

**This is a sample argument based on a generic Sitemetric worker. Facts for each worker may vary. But this gives you a guide as to why we believe Sitemetric’s workers are illegally misclassified as independent contractors, should have been classified as employees under the Fair Labor Standards Act, and should have been paid overtime wages at the rate of time and one-half the hourly rate. Note, that some state laws may provide additional protections. We welcome your feedback. Feel free to contact us at SitemetricOvertime@getmansweeney.com**

## **INTRODUCTION**

Onsite Data Control Officer brings claims against Sitemetric, LLC for unpaid overtime wages under the Fair Labor Standards Act (FLSA). Sitemetric misclassified Worker as an independent contractor, hired Worker to work as an Onsite Data Control Officer, paid Worker on an hourly basis, required Worker to work more than 40 hours in a workweek, and did not pay Worker overtime wages at the rate of time and one-half the regular rate for all hours worked over 40. As a result, Sitemetric violated the FLSA, and owes Worker back overtime wages, an equal amount of liquidated damages, and attorneys’ fees and costs.

## **SUMMARY OF THE FACTS**

### **A. Sitemetric Provides Construction Site Monitoring Services**

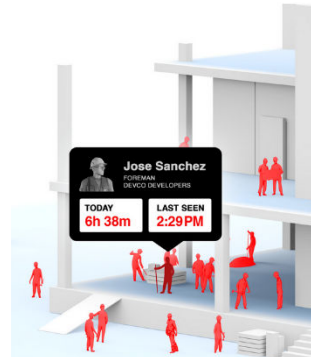
Sitemetric is headquartered in Houston, Texas. As explained on its website, Sitemetric is in the business of “offerings like smart badging, real-time location systems, mass texting, access control, field support, and more[.]” It provides its services nationwide, including Arizona, California, Georgia, North Carolina, Nevada, Ohio, South Carolina, Texas, Virginia.

Sitemetric enters into contracts with its corporate customers to monitor who is on its customers’ construction sites. Sitemetric provides the technology and personnel to monitor who is on a construction site at any given time. Its customers have included large companies such as

Mondelez and Johns Hopkins Medicine.<sup>1</sup> An example — taken from an image on its website — shows its business offering to its customers:

### Know who's on your site to maximize safety and security.

- Identify all workers onsite in any situation.
- Maintain comprehensive security and access control.
- Third-party real-time workforce verification.



To ensure that construction site personnel comply with Sitemetric’s customers’ monitoring requirements, Sitemetric provides workers to enforce the security and data collection process. These workers are called Onsite Data Control Officers, although they may also go by other titles. Onsite Data Control Officers are responsible for the following:

- verify the badges of all personnel entering Company’s facility through the construction gate.
- establish and maintain a daily badge log documenting all personnel entering the facility and the time of such person’s entry through the construction gate.
- compile appropriate daily safety orientation information of attending personnel and register that information into the Company’s platform.<sup>2</sup>

The image below — taken from Sitemetric’s website — shows how Sitemetric’s Onsite Data Control Officers monitor who is onsite at any given time.

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<sup>1</sup> Sitemetric lists many companies that it works or worked with on its website.

<https://www.sitemetric.com/how-we-roll> (last accessed Sept. 26, 2023).

<sup>2</sup> “scanning badges and handling new badge requests, maintaining daily badge log documentation, and providing gate-management services related to deliveries, special services personnel and others.” See, <https://www.salary.com/job/sitemetric/access-control-officer-hiring-asap/j202209160115414377476> (last accessed 8/22/23).



**B. Sitemetric Classifies Onsite Data Control Officers, Including Claimant, As Independent Contractors**

Like many of its workers, Sitemetric classifies Onsite Data Control Officers as independent contractors, and not employees. To begin work with Sitemetric, Onsite Data Control Officers are required to sign a Master Services Agreement and a Statement of Work. The agreement classifies the Worker as an independent contractor:

6. Independent Contractor.

(a) Nature of Relationship. Contractor will be, and act as, an independent contractor (and not an employee, agent, or representative) of Company in the performance of the Services. This Agreement will not be interpreted or construed as creating or evidencing an association, joint venture, partnership or franchise relationship among the parties.

Sitemetric then pays the workers on a 1099 form and provides them with no employee benefits.

