

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: March 9, 2017

TO: William B. Cowen, Regional Director  
Region 21

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: SOS International LLC  
Case 21-CA-178096

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The Region submitted this case for advice as to whether the Employer has violated Section 8(a)(1) by misclassifying immigration court interpreters as independent contractors. We conclude, first, that the interpreters are employees of the Employer under the Act, rather than independent contractors. We conclude, further, that the Employer has violated Section 8(a)(1) by misclassifying the interpreters as independent contractors because the misclassification operates to chill the interpreters' exercise of Section 7 activity.

**FACTS**

SOS International LLC ("SOSi" or the "Employer") supplies interpreters to immigration courts across the United States under a prime contract with the U.S. Department of Justice Executive Office for Immigration Review ("EOIR"), which administers the immigration court system. That contract (the "EOIR Contract") is one of many government contracts held by SOSi, which is a major government contractor providing services in linguistics and other fields.

The evidentiary record primarily concerns SOSi interpreters residing in southern California.<sup>1</sup> These interpreters<sup>2</sup> mainly work at hearing locations near their homes, although some also travel to locations throughout the region or country. Among the hearing locations in Southern California are two in downtown Los Angeles: the Federal Building at 300 North Los Angeles Street, which houses a detention center for aliens in custody, and an immigration court at 606 South Olive Street. Approximately sixty-five SOSi interpreters work at South Olive Street, and approximately thirty of these are Spanish-English interpreters.

At some hearing locations, EOIR keeps a staff of “in-house” interpreters, who are federal employees but perform the same substantive work as SOSi interpreters.

### **A. Initial Recruitment of Interpreters**

SOSi began providing interpreters to EOIR in late 2015 after winning the EOIR Contract from Lionbridge, another government contractor. When SOSi won the contract, it attempted to enlist Lionbridge’s interpreters, some of whom had worked in the immigration courts for over a decade, with ostensibly nonnegotiable pay rates lower than Lionbridge’s rates. Thereafter, these interpreters concertedly negotiated higher rates for interpreters across California. The incumbent interpreters began working for SOSi in the immigration courts at the concertedly-negotiated rates in December 2015.

### **B. General Onboarding Practices**

Pursuant to the EOIR Contract, SOSi interpreters must generally be U.S. citizens or lawful permanent residents; have one year of experience interpreting in a judicial environment, or a relevant certification; be highly proficient in English and foreign language vocabularies; know specialized vocabulary relevant to immigration court proceedings; and be adept at simultaneous and consecutive modes of interpretation,<sup>3</sup> as well as sight translation.

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<sup>1</sup> The Region has gathered affidavits from at least fourteen California-based interpreters who work or worked for SOSi. Additionally, some interpreters completed more recent non-Board declarations, which we considered for the purpose of analyzing the interpreters’ relationship with SOSi.

<sup>2</sup> Unless otherwise noted, subsequent references to SOSi interpreters are to those residing in southern California.

<sup>3</sup> In consecutive interpretation, the interpreter utters interpreted statements during pauses in a hearing participant’s speech, while simultaneous interpretation involves uttering interpreted statements as the participant speaks.

To ascertain interpreter candidates' qualifications, SOSi applies an evaluation protocol pursuant to general requirements in the EOIR Contract.<sup>4</sup> Initially, candidates take a skills-screening test developed and administered by a SOSi subcontractor. Otherwise-qualified candidates who pass the screening thereafter receive training on EOIR-specific protocol, terminology, and language skills before taking a test on these topics. SOSi assigns passing candidates to a first hearing and thereafter evaluates the interpreters based on a recording of that hearing.

New interpreters must complete government background investigations and forms, including an I-9 employment authorization form, a Declaration for Federal Employment, and, sometimes, a loyalty oath. SOSi also requires interpreters to sign an "Independent Contractor Agreement," which incorporates numerous attachments and exhibits (collectively, "ICA").

### **C. Independent Contractor Agreements<sup>5</sup>**

SOSi's ICA lays out many parameters of an interpreter's work. Pursuant to the ICA, the interpreter is to interpret immigration court hearings on an as-needed basis when requested by SOSi and able to do so. The interpreter cannot accept work falling under the EOIR Contract from any other company without SOSi's approval. Nor may the interpreter assign any rights or obligations under the ICA.

The ICA requires SOSi to pay the interpreter \$225 for a "half day," i.e., up to four hours of interpretation, and \$425 for a "full day," i.e., up to eight hours. The ICA also notes a supplemental hourly rate for half days exceeding four hours, but does not clearly indicate whether the hourly supplement or the full-day rate applies to workdays longer than four hours but shorter than eight. Also, the ICA is silent as to compensation for workdays exceeding eight hours.

For assignments involving non-local travel, SOSi and the interpreter will negotiate travel cost reimbursement on a case-by-case basis. SOSi may cancel half or full days of interpretation without payment if SOSi provides at least twenty-four hours' notice; it provides a half day's payment otherwise. Also, SOSi will pay a 10% premium fee for assignments issued two or fewer working days prior to the assigned hearing.

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<sup>4</sup> Incumbent interpreters did not undergo SOSi's initial testing and training process since EOIR and SOSi generally presumed they were qualified.

<sup>5</sup> The following summary is based on an incumbent interpreter's ICA. More recent ICAs may differ with respect to compensation, as described in sections further below.

The interpreter has to arrive at hearings early and prepared to proceed. Unless a hearing is adjourned for lunch, the interpreter must remain at the hearing until released. If a hearing is adjourned until later in the day, the interpreter may be given up to two hours for lunch. SOSi will not pay for lunch breaks unless adjournments exceed two hours. Lunch breaks are not guaranteed.

The ICA also permits SOSi to deduct from the interpreter's compensation the amount of "[o]ne (1) time the hourly rate" as a penalty for performance problems, including lateness, falling short of other requirements or standards, and failing to gain access to a hearing location due to lateness or lack of proper credentials. Notwithstanding penalties, the interpreter remains obligated to perform his or her work satisfactorily. Failure to do so subjects the interpreter to termination.

The interpreter "shall conform to high professional standards of work and business ethics." In that regard, the interpreter must follow rules, policies, and procedures embodied in documents authored by EOIR or SOSi. Documents stemming from EOIR include the following: U.S. D.O.J. Code of Professional Responsibility for Interpreters; U.S. D.O.J. Immigration Court Operating Guidelines for Contract Interpreters; U.S. D.O.J. Confidentiality Agreement for Contractor Employees; EOIR Court Interpreter Handbook; and Immigration Court Terminology List (for English-Spanish).

The Code of Professional Responsibility enumerates professional standards applicable to immigration court interpreters. The standards concern accuracy and completeness, representation of interpreter qualifications, impartiality and avoidance of conflicts of interest, professional demeanor, confidentiality, limits of the interpreter's role, reporting concerns about inability to competently complete an assignment, reporting ethical violations, and professional development.

The Immigration Court Operating Guidelines for Contract Interpreters prescribe procedures for interpreters to follow starting before their arrival at an assigned hearing location and continuing through the end of their day's work. The Guidelines cover matters such as checking in with court personnel, where to go and when, and completing Certification of Interpretation ("COI") forms, which are described further below. The Guidelines also prohibit conduct such as speaking with parties awaiting hearings, entering certain areas without court personnel escort, using electronic devices without permission, and asking court personnel for future interpreting assignments. Additionally, the Guidelines forbid soliciting employment or handing out business cards and resumes during assignments.

The Confidentiality Agreement for Contractor Employees requires the interpreter to agree that, among other things, the interpreter will not reveal, divulge, or publicize matters dealt with under the EOIR Contract; disseminate information obtained through their work; or remove documents without approval.

The EOIR Court Interpreter Handbook describes the immigration court hearing process and the interpreter's role therein; prescribes rules and standards concerning conduct, etiquette, and manner of interpretation; and provides guidance for handling a variety of contingencies during hearings. Examples of rules governing the manner of interpretation are, "never correct erroneous facts posed by judge or counsel in questions," and "try to control . . . laughter" in the event of a humorous response by a participant.

The Immigration Court Terminology List provides Spanish translations of common technical terms related to immigration court proceedings.

