DELAWARE'S SELF-EMPLOYMENT RULE AND THE NEED FOR LEGISLATIVE INTERVENTION

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Since *O'Brien v. Unemployment Insurance Appeal Board*[1] Delaware courts have enforced a general rule that self-employed individuals are not entitled to unemployment benefits. While this principle is easy to state, it has been difficult to apply. The Superior Court continues to struggle with the self-employment rule, and neither the Delaware Supreme Court nor the General Assembly has yet addressed the issue.

In particular, three questions have confounded courts in the two decades since *O'Brien.* First, how does the concept of self-employment relate to the statutory scheme of unemployment benefits? Some courts have determined that self-employed individuals are unemployed but nonetheless ineligible for benefits; others have determined that self-employed individuals are not unemployed at all. Second, what are the relevant factors necessary to reach a conclusion that an individual is self-employed? For instance, courts have analyzed hours spent and wages earned by the individual. Courts have also reviewed the profitability and duration of the self-employment venture. In expanding the factors, the courts have failed to develop a consistent approach regarding how these factors interact and whether some are preferred over others. Third, are there exceptions to the general principle that would allow self-employed individuals to receive benefits? Stated very generally, this final issue is a question of whether the particulars of an individual's situation may warrant a grant of benefits even though the person is self-employed.

This article examines these questions more closely to illustrate the need for the General Assembly to intervene and codify the self-employment rule. As a matter of law, intervention would resolve outstanding discrepancies in the existing case law. As a matter of policy, intervention would foster the unemployment- system's goals while enhancing its viability. As a matter of practicality, intervention would simplify the self-employment analysis by providing a consistent legal framework for the issue.

I. O'BRIEN AND THE SELF-EMPLOYMENT RULE

Delaware, in response to federal legislation, has created an elaborate set of procedures and requirements to provide benefits for persons unemployed through no personal fault.[2] These procedures and requirements are codified as a statutory scheme in Chapters 31 through 35 of Title 19 of the Delaware Code.[3] Individuals who file for unemployment benefits are

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1. No. 92A-11-005, 1993 WL 603363 (Del. Super. Ct. Oct. 20, 1993).

2. DEL. CODE ANN. tit. 19, § 3301 (West 2013) (the unemployment reserve fund is "for the benefit of persons unemployed through no fault of their own."); *id.* § 3305 ("This chapter is enacted as part of a national plan of social security in conformity to the federal Social Security Act."). Though originally enacted under the Social Security Act, unemployment benefits are currently governed by the Federal Unemployment Tax Act. *See* 26 U.S.C. §§ 3301-11 (2012). *See also* 42 U.S.C. § 503 (2012); 45 C.F.R. pts. 640, 650 (West 2013) (describing required state laws and procedures).

3. Unless otherwise specified, all further statutory citations are to Title 19 of the Delaware Code, available at http://delcode.delaware.gov.

known as claimants.[4] When a claimant initially files for benefits, the Division of Unemployment Insurance ("Division") of the Delaware Department of Labor ("Department") must determine if the claimant is within the class of persons who may benefit under the statutory scheme.[5] This involves an initial determination of whether the claimant's situation is within the statute's definition of "unemployment."[6] In order to receive benefits, unemployed individuals must then be eligible[7] and not disqualified.[8] Because these are continuing requirements, questions of eligibility and disqualification may be revisited over the course of an individual's claim based upon that individual's weekly claims for benefits.[9] Since 2004, the Division has evaluated each claimant first for disqualification and then for eligibility.[10]

Courts receive unemployment benefits cases as appeals from the Unemployment Insurance Appeal Board ("UIAB").[11] The UIAB reviews appeals from decisions of a lower tribunal, which generally consists of a single Appeals Referee.[12] Any interested party, including the Department, may appeal the Referee's decision.[13] The Referee receives the case as an appeal or referral from a Claims Deputy; Referee appeals are mandatory upon request.[14] The UIAB has the discretion whether to accept appeals from the Referee—it may affirm the Referee based upon the record, or it may conduct a *de novo review.*[15] The Delaware Superior Court has jurisdiction over appeals from decisions of the UIAB.[16] In the absence of legal

4. The term is operationally defined by the code. *See* § 3302(2).

5. §§ 3312, 3317(b)-(c), 3318(a).

