No. 22-1290

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARTIN J. WALSH,

Plaintiff – Appellee,

v.

MEDICAL STAFFING OF AMERICA, LLC., ET AL.,

Defendants – Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia
(Nos. 2:18-cv-226, 2:19-cv-475, Hon. Raymond A. Jackson)

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STATEMENT OF JURISDICTION

The Secretary of Labor ("Secretary" or "DOL") sued Defendants Medical Staffing of America, LLC (doing business as Steadfast) and Lisa Ann Pitts (collectively, "Steadfast") in district court alleging violations of the Fair Labor Standards Act ("FLSA") and seeking back wages and liquidated damages on behalf of registered nurses, certified nursing assistants, and licensed practical nurses (collectively, "nurses") who work or worked for Steadfast and to enjoin Steadfast from continuing to violate the FLSA. The district court had subject matter jurisdiction over this case pursuant to 29 U.S.C. 217, 28 U.S.C. 1331, and 28 U.S.C. 1345.

On January 14, 2022, after a bench trial, the district court made findings of fact and conclusions of law that Steadfast violated the overtime pay and recordkeeping requirements of the FLSA, that liquidated damages were warranted because Steadfast failed to show that it acted in good faith, and that Steadfast is therefore liable for backpay and liquidated damages. Joint App. ("JA.") 1172-1200. The district court also permanently enjoined Steadfast from continuing to violate the FLSA's overtime and recordkeeping provisions. JA.1199. The court entered judgment for the Secretary that same day. JA.1201. On March 11, at the court's direction, the Secretary filed an updated backpay calculation; on March 13, Steadfast filed a motion pertaining to the Secretary's backpay calculations; and on

March 14, Steadfast filed the instant appeal. JA.30; *see also infra* pp. 3-4. The Secretary agrees with Steadfast that this Court has jurisdiction over Steadfast's appeal of the district court's January 14, 2022, order and judgment pursuant to 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded, based on evidence presented at a bench trial, that the nurses were employees of Steadfast under the FLSA.

2. Whether the district court correctly determined that Steadfast failed to show that it acted in good faith and therefore liquidated damages were warranted under the FLSA.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

DOL investigated Steadfast in 2018 for FLSA compliance and, on May 2, 2018, the Secretary brought this FLSA lawsuit against Steadfast. JA.33-37. The Secretary alleged that Steadfast misclassified its nurses as independent contractors rather than employees, that it failed to pay required overtime compensation to its nurses in violation of the FLSA, and that it failed to comply with the FLSA's recordkeeping requirements. JA.33-37. On July 23, 2020, the district court denied the parties' cross-motions for summary judgment. JA.24.

After a seven-day bench trial during which the court heard from numerous witnesses, including Steadfast staff, 20 nurses who worked for Steadfast, representatives of competitor companies, and Steadfast's attorney, the court issued its findings of fact and conclusions of law on January 14, 2022 that, in relevant part, (1) the nurses are Steadfast's employees, not independent contractors, and therefore Steadfast is liable for overtime compensation and (2) Steadfast failed to show that it acted in good faith in determining the nurses' classification under the FLSA, and therefore Steadfast is liable for liquidated damages. JA.1170-1200. Among other things, the district court found that (1) under the Secretary's calculations, the "alleged backpay for Steadfast's nurses from August 18, 2015 through June 27, 2021 [was] $3,619,716.49" and (2) although Steadfast was "ordered to review [the Secretary's] back wage calculations for accuracy," Steadfast "did not offer evidence to refute [the Secretary's] damages calculations or offer a counter-calculation of damages." JA.1185.[1] The court ordered the Secretary "to provide the [c]ourt with an updated calculation of back pay and liquidated damages within sixty (60) days" of the January 14 order and ordered Steadfast "to cooperate with [the Secretary] by providing [the Secretary] with all information necessary" to complete the updated calculation. JA.1200. On March

[1] At trial, the Secretary sought relief for 1,105 nurses who currently and formerly worked at Steadfast. R.287-1.

11, 2022, the Secretary filed a Notice of Filing Updated Back Wage Computations, which provided further calculations for continuing violations between June 2021 and January 2022. District Ct. R. ("R.") 329 (for June 2021 to January 2022, Steadfast owes nurses $1,835,852.68—an additional $917,926.34 in back wages plus equal amount of liquidated damages). On March 13, Steadfast filed a motion disputing, for the first time, the backpay calculations the Secretary submitted before trial and requesting additional time to review the Secretary's March 11 updated calculations. R.331.[2]

B. District Court's Findings of Fact

1. Economic Relationship Between Steadfast and the Nurses

Steadfast is a company that negotiates and establishes contracts with healthcare facilities ("client-facilities") to place nurses at client-facilities to work shifts as requested by the client-facilities, and maintains a registry of nurses who work those shifts. JA.1172 (citing JA.553, JA.559, JA.984-87, R.261 at 2). Pitts owns Steadfast. JA.1171. Steadfast classified the nurses as independent contractors. JA.1173 (citing JA.561). It paid them an hourly rate and paid the same hourly rate for all hours worked, including all overtime hours. JA.1171.

[2] On April 8, 2022, the district court indicated that it would not rule on Steadfast's motion because the court found it "in the interest of judicial economy to defer action on this motion until the Fourth Circuit responds to [Steadfast's] Notice of Appeal." JA.31.

a. Application and on-boarding

Client-facilities relied on Steadfast to ensure that the nurses were properly licensed and otherwise qualified for the work. JA.1179 (citing JA.445, JA.946-48, JA.1677-1765). Nurses on Steadfast's registry must obtain and maintain their own licensure, and Steadfast did not pay for or reimburse nurses for licensing or educational expenses. JA.1174 (citing JA.120-21, JA.221-22, JA. 248).

Before Steadfast added a nurse to its registry, nurses completed an application that included questions about their employment history, skill set, and references. JA.1173-74 (citing JA.124-25, JA.1816-23). The application repeatedly referred to Steadfast as an "employer" and the nurses as "employees," and the application and related documents sometimes referred to Steadfast's application as an "application for employment." JA.1173-74 (citing JA.1816-23).[3] Steadfast paid for a credentialing process for applicants, which involved a background check, licensure check, drug screening, tuberculosis test, and COVID test (or vaccination confirmation). JA.1174 (citing JA.283, JA.319, JA.955-56, R.84 at 2); *see also* JA.908-09.

After an applicant passed the credentialing process, Steadfast entered into what it labels an "independent contractor" agreement with the nurse. JA.1174

[3] Similarly, some of the contracts between Steadfast and client-facilities expressly designated the nurses as "employees" or "employed personnel" of Steadfast. JA.1179 (citing JA.1688, JA.1702-03, JA.1740-41, JA.1748).

(citing JA.561, JA.1778-1815, JA.1048). Steadfast's agreement with its nurses included "non-competition" clauses, which prohibited the nurses from working for Steadfast's competitors without Steadfast's express, written consent. JA.1175 (citing JA.1677-1765, JA.1771, JA.1778-1815).

Nurses on the registry were covered by Steadfast's insurance policy and Steadfast handled workers' compensation claims for injuries nurses sustained while working at client-facilities. JA.1174 (citing JA.79-80); *see also* JA.420. Under the contracts between Steadfast and client-facilities, Steadfast assumed all legal responsibility as the nurses' "employer." JA.1179 (citing JA.1688, JA.1702-03, JA.1740-41, JA.1748).

When Steadfast added a nurse to its database, Steadfast trained the nurse on compliance with the Health Insurance Portability and Accountability Act (HIPAA), substance abuse, and harassment. JA.1174; *see also* JA.103-04, JA.238-239. Client-facilities did not train the nurses, but some client-facilities gave nurses a tour and provided documents related to the nurse's specific work assignments. JA.1181 (citing JA.434, JA.483-84); *see also* JA.433.

b. Assignments and scheduling

When Steadfast received staffing requests from client-facilities, it notified nurses who met the client-facilities' needs of the shift opportunity via phone, email, text, or the Zira app, a mobile application that Steadfast launched in January 2021. JA.1175-76 (citing JA.111, JA.133, JA.783). Steadfast decided which nurses to notify of particular available shifts. *See* JA.403, JA.406, JA.464-65, JA.987-88. It did not provide the client-facilities with nurses' contact information or a listing of nurses that meet its needs. JA.1179 (citing JA.403, JA.406, JA.464-657).

Steadfast allowed the nurses an opportunity to accept or decline shifts that Steadfast offered, and therefore the nurses did not have a start date or a set work schedule. JA.1176 (citing JA.165-66, JA.226, JA.247, JA.275, JA.303, JA321, JA.335, JA.743, JA.890, JA.984-85). Steadfast did not require nurses to work a minimum number of hours or prohibit the nurses from exceeding a maximum number of hours. JA.1176 (citing JA.677, JA.701, JA.724, JA.744, JA.856). Nurses were required to notify and/or obtain approval from Steadfast (not client-facilities) when they were running late to a shift, wanted time off, were sick, or otherwise could not complete a shift. JA.1176 (citing JA.74-75, JA.107-08, JA.132, JA.158, JA.373-76, JA.1074).

c. Pay

Steadfast determined each nurse's hourly rate and did not permit nurses to negotiate their pay rate with Steadfast. JA.1176-77 (citing JA.66, JA.98, JA.111, JA.133-34, JA.153, JA.175, JA.188, JA.235, JA.240, JA.254, JA.266, JA.283, JA.329, JA.368). The nurses in Steadfast's database could increase their earnings only by working more hours. JA.1176 (citing JA.289, JA.321, JA.713). Steadfast was solely responsible for compensating the nurses, and paid them from its own financial accounts on a weekly basis. JA.1177 (citing JA.415, JA.570-71, JA.577-79, JA.843-44, JA.1078-81).