In addition to the EOIR-authored documents, interpreters must follow SOSi's Code of Business Ethics and Conduct. The Code requires interpreters to abide by a variety of laws; treat colleagues with dignity and respect at all times; protect colleagues' personal information; avoid personal conflicts of interest with SOSi; avoid exchanges of gifts that would damage SOSi's reputation, even if lawful; refrain from using social media to discuss SOSi business; refrain from responding to press inquiries; report misconduct to SOSi; cooperate with SOSi's internal investigations of alleged misconduct; and seek guidance from internal resources when questions or concerns arise.<sup>6</sup> The Code states that the Employer may discipline not only individuals who violate the Code, but also those who deliberately fail to report violations.

The ICA lays out additional, partly overlapping requirements for interpreters. The interpreter must observe and follow applicable SOSi or U.S. Government site rules, policies, and standards while at any SOSi or U.S. Government facility, or when connected to a SOSi or Government computer network. The interpreter must understand the immigration courts' hearing process, terminology, and procedures. Consistent with language in the EOIR Contract, interpreters must carry SOSi-provided photo identification, government-issued photo identification, bilingual conversion dictionaries, and an Immigration Court Terminology List for the interpreter's language of interpretation.<sup>7</sup>

Interpreters must also complete SOSi-provided COI forms. Each form is one-and-a-half pages long, bears SOSi's logo, and contains fields to record information about an interpreter's work on a particular day. Interpreters must record their

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<sup>6</sup> The Region is currently investigating allegations that some of the Code's rules violate Section 8(a)(1).

<sup>7</sup> The EOIR-provided sample list, mentioned above, includes Spanish terms, but lists for other languages exist as well.

names, the hearing location, starting times of hearings, the names of immigration judges assigned to the hearings, and a signed certification that the interpretations provided were accurate. The COI also includes fields for immigration court personnel to record the start and end times of hearings and the interpreter's lunch break, as well as to note late arrivals by the interpreter or make open-ended comments.

Under the ICA, the interpreter “shall indemnify, defend and hold harmless the Company from and against any and all claims, demands, lawsuits, liability, costs and fees (including attorneys’ fees) threatened or incurred as a result of the [interpreter’s] breach of or failure to perform his/her obligations under [the ICA].” However, “[e]xcept as otherwise provided under [the ICA], neither party to [the ICA] shall be liable to the other for indirect, special, incidental, or punitive damages in connection with[] performance of any obligations under [the ICA.]”

Under a section titled “Independent Contractor,” the ICA states that “[t]he [interpreter] is not an employee of [SOSi].”<sup>8</sup> Also, “[t]he manner in which the [interpreter’s] language interpretation and translation services are rendered shall be within the [interpreter’s] sole control and discretion, provided the [w]ork is performed in accordance with the [requirements summarized above].” Finally, SOSi will not withhold taxes, provide any employee benefit plan, or make payments to unemployment, disability, or workers’ compensation insurance on the interpreter’s behalf.

The ICA lasts for a specified term—October 31, 2015, to August 31, 2016—subject to negotiated extension prior to termination. However, SOSi may terminate the ICA at will without penalty.

## **D. Day-to-Day Operations**

### **1. Advance Hearing Assignment Process**

Interpreters generally obtain hearing assignments on a weekly or monthly basis via emails with SOSi-employed coordinators, who physically work in Reston, Virginia, and are the interpreters’ primary company contacts. To start the assignment process, interpreters provide their coordinators with their availability during the upcoming week(s) or month. Coordinators respond with a hearing schedule for that time period.<sup>9</sup> These scheduling emails include details about hearings, including,

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<sup>8</sup> In a separate section, the ICA states that it should not be construed to create any form of employment relationship.

<sup>9</sup> In addition, coordinators make last-minute assignments by phone or email on a first-come, first-served basis.

among other things, the location, date and time, language to be interpreted, judge, and alien's nationality, as well as whether the alien is in custody.

Hearing times fall within the immigration courts' hours of operation, 8:00 a.m. to 5:00 p.m., which are divided into a morning and an afternoon session. Immigration judges generally conduct hearings every session except Wednesday afternoons. On a given weekday, an interpreter may be assigned to a morning session, an afternoon session, or both.

Interpreters usually accept all advance assignments that SOSi offers. Although, under the ICA, interpreters may reject any assignment, SOSi actively discourages rejections. Numerous interpreters have testified that, when they rejected assignments, coordinators reprimanded them, rescinded accepted assignments, or withheld assignments for time slots in which they expected to work.

Relatedly, interpreters encounter pressure to keep their schedules open for assignments before receiving offers. Several interpreters reported that SOSi offered them unusually few assignments for a week or two after they requested time off.

Pressuring interpreters to accept assignments is SOSi's deliberate managerial strategy. In a speakerphone conversation that an interpreter overheard, SOSi's Operations Manager stated that interpreters who reject assignments will not receive priority for upcoming assignments. Another interpreter testified that, after she rejected an assignment, her coordinator told her that he could not immediately "reward" her rejection with another case.

If an interpreter wishes to cancel an assignment, the interpreter must tell his or her coordinator. Usually, rather than simply canceling, an interpreter will line up another SOSi interpreter to attend the hearing pending SOSi's approval. If SOSi approves, the company later pays the substitute directly for completing the work. Excepting such substitutions, interpreters are personally responsible for completing assignments. They may neither subcontract assignments nor hire any assistants or helpers.

If the immigration court cancels a scheduled hearing, the assigned interpreter's coordinator will generally communicate the cancellation to the interpreter.

When assignments require long-distance travel, SOSi books any necessary flights and hotel accommodations without the interpreter's input.

## **2. Interpreters' Work Schedules**

SOSi unilaterally decides which assignments to offer to which interpreters, and gives preference to some interpreters over others. Many interpreters work for SOSi four or five weekdays per week, consider SOSi work to be their "principal" or "full-

time” job, and refrain from other interpretation work. Others occasionally engage in other interpretation work, but generally prioritize assignments from SOSi.

A minority of interpreters rely even less on SOSi for work. One interpreter, who runs a one-person interpretation business, testified that her decision to accept an assignment from SOSi or another company will depend on which company contacts her first.<sup>10</sup> Another, former SOSi interpreter worked for other companies out of necessity because SOSi only assigned him to five or six cases per month.

### **3. Interpreters’ Workdays**

Consistent with EOIR policy, SOSi requires interpreters to wear professional attire and SOSi-branded photo identification badges at hearing locations.<sup>11</sup> The badges bear SOSi’s logo and the phrase “Challenge Accepted,” which is SOSi’s slogan. Interpreters wear the badges on lanyards that also bear SOSi’s name.

Interpreters must bring SOSi-provided COI forms to hearing locations. They are also generally responsible for bringing notepads, writing utensils, and dictionaries for their use during hearings.

Interpreters must arrive at hearing locations about one hour before their first scheduled hearing. Upon arriving, interpreters pass through security screening and then check in at the immigration court clerk’s office. Interpreters must thereafter arrive at assigned hearing rooms early to set up the hearing room’s microphones, headphones, related peripherals, and, sometimes, televideo sets.<sup>12</sup> Interpreters may not modify this EOIR-owned equipment. Nor may they bring their own chairs or use electronic dictionaries or smartphone applications at hearings.

During hearings, interpreters must completely and accurately interpret the proceedings. At various times, interpreters interpret consecutively or simultaneously, depending on the judge’s preferences. Interpreters must continue tending to the

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<sup>10</sup> However, some months later, the same interpreter stated in a non-Board declaration that she prioritized SOSi cases because she got the impression from her coordinator that she would not be assigned cases unless she kept her schedule open for SOSi.

<sup>11</sup> In-house interpreters are permitted to dress more casually.

<sup>12</sup> Assignments at detention facilities require televideo equipment because immigration judges, and possibly others, participate remotely. The interpreter is present at the detention facility with a detained alien, and must interpret through a telephone system.

technological equipment throughout hearings. On occasion, judges may ask interpreters to complete tasks falling outside the EOIR Contract, such as reviewing asylum applications. SOSi forbids interpreters from completing these tasks and requires interpreters to decline the judges' requests.

When hearings conclude, interpreters must obtain the presiding judge's signature on their COI forms. Although, occasionally, SOSi assigns two interpreters to a hearing to conduct a "relay" interpretation,<sup>13</sup> SOSi instructs interpreters to have the judge sign only a single COI because EOIR compensates SOSi for only one of the two interpreters. However, both interpreters must later submit COI forms to SOSi.