6. § 3202(17) currently provides that:

> "Unemployment" exists and an individual is "unemployed" in any week during which the individual performs no services and with respect to which no wages are payable to the individual, or in any week of less than full-time work if the wages payable to the individual with respect to such week are less than the individual's weekly benefit amount plus whichever is the greater of $10 or 50% of the individual's weekly benefit amount. The Department shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs and other forms of short-time work as the Department deems necessary.

7. § 3315.

8. § 3314.

9. Individuals must file a weekly claim for benefits in accordance with the Department's regulations. § 3315(2). Those regulations require individuals to report information regarding their eligibility status, including work searches, earned wages, and medical disabilities. 19-1000-1202 DEL. CODE REGS. § 6.0 (LexisNexis 2014). After a certain amount, earned wages may reduce a claimant's benefits, § 3313(m), or even remove the claimant's unemployment status, § 3302(17).

10. In 2004, the General Assembly changed the designation of section 3315 to section 3314 and section 3314 to section 3315. 74 Del. Laws 306 §§ 1, 2 (2004). This change came in response to *Ingleside Homes, Inc. v. Gladden*, which faulted the UIAB for considering disqualification without first considering eligibility. No. 02A-12-009 PLA, 2003 WL 22048205 (Del. Super. Ct. Aug. 27, 2003).

11. § 3323(A).

12. §§ 3318(B)-(C), 3319.

13. §§ 3320(A), 3322(B) ("The Department shall be deemed to be a party to any judicial action involving any such decision…").

14. § 3318(B)-(C).

15. § 3320(A).

16. § 3323(A).

error, the Superior Court must affirm any UIAB decision that is supported by substantial evidence.[17] Evidence is reviewed in the light most favorable to the party prevailing at the UIAB,[18] and evidence is substantial if it is more than a scintilla.[19]

Prior to *O'Brien,* there is no indication that Delaware courts treated self-employment as a separate phenomenon within the unemployment benefits framework.[20] With O'Brien, and a trio of related cases decided soon thereafter, the court moved from no precedent to an "established rule."[21] In the years since, courts have struggled with how to connect the self-employment rule to the statutory scheme and how to determine what circumstances trigger the rule.

A. *O'Brien, Weeraratne,* and Statutory Confusion

In *O'Brien,* the court considered the appeal of a laid-off attorney.[22] Between receiving the lay-off and filing for benefits, the attorney had initiated the process of starting his own firm. Both the Appeals Referee and the UIAB determined that the venture rendered him ineligible for benefits under section 3314(3) of Title 19 of the Delaware Code.[23] At that time, section 3314 addressed eligibility for benefits, and subsection (3) specified that an individual was eligible only if the individual "[i]s able to work and is available for work and is actively seeking work."[24]

The *O'Brien* court affirmed the UIAB's decision. The court noted that the issue was one of first impression for Delaware, and the court looked to laws of other states.[25] The court determined that the majority rule among the states was that "self-employment is a bar to receiving unemployment compensation."[26] The court reasoned that this principle matched the legislative intent behind Delaware's statutory scheme.[27] The court also noted the similarity between Delaware's declaration of intent at section 3301 and the declarations of Pennsylvania and New Jersey. Under the laws of Pennsylvania

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17. *Id*. *See* Histed v. E.I. DuPont de Nemours & Co., 621 A.2d 340, 342 (Del.1993).

18. Thompson v. Christiana Care Health Sys., 25 A.3d 778, 782 (Del. 2011) (citing Pochvatilla v. U.S. Postal Serv., No. 96A-06-19-RRC, 1997 WL 524062, at *2 (Del. Super. Ct. June 9, 1997)).

19. Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981).

20. The *O'Brien* court noted that the UIAB had considered the situation at least once before *O'Brien*. 1993 WL 603363, at *3 (citing Appeal of Darrell Sanders, UIAB Appeal Docket No. 63044-13915-A (June 2, 1991)). In *Appeal of Darrell Sanders*, the UIAB cited to the Pennsylvania self-employment rule, and endorsed the sideline-business exception to the rule. UIAB Appeal Docket No. 63044-13915-A.

21. Weeraratne v. Unemployment Ins. Appeal Bd., No. 95A-05-011-NAB, 1995 WL 840722, at *2 (Del. Super. Ct. Sept. 6, 1995). *See infra* text accompanying notes 53-55.

22. 1993 WL 603363.

23. Section 3314(3) is now section 3315(3). *See supra* note 10.

24. § 3314(3) (1999), *redesignated by* 74 Del. Laws 306 §§ 1, 2 (2004). *See supra* note 10.

25. *O'Brien*, 1993 WL 603363, at *2.

26. *Id*. (citing sources).

27. *Id.* at *2-3.

and New Jersey, self-employed individuals were ineligible for benefits. Pennsylvania's self-employment rule was codified in its statutory framework.[28] New Jersey's was a matter of common law.[29]

The legal rationale of the *O'Brien* decision rested on the court's interpretation of section 3314(3)'s eligibility requirements. The court found that the claimant's sole focus was on the self-employment activity and that he had ceased seeking other work.[30] Because the O'Brien claimant had stopped actively seeking other work, he no longer met section 3314(3)'s eligibility requirements.

As it happened, the court's language in its holding implicated areas beyond mere eligibility: "[o]nce an individual engages in a self-employed business or practice on a full-time basis, the Court finds that the individual is no longer unemployed nor available for work, nor clearly, is that individual 'actively seeking work' other than the self-employment."[31] The court's inclusion of the phrase "no longer unemployed" is enigmatic since it implicates unemployment status, an issue outside the scope of the eligibility analysis.[32] On one hand, the phrase could be unintentional. On the other hand, the phrase could be an intentional reference to Delaware's own section 3302 which defines "unemployment."[33] Because the *O'Brien* court did not further explain the phrase's inclusion, subsequent courts have wrestled with how to apply *O'Brien's* legal rationale.

Along with its legal rationale, the *O'Brien* court also endorsed a variety of policy rationales. In what has become the hallmark of later cases, the court reasoned that the legislative intent behind the unemployment benefits scheme barred benefits to self-employed individuals because the benefits were not intended to "be utilized to support the early stages of a new business."[34] Additionally, as previously explained, the phrasing of the *O'Brien* conclusion can be read as a determination that full-time self-employment activity negates an individual's status as unemployed.

In dicta, the *O'Brien* court addressed the sideline-business exception to the self-employment rule. When discussing Pennsylvania's self-employment statute, the court noted that Pennsylvania law exempted some self-employment ventures. These exempt ventures were those that had existed during previous full-time employment, had not changed following the end of that full-time employment, did not interfere with new full-time employment, and were not the claimant's primary source of livelihood. The court also noted the sideline-business exceptions from other jurisdictions.[35] Because the *O'Brien* claimant began his venture after becoming unemployed, the court found that the sideline-business exception was not

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28. *Id*. at *2. *See* 43 Pa. Stat. Ann. § 802(h) (2002).

29. *O'Brien*, 1993 WL 603363, at *3 (citing Pedalino v. Bd. of Review, 200 A.2d 351 (N.J. Super. Ct. App. Div. 1964), *cert. denied*, 202 A.2d 702 (N.J. 1964). *See generally* Caldwell v. Bd. of Review, No. A-0882-09T1, 2011 WL 2749680 (N.J. Super. Ct. App. Div. July 18, 2011); Ford v. Bd. of Review, 670 A.2d 1116 (N.J. Super. Ct. App. Div. 1996).