*Id.* at ¶ 4.<sup>3</sup>

Onsite Data Control Officers are economically dependent on Sitemetric. Sitemetric paid Onsite Data Control Officers a flat hourly rate. That hourly rate was \$20 per hour, although it

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<sup>3</sup> The provision states: “Contractor acknowledges that he is an independent contractor, and not an employee, of the Company and has no right or ability to participate in or receive any benefits offered by the Company to its employees, including without limitation health, disability, life, or other insurance coverage, paid leave, or participation in any Company 401(k), HSA, or similar plan.”

could be more. The money Worker made depended solely on the hours worked. The Worker could not scale a “business,” hire more workers to perform the data and site control work, or outsource the work. Further, this was the Worker’s only job.

Onsite Data Control Officers invested no money in equipment or materials. Sitemetric provided equipment, materials, and all of the workers to perform the job. For example, it required the Worker to work within a Sitemetric booth, like the one below:



Sitemetric provided the scanner, air conditioner, heater, badges, iPad,<sup>4</sup> safety vest with Sitemetric’s logo, a hard hat with Sitemetric logo, safety glasses, and gloves.

Onsite Data Control Officers do not need any special skills to perform the job. Instead, they ensured that construction site personnel swiped in and out of Sitemetric’s data collection system. The Worker did not need a special degree, license, or high level of education to perform the work. Nor did Sitemetric require one.

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<sup>4</sup> When the Worker scanned a badge, a photo of the person displayed on the iPad screen for the Worker to confirm the person’s identify.

The working relationship is a long-term arrangement. Sitemetric expected Onsite Data Control Officers to work for it for at least one year. And, according to its contract, the working relationship is automatically extended for a year. Workers labored for Sitemetric anywhere from a few months to years.

Sitemetric schedules Onsite Data Control Officers to work scheduled shifts. Sitemetric scheduled Worker to work a shift each day. Sitemetric may terminate them if they fail to show up on time, if they leave early, or if they fail to comply with Sitemetric's company policies and procedures.

Finally, the Onsite Data Control Officers' services were integral to Sitemetric's business. As Sitemetric is in the business providing site control and monitoring, Worker's job was to ensure that the construction site personnel complied with the access requirements.

**C. Onsite Data Control Officer Worked More Than 40 Hours A Week But Was Not Paid Overtime Premium Pay at the Rate of Time and One-Half**

Sitemetric scheduled the Onsite Data Control Officer to work more than 40 hours a week. For example, it scheduled some Onsite Data Control Officers to work 12-hour shifts, five days a week. Although Onsite Data Control Officers may have worked more hours, and additional days. For these hours worked, Sitemetric paid the Worker \$20 per hour. It did not pay at the rate of time and one-half the hourly rate for hours worked over 40 in a workweek.

**LEGAL ARGUMENT**

**A. Sitemetric Employed Claimant**

Sitemetric misclassified the Worker as an independent contractor. Under the FLSA, the standard is whether as a matter of "economic reality [workers] are dependent upon the business to which they render services." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). Under the

FLSA, the Worker should have been classified as an employee. Thus, Worker is due unpaid overtime wages for the hours worked more than 40 in a workweek.

### **1. Worker is an employee under the FLSA**

Under the FLSA, “employ” is defined as “to suffer or permit to work.” 29 U.S.C. § 203(g). Congress defined “employ,” “employee,” and “employer” so that a “broad swath of workers [are brought] within the statute’s protection.” *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017) (the FLSA’s “‘striking breadth’ of these definitions brings within the FLSA’s ambit workers ‘who might not qualify as [employees] under a strict application of traditional agency law principles’”) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)). Indeed, the term employer and employee under the FLSA is one of the broadest. As the Fourth Circuit explained: “Congress defined ‘employee’ as ‘any individual employed by an employer,’ 29 U.S.C. § 203(e)(1), describing this language as ‘the broadest definition that has ever been included in any one act.’...And Congress defined ‘employer’ in a similarly expansive fashion[.]” *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017) quoting *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo Black)).

Employees are “those who as a matter of economic reality are dependent upon the business to which they render services.” *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). “[E]conomic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA.” *Real v. Driscoll Strawberry Asso., Inc.*, 603 F.2d 748, 755 (9<sup>th</sup> Cir. 1979). “The existence of a contract referring to a party as an independent contractor does not end the inquiry, because an employer may not avoid [the law] by affixing a label to a person that does not capture the substance of the employment relationship.” *Smolnik v. VanDyke*, 2006 WL

1401716 at \*3 (D. Neb. May 19, 2006) (quoting *Hunt v. State of Mo. Dept. of Corrections*, 297 F.3d 735, 741 (8th Cir. 2002); *Walling v. Southwestern Greyhound Lines*, 65 F.Supp. 52, 56 (W.D. Mo. 1946) (“If the economic realities reveal that a person performs services for another, which are an integral and necessary part of the latter’s interstate business, the conclusion is that the person . . . is an employee within the meaning of the [FLSA], regardless of the contract terms under which such services are rendered.”)).