Although interpreters receive advance assignments for only one hearing per session, interpreters usually work through the end of the session even if the pre-assigned hearing ends earlier. Whenever a hearing concludes mid-session, court personnel assign the interpreter to another hearing. Interpreters must accept such reassignments, and may not leave until released by court staff after providing the staff with copies of completed COI forms.<sup>14</sup> Interpreters later scan and submit COI forms to SOSi for payment.

Hearing duration and mid-hearing breaks are determined by immigration judges. Although the immigration courts officially close at 5:00 p.m., some judges will allow hearings to continue past that time.

Generally, a lunch recess divides the immigration courts' two daily sessions. However, consistent with the ICA, SOSi interpreters are not guaranteed time for a lunch break.

#### **4. Compensation**

SOSi generally pays interpreters via direct deposit within thirty days from its receipt of completed COI forms. Until May 2016, SOSi paid incumbent interpreters the full-day rate for single sessions that exceeded four hours. Now, these interpreters

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<sup>13</sup> Relay interpretation involves one interpreter interpreting between a rare language (e.g., an indigenous South American language) and a common non-English language (e.g., Spanish), and a second interpreter interpreting between the latter language and English.

<sup>14</sup> If a SOSi interpreter cannot accept reassignment due to an emergency or a schedule conflict, the interpreter must contact his or her SOSi coordinator.

instead receive supplemental payment by the hour.<sup>15</sup> Interpreters have recently reported that SOSi likewise provides additional pay for full days exceeding eight hours.<sup>16</sup>

As indicated further above, incumbent interpreters' rates are products of concerted negotiations with SOSi. Though the negotiated rates still apply to incumbent interpreters who continued working for SOSi after August 31, 2016—the incumbent interpreters' ICAs' initial expiration date—interpreters have reported that SOSi has recruited new interpreters whom it pays a less generous hourly rate unilaterally set by SOSi.

The incumbent interpreters' ICAs did not set rates for non-local travel assignments, thereby implicitly leaving travel rates open for negotiation on a case-by-case basis.<sup>17</sup> However, while some who attempted to negotiate were successful, others were either rebuffed or penalized by SOSi with fewer assignments.

## **5. Supervision and Discipline**

SOSi and EOIR share supervisory and disciplinary authority over the interpreters. EOIR enforces its rules, policies, and standards through the ability to “disqualify” interpreters for infractions. “Disqualification” is a temporary or permanent bar from interpreting for a particular case, judge, or immigration court, or for the entire immigration court system, with respect to one or more interpretation languages.<sup>18</sup>

Disqualification generally begins with a complaint by an immigration judge, court staff member, or attorney asserting that an interpreter has performed inadequately, behaved unprofessionally, or violated rules such as the prohibition on speaking to parties. A judge or staff member may document the complaint and submit

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<sup>15</sup> As indicated above, the ICAs are ambiguous as to the applicability of a supplemental hourly rate or the full-day rate for workdays lasting longer than four but shorter than eight hours.

<sup>16</sup> Reassignment by the clerk's office within a session does not result in additional pay unless the session runs long as a result. The interpreter's ability to take a lunch break likewise does not affect pay.

<sup>17</sup> The extent to which currently-effective ICAs set rates for non-local travel assignments is unclear.

<sup>18</sup> SOSi may not assign an interpreter to any hearing for which the interpreter is disqualified.

it to EOIR's centralized Language Services Unit ("LSU") with a recommended minimum scope of disqualification.

Once LSU reviews the complaint, it may decide that a broader disqualification level is appropriate.<sup>19</sup> LSU notifies SOSi of the disqualification, after which SOSi may take remedial action. If the reason for disqualification is interpretation-related, SOSi may conduct a scored evaluation of the interpreter based on a recording of the relevant hearing. In the event of a passing score, SOSi may request the interpreter's reinstatement. Otherwise, SOSi must retrain and reevaluate the interpreter before seeking reinstatement. For non-interpretation-related issues, such as unprofessional behavior, SOSi may counsel or train the interpreter and submit a request for reinstatement in conjunction with a statement outlining the remedial steps taken.

LSU may approve or reject a reinstatement request, in consultation with the immigration court whence the complaint originated. A disqualified interpreter may be reinstated system-wide or with exceptions.

SOSi does not invariably seek the reinstatement of disqualified interpreters, but rather exercises discretion. After an interpreter was disqualified in April 2016, SOSi told the interpreter, in essence, that SOSi could do nothing for her. The interpreter later contacted LSU and learned that SOSi had never requested her reinstatement. Afterwards, the interpreter relayed this information to SOSi's Operations Manager. Only then did SOSi report to the interpreter that SOSi was actively seeking her reinstatement.<sup>20</sup>

SOSi can discipline interpreters independently from EOIR through a variety of methods. Pursuant to the ICA, SOSi retains the right to terminate interpreters at will and dock interpreters' pay for lateness and other infractions. SOSi also rescinds or withholds assignments as a form of discipline, such as when an interpreter cancels an assigned case, arrives late, or prematurely leaves a hearing location.

At some EOIR locations, SOSi retains an "interpreter liaison," who may address disciplinary problems. A liaison working in Los Angeles (the "LA Liaison") sometimes counsels interpreters informally, such as when judges bring complaints to him rather than LSU. The LA Liaison reports some, but not all, issues to SOSi. In some instances, he may recommend that the company stop assigning cases to the interpreter.

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<sup>19</sup> An example of a problem warranting system-wide disqualification is incomprehensibility of an interpreter's English.

<sup>20</sup> The ultimate outcome of the interpreter's disqualification was not in the evidentiary record at the time of writing.

Pursuant to the EOIR Contract, SOSi must evaluate interpreters semi-annually. SOSi pays other interpreters, such as the LA Liaison, to conduct these evaluations. When the LA Liaison conducts an evaluation, he observes a hearing, evaluates the interpreter's performance using a point system, and outlines areas that are satisfactory or that need improvement. Point deductions may result not only from interpretation problems, but also from failure to bring required equipment, such as a dictionary, SOSi ID badge, or Immigration Court Terminology List. A negative evaluation can be a basis for additional training, rescission or withholding of assignments by SOSi, or disqualification by EOIR.

## **6. On-the-Job Assistance**

When interpreters encounter issues at work, they generally contact their coordinators for help in the first instance. If coordinators are unable to resolve the issue, interpreters may communicate with SOSi's Operations Manager or one of two more senior Program Managers. Issues concerning payment or disqualification generally require intervention by a SOSi official above the coordinator level.

Liaisons, where available, are another source of assistance to interpreters. One interpreter stated that she goes to the LA Liaison with protocol-related questions such as whether she should continue interpreting during off-the-record breaks or what the rules concerning lunch breaks are. Some interpreters also contact the LA Liaison with problems when they cannot reach their coordinators.

SOSi regularly sends work-related guidance to interpreters via mass email. This guidance may address, for example, the dress code, wearing ID badges, courtroom demeanor, directions to hearing locations, instructions in the event a hearing location is changed, required arrival and check-in times, how to set up equipment in hearing rooms, and filling out COI forms. Guidance emails may include warnings that interpreters may be disqualified if they fail to follow applicable rules.

SOSi has told interpreters that it intends to implement an electronic portal that would give interpreters web access to schedules and the ability to upload COI forms or download paystubs. It is unclear whether SOSi has implemented this portal at the time of writing.

## **E. Duration of Relationship**

The EOIR Contract requires SOSi to "make every effort" to preclude the government from incurring costs for security investigations for the replacement of interpreters. In that regard, SOSi must ensure that qualified interpreters perform work under the EOIR Contract for at least one year.

As indicated above, the initial ICAs between SOSi and incumbent interpreters expired on August 31, 2016. That date matches the initial expiration date of the EOIR Contract, which was subject to renewal on an annual basis up to four times at EOIR's discretion. In the fall of 2015, a SOSi Program Manager told the LA Liaison and other interpreters that if EOIR renewed SOSi's contract, the interpreters' contracts would be renewed as well.

The EOIR Contract was eventually renewed past August 31, 2016. Concurrently, SOSi renewed the contracts of some, but not all, incumbent interpreters. Prior to that time, SOSi had also begun hiring new interpreters, reportedly with less generous hourly rates of compensation, as mentioned above.