Steadfast and its client-facilities negotiated an hourly rate that the client-facilities paid Steadfast for the work Steadfast's nurses performed, and Steadfast submitted invoices to client-facilities detailing the hours its nurses worked. JA.1180 (citing JA.412-19, JA.468-71, JA.566, JA.980-82, JA.1677-1765, JA.1766). The hourly rates Steadfast charged client-facilities were not the same rates Steadfast paid its nurses, because Steadfast retained a percentage of the client-facilities' hourly rates. JA.1180 (citing JA.573, JA.981-82, JA,1677-1765). Steadfast did not permit nurses to negotiate pay rates directly with client-facilities. JA.1181 (citing JA.160, JA.235, JA.307, JA.319).

Steadfast paid the nurses straight time for all hours worked, including for hours worked over 40 hours in a workweek, and did not separately record straight

time and overtime hours. JA.1171, JA.1182. When working with a technology company to develop the Zira app, Steadfast declined the option to include a feature that would have tracked the number of hours the nurses worked in excess of 40 hours each workweek. JA.1181-82 (citing JA.1055-56). On numerous occasions, nurses complained to Steadfast that they were not receiving overtime pay. JA.1179 (citing JA.115, JA.164, JA.222-23, JA.258-59, JA.382-83). Because Steadfast did not pay overtime, Steadfast could charge client-facilities lower rates for its services than competitors that offered comparable services, but did pay overtime. JA.1180 (citing JA.662-63).

d. Supervision and discipline

Steadfast instructed nurses on how they should behave while working at client-facilities by sending nurses written memoranda on topics including, but not limited to, work attire, punctuality, and timekeeping. JA.1178 (citing JA.174-75, JA.218, JA.575, JA.1070, JA.1074); *see also* JA.1824-36. Client-facilities provided any tools and equipment the nurses needed to perform their work and nurses were not required to use their own equipment; however, some nurses preferred to use their own stethoscopes, blood pressure cuffs, or other equipment. JA.1181 (citing JA.121, JA.135-36, JA.221, JA.864-65).

Steadfast required nurses to track their hours when working at client-facilities—using timesheets Steadfast created—and required nurses to submit the

timesheets to Steadfast. JA.1177 (citing JA.75-76, JA.129-30, JA.154-55 , JA.241, JA.261, JA.267. JA.302-03, JA.320-21, JA.353, JA.471). Before paying the nurses, Steadfast required them to obtain a signature from client-facility staff to verify the nurse's start and end time. JA.1177-78 (citing JA.147-48, JA.168-69, JA.290). Client-facilities did not require nurses to complete timesheets or otherwise record their hours worked. JA.1181 (citing JA.172, JA.413, JA.415-19, JA.468-471).

Steadfast did not permit nurses to hire other nurses, employees, or contractors to work for them at client-facilities. JA.1175 (citing JA.110-11, JA.159. JA.178, JA.307, JA.862-63). When working at client-facilities, the nurses performed activities typical of nurses in the medical industry, such as administrating medications, treating wounds, and otherwise caring for patients, and did not exercise independent judgment. JA.1178 (citing JA.136, JA.398-425, JA.452-72).

Steadfast (not client-facilities) addressed any performance concerns and disciplinary matters respecting nurses on its registry. Client-facilities did not discipline the nurses; instead, they contacted Steadfast regarding any issues they had with a nurse's performance. JA.1181 (citing JA.187, JA.411-12, JA.434, JA.461-62); *see also* JA.1180 (citing JA.412, JA.438, JA.461) (Steadfast required client-facilities to provide Steadfast with feedback on the nurses' performance).

Steadfast imposed discipline for a variety of reasons, including, but not limited to, being recruited by client-facilities to work directly for them; discussing compensation with co-workers or client-facilities; attempting to contact client-facilities to set schedules or rates; working for a competitor; declining or cancelling shifts; and unprofessional conduct (including intoxication) while working at a client-facility. JA.1178 (citing JA.67-68, JA.72, JA.74, JA.78, JA.99-100, JA.214-15, JA.285-87, JA.320, JA.686, JA.922-25). Steadfast disciplined nurses by, among other things, cancelling nurses' shifts or otherwise "removing them from the schedule." JA.1178 (citing JA.67, JA.72, JA.77-79, JA.81, JA.156- 57, JA.243-44, JA.373-74, JA.686). If a client-facility no longer wanted a particular nurse to work at its facility, the facility could contact Steadfast and request that the nurses be placed on a "do not return" or "DNR" list. JA.1180 (citing JA.435-36). The Board of Nursing contacted Steadfast (not the nurses or the client-facilities) with any questions or issues respecting the nurses on Steadfast's registry. JA.1178 (citing JA.1018-19, JA.1043, JA.1045).

e. Ability to work for others

The contracts between Steadfast and client-facilities prohibited client-facilities from recruiting the nurses. JA.1179 (citing JA.1677-1765, JA.1771). Steadfast enforced this prohibition either by requiring facilities to buy out Steadfast's contract with a particular nurse or by removing recruited nurses from

the registry. JA.1179 (citing JA.68, JA.214-15, JA.285-86). As noted above, Steadfast's agreements with the nurses included non-compete provisions prohibiting them from working for Steadfast's competitors without Steadfast's written permission. *See supra* at p.6; JA.1175. Lastly, the nurses did not own their own businesses and did not advertise their services. JA.1173 (citing JA.129, JA.177-78, JA.213-14, JA.327, JA.754-55).

2. Steadfast's Classification of the Nurses

Between its founding in 2015 and DOL's investigation in 2018, Steadfast never contacted any DOL personnel to determine whether its compensation policies complied with the FLSA. JA.1182 (citing JA.591). It likewise never consulted an attorney during this time to determine how the nurses should be classified under the FLSA. JA.1182 (citing JA.943, JA.1145).

After DOL informed Steadfast that its pay practices violated the FLSA, Pitts met with attorney John Michael Bredehoft on two occasions (June 2018 and January 2019) to discuss the classification status of Steadfast's nurses. JA.1182 (citing JA.1108, JA.1135). Bredehoft testified that he spoke with Pitts and Steadfast Payroll Manager Christine Kim to glean information about Steadfast's business operations. JA.1182 (citing JA.1108, JA.1116, JA.1135). Bredehoft also reviewed Steadfast's application form for nurses, Steadfast's contracts with nurses

and with client-facilities, and some of Steadfast's invoices to client-facilities. JA.1183 (citing JA.1139-40).

In January 2019, Bredehoft communicated to Pitts his view, "to a very high degree of confidence," that Steadfast's nurses were independent contractors and that Pitts had an "excellent chance" of prevailing on the classification question. JA.1183 (citing JA.1110, JA.1114-16, JA.1118-21). However, Bredehoft advised Steadfast to remove the non-compete clause in its nurse contracts and cease using a document titled "Employment Application" because the clause and the document were inconsistent with Steadfast's position that the nurses were independent contractors. JA.1183 (citing JA.1136, JA.1139-40, JA.1155). Steadfast did not follow this advice. JA.1173-75 (citing JA.1677-1765, JA.1771, JA.1778-1823).

Bredehoft testified that he did not do any independent factfinding to verify whether the information Steadfast provided to him reflected Steadfast's actual business practices. JA.1183 (citing JA.1108, JA.1134-35). And Bredehoft never discussed Steadfast's business practices with any of Steadfast's nurses, client-facilities, or office employees other than Kim (who was convicted for felonious embezzlement). JA.1183-84 (citing JA.831-32, JA.1108, JA.1134-35). Other than the documents Steadfast provided to him, Bredehoft did not review any documents pertaining to Steadfast's business practices, including any of the memoranda Steadfast sent to nurses. JA.1184 (JA.1108, JA.1134, JA.1149-50). Nor did

Bredehoft discuss with Steadfast DOL's Wage and Hour Division's ("WHD") Field Assistance Bulletin No. 2018-4 (July 13, 2018) ("FAB 2018-4"), https://www.dol.gov/agencies/whd/field-assistance-bulletins/2018-4, which provides guidance in determining whether nurse or caregiver registries are employers of the nurses or caregivers under the FLSA, even though both Steadfast and Bredehoft were aware of the FAB at the time. JA.1184 (citing JA.1032, JA.1068, JA.1146).

C. District Court's Legal Analysis

Based on the district court's factual findings, which in turn were based on the trial evidence, the district court concluded that the nurses were Steadfast's employees and Steadfast is therefore liable for violating the FLSA's overtime and recordkeeping requirements, that Steadfast did not act in good faith in classifying the nurses as independent contractors and Steadfast is therefore liable for liquidated damages, and that a permanent injunction requiring Steadfast to comply with the FLSA was warranted. JA.1185-1200.

1. Economic Realities Test

After rendering factual findings respecting the arrangement between Steadfast and the nurses, the court determined that the nurses were Steadfast's employees under the FLSA. The court applied this Court's six-factor "economic realities" test to assess whether the nurses were employees of Steadfast or

independent contractors: "'(1) the degree of control that the putative employer has over the manner in which the work is performed, (2) the worker's opportunities for profit or loss dependent on his managerial skill, (3) the worker's investment in equipment or material, or his employment of other workers, (4) the degree of skill required for the work, (5) the permanence of the working relationship, and (6) the degree to which the services rendered are an integral part of the putative employer's business.'" JA.1186-87 (quoting *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 241 (4th Cir. 2016)). As the court explained, no single factor is dispositive. JA.1187.