30. *O'Brien*, 1993 WL 603363, at *3.

31. *Id*. (emphasis added).

32. *See* § 3315 ("An *unemployed* individual shall be eligible to receive benefits with respect to any week only if the Department finds that the individual [meets the numbered eligibility requirements]") (emphasis added). It is also outside of the Pennsylvania law that the court cites. *See* 43 Pa. Stat. Ann. § 802(h) (addressing eligibility).

33. *See* § 3302(17). Other courts have certainly read the phrase this way. *See infra* Part II(B).

34. *O'Brien*, 1993 WL 603363, at *3.

35. *Id*. at n.2 (citing sources).

applicable to the case. Thus, though the *O'Brien* court acknowledged the existence of the sideline-business exception, the court did not include the exception as part of its holding.

Since *O'Brien,* courts have cited it for the proposition that self-employed individuals are not entitled to unemployment benefits. However, courts have struggled with how to anchor this imported proposition to Delaware's statutory scheme. *The O'Brien* court framed the issue as a question of eligibility, yet it also implied that an individual who was self-employed was not unemployed. O'Brien's creation of the self-employed/unemployed dichotomy has led to later confusion about how to connect the self-employment rule to the statutory text. This confusion was exacerbated by a series of related cases decided in *O'Brien's* aftermath.

Soon after *O'Brien,* the Superior Court decided three cases involving the same claimant's appeal of UIAB decisions denying his claim for benefits. In the first case *("Weeraratne I"),* the claimant appealed a determination that he was ineligible for benefits since he was unavailable for work because he was a full-time independent salesperson for an insurance company.[36] The claimant had filed for benefits upon his separation from different employment at a marketing firm. During and after the marketing firm work, he had performed the insurance work. The UIAB adopted the decision of the Appeals Referee that the claimant was ineligible because of the insurance work.[37] On review, the court determined that the Referee's decision contained numerous factual inconsistencies that undercut the Referee's conclusion that the claimant was not unemployed. The court also expressed reservations about the UIAB's unsupported conclusion that an individual could be a full-time employee when the individual worked full-time hours but did not receive full-time pay.[38] Because the claimant's insurance work was commission-based, there was no guarantee of pay for any hours worked. Without discussing, or even citing *O'Brien,* the court remanded the case.

The second case *("Weeraratne II")* involved the Division's motion to reargue *Weeraratne I*.[39] The Division sought to reargue whether the claimant had full-time employment based upon hours alone. The Division also advanced a new argument that the claimant was self-employed, not unemployed, and that he was not actively seeking work.[40] The Division based its new argument upon *O'Brien* and the Pennsylvania law cited therein.[41]

The court rejected both arguments. As to the first argument, the court again rested its decision on the inconsistent factual record and the UIAB's dissociation of hours worked and wages earned.[42] The court reasoned that the analysis should always include wages, especially as they related to hours worked, as a matter of practicality.[43] As to the

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36. Weeraratne v. Unemployment Ins. Appeal Bd., No. 93A-04-003, 1994 WL 164565 (Del. Super. Ct. Apr. 14, 1994) (hereinafter *Weeraratne I*).

37. *Id*. at *2.

38. *Id*. at *3.

39. Weeraratne v. Unemployment Ins. Appeal Bd., No. 93A-04-003, 1994 WL 164559 (Del. Super. Ct. Apr. 27, 1994) (hereinafter *Weeraratne II*).

40. *Id*. at *1.

41. *Id*.

42. *Id*. at *2.