Like many circuits, the Fourth Circuit applies an economic reality test to determine if an employer-employee relationship exists. “The touchstone of the ‘economic realities’ test 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.’” *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 241 (4<sup>th</sup> Cir. 2016) (citing *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 305). This Circuit applies six factors, which include:

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.

*Hall*, 846 F.3d at 774 (internal citation omitted). When applying the economic reality test, courts examine the “totality of the circumstances presented.” *McFeeley*, 825 F.3d at 241.

- a. *Sitemetric exerted all of control over Worker’s work*

Control about the “degree of control that the alleged employer has in comparison to the control exerted by the *worker*.” *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 305 (4<sup>th</sup> Cir. 2006). Further, this factor is satisfied if “the putative employer sets the workers’ schedules, directs them to particular work sites, requires them to fill out time sheets, and can fire them at will.” *Randolph v. PowerComm Const., Inc.*, 309 F.R.D. 349, 357 (D. Md. 2015). Here, Sitemetric maintained all of the control. Sitemetric had the authority to hire, discipline, and fire Onsite Data Control Officers. Sitemetric trained them to use its equipment and software and provided on and off-site supervision. Sitemetric controlled where and when Worker worked, required Worker to work at Sitemetric’s customer’s construction site, and required Worker to work in Sitemetric’s stylized booth. Sitemetric also provided Onsite Data Control Officers with explicit direction on how to perform their job and the duties to perform throughout the day. *Guerra v. Teixeira*, 2019 WL 330871, \*7 (D. Md. Jan. 25, 2019) (“Most importantly, Teixeira provided specific guidance to Guerra and other installers on how to complete the work.”). In comparison to Sitemetric, Worker had little to no control. *Schultz*, 466 F.3d at 307 (4<sup>th</sup> Cir. 2006) (joint employers exercised complete control over how security guards did their job).

Thus, this factor favors a finding that Worker was an employee. *Randolph v. PowerComm Const., Inc.*, 309 F.R.D. 349, 357 (D. Md. 2015).

*b. Worker could not determine their opportunity for profit or loss*

For the second factor, the Fourth Circuit has held that “[t]he more the worker’s earnings depend on his own managerial capacity rather than the company’s . . . the less the worker is ‘economically dependent on the business’ and the more he is ‘in business for himself’ and hence an independent contractor.” *McFeeley*, 825 F.3d at 243. “Where the putative employee’s work is, by its nature, time oriented, not project oriented, courts have weighed [this] factor in favor of



employee status.” *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F.Supp.2d 569, 580 (D. Md. 2008); *Schultz*, 466 F.3d at 308 (4<sup>th</sup> Cir. 2006) (security work that was time oriented and not project oriented favored a finding of employee status). Here, unlike a true independent contractor, Worker’s profit or loss did not depend “upon [their] own creativity, ingenuity, and skill.” *Salinas*, 848 F.3d at 150. Indeed, the quality of Worker’s work did not affect any “profits.” Instead, it depended on the hours that Sitemetric scheduled Worker to work, and the hours worked. Regardless of the quality of Worker’s work, they earned a flat rate of \$20 an hour.

Thus, this factor favors a finding that Worker was an employee. *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F.Supp.2d 569, 580 (D. Md. 2008).

*c. Worker made no investment in the business*

Unlike an independent contractor, who makes substantial capital investments in their business, including fronting operating costs, office overhead, equipment, materials, inventory, and provides the materials and supplies necessary to complete the job, here Worker was required to use Sitemetric’s equipment and materials. *See McFeeley*, 825 F.3d at 244 (holding that the focus should be on the individual’s “investment relative to the company’s”); *Schultz*, 466 F.3d at 308 (4<sup>th</sup> Cir. 2006) (security guard that was not required to invest in equipment or materials, and could not hire other workers to help with their work, favored a finding of employee status). When monitoring people entering and exiting the construction site, Onsite Data Control Officers sat or stood in Sitemetric’s booth. And Sitemetric provided the supervision and technology to ensure Worker monitored the construction site according to the required protocol. Worker made no business investment. Further, Worker had to perform the work, and could not hire anyone else to do the work. *Guerra v. Teixeira*, 2019 WL 330871, \*8 (D. Md. Jan. 25, 2019) (finding the ability to hire other workers to do the job was illusory and favored a finding of employee status).