#### **F. Interpreters' Invocation of Employee Rights**

Since SOSi took over the EOIR Contract, interpreters have invoked employee rights under the NLRA and other laws. Many interpreters have joined the Pacific Media Workers Guild, Communication Workers of America Local 39521 (the "Union"). Additionally, interpreters have submitted petitions to SOSi addressing grievances about late payment and disqualifications. At times, interpreters have strategically sought media coverage of their concerns, and worn bright yellow pins at work stating, "Interpreters Deserve Respect!" Interpreters and the Union have also filed charges against SOSi with the Region, including the instant charge, premised on the interpreters being employees enjoying the Act's protection.<sup>21</sup> Finally, at least two former SOSi interpreters have successfully sought California unemployment benefits available to "common-law employees."

At least once, the Employer has told the Union and/or the interpreters that the interpreters lack protection under the Act because they are independent contractors. On October 6, 2016, the Employer, through counsel, sent a letter to an interpreter accusing the interpreter of violating the Employer's instructions and her ICA by forwarding a link to a document concerning an extension of her contract with SOSi. The letter stated that SOSi was "taking this matter very seriously"; that the company had made no final decisions "about what action, if any, may be taken"; and that SOSi expressly reserved "any legal or equitable rights or remedies[.]" The Union responded on the interpreter's behalf, asserting, among other things, that "to the extent any adverse action is taken with respect to individual [i]nterpreters," the Union believes the Employer would thereby violate federal labor law because "interpreters have the right to discuss and disseminate information regarding their working conditions and term[s] of employment[.]"

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<sup>21</sup> Pending charges allege, among other things, that SOSi violated the Act by failing to renew certain interpreters' contracts in retaliation for protected activity.

The Employer thereafter replied to the Union, stating in part: “SOSi has always taken and continues to take the position that the interpreters with whom it subcontracts are independent contractors rather than employees, and feels confident the [NLRB] will agree. Accordingly, because the interpreters are independent contractors, their actions have no legal protection under [the Act] . . . .”

### **ACTION**

We conclude, first, that the interpreters are employees of the Employer under the Act, rather than independent contractors. We conclude, further, that the Employer has violated Section 8(a)(1) by misclassifying the interpreters as independent contractors because the misclassification operates to chill the interpreters’ exercise of Section 7 activity.

#### **A. The interpreters are employees of SOSi under the Act.**

“Independent contractors” are excluded from the definition of “employees” in Section 2(3) of the Act.<sup>22</sup> To determine whether workers are statutory employees or independent contractors, the Board applies the common-law factors enumerated in the Restatement (Second) of Agency § 220, as well as a related factor that asks “whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business.*”<sup>23</sup> The common-law factors include the following:

[1] The extent of control which, by the agreement, the [employer] may exercise over the details of the work, [2] whether or not the one employed is engaged in a distinct occupation or business, [3] the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, [4] the skill required in the particular occupation, [5] whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work, [6] the length of time for which the person is employed, [7] the method of payment, whether by the time or by the job, [8] whether or not the work is part of the regular business of the

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<sup>22</sup> 29 U.S.C. § 152(3).

<sup>23</sup> *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 1, 11, 12 (Sept. 30, 2014) (emphasis in original), *enforcement denied*, No. 14-1196 (D.C. Cir. Mar. 3, 2017).

employer, [9] whether or not the parties believe they are creating the relation of master and servant, and [10] whether the principal is or is not in the business.<sup>24</sup>

The additional “independent-business factor” encompasses consideration of whether the putative contractor has significant entrepreneurial opportunity; has a realistic ability to work for other companies; has proprietary or ownership interest in his or her work; and has control over important business decisions, such as the scheduling of performance, hiring and assignment of employees, equipment purchases, and commitment of capital.<sup>25</sup> The Board gives weight to actual, and not merely theoretical entrepreneurial opportunity, and also evaluates the constraints imposed by a company on the individual’s ability to pursue this opportunity.<sup>26</sup> Additionally, the Board considers whether the terms and conditions under which the individual operates are “promulgated and changed unilaterally” by the employer.<sup>27</sup>

In an independent contractor analysis, “all of the incidents of the relationship [between the employer and the worker] must be assessed and weighed with no one factor being decisive.”<sup>28</sup> A particular factor’s weight depends on the factual circumstances of each case.<sup>29</sup> When applying the relevant factors, the Board will “construe the independent-contractor exclusion narrowly” so as not to “deny protection to workers the Act was designed to reach.”<sup>30</sup> The burden of proving that workers are independent contractors rests with the party asserting independent contractor status.<sup>31</sup>

Applying the foregoing principles and factors, we conclude that the immigration court interpreters working for SOSi are employees of SOSi, rather than independent contractors. Among the traditional common-law factors, only the skill

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<sup>24</sup> *Id.*, slip op. at 2 (quoting Restatement (Second) of Agency § 220 (1958)).

<sup>25</sup> *Id.*, slip op. at 12.

<sup>26</sup> *Id.*, slip op. at 1, 12.

<sup>27</sup> *Id.*, slip op. at 12.

<sup>28</sup> *Id.*, slip op. at 1 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

<sup>29</sup> *Id.*, slip op. at 2, 12.

<sup>30</sup> *Id.*, slip op. at 9–10.

<sup>31</sup> *Id.*, slip op. at 2 (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001)); see also *Central Transport, Inc.*, 247 NLRB 1482, 1483 n.1 (1980).

required in the particular occupation supports independent contractor status, while the remaining factors either support employee status or are neutral. Additionally, the independent-business factor supports employee status. In light of the Board's narrow construction of the independent-contractor exclusion and the allocation of the burden of proof to the Employer, the multi-factor analysis decisively favors finding the interpreters to be employees of SOSi under the Act.

### **1. The extent of control by the Employer favors employee status.**

Analysis of the control factor requires weighing the degree of control the employer retains over the details of the work against the degree of control left to the worker.<sup>32</sup> In determining the extent of the employer's control, the Board excludes from consideration those incidents of control required by governmental regulations or contracts.<sup>33</sup> However, where the government requirements are general in form and allow the employer to retain flexibility to assert meaningful control according to the employer's needs and requirements, control so asserted is attributable to the employer.<sup>34</sup> Moreover, government control over details of the work necessarily circumscribes the control left to the employer or the worker. Thus, where government

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<sup>32</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 12–13 (weighing package delivery drivers' minimal discretion over logistical choices against employer's "pervasive control over the essential details of drivers' day-to-day work"); *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (Jan. 29, 2015) (comparing control retained by drywall construction "crew leaders" and by employer); *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (Sept. 25, 2015) (analyzing distribution of control between door-to-door canvassers and employer); see also *City Cab Co. of Orlando*, 285 NLRB 1191, 1194 (1987) ("The greater the personal control by the [worker], the more likely it is that the relationship [to the employer] is that of an independent contractor.").

<sup>33</sup> See *Air Transit*, 271 NLRB 1108, 1111 (1984) (control required by, *inter alia*, federal regulations and contract between employer and Federal Aviation Administration did not establish employer control over work of owner-drivers of airport cabs); see also, e.g., *Cardinal McCloskey Services*, 298 NLRB 434, 435 (1990) ("Enforcement of laws or government regulations . . . is not considered control over the 'manner and means' by which results are accomplished, because such enforcement is, in reality, supervision by the government, not by the 'employer.'").

<sup>34</sup> See *People Care, Inc.*, 311 NLRB 1075, 1077 (1993) (state required employer to maintain written personnel policies applicable to home healthcare workers, but left employer with flexibility to structure personnel policies according to its needs and requirements, concerning, e.g., whether to adopt disciplinary procedures and other policies constituting "hallmarks" of an employer/employee relationship).

control is significant, even a relatively modest showing of employer control can support employee status provided that it outweighs the control left to the worker.<sup>35</sup>

Here, the control factor favors employee status because, even though the government, i.e., EOIR, retains significant control over the interpreters' work, the control left to the Employer outweighs the minimal control left to the interpreters.