43. *Id*. at *2. However, this practicality is not always readily apparent. Other courts have held that the presence of either wages or services may negate a finding of unemployment. *See infra* at Part II(B).

second argument, the court questioned the Division's invocation of Pennsylvania law, even via *O'Brien*. The court noted the argument's impropriety since the self-employment argument (or the sideline-business exception) had not been raised during the Appeals Referee or UIAB hearings. Still, the court took pains to distinguish the situation in *O'Brien* from the claimant's situation. Ultimately, the court determined it did not need to reach the self-employment argument, and denied the Division's motion.

At the rehearing, the UIAB again denied benefits, and following that, the claimant again appealed the UIAB's decision.[44] Matching the Division's argument from *Weeraratne II,* the UIAB determined that the claimant was not an unemployed individual under the statutory framework of section 3302.[45] Additionally, the UIAB determined that the claimant's self-employment activities rendered him unavailable for work and therefore, ineligible for benefits under section 3314(3).[46] This time, the court affirmed ("*Weeraratne III")*.[47]

Regarding the UIAB's first determination, the court agreed that the claimant did not meet the statutory definition of an unemployed person. Under the statute at the time, individuals could be considered fully unemployed in weeks where they earned no wages and performed no work.[48] Additionally, individuals could be considered partially unemployed if they had had their full-time hours reduced.[49] The UIAB found that the claimant had been, and continued to be, a part-time employee of the marketing firm. The court agreed that a current part-time employee did not fall into either definition of unemployment. For unclear reasons, the court cited to section 3314, the eligibility section, as authority for its conclusion, even though it had previously noted that the UIAB reached its conclusion under section 3302.[50] Neither the UIAB nor the court cited *O'Brien* as a basis that the claimant was not unemployed.

Likewise, regarding the UIAB's second determination, the court agreed that the claimant "was unavailable for work because of the many hours spent on self-employment pursuits."[51] The court cited to section 3314(3) for its conclusion.[52] Unlike *Weeraratne I* or *Weeraratne II,* the court made no mention of the role wages should play in the decision. There is no clear explanation for the absence. The court went on to discuss *O'Brien,* noting that it was an "established rule" that self-employment barred unemployment benefits.[53] The court also endorsed one of *O'Brien's* policy rationales:

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44. *Weeraratne*, 1995 WL 840722 (hereinafter *Weeraratne III*).

45. *Id*. at *1. At the time, the definition of "unemployment" was found in section 3302(16). *See* 70 Del. Laws 43 §§ 2, 3 (1995) (redesignating § 3302(16) as § 3302(17)).

46. *Weeararatne III*, 1995 WL 840722, at *1. Under the statute's current form, eligibility criteria are in section 3315. *See supra* note 10.

47. *Weeararatne III*, 1995 WL 840722, at *3.

48. § 3302(16), *redesignated by* 70 Del. Laws 43 §§ 2, 3 (1995).

49. *Id*.

50. *Weeararatne III*, 1995 WL 840722, at *1.

51. *Id*. at *2. It is unclear why the court undertook the eligibility analysis since it had already determined the claimant was not an unemployed individual.

52. *Id.* at *2.

53. *Id*.

that unemployment benefits were not meant to support the early stages of a new business. Again, the court offered no explanation for the apparent change between *Weeraratne II* and *Weeraratne III.* Finally, the court determined that there was sufficient evidence to support the UIAB's conclusion that the sideline-business exception did not apply to the claimant's case. On the claimant's further appeal, the Delaware Supreme Court affirmed the court's "well-reasoned Order."[54]

Read together, the *Weeraratne* cases offer no clear picture of how to analyze self-employment or apply *O'Brien.* In addressing the same facts, *Weeraratne I* did not mention *O'Brien, Weeraratne II* distinguished *O'Brien,* and *Weeraratne III* endorsed O'Brien. Even the expansion of the record between *Weeraratne II* and *Weeraratne III* does not explain how the court moved from treating *O'Brien's* analysis with disdain to regarding it as an "established rule." Additionally, the *Weeraratne* cases mixed the analysis of whether the claimant was unemployed with the analysis of whether the claimant was eligible. *Weeraratne III* attempted to confine its application of *O'Brien* to the eligibility analysis. This should not have been a difficult task since the question of whether the claimant was unemployed involved his marketing work while the question of whether the claimant was ineligible involved his insurance work. Yet, the *Weeraratne III* court cited to the eligibility section as the basis for its conclusion that the claimant was unemployed, and the court included *O'Brien's* "no longer unemployed" language in its discussion regarding eligibility. It is no wonder that subsequent courts have also conflated the two analyses and have struggled to link *O'Brien* to Delaware's statutory framework.

