club contends that we should also consider as an investment each dancer's nightly tip-out, which it characterizes as rent. The district court rejected this argument, and so do we. It is the economic realities that control our determination of employee status.

Third, we must look at the degree to which the workers' opportunity for profit and loss is determined by the alleged employer. Once customers arrive at the club, a dancer's initiative, hustle and costume significantly contribute to the amount of her tips. But the club has a significant role in drawing customers. Given its control over determinants of customer volume, the club exercises a high degree of control over a dancer's opportunity for "profit." Dancers are far more closely akin to wage earners toiling for a living than to independent entrepreneurs seeking a return on their risky capital investments.

The fourth factor is the skill and initiative required in performing the job. Many of the dancers did not have any prior experience with topless dancing before coming to work at the club. They do not need long training or highly developed skills to dance at the club. A dancer's initiative is essentially limited to decisions involving costumes and dance routines. This does not exhibit the skill or initiative indicative of persons in business for themselves.

Finally, we must analyze the permanency of the relationship. The district court found that most dancers have short-term relationships with the club. Although not determinative, the impermanent relationship between the dancers and the club indicates non-employee status.

Despite the lack of permanency, on balance, the five factors favor a determination of employee status. A dancer has no specialized skills and her only real investment is in her costumes. The club exercises significant control over a dancer's behavior and the opportunity for profit. The transient nature of the workforce is not enough here to remove the dancers from the protections of the FLSA. AFFIRMED.

Case Questions

1. Does any of the case surprise you? Explain.
2. If you were the club owner and did not want the dancers to be employees, after receiving this decision, how would you change things?
3. Do you think the dancers should have been considered employees? Why or why not?

Kilgore v. Outback Steakhouse of Florida, Inc. *160 F.3d 294 (6th Cir. 1998)*

Employee servers who were required to pool their tips and have them redistributed to other types of employees who were not paid minimum wage challenge this practice as a violation of the minimum wage provision of the FLSA. The court permitted the arrangement.

Kennedy, J.

Outback's tip pooling arrangement requires its servers to contribute a share of their tips to a tip pool, which the restaurant distributes to hosts, bus persons, and bartenders. The servers' mandated contribution is three percent of their "total gross sales," which includes not only food and beverages, but also gift certificates and merchandise such as steak knives and T-shirts sold to customers at a server's assigned tables.

The restaurant paid its hosts and servers $2.125 per hour—one half the minimum wage at the time in question—with the required minimum wage difference made up through the tip pool arrangement. It was undisputed that hosts and servers never received less than the minimum wage for a workweek under this arrangement. Servers testified, however, that customer tips often fell short of the fifteen percent industry standard, and that Outback's tip pool requirement "routinely" required them to "tip out" more than thirty-five percent of the tips they actually received.

The FLSA, at 29 U.S.C. § 203(m), permits employers to use a tip credit to account for up to fifty percent of the minimum wage but only with respect to "tipped" employees. The statute defines a "tipped employee" as "any employee engaged in an occupation in which

he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). Section 203(m) also states that use of the tip credit this way "shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips."

Employee servers and hosts allege that the required tip-out amount was impermissibly excessive, and, therefore, not "customary and reasonable" as required under Labor Department interpretations of the relevant statutory sections. They also contended that Outback's use of the tip credit to calculate the minimum wage was unlawful with respect to hosts because they did not qualify as "tipped employees."

Even though Outback prohibits hosts from accepting tips, they receive more than $30 a month in tips if tip pool receipts are included. Employees who receive tips from a tip pool are employees who "receive tips" according to Department of Labor regulations, case law, and Department of Labor practices. Accordingly, the hosts meet the qualifications of Sections 203(t) and 203(m).

The hosts perform services to customers—greeting and seating, giving out menus, and sometimes "enhancing the wait" by serving food. These activities constitute sufficient interaction with customers in an industry where undesignated tips are common. Accordingly, the hosts are engaged in an occupation in which tips are customarily and regularly received and thereby qualify as tipped employees. AFFIRMED.

Case Questions

1. Do you consider the restaurant's pool tipping policy to be fair to the servers who received the tips? Explain.
2. Does the court's analysis make sense to you, that if hosts receive tips from the tip pot, then they are employees who routinely receive tips? Explain.
3. Why do you think the employer uses this method of payment?

Reich v. Newspapers of New England, Inc. *44 F.3d 1060 (1st Cir. 1995)*

In this case the court determines whether reporters who do general reporting for a small local newspaper are subject to the FLSA overtime pay requirements.

Torruella, J.

The Monitor is an award-winning small-city newspaper with a daily circulation in excess of 4,000 copies. Its reporters are assigned to tasks ranging from writing features to covering legislative, municipal, and town governments and agencies. The reporters work essentially unsupervised, have authority and discretion over what they do and write, and decide how their assignments should be executed. Most of their time, however, is spent on "general assignment" work, and their writing is mainly focused on "hard news."

Even though its reporters work extended hours, management at *The Monitor* discourages overtime. Rather, it prefers that its employees seek compensatory time. The secretary of labor asserts that *The Monitor*'s overtime policy violates the FLSA, and seeks a permanent injunction and back pay for the employees. *The Monitor* responds that the employees are exempt professionals.

The FLSA's overtime compensation provisions do not apply to professionals. The specific requirements of the exemption are not set forth in the statute. Rather, they are articulated in Department of Labor regulations and interpretations.

The regulation enumerates several types of professional exemptions, but only the "artistic professional" exemption, which applies to professionals working in a "recognized field of artistic endeavor," applies here. The regulation outlines both a short and long test for determining whether an employee qualifies as an artistic professional. The long test is applied to employees who earn weekly salaries of at least $170 but less than $250. Both tests demand that the employee's "primary duty" consist of work requiring "invention, imagination, or talent." The long test also requires that the employee's primary duty consist of "[w]ork that is original and creative in character." 29 CFR 541.3(a)(2).