In applying the economic realities test, the court focused primarily on the control factor, determining that Steadfast "exercised extensive control over the nurses' manner of work." JA.1190-95. The court looked at evidence of Steadfast's role in the following: scheduling and assigning work, investment in training and insurance, setting the nurses' pay rate, continuously paying for services, paying wages, tracking hours, and supervision and discipline. JA.1190-95. In conducting this analysis, the court relied on FAB 2018-4, which, as the court explained, is intended to "provide guidance to [WHD] field staff to help them determine whether home care, nurse, or caregiver registries … are employers under the Fair Labor Standards Act." JA.1190 (quoting FAB 2018-4 at 1). The court noted that FAB 2018-4 provides "'specific examples of common registry business

practices, which may, when the totality of factors is analyzed,' establish the existence of an employment relationship." JA.1190 (quoting FAB 2018-4 at 1).

The court determined that Steadfast had "an extensive degree of control over the scheduling and assigning of work between the nurses and client-facilities" because Steadfast controlled all information that nurses received regarding available shifts and prohibited nurses from communicating with client-facilities regarding scheduling. JA.1191 (citing FAB 2018-4 at 5). It determined that Steadfast's investment in nurses' training and insurance "weighs in favor of an employment relationship," citing Steadfast's practices of training the nurses on topics including HIPAA compliance and harassment, covering the nurses under the company's malpractice policy, providing the nurses with workers' compensation benefits, and sending nurses memoranda with guidance on workplace conduct. JA.1191-92 (citing FAB 2018-4 at 8).

Next, the court explained that Steadfast "admit[s]" that it set the nurses' pay rate, which, the court reasoned is "an action typical of an employer." JA.1192 (citing FAB 2018-4 at 6). The court added that Steadfast "determine[d] the nurses' pay rates without any input from the nurses" and "expressly forbid nurses from negotiating their pay rates with facilities directly and with[held] the nurses' contact information from facilities." JA.1192.

The district court determined that Steadfast's receipt of continuous payments from client-facilities for the nurses' services weighed toward a determination that Steadfast is the nurses' employer. JA.1192-93 (citing FAB 2018-4 at 7). The court cited record evidence that "the amount [Steadfast] invoice[d] client-facilities [was] based directly on the number of hours worked by the nurses, not the initial referral or administrative efforts." JA.1193.

On paying wages, the district court determined that Steadfast "act[ed] as the nurses' employer by guaranteeing direct payment of wages from [its] own financial accounts," "regardless of whether client-facilities pa[id] [Steadfast] for its nurses' services." JA.1193. The court cited language from FAB 2018-4 stating that, where a nursing registry guarantees payment to caregivers, "the caregiver may be economically dependent on the registry, which indicates that the registry is the caregiver's employer." JA.1193 (quoting FAB 2018-4 at 7).

The court further determined that Steadfast's practice of "maintain[ing] detailed and accurate records of the nurses' time is more like the efforts of an employer than an agency providing a mere administrative function," noting, among other things, that Steadfast created the nurses' timesheets, that nurses had to submit timesheets to Steadfast, and that even though client-facilities verified nurses' work hours, client-facilities did not require the nurses to track their hours and did not maintain time records. JA.1194 (citing FAB 2018-4 at 8).

Finally, the court determined that "the record reflects that Steadfast exercise[d] excessive control over the nurses by supervising the nurse's performance and disciplining them when [Steadfast] deem[ed] necessary." JA.1194 (citing FAB 2018-4 at 5-6). The court relied on its findings that Steadfast requested feedback about nurses from client-facilities and that Steadfast (not client-facilities) was responsible for disciplining nurses, including by cancelling shifts or removing them from the registry. JA.1195.

After discussing the control factor in detail, the court concluded that "the totality of the remaining factors … weigh in favor of the nurses being properly classified as [Steadfast's] employees." JA.1196. The court said "the nurses ha[d] no opportunities for profit/loss" because Pitts is Steadfast's sole owner, "there is no evidence that the nurses h[ad] an interest in Steadfast beyond their role as workers for a set hourly pay rate," and "the non-competition clauses in the [nurses'] contracts … significantly hinder[ed] the nurses' ability to accumulate profit independent of [Steadfast]." JA.1195 (citing FAB 2018-4 at 6 (stating that "prohibiting a caregiver from registering with other referral services … [or] clients outside of the registry" indicates the existence of an employment relationship)). The court further explained that the record showed that "nurses d[id] not invest in equipment to an extent indicative of an independent contractor status and that [Steadfast] prohibit[ed] nurses from hiring other nurses, employees, or contractors

to work for them at client-facilities." JA.1195-96. As to the permanence factor, the court explained that Steadfast's pay records show that the relationship between Steadfast and the nurses, was "permanent in nature, even if a term limit [was] stated in a nurse's contractor agreement." JA.1195. The court stated that "the parties agree that the work the nurses perform is integral to [Steadfast's] business." JA.1196. Finally, the court stated that "[t]he degree of skill (via education and licensures) required for the nurses' work suggests that the nurses could work in an independent capacity, but the economic realities of the nurses' relationship with [Steadfast] under the other factors outweigh this factor significantly." JA.1196.

2. Recordkeeping Violations

The district court also concluded that Steadfast violated the FLSA's recordkeeping provisions, because it did not record the nurses' overtime hours, among other things. JA.1199 (citing 29 U.S.C. 211(c); 29 C.F.R. 516.2).

3. Good Faith Defense

The district court concluded that Steadfast failed to prove a good faith defense to liquidated damages under 29 U.S.C. 260. JA.1196. The court explained that Steadfast asserted that it had a reasonable good faith belief that it was not violating the FLSA after receiving legal advice that the nurses were likely properly classified as independent contractors. JA.1196. In determining that Steadfast failed to prove the defense, the court first underscored that Steadfast could not rely

on the good faith defense for dates before June 2018, because Steadfast "failed to present any evidence that it sought legal advice on the classification of its nurses or took any proactive steps to educate [itself] on the FLSA prior to meeting Mr. Bredehoft in June 2018." JA.1196.

The court further concluded that Steadfast's "continuing reliance on Bredehoft's legal opinion on and after June 2018 [was] not objectively reasonable," citing three reasons. JA.1197. First, the court emphasized that, after a multi-year investigation, DOL informed Steadfast in 2018 that its pay practices violated the FLSA. JA.1197. Second, Steadfast admitted familiarity with FAB 2018-4, which characterizes some of Steadfast's pay practices as indicative of an employment relationship, but did not seek counsel on whether its practices complied with the FAB. JA.1197. Third, Steadfast did not prove that it provided Bredehoft with "all the information he would have needed to provide a fully informed, reasonable legal opinion on [Steadfast's] pay practices." JA.1197. That information consisted of, among other things, the opportunity to speak with nurses or client-facilities, memoranda Steadfast sent nurses regarding work practices, information about Steadfast's discipline practices, and details on Steadfast's requirement that nurses notify Steadfast of absences or tardiness. JA.1197-98.

The court rejected Steadfast's arguments relying on *Burnley v. Short,* 730 F.2d 136, 140 (4th Cir. 1984), and *McFeeley v. Jackson Street Entertainment, LLC*,

stating that, unlike in those cases, Steadfast was subject to a DOL wage-and-hour investigation, and because Steadfast did not follow Bredehoft's "advice to forgo the non-compete clauses in its contractor agreements." JA.1198 (citing *Burnley*, 730 F.2d at 136; *McFeeley*, 825 F.3d at 235).

4. Injunctive Relief

Finally, the court determined that injunctive relief was appropriate because the trial record "demonstrate[d]" that Steadfast has "never complied with the FLSA and will continue to violate the FLSA" by continuing to misclassifying the nurses in its registry "despite [its] familiarity with DOL guidance and law to the contrary." JA.1199 (quoting 29 U.S.C. 217).

SUMMARY OF ARGUMENT

The trial record squarely demonstrates that the nurses were Steadfast's employees under the economic realities test. Steadfast maintained significant control over the nurses because it set the nurses' pay rate, handled all details of setting nurses' schedules and controlled nurses' access to shifts, supervised the nurses' work in multiple ways, and imposed discipline on the nurses. The nurses did not have opportunities for profit or loss dependent on their managerial skill because the nurses could not negotiate the rate of pay for their work, either with Steadfast or the client-facilities, or contact the client-facilities directly to seek shifts to work. The only way they could earn more was to work more shifts when

Steadfast offered them shifts to work. And they bore no risk of loss because they were paid directly from Steadfast's accounts, regardless of whether the client-facilities paid Steadfast or not. The non-compete provisions in their employment agreements also limited their opportunities for profit or loss. The nurses did not make any significant investment in materials or equipment and they could not hire others to work their shifts for them. Although the district court suggested that the nurses' professional qualifications weighed against concluding that the skill factor favored employee status, other record evidence and case law indicate that this factor weighs in favor of employee status. Evidence at trial showed that the nurses had a permanent relationship with Steadfast. And, as Steadfast does not contest on appeal, the nurses' work was integral to Steadfast's business, which consisted of placing nurses in healthcare settings to work specific shifts. Thus, all, or nearly all, of the economic realities factors weigh strongly towards employee status. This conclusion is consistent with the relevant case law.