Thus, this factor favors Worker. *Guerra v. Teixeira*, 2019 WL 330871, \*8 (D. Md. Jan. 25, 2019).

*d. Worker's skill is typical*

Unlike true independent contractors, Onsite Data Control Officers did not work on a special project—they provided site control services — the same essential service that Sitemetric offers its customers. *Guerra v. Teixeira*, 2019 WL 330871, \*8 (D. Md. Jan. 25, 2019) (unskilled work weighs in favor of employment status). Further, Sitemetric trained Onsite Data Control Officers not only about Sitemetric's data collection system, but also in the manner that it wanted Onsite Data Control Officers to perform their work. *See Schultz*, 466 F.3d at 308 (noting that even though personal security agents requires “special skill,” the inquiry does not end there, because “the agents’ tasks were, for the most part, carefully scripted by the [defendant]”).

Thus, this factor favors employment status.

*e. Worker's work with Sitemetric was relatively permanent*

Worker worked exclusively for Sitemetric. During the time that they worked on site, Worker performed no work for any other company. Further, this was Worker's only job during this time period. Indeed, given the long workweeks, Worker could not work for anyone else. The contract required Worker to work for Sitemetric for one year, and automatically renewed each year. Thus, there was a long-term work expectation.

*f. The Onsite Data Control Officers' work is integral to Sitemetric's business*

The work Worker did was an integral part of Sitemetric's business as it is in the site control and monitoring business. *See Hall*, 846 F.3d at 775 (holding that “Plaintiffs’ work was integral to DIRECTV's business—absent Plaintiffs’ work installing and repairing DIRECTV

satellite systems, DIRECTV would be unable to convey its product to consumers”); *Schultz*, 466 F.3d at 309 (4<sup>th</sup> Cir. 2006) (security guards were an integral part of the security guard business).

Accordingly, these factors support Worker’s employee status. The economic-realities test necessitates a finding that Worker was economically dependent on Sitemetric, and thus an employee under the FLSA.

### **B. Sitemetric Owes Claimant Overtime Wages**

The FLSA requires employers to pay non-exempt employees time and one-half the regular rate for all hours worked over 40 in a workweek. 29 U.S.C. § 215; Va. Code § 40.1-29.2.1; Va. Code § 40.1-29. Here, no exemption applies to Worker. Sitemetric paid Worker \$20 per hour. Thus, the overtime rate is time and one-half the hourly rate (\$30). And Worker regularly worked more than 40 hours in a workweek.

Sitemetric thus owes Worker the additional half-time overtime premium for all overtime hours it paid them at the hourly rate.

### **C. Claimant Is Due Mandatory FLSA Liquidated Damages**

The FLSA provides that “[a]ny employer who violates the [overtime provisions] of this title shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). Awarding liquidated damages is consistent with the underlying remedial purpose of the FLSA. *McFeeley*, 825 F.3d at 245 (“If an employer were instead liable for only unpaid wages and overtime pay, it might roll the dice by underpaying employees, reasoning all the while it would be no worse off even if the employees eventually prevailed in court.”).

Accordingly, when a Court finds an employer violated the FLSA’s overtime provisions, awarding liquidated damages is the “norm.” *U.S. v. Edwards*, 995 F.3d 342, 346 (4th Cir. 2021)

(internal citation omitted). The employer bears a “substantial burden” to avoid liquidated damages. *Sellers v. Keller Unlimited LLC*, 388 F. Supp. 3d 646, 652 (D.S.C. 2019) (holding that to avoid liquidated damages, the employer must “persuad[e] the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory verdict.”) (internal citation omitted).

Similarly, when employers withhold the wages due an employee, the employee is entitled to “an additional equal amount as liquidated damages, plus prejudgment interest[.]” Va. Code Ann. § 40.1-29 (G).

Thus, Worker is due liquidated damages in the same amount as the unpaid overtime wages.

### **RELIEF REQUESTED**

Based on the summary facts alleged above, Sitemetric failed to classify Worker as an employee and pay overtime wages as required by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and its implementing regulations. Sitemetric’s failure to pay Claimant the required overtime wages caused Worker to lose wages and interest on those wages. Worker seeks to recover back wages, liquidated (double) damages, and costs and fees in bringing the claims.

Worker requests an Order for the following:

1. Declaring that Sitemetric violated the Fair Labor Standards Act;
2. Granting judgment to Worker for claims of unpaid overtime wages as secured by the FLSA, plus an equal amount in liquidated damages; and
3. Awarding Worker the costs of suit, and reasonable attorneys’ fees.