Many aspects of the interpreters' work are ultimately controlled by EOIR. Newly-hired interpreters must pass government background investigations and complete an I-9 form, a Declaration for Federal Employment, and, sometimes, a loyalty oath. They must also pass an initial screening, EOIR-specific training and testing, and an evaluation of the interpreter's first hearing.<sup>36</sup>

While working, interpreters are subject to extensive EOIR rules, policies, and standards, which EOIR enforces through the disqualification process.<sup>37</sup> Interpreters must observe a professional dress code and carry a SOSi-branded badge, additional photo identification, a bilingual dictionary, and a language-specific Immigration Court Terminology List. Interpreters must abide by the Code of Professional Responsibility for Interpreters, Immigration Court Operating Guidelines, Confidentiality Agreement for Contractor Employees, and EOIR Court Interpreter Handbook, which dictate important aspects of the interpreters' interpretation and general behavior at work.<sup>38</sup> Interpreters must use hearing room equipment without

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<sup>35</sup> See *supra* note 32; cf. *Cardinal McCloskey*, 298 NLRB at 434–438 (finding home daycare providers to be independent contractors in part because the employer's ostensible control was virtually all government control and because the daycare providers retained control over certain details of their work).

<sup>36</sup> Although SOSi implements and administers these onboarding requirements, we conclude that SOSi does not thereby assert control meaningfully exceeding the government control embodied in relevant requirements in the EOIR Contract.

<sup>37</sup> Cf. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (employer's imposition of discipline on canvassers evinced employer control over canvassers' work, supporting employee status); *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (art models' freedom from discipline supported independent contractor status).

<sup>38</sup> Cf. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011) (control factor favored concert musicians' employee status where employer controlled content and performance of music programs and musicians were subject to employer's dress code and behavioral guidelines such as "maintain[ing] good posture and playing positions" and "no talking during bows"); *People Care*, 311 NLRB at 1077 (employer control evinced by discipline-backed expectation that home healthcare workers adhere to rules in employer's personnel manuals).

modification, and may use neither electronic dictionaries nor smartphone applications.<sup>39</sup> Furthermore, interpreters must document their work time and certify the accuracy of their interpretations on COI forms.<sup>40</sup> At the same time, interpreters may not solicit other work while completing assignments.<sup>41</sup>

Interpreters also lack control over the time for completing specific assignments.<sup>42</sup> Interpreters must arrive at hearing locations an hour before hearing start times to pass through security, check in at the clerk's office, and set up courtroom equipment. When hearings end, interpreters must check in with court staff for reassignment, and may not depart from a session until released by court staff. Mid-hearing breaks are within the exclusive control of immigration judges, and the interpreters have no control over the availability and length of lunch breaks. "Unlike a true independent contractor, for example, a roofer, who is hired to do a job but can mutually arrange with the owner or general contractor when to do it and control how long it takes, once they sign up for [an assignment], the [interpreters] have no control over their worktime."<sup>43</sup>

Although the aforementioned facts reveal extensive government control over the interpreters' work, the record also discloses significant independent control by the Employer. SOSi unilaterally decides the distribution of assignment offers to interpreters and, through the threat of withholding or rescinding assignments, effectively requires interpreters to accept assignments offered and keep their schedules open.<sup>44</sup> Additionally, SOSi requires interpreters to obtain its approval

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<sup>39</sup> Although we have found no clear indication in the record establishing that these particular equipment-related rules are ultimately attributable to EOIR, we assume that to be the case for purposes of this analysis.

<sup>40</sup> *Cf. Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (employer controlled canvassers' work through requirement that canvassers complete and submit detailed records of houses visited and the outcomes of visits).

<sup>41</sup> *Cf. id.* (employer exercised control by prohibiting canvassers from soliciting contributions for other causes during work time).

<sup>42</sup> *Cf. id.* (employer exercised control by setting daily start and end times for canvassing).

<sup>43</sup> *Lancaster Symphony*, 357 NLRB at 1764.

<sup>44</sup> *See FedEx Home*, 361 NLRB No. 55, slip op. at 12–13 (employer exercised pervasive control over essential details of delivery drivers' day-to-day work, weighing in favor of employee status, by requiring drivers to make their delivery vehicles available Tuesday through Sunday, configuring drivers' service areas, and controlling the

before giving an assignment up to a substitute SOSi interpreter.<sup>45</sup> When assignments require flights or overnight accommodations, SOSi arranges these unilaterally.

SOSi also controls aspects of interpreters' behavior inside and outside the workplace independently of EOIR. SOSi forbids interpreters from completing EOIR Contract work for another company without SOSi's approval, and also forbids interpreters from completing tasks for the immigration courts that fall outside the scope of the EOIR Contract. SOSi relies on COI forms to track interpreters' completion of work for its own purposes, as evidenced by the fact that interpreters must submit COI forms to SOSi for which the company will not obtain payment from EOIR (e.g., for "relay" interpreting).<sup>46</sup> Additionally, SOSi's Code of Business Ethics and Conduct prohibits actions such as using social media to discuss SOSi's business, and requires actions such as reporting ethical violations by other SOSi personnel.

A further indicator of employer control is SOSi's ability to discipline interpreters through multiple means<sup>47</sup>: counseling, at-will termination, pay deductions, and rescission or withholding of assignments. Additionally, when an interpreter is disqualified by EOIR, SOSi maintains discretion to pursue remedial action and seek the interpreter's reinstatement.

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number of stops to be made and packages to be delivered); *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (employer exercised control by unilaterally assigning canvassers to territories); *Postmates, Inc.*, Case 13-CA-163079, Advice Memorandum dated Sept. 19, 2016, at 13 (although independent contractor agreement stated that couriers could accept or reject jobs, employer in reality exercised control by undermining couriers' ability to reject jobs); cf. *Pennsylvania Academy*, 343 NLRB at 847 (models' freedom to control their schedules supported independent contractor status).

<sup>45</sup> Cf. *DIC Animation City*, 295 NLRB 989, 991 (1989) (animation writers could decide to perform writing work individually or with a team, supporting independent contractor status).

<sup>46</sup> See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (employer controlled canvassers' work through requirement that canvassers complete and submit detailed records of houses visited and the outcomes of visits).

<sup>47</sup> See *id.* (employer's imposition of discipline on canvassers evinced control over canvassers' work, supporting employee status); cf. *Pennsylvania Academy*, 343 NLRB at 847 (workers' freedom from employer discipline supported independent contractor status); *Cardinal McCloskey*, 298 NLRB at 435 (meaningful employer control absent where employer could not discipline daycare providers, but could merely make notations in providers' files that were ultimately reviewed by government agency or, if a home posed a serious hazard to children, remove children from the home).

In comparison to the Employer, the interpreters retain little meaningful control over the details of their work. Although in theory interpreters may control their schedules and turn down assignments, in practice their freedom to do so is limited by pressure from SOSi. Also, though interpreters may obtain substitutes to cover their assignments, they may only do so with Employer approval. And, while interpreting, interpreters do not exercise significant independence, but instead follow EOIR and SOSi's extensive rules, policies, and standards. Although SOSi's government customer controls many aspects of the work, the Employer's degree of control nonetheless outweighs the freedom retained by interpreters, supporting employee status.<sup>48</sup>

## **2. Whether the interpreter is engaged in a distinct occupation or business favors employee status.**

The interpreters do not engage in a distinct occupation or business when interpreting for SOSi. Interpreters work in SOSi's name, as evinced by their mandatory SOSi-branded identification badges, lanyards, and COI forms, as well as their inability to solicit work while on assignment or compete with SOSi.<sup>49</sup>

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<sup>48</sup> See *People Care*, 311 NLRB at 1077 (employer retained significant control, supporting home healthcare workers' employee status, through disciplinary procedure, personnel rules, and ability to respond directly to workers' on-the-job problems, even though employer's customers determined the type, scope, and duration of work in addition to directing and evaluating performance of duties); cf. *Cardinal McCloskey*, 298 NLRB at 434–38 (home daycare providers were independent contractors where virtually all of employers' supervision and control was exercised pursuant to government requirements and daycare providers worked in their own homes, could limit the number of children under their care, and could take time off without employer permission).

<sup>49</sup> See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (canvassers' presentations and distribution of materials clearly identified them as working for the employer, supporting employee status); *FedEx Home*, 361 NLRB No. 55, slip op. at 13 (delivery drivers' uniforms and logos and colors on delivery vehicles established that drivers did business in employer's name rather than their own, supporting employee status, notwithstanding that some drivers operated as incorporated businesses); cf. *Porter Drywall*, 362 NLRB No. 6, slip op. at 3 (crew leaders' ability to compete with the employer for work supported independent contractor status).