There is no merit to Steadfast's argument that the district court committed legal error by relying on FAB 2018-4. Not only did Steadfast itself proffer FAB 2018-4 at trial, the district court reasonably relied on FAB 2018-4, which offers guidance on the economic realities test for healthcare registries and accords with this Court precedent.

Finally, the district court did not abuse its discretion in determining that Steadfast could not avoid liquidated damages—which are the norm in such cases—by showing that it acted in good faith in classifying the nurses as independent contractors rather than employees under the FLSA. The district court properly determined that, before Steadfast sought legal advice, the company took insufficient steps to determine whether it was complying with the FLSA. It likewise correctly concluded that even when Steadfast sought legal advice, it failed to provide essential information to its attorney, particularly in light of the fact that DOL had completed its investigation by that point and informed Steadfast that its nurses were employees under the FLSA, not independent contractors, and the fact that DOL issued FAB 2018-4 shortly after Steadfast sought this legal advice, but declined to seek counsel on whether its practices complied with the FLSA. The district court correctly concluded that Steadfast failed to show that it acted in good faith.

STANDARD OF REVIEW

This Court reviews a district court's factual findings at trial for clear error and its legal conclusions de novo. *Mayhew v. Wells*, 125 F.3d 216, 218 (4th Cir. 1997). Whether a worker is an employee or an independent contractor under the FLSA is a legal question subject to de novo review. *McFeeley*, 825 F.3d at 240.

This Court reviews a district court's award of liquidated damages for abuse of discretion. *Id.* at 245.

ARGUMENT

I. THE NURSES WERE STEADFAST'S EMPLOYEES UNDER THE FLSA.

A. The Trial Record Demonstrates that the Nurses Were Steadfast's Employees under this Court's Economic Realities Test.

The FLSA defines "employer" to include "any person acting directly or indirectly in the interest of any employer in relation to an employee," 29 U.S.C. 203(d), "employee" to mean generally "any individual employed by an employer," 29 U.S.C. 203(e)(1), and "employ" to "include[] to suffer or permit to work," 29 U.S.C. 203(g). As this Court recognized, these definitions reflect that "Congress applied the FLSA broadly," in keeping with its remedial purpose. *McFeeley*, 825 F.3d at 240. The Supreme Court has explained that the FLSA covers "many persons and working relationships, which prior to [its enactment], were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947); *see also Schultz v. Cap. Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (FLSA's definitions "broaden 'the meaning of 'employee' to cover some [workers] who might not qualify as such under a strict application of traditional agency [or contract] law principles.'" (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992))).

This Court has articulated a six-factor "economic realities" test to assess whether workers are employees or independent contractors under the FLSA: "(1) the degree of control that the putative employer has over the manner in which the work is performed, (2) the worker's opportunities for profit or loss dependent on his managerial skill, (3) the worker's investment in equipment or material, or his employment of other workers, (4) the degree of skill required for the work, (5) the permanence of the working relationship, and (6) the degree to which the services rendered are an integral part of the putative employer's business." *McFeeley*, 825 F.3d at 241. No single factor is dispositive. *Id.* "The touchstone" of this inquiry is "whether the worker is 'economically dependent on the business to which he renders service or is, as a matter of economic [reality], in business for himself.'" *Id.* (quoting *Schultz*, 466 F.3d at 304).

Because the applicable analysis focuses on the economic realities of the working relationship, labels or agreements characterizing the worker as an independent contractor are not determinative. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("[A]n 'independent contractor' label does not take the worker from the protection of the [FLSA]."). Accordingly, the independent

contractor designation in Steadfast's agreements with the nurses is not material to the analysis.[4]

As a threshold issue, this Court should reject Steadfast's attempt to undermine the district court's economic realities analysis by asserting that the court failed to allocate the burden of proof properly. *See* Steadfast Br. 28-29. Notably, Steadfast does not contest that the district court applied the correct standard—the economic realities test—in assessing whether the nurses were Steadfast's employees. *See* Steadfast Br. 27. Nor does Steadfast contest that the question at trial—and on appeal—is whether the evidence offered at trial shows that the nurses were Steadfast's employees. Based on the evidence presented at trial, the district court made findings of fact, applied the economic realities test based on those findings, and made the legal conclusion that Steadfast's significant control over the nurses as well as the other economic realities factors indicated that the nurses were Steadfast's employees under the FLSA. JA.1190-96.

Steadfast offers no authority to support its suggestion that this Court should take the drastic approach of disregarding the district court's factual findings

[4] In any event, Steadfast's labelling the nurses independent contractors in the agreements appears to be strategic considering that in numerous documents, Steadfast refers to itself as an "employer" and the nurses as "employees." JA.1173-74, JA.1179.

rendered after hearing evidence at trial, Steadfast Br. 29. Neither case that Steadfast cites, Steadfast Br. 29 (citing *N.C. State Conf. NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020) and *Abbott v. Perez*, 138 S. Ct. 2305 (2018)), supports setting aside the district court's findings of fact on the issue of whether the nurses are Steadfast's employees as a matter of economic reality. Both cases involved a district court's failure to hold plaintiffs challenging a state voting law to their burden of showing that the law was passed with racially discriminatory intent, especially given the presumption of legislative good faith. 981 F.3d at 303; 138 S. Ct. at 2326-27.

As the district court correctly determined, the totality of the factors weighs in favor of classifying the nurses as Steadfast's employees. JA.1195-96. The district court focused much of its analysis on the control factor, but many of the court's factual findings provide support under multiple factors for concluding that the nurses were Steadfast's employees.

1. Control

The trial evidence supports the district court's determination that Steadfast exercised a significant degree of control "over the manner in which the [nurses'] work was performed." JA.1190; *see also McFeeley*, 825 F.3d at 241. Steadfast exercised control by setting the nurses' pay rates, handling scheduling of nurses' shifts, supervising nurses' work, and imposing discipline. As in *McFeeley*, "the

many ways" in which Steadfast "directed" the nurses "rose to the level of control that an employer would typically exercise over an employee." 825 F.3d at 242.

a. Setting the pay rate

As the district court found at trial, Steadfast unilaterally determined the nurses' hourly pay rate and did not permit nurses to negotiate their pay rate with Steadfast. JA.1177-78. Steadfast and client-facilities negotiated an hourly rate the client-facility paid Steadfast for the hours worked by the nurses at the client-facility, and Steadfast retained a portion of those rates when it paid the nurses. JA.1180. Nurses were not permitted to negotiate rates directly with client-facilities. JA.1181.

Setting the pay rate without the opportunity for the worker to negotiate the rate is a strong indicator of employee status. *See, e.g.*, *McFeeley*, 825 F.3d at 241-42 (nightclub dancers were employees because, among other things, the club set the fees that dancers could charge for private dances, which indicated the club's significant control); *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1060 (6th Cir. 2019) (security guards were employees, in part, because employer "set the rate at which the workers were paid"); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1315 (11th Cir. 2013) (reversing summary judgment for the employer based in part on evidence that workers "could not bid for jobs or negotiate the prices for jobs"). This principle applies with equal force in the context of healthcare

personnel placement agencies or registries, where courts have concluded that when a registry determines nurses' pay, that weighs towards a determination that the registry exercises significant control and the nurses are employees. For example, in *Gayle v. Harry's Nurses Registry*, 594 F. App'x 714, 717 (2d Cir. 2014), the Second Circuit cited as evidence of control the fact that nurses' hourly rate was "fixed" by the registry, not negotiated by the nurses. *See also Hughes v. Family Life Care, Inc.*, 117 F. Supp. 3d 1365, 1370 (N.D. Fla. 2015) (citing as evidence of control the fact that nurses' pay rate depended on the registry's contract with a state health agency); FAB 2018-4 at 7 (stating that a "registry's decision to effectively set a caregiver's rate of pay without the caregiver making the ultimate determination indicates that the registry is acting as the caregiver's employer").

Steadfast claims that nurses could negotiate their rates of pay for difficult client-facilities, for urgent needs, or when travel was required. Steadfast Br. 16 (citing JA.247-48, JA.277, JA.283, JA.703, JA.859, JA.982-983). But the testimony on which Steadfast relied actually established only that Steadfast sometimes *offered* a higher rate. JA.236, JA. 247 (J. Jones; Steadfast scheduler testified that Pitts authorized schedulers to offer higher rates in emergencies); JA.282-83, JA.295 (T. Morey; Pitts offered higher rate when "desperate" to fill the shift; denying that Pitts' offers constituted negotiation). Moreover, Steadfast's practice of offering gas and lodging incentives or reimbursements for shifts that

required travel, JA.265, JA.267-77, JA.850, JA. 859, JA.865-66, is fully consistent with employee status, and cannot be characterized as negotiation of rates of pay by the nurses.

b. Scheduling

The record shows that Steadfast exercised significant control over scheduling the shifts that it offered to nurses. Steadfast controlled all information that nurses received regarding available shifts and prohibited nurses from communicating with client-facilities regarding scheduling. JA.1175-76. Steadfast notified nurses of shifts—and nurses accepted shifts—via phone, text, email, and later the Zira app. JA.1176. Steadfast then notified the client-facility which nurse would be covering which shift. JA.403-07, JA.445. As the district court found, when nurses could not complete a shift or were running late, nurses were required to notify Steadfast—not client-facilities. JA.1176.