Part of the confusion may also stem from the lack of specificity of language in decisions by the Referees, the UIAB, and the courts.[55] Under the statutory scheme, an unemployed individual is "eligible" when he or she meets all of the requirements of eligibility and "ineligible" when he or she does not.[56] Thus, as a statutory matter, the question of eligibility does not arise for persons who are not unemployed under section 3302.[57] Still, decisions at all levels frequently determine that individuals who are not unemployed are "ineligible" for benefits.[58] By using the term "ineligible" to describe both a failure of one of the specific eligibility criteria and also a general disentitlement to benefits, the decisions unintentionally equivocate two legally distinct situations: where individuals are unemployed but ineligible for benefits under the eligibility requirements, and where individuals are not unemployed and thus not covered by the statutory scheme at all.

As decisions following *O'Brien* and the *Weeraratne* cases have illustrated, courts continue to struggle not only with how to connect the self-employment rule to the statutory scheme but also when to invoke the rule at all.

B. *Jones, Workman,* and Multiplying Factors

Courts did not return to the self-employment rule until 2001's *Jones v. Unemployment Insurance Appeals Board*.[59] The *Jones* decision was the first of several to begin to parse what factors were important in the analysis of whether an

54. Weeraratne v. Unemployment Ins. Appeal Bd., 676 A.2d 909 (Del. 1996) (table). The opinion reflects the Supreme Court's standard language for a summary affirmance.

55. At least part of this confusion might be explained by the renumbering of certain sections of the code. *See supra* notes 10, 45.

56. *See* § 3315; *see also supra* note 32.

57. *Id.*

58. *See, e.g.*, *Weeraratne III*, 1995 WL 840722, at *1; *O'Brien*, 1993 WL 603363, at *2-3. *See infra* Parts II(B)-(C). Even the Delaware Supreme Court is not immune. *See* Unemployment Ins. Appeal Bd. v. Div. of Unemployment Ins., 803 A.2d 931 (Del. 2002).

59. No. 00A-08-001, 2001 WL 755379 (Del. Super. Ct. June 11, 2001).

individual was self-employed. Because courts reached no consensus on the relevant factors, the uncertainty present in *O'Brien* and the *Weeraratne cases* has also permeated later cases.

In *Jones,* the court considered the appeal of a claimant who had started a new business venture within two weeks of filing for unemployment benefits.[60] The Claims Deputy determined that the claimant was not unemployed because his situation did not meet the definition of "unemployment" found in section 3302(17). At the hearing with the Appeals Referee, the claimant testified that he worked thirty to fifty hours per week on the business, but he spent an equal amount of time searching for work. The claimant also testified that the business was operating at a loss (even though it had received some payments for services) and that he had not received any wages. The Appeals Referee affirmed, and the UIAB adopted the Referee's decision without further hearing.

The court affirmed the UIAB, agreeing that the claimant did not meet the statutory definition of an unemployed person. The court determined that payments to the claimant's business met the definition of "wages" under the statute.[61] After reaching that conclusion, the court found that the claimant's admission of full-time, self-employment work excluded him from benefits under section 3302(17)'s definition of "unemployment."[62] Citing to *O'Brien,* the court found that unemployment benefits were not meant to subsidize a new business. The court also cited *O'Brien's* conclusion that the legislative intent behind Delaware's statute aligned with the intent of other jurisdictions that had held that self-employment was a bar to unemployment benefits. Citing to *Weeraratne III,* the court agreed that the bar of benefits to the self-employed was an established rule.