Moreover, the interpreters are fully integrated into SOSi's organization and receive significant on-the-job assistance from SOSi.<sup>50</sup> Interpreters rely on SOSi to provide them with assignments; COI forms; terminology lists; information about EOIR's rules, policies, and standards; initial training; and as-needed retraining or counseling. Coordinators and liaisons address interpreters' questions, scheduling conflicts, and lateness. More senior SOSi officials resolve issues concerning payment or disqualification. Through mass emails, SOSi also shares guidance with interpreters as to rules and policies, such as the dress code, courtroom demeanor, and instructions for filling out COI forms and setting up courtroom equipment.<sup>51</sup>

Facts that the Board has found to support independent contractor status under the distinct-occupation factor are largely absent here. Interpreters do not supply expensive or specialized equipment.<sup>52</sup> And, although the ICAs require interpreters to indemnify SOSi for any liability to others resulting from inadequate work, there is no evidence that an indemnification clause is meaningful in the immigration court interpretation context, unlike in the construction industry.<sup>53</sup> Finally, though interpreters may conduct non-EOIR interpretation work when not actively working for SOSi, this solitary fact is not dispositive,<sup>54</sup> particularly since SOSi places practical restraints on interpreters' ability to take on outside work. In sum, the interpreters are not engaged in a distinct occupation or business, favoring employee status.

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<sup>50</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 13 (delivery drivers' integration into employer's organization and assistance from employer supported employee status); *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 3 (employer's control over canvassers and canvassers' importance to employer's operations showed that canvassers were well integrated into employer's organization, supporting employee status).

<sup>51</sup> If, at the time of trial, SOSi has implemented the previously-announced web portal for access to schedules and other functions, that portal would constitute a further instance of on-the-job assistance.

<sup>52</sup> Cf. *Porter Drywall*, 362 NLRB No. 6, slip op. at 3 (crew leaders maintained and supplied equipment that they used when working for employer or other contractors).

<sup>53</sup> Cf. *id.* (crew leaders were required to indemnify the employer for damage claims arising from the work of their crews).

<sup>54</sup> See *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (ability to work for multiple employers when not actively soliciting for the employer did not make canvassers independent contractors).

**3. Whether the work is usually done under the direction of the employer or by a specialist without supervision favors employee status.**

Interpreters are subject to extensive supervision by SOSi and EOIR, supporting employee status. As discussed in the “extent of control” analysis, interpreters work under pervasive discipline-backed rules, policies, and standards.<sup>55</sup> SOSi monitors compliance through COI forms,<sup>56</sup> feedback from EOIR staff,<sup>57</sup> and periodic evaluations.<sup>58</sup> Although SOSi does not usually supervise interpreters in person, the “direction” factor favors employee status.<sup>59</sup>

**4. The skill required in the occupation favors independent contractor status.**

Immigration court interpretation is skilled work, and interpreters must have at least a year of judicial interpretation experience or a relevant certification to work for SOSi. Thus, the skill factor supports independent contractor status.<sup>60</sup>

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<sup>55</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 13 (direction by employer, supporting employee status, evinced in requirement that delivery drivers adhere to strict company protocol, with guidelines governing dress, appearance, safety, and details of package delivery).

<sup>56</sup> See *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 3 (employer’s extensive recordkeeping requirements constituted supervision supporting employee status); *FedEx Home*, 361 NLRB No. 55, slip op. at 13 (employer ability to track and discipline delivery drivers for violations of contractual rules and procedures supported employee status under “direction” factor).

<sup>57</sup> See *Postmates*, Advice Memorandum at 16 (employer supervised delivery couriers through reliance on customer ratings and reviews in deciding to coach or terminate delivery couriers); *SpoonRocket*, Case 32-CA-144189, Advice Memorandum dated July 28, 2015, at 5 (employer counseled and disciplined delivery drivers based on customer feedback and reviews).

<sup>58</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 13 (employer supervised drivers through periodic audits and appraisals of driver performance).

<sup>59</sup> See, e.g., *id.* (direction by employer did not depend on continuous in-person supervision).

<sup>60</sup> See *Lancaster Symphony*, 357 NLRB at 1766 (high skill level of concert musicians militated in favor of independent contractor status).

**5. Whether the Employer or interpreter supplies the instrumentalities, tools, and place of work is a neutral factor.**

Where the employer's and the worker's contributions to the instrumentalities, tools, and place of work are roughly equitable, the "instrumentalities" factor is neutral.<sup>61</sup> Such is the case here. Interpreters rely on SOSi for COI forms, badges, lanyards, terminology lists, and documentation of rules and standards. Interpreters, meanwhile, are responsible for notepads, writing utensils, and dictionaries. It is EOIR that provides the costliest instrumentalities: hearing rooms and the equipment therein. As the instrumentalities that SOSi and interpreters provide are both comparatively negligible and roughly equitable to each other in value, the instrumentalities factor is neutral.

**6. The length of time for which the interpreter is employed favors employee status.**

Both the interpreters and SOSi intend their relationship to be of indefinite duration, supporting employee status.<sup>62</sup> Numerous incumbent interpreters had worked in the immigration courts for over a decade under SOSi's predecessor contractors, and many interpreters described SOSi work as their "principal" or "full-time" job. Although the incumbent interpreters' initial ICAs with SOSi were effective for a defined term—October 31, 2015, to August 31, 2016—SOSi's statements and actions shows that SOSi likewise intended to form open-ended relationships with interpreters, adopting the end date for ICAs only because the EOIR Contract itself was subject to EOIR's decision to renew. Thus, the length-of-time factor favors employee status.

**7. The method of payment favors employee status.**

Interpreters are essentially paid by time, rather than by job, which supports employee status.<sup>63</sup> As indicated above, SOSi reportedly pays newer interpreters on an hourly basis. The incumbent interpreters effectively receive hourly wages as well. For non-travel assignments, they receive \$225 to work a four-hour court session (a half

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<sup>61</sup> See, e.g., *id.* (factor neutral where musicians supplied instruments and clothes, but employer supplied music, stands, chairs, and concert hall).

<sup>62</sup> See, e.g., *FedEx Home*, 361 NLRB No. 55, slip op. at 14 (length-of-time factor favored employee status where drivers could expect to continue working as long as they performed satisfactorily, based on one- or two-year agreements that automatically renewed upon expiration, and drivers' sizeable capital investments).

<sup>63</sup> See, e.g., *Lancaster Symphony*, 357 NLRB at 1766.

day); \$425 (i.e., almost twice the half-day amount) for an eight-hour workday comprising two sessions (a full day); an hourly supplement when scheduled workdays run long; and a 10% premium fee for assignments issued on short notice. Thus, the incumbent interpreters' compensation for non-travel assignments has a roughly linear relationship to hours worked, approximating an hourly-wage model.<sup>64</sup> Additionally, the record does not suggest that travel compensation significantly departs from this model. Accordingly, the interpreters' rate structure supports employee status under the method-of-payment factor.<sup>65</sup>

Further supporting employee status is that individual interpreters have at most limited ability to negotiate rates of compensation.<sup>66</sup> Only through concerted action were incumbent interpreters able to negotiate rates in their initial ICAs. Additionally, although interpreters ostensibly are free to negotiate travel rates, the Employer has retaliated against some interpreters for seeking their desired rates by withholding assignments from them.

One payment-related fact supporting independent contractor status is that SOSi does not withhold taxes or provide insurance or benefits.<sup>67</sup> On balance, however, the method of payment factor supports employee status.<sup>68</sup>

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<sup>64</sup> Although, in theory, an interpreter could be released before the end of a session and receive a half or full day's pay for much less than four or eight hours of work, respectively, there is no evidence that this occurs with significant frequency. To the contrary, the record establishes that, due to reassignment by court staff, interpreters generally continue working through the scheduled end of a session, or longer.

<sup>65</sup> See *Lancaster Symphony*, 357 NLRB at 1765–66 (payment scheme whereby musicians received a set payment for each appearance and an added payment for every 15 minutes over 2-1/2 hours approximated hourly wage, thereby supporting employee status); cf. *Pennsylvania Academy*, 343 NLRB at 847 (payment “by class,” rather than by hour or salary basis, supported independent contractor status).

