seem difficult based on the court's aggressive rejection of the plaintiffs' motion in Edwards, it is certainly not an impossible hurdle to meet. In Ansoumana v. Gristede's Operating Corp., the court certified a class action under New York wage and hour law for unskilled workers who delivered products to supermarkets and drug stores. The court in Ansoumana applied a much lesser standard than in Edwards. On the issue of commonality, the court found that “[t]he differences among the Plaintiffs as to the number of hours worked, the precise work they did, and the amount of pay they received concern the amount of damages to which any individual Plaintiff might be entitled if and when liability is found," and not whether common issues of law existed. Further, on the similar issue of predominance under F.R.C.P. 23(b)(3), the court again succinctly found in plaintiffs favor:

Plaintiffs each raise the same underlying, contested issue, whether the Defendant stores, in contravention of applicable federal and state labor law, should have treated the Plaintiffs as employees, rather than independent contractors. … The single issue predominates over all other factual and legal issues presented, because each proposed Plaintiff class member did substantially the same type of work, for the same type of employer, and was assigned in the same sort of way, during the relevant time period.

Ansoumana presents an interesting juxtaposition with Edwards and shows that similarly to opt-in collective actions, courts in F.R.C.P. 23 class actions will apply apparent different standards of review when considering certification. While in Edwards, the court looked at the legal issue of whether the plaintiffs were employees or independent contractors, the court in Ansoumana looked only at what the legal issue was itself and not whether the plaintiffs had yet met that standard. This disparity is similar to the collective action cases discussed in the previous section in which some courts looked at the underlying issue and others looked only at whether the same policy applied to the putative class.

V. Conclusion

A review of the caselaw regarding whether a court certifies a collective action under 29 U.S.C. § 216(b) when the primary issue is whether the class members were improperly classified as independent contractors reveals that independent contractor allegations do not change the framework of analysis. The same lenient standard applicable to other FLSA cases to determine whether to conditionally certify a putative class applies to independent contractor cases. In deciding whether to grant a motion for

50 Id. at 187.
51 Id. at 189.
53 Id. at 86.
54 Id. at 89.
conditional certification the court should not reach the merits as to whether the plaintiffs are employees or independent contractors. Instead, the plaintiffs need only make a minimal showing that they perform similar job duties as the putative class and that they share some of the aspects of the economic realities test with respect to the employees' relationship with their purported employer. Cases holding that a different analysis should be used are misapplying the section 16(b) notice requirements by imposing a more stringent standard on plaintiffs than is necessary or justified, and are doing so in industries that often involve the worst employment abuses.