In other FLSA classification cases arising in the context of healthcare personnel placement agencies or registries, courts have relied on similar indicia of control in determining that healthcare workers were the agencies' employees. In concluding that a healthcare staffing agency exercised control over nurses' work, *Crouch v. Guardian Angel Nursing, Inc.*, No. 3:07-CV-00541, 2009 WL 3737887, at *19 (M.D. Tenn. Nov. 4, 2009), explained that the nurses could "only work those hours" the agency "offered and approved" and were required to notify the

agency if they could not work a scheduled shift. *See also LeMaster v. Alt. Healthcare Sols., Inc.*, 726 F. Supp. 2d 854, 863 (M.D. Tenn. 2010) (deeming nurses employees of healthcare staffing company; citing company's control over nurses' work schedules in analyzing control factor).

That the nurses did not have set schedules, were not required to work a minimum number of hours or shifts per week, and generally had the ability to accept and decline shifts (although, in practice, as explained below, Steadfast sometimes disciplined nurses for declining shifts), JA.1176, does not negate Steadfast's control. Steadfast asserts that these findings amounted to a determination that the nurses could "control where they worked and what rates of pay they would accept." Steadfast Br. 41 (citing JA.1176). But this gloss on the court's findings is not persuasive, because it ignores that the nurses could only accept shifts offered by Steadfast, at client-facilities selected by Steadfast, and that it was Steadfast, not the nurses, who negotiated pay rates with client-facilities. Courts have concluded that healthcare staffing agencies and registries may exercise significant control over healthcare personnel even where personnel were "not obligated to accept" shifts offered by the agencies. *Crouch*, 2009 WL 3737887, at *19; *see also Gayle*, 594 F. App'x at 717; *Hughes*, 117 F. Supp. 3d at 1370.

Indeed, in many cases regardless of the industry, courts have found that workers' ability to set their own hours is only minimal evidence that the worker is

an independent contractor when considered in relation to other forms of control by the employer. *See, e.g.*, *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 230 (3d Cir. 2019) (workers' ability to set hours, select shifts, and accept or reject work were "narrow choices" when evaluated against other types of control exerted by the employer, including employer's control over establishing available shifts); *Lilley v. BTM Corp.,* 958 F.2d 746, 750 (6th Cir. 1992) (worker's "flexibility" to establish "hours and vacation schedule" "not sufficient to negate control"); *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (explaining that "[a] relatively flexible work schedule alone" does not render workers independent contractors; determining that restaurant "essentially established" servers' work schedules because servers "could wait tables only during … business hours") (citation omitted). Similarly here, Steadfast's nurses could work only the specific shifts that Steadfast offered to them; they could not arrange directly with the client-facilities to work shifts.

Steadfast attempts to undermine the proposition that it exercised control over nurses' schedules by claiming that, before the Zira App, nurses occasionally communicated directly with facilities, or vice versa, to schedule available shifts. Steadfast Br. 13 (citing JA.167-68, 220, 240, 311, JA.322-23, 335, 694, 722-23). But numerous witnesses testified that, in general, Steadfast identified available shifts and communicated information about those shifts to nurses. JA.1175-76 (citing JA.111, JA.133, JA.783); *see also* JA.403, JA.406, JA.464-65, JA.987-88.

Moreover, some of the very testimony on which Steadfast relies also confirmed that it was not possible to schedule shifts without Steadfast "being aware." JA.240; *see also* JA.214 (J. Jones; "[e]verything went through" Pitts); JA.167-68, JA.171-72 (S. Boykins; she had "to go through Steadfast" for shifts).[5]

c. Supervision

The evidence at trial further showed that Steadfast oversaw the nurses' work, notwithstanding that the work was not performed on Steadfast's premises and Steadfast personnel were not present at client-facilities when the nurses were working. *See Brock v. Superior Care*, 840 F.2d 1054, 1060 (2d Cir. 1988) ("An employer does not need to look over his workers' shoulders every day in order to exercise control."). For example, as the district court found, Steadfast instructed nurses on conduct while working at client-facilities by sending nurses written memoranda on topics including work attire, punctuality, and timekeeping. JA.1178; JA.1824-36. *See, e.g.*, *McFeeley*, 825 F.3d at 242 (nightclubs' imposition of workplace rules, including banning drinking, smoking, and loitering, weighed in favor of employee status); *Off Duty Police*, 915 F.3d at 1061 (employer

[5] DOL sought to offer trial evidence from additional nurses who would have testified about Steadfast's scheduling practices and other topics, but the district court wished to avoid cumulative testimony, so DOL filed an Offer of Proof stating that DOL would have elicited testimony from seven additional nurses that "Steadfast prohibited the nurses from setting their schedules or otherwise communicating about their schedules with the facilities." JA.364-66; R.303 at 2-3.

required workers to comply with dress and grooming policies, which weighed in favor of employee status).

Steadfast trained the nurses on topics including HIPAA compliance and harassment. JA.1174. And it provided insurance and workers' compensation coverage for nurses. JA.1174. *See Gayle*, 594 F. App'x at 717 (citing registry's provision of training regarding HIV confidentiality as evidence of registry's control); *see also* FAB 2018-4 at 8 (registry's investment in a caregiver's training or insurance may indicate control).

Steadfast's timesheet practices—requiring that nurses track their work hours (using Steadfast's timesheets), obtain client-facility signatures to verify start and end times, and submit timesheets to Steadfast—also reflect Steadfast's supervision. JA.1177-78. Notably, the client-facilities did not require the nurses to track their hours or complete timesheets. JA.1181.

Moreover, the circumstances in this particular workplace and industry do not require that an employer exercise on-site or day-to-day supervision to exercise control indicative of employee status. Here, the nurses' work at client-facilities involved routine patient care (that required little independent judgment), which they were qualified to perform under their professional licenses. JA.1172, JA.1178. Where the work is routine, courts recognize that day-to-day supervision is not necessarily required to establish that the workers are employees. *See Off*

Duty Police, 915 F.3d at 1061 (level of supervision necessary is partly a function of skills required to complete the work, and "routine" work does not necessarily demand more than periodic supervision). And the fact that Steadfast's nurses maintained professional licenses similarly showed that their work did not require Steadfast's direct supervision. *See Keller v. Miri Microsystems LLC*, 781 F.3d 799, 814 (6th Cir. 2015) (factfinder could find that employer controlled cable installers' job performance where the employer relied on pre-hire certification programs and installation instructions in lieu of day-to-day supervision). Moreover, instead of providing on-site or day-to-day supervision, as the court found, Steadfast exercised control over the nurses by requiring client-facilities to provide Steadfast with feedback on the nurses' performance. JA.1180.

Thus, there is no merit to Steadfast's assertion that the district court erred because it supposedly did not "focus[] on specific operational details of workers' day-to-day responsibilities." Steadfast Br. 39-42. As outlined above, the case law simply does not support Steadfast's interpretation of the type of control necessary. There is likewise no merit to Steadfast's assertion that the court erred because it did not require that Steadfast have written policies pertaining to "core nursing tasks," such as "engaging in patient care." Steadfast Br. 42. Nothing in this Court's precedent requires such written policies to demonstrate an employer's control indicative of employee status.

d. Discipline

Steadfast also exercised control over the nurses through discipline (which is a specific form of supervision). As the district court found, Steadfast took disciplinary actions—including cancelling shifts and removing nurses from the schedule—for a variety of reasons, including when nurses discussed compensation with co-workers or client-facilities, declined or cancelled shifts, or attempted to contact client-facilities to set schedules or rates. JA.1178. *See Hughes*, 117 F. Supp. 3d at 1370 (registry's practice of disciplining nurses was evidence of control); FAB 2018-4 at 6 (registry's discipline of caregiver may weigh towards determination that registry exercises control over caregiver).

There was also evidence that Steadfast enforced its non-compete provisions by disciplining nurses who worked for competitors. JA.1178. That Steadfast's contracts with the nurses included non-compete clauses is, on its own, strong evidence of employee status because, through such agreements, the employer controls the worker's ability to work for others. *See Off Duty Police*, 915 F.3d at 1060-61 (non-compete clause weighed in favor of employee status); *Hughes*, 117 F. Supp. 3d at 1370 (in case involving nurse registry, non-compete agreement may provide evidence of control). Steadfast's practice of disciplining nurses who worked for competitors further bolstered its control over the nurses.

The client-facilities did not discipline the nurses. Instead, they were required to contact Steadfast regarding any issues they had with a nurse's performance. JA.1181; *see also* JA.1180 (Steadfast requires client-facilities to provide feedback on the nurses' performance). Similarly, it is relevant that the Board of Nursing contacted Steadfast—not client-facilities—with any questions or issues about nurses on Steadfast's registry. JA.1178.

Steadfast takes issue with some of the court's findings regarding its practice of disciplining its nurses, but its arguments lack merit. Steadfast claims that the district court improperly relied on "anecdotal" evidence from a "handful" of "outlier" nurses respecting Steadfast's disciplinary practices. Steadfast Br. 18, 25. In fact, the court credited the testimony of Courtnay Draughn, Steadfast's accounts/call center manager, who testified, among other things, that she regularly witnessed Pitts disciplining nurses for infractions including discussing compensation with other nurses, contacting client-facilities on their own, and declining shifts. JA.1178 (citing JA.67-68, JA.72, JA.74, JA.77-79, JA.81). Draughn's testimony was not "anecdotal," nor did it highlight "outlier" incidents; instead, as a Steadfast employee who handled account management, Draughn had firsthand knowledge of the company's actual practices. The district court also relied on corroborating testimony from several nurses, some of which described general practices. *See* JA.1178; *see also* JA.320 (C. Turner; Pitts disciplined

nurses by taking them off the schedule for a few days).[6] And despite Pitts' testimony in support of its position, the court heard contradictory testimony by Draughn that she witnessed Pitts disciplining nurses, as well as various nurses, and found that Steadfast had a practice of disciplining nurses for various reasons. JA.67-68, JA.72, JA.74, JA.77-79, JA.81.