<sup>66</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 14 (employer's unilateral control of compensation rates supported employee status).

<sup>67</sup> See, e.g., *Pennsylvania Academy*, 343 NLRB at 847 (lack of fringe benefits supported independent contractor status).

<sup>68</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 14 (although lack of fringe benefits and tax withholding weighed in favor of independent contractor status, these considerations were outweighed by employer control of driver compensation).

**8. Whether the work is part of the regular business of the Employer favors employee status.**

The EOIR Contract constitutes a part of SOSi's government contracting business in linguistics and other fields. The interpreters' services, meanwhile, are fundamental to SOSi's fulfillment of that contract. Thus, the interpreters' work lies at the core of SOSi's regular business, militating heavily in favor of employee status.<sup>69</sup>

**9. Whether the parties believe they are creating a master-servant relationship is a neutral factor.**

SOSi's ICA purports to establish an independent-contractor relationship, not an employment relationship. However, interpreters did not negotiate that term with SOSi. Additionally, many interpreters have invoked employee rights recognized under the Act: joining the Union, asserting employee status in NLRB proceedings, and engaging in other concerted activity aimed at improving terms and conditions of their work with SOSi. Furthermore, terminated interpreters have sought and obtained unemployment benefits in California, which shows that these interpreters believed they were employees because "independent contractors" would not be entitled to those benefits. Thus, the evidence of the parties' intent as to the nature of their relationship is inconclusive.<sup>70</sup>

**10. Whether the principal is or is not in the business favors employee status.**

The EOIR Contract and ICAs establish that both SOSi and the interpreters provide immigration court interpretation services to EOIR. Thus, SOSi is in the same business as the interpreters, which supports employee status.<sup>71</sup>

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<sup>69</sup> See *id.* (regular-business factor weighed heavily in favor of employee status where service provided by workers constituted "the very core of [the employer's] business") (quoting *Roadway Package System, Inc.*, 326 NLRB 842, 851 (1998)); *Porter Drywall*, 362 NLRB No. 6, slip op. at 5 (same).

<sup>70</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 14 (intent factor inconclusive where contract between employer and delivery drivers designated drivers as independent contractors, but employer imposed term unilaterally and majority of drivers voted for union representation); *Lancaster Symphony*, 357 NLRB at 1766 (intent factor inconclusive where contract characterized musicians as independent contractors, musician playing with employer for thirty-two years considered himself an employee, and at least 30% of musicians signed cards reflecting interest in union representation).

<sup>71</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 15 (factor weighed in favor of employee status where employer documentation showed that employer was engaged

**11. The interpreter is not rendering services as part of an independent business, favoring employee status.**

As indicated above, the “independent-business factor” encompasses consideration of whether the worker has significant entrepreneurial opportunity; has a realistic ability to work for other companies; has proprietary or ownership interest in his or her work; and has control over important business decisions, such as the scheduling of performance, hiring and assignment of employees, equipment purchases, and commitment of capital.<sup>72</sup> Here, the interpreters’ ability to work for other companies is a neutral sub-factor, while the remaining sub-factors decisively favor employee status.

**a. The interpreters lack significant entrepreneurial opportunity.**

The compensation model for interpreters does not provide entrepreneurial opportunity. As discussed above, interpreters’ earnings depend primarily on the number of hours they work for SOSi; variables such as the difficulty of interpretation or quality of performance (above minimum competence) are irrelevant.<sup>73</sup> Additionally, since interpreters cannot conduct or solicit other work on assignment, interpreters have no entrepreneurial opportunities while actively working for SOSi.<sup>74</sup> At the same time, completing assignments involves no entrepreneurial risk: interpreters can expect payment for time spent working.<sup>75</sup>

Long-distance travel assignments provide at most a negligible amount of *actual* entrepreneurial opportunity to interpreters offered such assignments. In theory,

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in same business as workers); *accord Porter Drywall*, 362 NLRB No. 6, slip op. at 5; *cf. Pennsylvania Academy*, 343 NLRB at 847 (academy was in the business of providing instruction to art students, while models were in the different business of modeling).

<sup>72</sup> *FedEx Home*, 361 NLRB No. 55, slip op. at 12.

<sup>73</sup> *See Lancaster Symphony*, 357 NLRB at 1764 (no entrepreneurial opportunity or risk where, *inter alia*, musicians were paid set fees, and did not receive more or less money based on ticket sales or quality of individual performance).

<sup>74</sup> *See Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 5 (employer’s prohibition on soliciting for other organizations while canvassing limited canvassers’ entrepreneurial opportunity).

<sup>75</sup> *Cf. DIC Animation City*, 295 NLRB at 991 (animation writers bore entrepreneurial risks where writers exerted time, effort, and travel to solicit work, but were not paid if employer rejected their story ideas).

interpreters can negotiate travel rates and decide to accept or reject assignments in light of the payment offered and travel time required. However, as discussed above, SOSi has retaliated against some interpreters for attempting to negotiate travel rates and restricts interpreters' ability to reject assignments. Thus, travel assignments do not provide significant *actual* entrepreneurial opportunity even to those interpreters offered such assignments. Fundamentally, the interpreters' work for SOSi is non-entrepreneurial, supporting employee status.

**b. The interpreters have limited ability to work for others.**

Many interpreters work for SOSi at least four weekdays per week, between approximately 8:00 a.m. and 5:00 p.m. Some interpret exclusively for SOSi, and others give precedence to SOSi assignments, as SOSi effectively requires. Thus, SOSi requires a commitment of time and schedule availability that limits interpreters' ability to pursue other interpretation opportunities, which supports employee status.<sup>76</sup> Nonetheless, at least a minority of interpreters regularly take on other interpretation jobs, which supports independent contractor status.<sup>77</sup> These conflicting considerations render this sub-factor neutral.

**c. The interpreters have no proprietary or ownership interest in the work.**

The interpreters may not subcontract their assignments,<sup>78</sup> and SOSi controls the distribution of assignments to interpreters.<sup>79</sup> Additionally, no other evidence suggests that interpreters have any proprietary or ownership interest in their work. Thus, this sub-factor favors employee status.

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<sup>76</sup> *FedEx Home*, 361 NLRB No. 55, slip op. at 15 (drivers did not use delivery vehicles for purposes other than work for employer because of practical obstacles inherent in working for the employer, which supported employee status).

<sup>77</sup> *Pennsylvania Academy*, 343 NLRB at 847 (models' freedom to work for other schools and artists supported independent contractor status). *But see Sisters' Camelot*, 363 NLRB No. 13, slip op. at 5 (canvassers' ability to work for others when not actively working for employer was indicative of part-time work schedule and had "little bearing on whether canvassers [were] employees or independent contractors").

<sup>78</sup> *See Sisters' Camelot*, 363 NLRB No. 13, slip op. at 5 (canvassers lacked proprietary interest in the geographical areas to which they were assigned).

<sup>79</sup> *See Lancaster Symphony*, 357 NLRB at 1764–65 (noting absence of indication that musicians could assign or sell their orchestra positions).

**d. The Interpreters do not control important business decisions.**

Interpreters' sole business decisions concern their schedule availability, acceptance or rejection of offered assignments, and, in rare cases, proposing travel rates. And, as discussed above, SOSi constrains interpreters' decisionmaking in each of these areas. Moreover, interpreters lack control over the terms of interpretation assignments, such as the start and end times of hearings; make no personnel decisions; play no role in the business relationship between SOSi and EOIR; and make no significant equipment purchases or capital investments. The interpreters' lack of control over such business decisions supports employee status.<sup>80</sup>

Because the other sub-factors of the "independent-business" factor either support employee status or are neutral, that factor overall supports employee status as well.

Thus, consideration of all incidents of the relationship between SOSi and the interpreters establishes that the interpreters are SOSi's employees. To be sure, SOSi's government customer, EOIR, controls many details of the interpreters' work. But SOSi likewise exerts significant control. Meanwhile, the interpreters, who are closely supervised by SOSi and EOIR, maintain little control over the details of their work. Additionally, the interpreters work in SOSi's name for an indefinite duration, and are a critical and well-integrated component of SOSi's regular business providing immigration court interpretation services. Moreover, interpreters effectively earn hourly pay, lack significant entrepreneurial opportunity or proprietary interest in their work, and control no important business decisions. Although the interpreters are skilled workers, that sole factor is insufficient to establish independent contractor status.<sup>81</sup> In light of the Board's narrow construction of the independent-contractor exclusion and the allocation of the burden of proof to the Employer, the multi-factor analysis decisively favors finding the interpreters to be employees of SOSi under the Act.