Two principles from *Jones* would become central in later self-employment cases. First, full-time self-employment is a bar to benefits because individuals who perform such work are not "unemployed" under section 3302(17).[63] Though the decision used the term "ineligible" in its broader sense, the *Jones* decision was applying section 3302(17) and deciding whether the claimant was an unemployed individual. Second, under *Jones,* the self-employment bar applies even to self-employment ventures that are not profitable. The *Jones* court ignored *Weeraratne I* and *II's* discussions of parity of hours and wages.[64] Rather, the *Jones* court endorsed the rationale expressed by *O'Brien* and *Weeraratne III* that unemployment benefits were not meant to support the early stages of a new business.[65] Like *O'Brien,* the *Jones* court determined that the unemployment statute was for the benefit of workers separated from an employer.[66]

In *Miller v. Herschmann, Inc.,* the court addressed the situation where the claimant's self-employment was less than full-time.[67] The claimant operated an on-line computer consulting and sales business, and while he worked full time

60. *Id*. at *1.

61. *Id*. at *2. *See also §* 3302(18) ("'Wages' means all remuneration for personal services, including commissions, bonuses, dismissal payments, holiday pay, back pay awards and the cash value of all remuneration in any medium other than cash…").

62. *Jones*, 2001 WL 755379, at *2-3.

63. *Id*.

64. Other courts have found *Weeraratne I*'s wage argument more persuasive in other contexts. *See* Schneider v. Unemployment Ins. Appeal Bd., No. 03A-09-004 WLW, 2004 WL 2827915, at *2 (Del. Super. Ct. Apr. 30, 2004).

65. *Jones*, 2001 WL 755379, at *2. One cannot help but wonder if the *Jones* court would have reached this same conclusion if neither the claimant nor the business had received any payments. *See infra* text accompanying notes 81-82.

66. *Jones*, 2001 WL 755379, at *2.

67. No. 06A-10-013-JEB, 2007 WL 4577373 (Del. Super. Ct. Dec. 12, 2007).

in some weeks, his hours varied widely. He had received no wages from the business, but it was unclear whether the business received income. The *Herschmann* court concluded that the claimant's situation fell into section 3302(17)'s second definition of unemployment, because he worked less than full-time and earned less than his weekly benefit amount.[68] Nevertheless, the court concluded that the claimant was not entitled to benefits. Again, the court used the term "ineligible" to describe the claimant's status.[69]

The court opined that, "unemployment is different from self-employment."[70] The court noted that case law had established that self-employed individuals could not receive unemployment benefits. The court, citing *Weeraratne III*, found this bar to be absolute under the principle that benefits were not meant to support new businesses. Thus, the court concluded that the claimant's efforts on behalf of his business barred him from benefits. The primary significance of the *Herschmann* decision was its determination that a part-time, unpaid, self-employment venture barred a claimant from benefits.[71]

Bachman v. Bachman & Associates, Inc.,[72] also involved part-time, unpaid activities. Technically, *Bachman* was not a self-employment case, yet parts of its analysis have been employed in subsequent self-employment cases. At the outset, the court noted that it was "undisputed that [the claimant] was an employee and is not self-employed."[73] *Bachman* involved a claimant who had been a corporate officer and a 50% owner of a defunct corporation. By that time, section 3302 had been amended to include services performed by corporate officers within the definition of "employment."[74] At the time he filed for benefits, the claimant continued to spend two unpaid hours per week wrapping up the business. The UIAB had determined that the claimant was not unemployed, and additionally, that he was ineligible for benefits because he was unavailable for work.[75] Thus, the case indirectly implicated both unemployment status and benefits eligibility.

The *Bachman* court's discussion of unemployment status under section 3302 did not involve any extensive analysis of the claimant's self-employment. Despite concluding that the claimant was not self-employed, the court went on to note the differences between wrapping up a closed business and starting a new business venture.[76] Thus, the *Bachman* court

68. *Id*. at *2.