The district court's assessment of this evidence accords with this Court's prior decisions, contrary to Steadfast argument that the court "deviated" from those cases, Steadfast Br. 36. In *McFeeley*, this Court explained that "'typical' deposition testimony" regarding workers' schedules was offered to rebut the employer's assertion that the workers had significant control over their schedules. 825 F.3d at 241-42. Similarly, here, the district court relied on testimony from multiple witnesses (Draughn and various nurses), some of which addressed Steadfast's practices generally, to rebut Steadfast's claims that it did not discipline the nurses. JA.1178. Steadfast also cited *Herman v. Mid-Atlantic Installation Services, Inc.*, 164 F. Supp. 2d 667, 673-77 & nn. 4, 10 (D. Md. 2000), which, it said, "assign[ed] weight to evidence of general policies and typical operational practices[] and discount[ed] significance of outlier evidence. " Steadfast Br. 24-25. But the evidence on which the district court here relied *was* "evidence of

[6] *See also* R.303 at 3 (DOL Offer of Proof; stating that DOL would have elicited testimony from seven additional nurses that Steadfast disciplined employees who turned down shifts).

general policies and typical operational practices," albeit not necessarily *written* policies. And, moreover, the district court in *Mid-Atlantic Installation* actually credited *testimony* that the putative employer "discouraged" working for competitors despite a written policy that purportedly permitted such work (while dismissing other testimony for evidentiary reasons). *Mid-Atlantic Installation*, 164 F. Supp. 2d at 673-77 & nn. 4, 10.[7]

Steadfast further claims that the trial testimony "uniformly established" that Steadfast did not enforce the non-compete clause and "did not restrict its nurses for working for other entities," pointing to testimony by some nurses who stated that they worked at Steadfast and other registries at the same time. Steadfast Br. 15 & n.2. But such testimony does not come close to substantiating Steadfast's apparent position that it *never* restricted nurses and *never* enforced its non-compete provision. Moreover, as explained, the court heard contrary evidence from Draughn and nurses, and found that Steadfast had disciplined nurses for working for competitors. Finally, regardless of how frequently Steadfast enforced the non-compete agreements, the nurses would not know whether Steadfast would pursue

[7] Steadfast also faults the district court because it relied on verbal testimony respecting Steadfast's disciplinary practices rather than written policies, citing *Schultz* and *McFeeley*. Steadfast Br. 35-36. Although those decisions cite written policies, they do not preclude factfinders from relying on other evidence when making determinations about a company's policies and practices, and this Court has never required that the economic realities test looks to only written policies.

enforcement when contemplating working for a competitor registry, and selective enforcement of the provision would allow Steadfast to exercise control over the nurses. *Cf. Keller*, 781 F.3d at 815 (factfinder could determine that company exercised disciplinary power over technician even where company claimed it had never disciplined technicians).

Finally, Steadfast appears to assert that the district court's factual findings respecting Steadfast's disciplinary practices conflicted with other findings by the court, and implied that the court's reasoning was therefore erroneous because it focused on "outliers" rather than Steadfast's practices during the "hundreds of thousands of shifts" performed by the nurses. Steadfast Br. 37-38. But these findings by the court—that Steadfast generally gave "nurses the opportunity to accept or decline shifts" and generally "d[id] not require … a minimum number of hours" or impose a "maximum number of hours," JA.1176—do not negate the ample evidence that Steadfast, nevertheless, had a practice of disciplining nurses (for a variety of reasons). There is nothing internally inconsistent between the two findings. On a related note, although Steadfast underscored that intoxication and unprofessional conduct were also bases for discipline, Steadfast Br. 38, that fact does not somehow negate the evidence that its disciplinary actions also included discipline for other conduct for which workers were blacklisted or had shifts cancelled: discussing compensation with other nurses, contacting client-facilities

on their own, declining shifts, working for other companies. *See supra* p. 11. In fact, the court only cited one (unconfirmed) example of discipline related to a drug-and-alcohol policy. JA.1178 (citing JA.922-925).

e. Features common to both employment relationships and independent contractor relationships may nevertheless provide evidence of control.

Steadfast argues that the district court's analysis conflicts with circuit precedent, particularly *McFeeley* and *Chao v. Mid-Atlantic Installation Services, Inc.*, 16 F. App'x 104 (4th Cir. 2001), because, Steadfast claims, the court treated the presence of features that are typically present in both employment relationships *and* independent contractor relationships as "default proof of employment status." Steadfast Br. 31-35. Steadfast relies on language from *McFeeley* stating that a company that hires an independent contractor normally seeks to exert some control over the performance of the work, such as the contractor's conduct while on the company's premises, and that "such conditions, along with the terms of performance and compensation, are part and parcel" of independent contracting arrangements. Steadfast Br. 31-32 (quoting *McFeeley*, 825 F.3d at 243). Steadfast seems to suggest that this language means that courts applying the economic realities test should not consider "terms of performance," "compensation," and other conditions that a company imposes. Steadfast misconstrues the relevance of this language.

The language quoted above was simply the court in *McFeeley* acknowledging the uncontroversial proposition that if a company contracts with an individual who is a genuinely an independent contractor (e.g., an independent plumber), the company will typically define the terms of the work (e.g., repair a leak on company premises outside the company's normal operating hours), the contractor will indicate when it will perform the work, the parties will agree to a price for the work, and the company will, of course, pay the contractor for his work. Contrary to Steadfast's suggestion otherwise, even though both independent contractor and employee arrangements involve payment for work, it does not follow that courts should not consider the nature of payment when applying the economic realities test. Thus, Steadfast's assertion that the district court concluded that Steadfast created an employment relationship simply by paying the nurses, Steadfast Br. 33-35, is meritless. That is not what the court concluded and not what the Secretary argues here. Rather, it was a feature of the payments, specifically that Steadfast unilaterally set the pay rates without negotiation with the nurses, that showed a degree of control indicating employee status. Moreover, if factfinders could not consider the form of payment in applying the economic realities test, that would subvert the purpose of that test, which is to examine the totality of the circumstances in determining whether the worker is economically dependent on the putative employer. *See McFeeley*, 825 F.3d at 241.

2. Opportunity for profit or loss

The trial record demonstrated that the nurses did not have opportunities for profit or loss dependent on their managerial skill. The nurses earned predetermined hourly pay for shifts that Steadfast offered to them; they could not negotiate their pay with Steadfast or client-facilities; they did not advertise their services to client-facilities; and Steadfast prohibited them from contacting client-facilities directly to seek shifts. The only way they could increase their pay was to accept more shifts that Steadfast offered. This Court explained in *Schultz* that the opportunity-for-profit-or-loss factor weighed in favor of employee status where workers could not "exercise or hone their managerial skill to increase their pay" because the employer "paid [them] a set rate for each shift worked" and the customer's "needs dictated the number of shifts available and the hours worked." 466 F.3d at 307-08; *see also Gayle*, 594 F. App'x at 717-718 (opportunity-for-profit-or-loss factor "weigh[ed] heavily in favor of the nurses' status as employees" where, among other things, nurses "earn[ed] only an hourly wage and ha[d] no downside exposure"). Because the nurses earned wages solely based on the number of hours they worked, they had no opportunity for profit based on their managerial skill. They likewise had no risk of loss based on their managerial skill. *See Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989) (cake decorators had no opportunity for profit or loss where they "did not undertake the risks usually

associated with an independent business," and "there was no way that [they] could experience a business loss").

It is also significant, as the district court observed, that Steadfast guaranteed the nurses payment "from [its] own financial accounts," "regardless of whether client-facilities [paid] [Steadfast] for its nurses' services." JA.1193; *see Gayle*, 594 F. App'x at 717 (fact that registry paid nurses "promptly regardless of whether" registry received insurance payments supported nurses' position that they lacked opportunities for profit or loss); FAB 2018-4 at 7 (where caregiver registry guarantees payment to caregivers, "the caregiver may be economically dependent on the registry"). Because the nurses received pay regardless of whether the client-facilities paid Steadfast, the nurses bore no risk of financial loss, unlike genuine independent contractors.[8] Lastly, as the district court correctly reasoned, "the non-competition clauses in the [nurses'] contracts … significantly hinder[ed] the nurses' ability to accumulate profit independent of [Steadfast]." JA.1195. *See supra* pp. 36- 39-40 (discussing non-compete provisions under the control factor).

[8] The district court also emphasized that Pitts is Steadfast's sole owner and "there is no evidence that the nurses have an interest in Steadfast beyond their role as workers for a set hourly pay rate." JA.1195. This further demonstrates that they did not have any opportunity for a potential loss and did not have any sort of independent businesses consistent with being independent contractors; instead, they worked in Pitts' business.