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<sup>80</sup> See *FedEx Home*, 361 NLRB No. 55, slip op. at 4, 15 (delivery drivers had no control over important business decisions, supporting employee status, where employer had total control over business strategy, customer base and recruitment, prices charged to customers, and terms of drivers' work, even though some drivers operated as incorporated businesses); *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 5 (canvassers lacked control over important business decisions where, *inter alia*, canvassers had no influence on the selection or assignment of canvassing territory, made no monetary investments in connection with their work, and made no personnel decisions).

<sup>81</sup> See *Lancaster Symphony*, 357 NLRB at 1766 ("The musicians are highly skilled, but so are many other types of employees who are covered by the Act.").

**B. SOSi has violated Section 8(a)(1) by misclassifying interpreters as independent contractors.**

Section 8(a)(1) makes it unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of” employees’ Section 7 rights.<sup>82</sup> Although the Board has never held that an employer’s misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), several lines of Board decisions support such a finding.

First, the Board has held that an employer violates Section 8(a)(1) when its actions operate to chill or curtail future Section 7 activity of statutory employees.<sup>83</sup> In *Parexel International*, the Board made clear that an employer’s “preemptive strike to prevent [an employee] from engaging in activity protected by the Act” violates Section 8(a)(1) because of its chilling effect on employees’ future exercise of their Section 7 rights.<sup>84</sup> Even if an employee has no history of Section 7 activity, employer action to prevent that employee from engaging in protected activity in the future “interferes with and restrains the exercise of Section 7 rights and is unlawful without more.”<sup>85</sup> The Board also noted that suppression or chilling of future protected activity lies at the heart of most unlawful employer retaliation against past protected activity.<sup>86</sup> Similarly, Board precedent holding unlawful an employer’s adverse action taken on

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<sup>82</sup> 29 U.S.C. § 158(a)(1). In contrast, an employer does not violate the Act if it interferes with, restrains, or coerces the exercise of what would otherwise constitute Section 7 rights by individuals who are not statutory employees. *See Wal-Mart Stores, Inc.*, 340 NLRB 220, 223 (2003) (employer’s instruction to group of twenty-two putative statutory supervisors that they could not engage in union activity only violated Section 8(a)(1) with respect to the four who were actually statutory employees).

<sup>83</sup> *See, e.g., Parexel International, LLC*, 356 NLRB 516, 518–19 (2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (maintenance of rules that would reasonably tend to chill employees’ exercise of Section 7 rights violates Section 8(a)(1)), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>84</sup> 356 NLRB at 517, 519.

<sup>85</sup> *Id.* at 519.

<sup>86</sup> *Id.*

the mistaken belief that an employee engaged in protected concerted activity is premised on the notion that the chilling of future protected activity violates the Act.<sup>87</sup>

Second, employer statements to employees that engaging in Section 7 activity would be futile violate Section 8(a)(1).<sup>88</sup> Thus, in *Sisters' Camelot*, the Board found that the employer violated Section 8(a)(1) by indicating that union organizing would be futile when it informed its canvasser employees, who had been misclassified as independent contractors and were attempting to organize, that it would never accept an employer-employee relationship with its workers.<sup>89</sup>

Third, the Board has found misstatements of law to constitute unlawful interference with employees' Section 7 rights if the statement reasonably insinuates adverse consequences for engaging in Section 7 activity.<sup>90</sup> For example, employer statements suggesting that employees could "lose their jobs" as a consequence of engaging in an economic strike inaccurately describe economic strikers' rights and therefore constitute unlawful threats of reprisal.<sup>91</sup>

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<sup>87</sup> See, e.g., *United States Service Industries, Inc.*, 314 NLRB 30, 31 (1994), *enforced mem.*, 80 F.3d 558 (D.C. Cir. 1996).

<sup>88</sup> See, e.g., *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. at 1 (Dec. 16, 2014) (concluding that employer's statement that employees' grievance would go nowhere constituted unlawful threat of futility); *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what employer chose to give them and unionization would lead employer to choose to give them less violated Section 8(a)(1) because employees "could reasonably infer futility of union representation").

<sup>89</sup> 363 NLRB No. 13, slip op. at 6.

<sup>90</sup> See, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617, 618 & n.22 (2007) (employer's flyer that misled employees by creating impression that employees would have to give up customary wage increases as a "lawful and ineluctable consequence" of bargaining violated Section 8(a)(1)); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff to retain their jobs was unlawful in context of other threats), *enforced mem.*, 679 F.2d 900 (9th Cir. 1982).

<sup>91</sup> See, e.g., *Fern Terrace Lodge*, 297 NLRB 8, 8–9 (1989) (statement that permanently "replaced striker is not automatically entitled to his job back just because the strike ends" unlawful, because economic strikers are automatically entitled to their jobs back, or, if their job is unavailable, preferential hiring to similar openings).

Based on the foregoing principles, the Division of Advice concluded in *Pacific 9 Transportation*,<sup>92</sup> *Liberty Transportation Group*,<sup>93</sup> and *Menard, Inc.*<sup>94</sup> that employers violated Section 8(a)(1) by misclassifying their employees as independent contractors.

Under those same principles, SOSi's misclassification of its employees as independent contractors restrains and interferes with the employees' exercise of their Section 7 rights. Notably, the Employer stated in a letter to the Union that the "interpreters[] actions have no legal protection under" the Act "because the interpreters are independent contractors[.]" This communication would presumptively be shared with SOSi interpreters associated with the Union, including, at a minimum, the employee whose conduct was the topic of the letter. Particularly in light of the employees' history of Section 7 activity, including joining the Union and collectively seeking the redress of grievances by the Employer, the Employer's misclassification suppresses future Section 7 activity by imparting to its employees that they do not possess Section 7 rights in the first place.<sup>95</sup> Additionally, the Employer's insistence that its interpreters are independent contractors is a misstatement of law that reasonably insinuates both adverse consequences for employees' continued Section 7 activity and the futility of pursuing the Board's processes to remedy unfair labor practices. Thus, the Employer's misclassification works as a preemptive strike to chill its employees from exercising their rights under the Act during a period in which many of the employees are seeking Union representation and attempting to adjust grievances against the Employer.

Based on the foregoing, the Region should issue a complaint, absent settlement, alleging that the Employer's misclassification of its employees as independent contractors violates Section 8(a)(1).

Since SOSi retains immigration court interpreters nationwide to service the EOIR Contract, a nationwide remedy is likely warranted. Prior to issuing complaint, the Region should provide the Employer with an opportunity to demonstrate that its unlawful misclassification of interpreters is limited to interpreters in a smaller geographic area. If the Employer fails to establish such geographic limitations, the

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<sup>92</sup> Case 21-CA-150875, Advice Memorandum dated Dec. 18, 2015.

<sup>93</sup> Case 06-CA-162363, Advice Memorandum dated July 22, 2016.

<sup>94</sup> Case 18-CA-181821, Advice Memorandum dated Dec. 2, 2016.

<sup>95</sup> *Cf. Parexel*, 356 NLRB at 519–20 (discharge violated Section 8(a)(1) because it was undertaken to ensure employee did not engage in future Section 7 activity).

Region should seek a nationwide remedy in this case for the Employer's violation of Section 8(a)(1).<sup>96</sup>

As a remedy for the misclassification violation, the Region should seek an order requiring that the Employer cease and desist from interfering with, restraining, or otherwise coercing its employees in the exercise of their Section 7 rights by communicating to its interpreters that they are independent contractors and not employees within the meaning of the Act. The order should also require that the Employer take affirmative action to rescind any portions of its ICAs with the interpreters that purport to classify them as independent contractors and post an appropriate notice.

/s/  
B.J.K.

ADV.21-CA-178096.Response.SOSInternationalLLC. (b) (6), (b) (7)

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<sup>96</sup> See *Menard*, Advice Memorandum at 14 n.42 (concluding that a nationwide remedy was appropriate based on employee testimony from two of the employer's locations).