Steadfast repeats its argument that the district court treated the presence of features common to both employment and independent contractor relationships as automatically establishing employee status, Steadfast Br. 32-35, but Steadfast's argument again fails. For the opportunity-for-profit-and-loss factor, Steadfast relies on language in *McFeely* stating that "fundamental components of running a company"—such as exercising managerial skill in ways that affects the opportunities for profit—"hardly render anyone with whom the company transacts business an 'employee' under the FLSA." Steadfast Br. 32 (quoting *McFeeley*, 825 F.3d at 244). But Steadfast ignores the next sentence in *McFeeley*, which states that "[t]he focus … should remain on the worker's contribution to managerial decision-making." 825 F.3d at 244. Steadfast has not pointed to any evidence in the record that the nurses contributed to managerial decision making in any way that reflected an opportunity for profit or loss.

Steadfast also relies, Steadfast Br. 32-35, for this argument on *Mid-Atlantic Installation*, which concluded that cable installers were independent contractors. 16 F. App'x at 105. There, this Court reasoned that the opportunity-for-profit-or-loss factor weighed in favor of independent contractor status because—even though installers were not "solely" in control of their profits or losses because they could not unilaterally determine the number of installations they would do on a given day or the piece rate the company paid them—installers' profit or loss

nevertheless depended on "skill in meeting technical specifications, thereby avoiding [deductions for faulty installations]; on … business acumen … [in] mak[ing] required capital investments in tools, equipment, and a truck; and on the … decision whether to hire … employees or to work alone." 16 F. App'x at 106-08. Steadfast claims that its "payment of nurses for services rendered to [client-facilities] is no different than the independent contractor cable installer arrangement" in *Mid-Atlantic Installation*, Steadfast Br. 34, but there are important differences. Unlike the installers, the nurses could not maximize profits through exercise of skill or capital investments, they were not exposed to potential financial loss for poor performance, and they could not hire other nurses to cover their shifts. JA.1195-96; *see also Mid-Atlantic Installation*, 16 F. App'x at 107. Indeed, the way *Mid-Atlantic Installation* discussed this factor shows that a worker's inability to negotiate the pay rate tends to indicate employee status, but that fact is not dispositive if there are other facts going the opposite direction. Here, however, there are no facts going the opposite direction on this factor.

3. Investment or employment of other workers

As the district court correctly reasoned, the trial evidence demonstrated that the "nurses d[id] not invest in equipment to an extent indicative of an independent contractor status and that [Steadfast] prohibit[s] nurses from hiring other nurses, employees, or contractors to work for them at client-facilities." JA.1195.

Although some nurses preferred to use their own stethoscopes and blood pressure cuffs, this minimal investment was not the type of "investment in equipment" that indicates independent contractor status and, in any event, they were "not required to invest in any equipment or materials." *Schultz*, 466 F.3d at 308 ("investment in equipment" factor did not weigh towards independent contractor classification where, although some agents chose to use their own firearms, this was not required); *see also Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1236 (10th Cir. 2018) ("The mere fact that workers supply their own tools or equipment does not establish status as independent contractors; rather, the relevant investment is the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.") (internal quotation marks omitted). Although it is true that client-facilities, not Steadfast itself, provided the medical equipment the nurses used in their work, one court explained that it was "not particularly relevant that [a healthcare staffing agency] [had] not invested in medical equipment" because the agency had instead invested "in the business of placing [healthcare personnel]." *Crouch*, 2009 WL 3737887, at *17.

Equally significant, Steadfast prohibited its nurses from hiring others to perform their work. *Schultz*, 466 F.3d at 308 (fact that the workers "could not hire other workers to help them do their work" weighed against independent contractor

status); *cf. Gayle*, 594 F. App'x at 717 (registry's policy "prohibit[ing] a nurse from subcontracting a shift to another nurse" demonstrated control).

4. Skill required for the work

The next factor, the "degree of skill required for the work," also weighs in favor of classifying the nurses as Steadfast's employees. The district court stated that "[t]he degree of skill (via education and licensures) required for the nurses' work suggests that the nurses could work in an independent capacity, but the economic realities of the nurses' relationship with [Steadfast] under the other factors outweigh this factor significantly." JA. 1196.

However, on de novo review, this Court may conduct its own analysis of this factor, applying the district court's factual findings and other record evidence. In considering this factor, some courts have considered whether the workers use specialized skills in an independent way consistent with exercising business initiative in addition to whether the worker has special or specialized skills. *See, e.g.*, *Superior Care*, 840 F.2d at 1060-61 (though the nurses had "technical skills," the lack of evidence showing they used them "in any independent way" to "find job assignments" weighed against independent contractor status); *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 345 (5th Cir. 2008) ("Generally, we look for some unique skill set, or some ability to exercise significant initiative within the business.") (internal citations omitted); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286,

1295 (3d Cir. 1991) ("[T]he use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way."). And some courts have adopted this approach in cases involving healthcare staffing agencies or registries, assessing whether healthcare personnel were "dependent on" agencies for placement rather than exercising skill to find clients. *Crouch*, 2009 WL 3737887, at *16; *see also LeMaster*, 726 F. Supp. 2d at 861.[9]

Here, several findings support the conclusion that the nurses were "dependent" on Steadfast for "placements," namely that Steadfast controls all information that nurses receive regarding available shifts, prohibits nurses from communicating with client-facilities, and forbids nurses from negotiating their pay rates. JA.1175-76, JA.1181. And, as noted above, the nurses did not advertise their services. JA.1173. Thus, if this Court were to consider the nurses' skills in exercising business initiative, this factor weighs against independent contractor status.

5. Permanency

The district court correctly determined that Steadfast had a "permanent" working relationship with the nurses, which favored employee status. JA.1195.

[9] This Court has not addressed the relevance of workers exercising business initiative.

"The more permanent the relationship, the more likely the worker is to be an employee." *Schultz*, 466 F.3d at 309. As the district court explained, Steadfast's pay records show a permanent relationship between Steadfast and the nurses, "even if a term limit is stated in a nurse's contractor agreement," JA.1195; *see also* JA.1175 (also citing, as evidence of a permanent relationship, client-facility invoices (excerpts at JA.1766-70), employee change reports (excerpts at JA.1772-77), and agreements between Steadfast and nurses (excerpts at JA.1778-1815)).

In particular, the pay records (and trial testimony) established that many of the nurses worked for Steadfast for multiple years. JA.1175. Even though some of the nurses had shorter tenures with Steadfast, that fact is not dispositive of independent contractor status. *See Superior Care*, 840 F.2d at 1060-61 (nurses deemed employees even though the majority had worked for nursing registry for less than thirteen weeks because "the fact that these nurses are a transient work force reflects the nature of their profession"). Similarly, although Steadfast claimed that fluctuations in some nurses' schedules undermined the proposition that Steadfast and the nurses had a permanent relationship, Steadfast Br. 15, there is no reason why a permanent relationship cannot feature fluctuating work schedules.

Moreover, as the district court found, Steadfast prohibited the nurses from working for other registries, even disciplining them for violating this rule, which

supports the proposition that Steadfast had a permanent relationship with the nurses. JA.1178. "[E]ven short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship." *Keller*, 781 F.3d at 807.

6. Integral

Finally, the district court correctly concluded—and Steadfast does not contest on appeal—that the work the nurses perform is integral to Steadfast's business. JA.1196. *See also, e.g.*, *Gayle*, 594 F. App'x at 718 (explaining that nurses were integral part of registry's business because "placing nurses accounts for [registry's] only income"); *Crouch*, 2009 WL 3737887, at *20 ("work performed by [nurses was] at the heart of [the agency's] business" because "[w]ithout the [nurses], [the agency] would not be in business").

B. The District Court Did Not Commit Legal Error by Relying on FAB 2018-4.

Steadfast challenges the district court's reliance on FAB 2018-4, Steadfast Br. 43-46, but Steadfast itself proffered FAB 2018-4 as a trial exhibit—over the Secretary's objections respecting relevance, confusion, and hearsay—and relied on the FAB at the trial. R.261 at 15; JA.1090-94. Steadfast's objection to the district

court's reliance on a document that Steadfast itself submitted at trial rings hollow at this stage in the litigation.[10]

In any event, there is nothing objectionable about the district court's reliance on this guidance. FAB 2018-4 is intended to "provide[] guidance to Wage and Hour Division (WHD) field staff to help them determine whether home care, nurse, or caregiver registries (registries) are employers under the [FLSA]." FAB 2018-4 at 1. That is, the purpose of FAB 2018-4 is to ensure enforcement consistency regarding registries providing home care services.[11] As *McFeeley* noted, when applying the economic realities test, "the court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case." 825 F.3d at 241.

Steadfast suggests that there is something nefarious about the timing of FAB 2018-4's issuance, which was shortly after the Secretary filed suit in this case. Steadfast Br. 44. But FAB 2018-4 was simply updated guidance issued following years of prior guidance on this very issue. *See* Application of the Fair Labor

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[10] Steadfast's renunciation of the FAB is striking given its argument below that the FAB was entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See* R.274 at 30-31.

[11] FAB 2018-4 is directed principally at registries providing caregivers in patients' homes, not in healthcare facilities. FAB 2018-4 at 1. It was not unreasonable, however, for the district court to have relied on it for guidance in determining whether Steadfast's nurses were, as a matter of economic reality, Steadfast's employees.

Standards Act to Domestic Service, 78 Fed. Reg. 60454, 60484 (Oct. 1, 2013) (discussing the application of the economic realities test to determine classification of caregivers working for a registry; explaining that agency is "likely an employer" of caregivers where agency, among other things, "review[s] worker time sheets" and "exercises control over the wage rate"); Wage and Hour Division Opinion Letter WH-350, 1975 WL 40973, at *1 (July 31, 1975) (addressing whether nurses who are members of a registry are employees under the FLSA; summarizing facts that may indicate employment relationship, including that registry "establishes the rate which will be charged," "exercises a form of discipline," and "exercises control over … the work schedule"). The timing here was entirely coincidental.

Moreover, FAB 2018-4 accords with court decisions, including those addressing classification in the context of caregiver registries. For example, consistent with relevant case law, *see Gayle*, 594 F. App'x at 717-18, the district court relied on FAB 2018-4 for the proposition that a registry's "direct payment of its own funds to the caregiver … may indicate that the registry is the caregiver's employer." JA.1193 (quoting FAB 2018-4 at 7). The district court also invoked FAB 2018-4 for the principle that "a registry's decision to effectively set a caregiver's rate of pay without the caregiver making the ultimate determination indicated that the registry is acting as the caregiver's employer." JA.1192 (quoting FAB 2018-4 at 7). Courts have similarly cited the fact that a registry (not

caregivers) set the pay rate as evidence of control. *See Gayle*, 594 F. App'x at 717; *Hughes*, 117 F. Supp. 3d at 1370. Additionally, the district court relied on the FAB for the idea that limiting caregivers from seeking outside work may indicate the existence of an employment relationship. JA.1195 (citing FAB 2018-4 at 6). Again, court decisions support the same principle. *See, e.g.*, *Hughes*, 117 F. Supp. 3d at 1372 (non-compete agreement may provide evidence of control).

Steadfast's suggestion that the district court's reliance on FAB 2018-4 amounted to a misapplication of the burden of proof, Steadfast Br. 29, also fails. There is no indication that the district court treated FAB 2018-4 as somehow automatically making Steadfast's nurses employees. As explained, the court simply relied on the FAB as guidance when analyzing the economic realities of the situation.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT STEADFAST DID NOT SHOW THAT IT ACTED IN GOOD FAITH IN CLASSIFYING THE NURSES AS INDEPENDENT CONTRACTORS AND THEREFORE COULD NOT AVOID LIQUIDATED DAMAGES.

The district court did not abuse its discretion by awarding liquidated damages for Steadfast's violations of the FLSA. The FLSA provides for "mandatory" liquidated damages. *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 375 (4th Cir. 2011). When an employer violates the overtime pay provisions of the FLSA, it is liable for both the amount of unpaid wages and an additional equal

amount as liquidated damages. 29 U.S.C. 216(b). Liquidated damages are a form of compensation, not a penalty; they "compensate for the employer's 'retention of a [worker's] pay' which 'may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.'" *United States v. Edwards*, 995 F.3d 342, 346 (4th Cir. 2021) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942)). Therefore, as this Court recently underscored, "awarding liquidated damages for violations of the FLSA's minimum-wage and overtime provisions is the 'norm.'" *Id.* (quoting *Mayhew*, 125 F.3d at 220).

Accordingly, an employer may avoid mandatory liquidated damages only if the district court, in its "sound discretion," determines that the employer has shown "to the satisfaction of the court" that it acted in good faith and that it had reasonable grounds for believing that it was not violating the FLSA. 29 U.S.C. 260. As the statute makes clear, the employer bears the burden of establishing the good-faith defense. *Mountaire Farms*, 650 F.3d at 375.

The district court's conclusion that Steadfast failed to meet its burden is well supported by the facts in the record. Nothing in the record indicates that the court abused its discretion in rejecting Steadfast's good faith defense to mandatory liquidated damages.

The district court found that, before Steadfast sought advice from Bredehoft in June 2018, Steadfast did not present "any evidence that it sought legal advice on

the classification of its nurses *or took any proactive steps to educate [itself] on the FLSA*." JA.1196 (emphasis added); *see also* JA.1182 (citing JA.591, JA.943, JA.1145). In its post-trial proposed findings and conclusions, its good faith argument was limited to the post-2018 period, not anything that occurred prior to 2018. R.322 at 29-30. In any event, its attack on the court's finding has no merit. First, it asserts the court committed legal error because "good faith does not necessarily require seeking the advice of a lawyer." Steadfast Br. 50. Steadfast mischaracterizes the district court's decision. From the full context, it is clear that the court's order did not impose a requirement to consult an attorney to establish good faith; instead, it simply explained that the record lacked evidence that Steadfast took *any* steps to ensure the company was complying with the FLSA, and indicated that seeking legal advice on this question could have supported a good faith defense. JA.1196-98. Second, Steadfast asserts that it did present evidence of good faith steps prior to June 2018 via Pitts' testimony at trial that "she researched 'staffing agencies,' 'independent contractors,' and '1099's'" and that she consulted an attorney, Wanda Cooper. Steadfast Br. 50 (citing JA.940-42). But Pitts admitted that her "research" consisted of "Googl[ing]" a few pertinent phrases "years ago," and there was no record evidence that Cooper provided Pitts any advice on FLSA compliance. JA.940-943. The district court did not abuse its

discretion in determining that Steadfast failed to establish the good faith defense for violations before June 2018.

Steadfast next attacks the district court's rejection of Steadfast's good faith defense for the period after June 2018, when Steadfast sought advice from Bredehoft. Steadfast Br. 51-52. The district court concluded that Steadfast's reliance on Bredehoft's legal opinion was "not objectively reasonable" because DOL had informed Steadfast by then that its practices violated the FLSA, Steadfast admitted it was familiar with FAB 2018-4 but did not seek Bredehoft's opinion if its practices complied with that guidance, and Steadfast failed to show that it provided Bredehoft with all the relevant information that he would need to provide "a fully informed, reasonable legal opinion." JA.1197-98.

Steadfast first argues that there was no legal basis for concluding that Steadfast "lack[ed] an objectively reasonable basis to believe that it [was] complying with the FLSA" once DOL informed Steadfast that it found overtime violations and once DOL issued FAB 2018-4. Steadfast Br. 51. The cases cited by the district court support its conclusion and Steadfast's attempt to distinguish them is not persuasive. In *Marshall v. Brunner*, 668 F.2d 748, 754 (4th Cir. 1982), this Court concluded that an employer did not act in good faith because it continued to violate the FLSA after DOL investigated it and informed it of its unlawful practices, including by continuing to unlawfully employ minors as well as actions

taking actions to conceal its continuing refusal to pay overtime. Similarly, here, Steadfast continued to classify its nurses as independent contractors and not pay them overtime even after DOL investigated it and informed it of its unlawful practices. Even if the employer's actions in *Brunner* may appear more egregious than Steadfast's, the Court characterized those actions as reflecting the employer's "bad faith." 668 F.2d at 754. The fact that Steadfast may not have taken equally egregious steps does not show that it acted in good faith. In *Richard v. Marriott Corp.*, 549 F.2d 303, 306 (4th Cir. 1977), this Court concluded that the employer did not act in good faith where a DOL opinion letter put the employer on notice that its pay practices violated the FLSA but instead of changing its practices, "it took a chance, acted at its peril, and lost." FAB 2018-4 likewise put Steadfast on notice that certain facts indicate that nurses working for registries are employees, not independent contractors, yet it failed to seek Bredehoft's legal advice about whether its pay practices complied with the guidance.

Steadfast also argues that, in concluding that Bredehoft lacked adequate information to render a legal opinion, the court erroneously assumed that Bredehoft "was legally obligated to conduct multiple interviews both inside and outside of his client's business" to render a sufficient opinion. Steadfast Br. 51-53. Steadfast overstates—and misunderstands—the district court's reasoning. In reality, the district court's reasoning highlighted that, even though Steadfast was on

notice of DOL's finding of overtime violation (and should have taken that finding seriously), Steadfast failed to provide to its attorney essential information, company records, and access to personnel that "he would have needed to provide a fully informed, reasonable legal opinion on [Steadfast's] pay practices." JA.1197-98 (explaining that Steadfast did not, for example, provide Bredehoft with memoranda it issued to nurses regarding work practices or inform him that Steadfast disciplined nurses and required nurses to notify Steadfast of tardiness or missed shifts).

Moreover, Steadfast does not contest that it did not comply with Bredehoft's advice that the company remove non-compete clauses from its contracts with nurses. Instead, Steadfast claims that "the overwhelming weight of evidence at trial confirmed that the non-compete was almost never enforced" after Bredehoft rendered his advice. Steadfast Br. 54. But the district court explicitly found, after considering the credibility of the witnesses, that Steadfast had disciplined nurses for working for competitors, JA.1178. And regardless of whether there was evidence of such enforcement after 2019, given Steadfast's history of enforcing the non-compete provision, Steadfast's continued inclusion of the provision had the effect of maintaining control over the nurses, so Steadfast cannot defend its failure to heed its attorney's advice in arguing for good faith. Therefore, the court correctly concluded that Steadfast failed to show that it acted in good faith.

CONCLUSION

For the reasons explained above, the Secretary asks this Court to affirm the district court's rulings that the nurses were employees of Steadfast under the FLSA and that liquidated damages are warranted because Steadfast failed to show that it acted in good faith in classifying the nurses as independent contractors.

ORAL ARGUMENT STATEMENT

Although the Secretary would gladly participate in any oral argument that the Court schedules in this matter, the Secretary does not believe that oral argument is warranted in this case because the issues are well-settled and can be decided on the brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Secretary of Labor's Brief:

(1) was prepared in a proportionally spaced typeface (14-point Times New Roman font); and

(2) complies with the length limit in Federal Rule of Appellate Procedure 32(a)(7) because it contains a total of 12,970 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

/s/ Anne W. King
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