69. *Id*.

70. *Id*.

71. The court could have analogized the case to the situation in *Jones* and avoided such a broad conclusion. In *Herschmann*, the claimant offered inconsistent testimony, and he admitted to working up to eighty hours in some weeks. 2007 WL 4577373, at *1. Thus, the *Herschmann* court could have determined his venture was full-time self-employment, and under the standard of review, perhaps it should have done so. *See Thompson*, 25 A.3d at 782 (noting that factual inferences should be viewed in the light favorable to the party that prevailed at the UIAB level).

72. No. 09A-08-005 DCS, 2010 WL 5551332 (Del. Super. Ct. May 26, 2010).

73. *Id*. at *1.

74. *See* 70 Del. Laws 229 § 1 (1995) (adding the service of "[a]ny officer of a corporation after December 31, 1995" to the definition of "employment" under § 3302(9)); 70 Del. Laws 43 §§ 2, 3 (1995) (redesignating § 3302(9) as § 3302(10)).

75. *Bachman*, 2010 WL 5551332, at *1. The case also involved an issue of disqualification since the claimant's business had closed. Individuals who close a business permanently or temporarily may be disqualified for benefits unless there is an objectively reasonable basis for doing so. *See* § 3314(1); *Unemployment Ins. Appeal Bd*., 803 A.2d 931. This situation is outside the scope of this article since the situation addresses the consequences of past self-employment, not current self-employment.

76. *Bachman*, 2010 WL 5551332, at *2-3.

created a distinction between operational and non-operational self-employment ventures. Further portions of the court's analysis also implicated other self-employment cases. Specifically, the court determined that services and wages are "interdependent" under section 3302's definition of unemployment: "[t]he phrase 'with respect to which' (no wages are payable) modifies the services being considered."[77] In doing so, the court rejected the UIAB's assertion that the two requirements were disjunctive, such that either the performance of services or the earning of wages could place an individual outside the definition of unemployment.[78] Ultimately, the court determined that the claimant's two hours of unpaid work did not cancel his unemployment status.

The court also addressed self-employment in its discussion of the claimant's eligibility. The UIAB had concluded that the two hours the claimant spent wrapping up a business meant that the claimant was self-employed and unavailable for work. Citing to *Weeraratne III* and *O'Brien,* the court recognized that self-employment was a bar to unemployment benefits because benefits were not meant to support new businesses and because full-time self-employment rendered the individual unavailable for other work. The court also discussed the factual scenarios from *Herschmann, O'Brien,* and *Jones.* The court determined that the minimal time the claimant spent on the business was not enough to make him unavailable for work and thus, ineligible for benefits.

Bachman is a curious addition to the self-employment analysis, particularly since it was not a true self-employment case. Without citing to *Weeraratne I* or *II*, the court's discussion of section 3302 returned the specter of wages to the self-employment analysis. Likewise, the *Bachman dicta* indicated a new facet to the self-employment analysis: whether the self-employment venture is operational. Under *Bachman*, individuals who perform work for a non-operational business may not be self-employed. The *Bachman* court also created an implicit exception to the self-employment rule such that minimal self-employment activity is not a bar to benefits if an individual remains available for other work.[79]

In *Annand v. Unemployment Insurance Appeal Board,*[80] the court addressed substantially the same situation as *Herschmann* yet reached an opposite conclusion. In *Annand*, the claimant worked part time for a surveying company and part time for his own company. The claimant filed for benefits only for those weeks in which he performed little or no work for the surveying company and none for his own company. The UIAB determined that the claimant was not unemployed under section 3302(17) because the claimant was still providing some services to both companies. The court reversed and remanded.

The court reasoned that the claimant was entitled to benefits under the second definition of unemployment—partial unemployment.[81] In contrast to *Herschmann,* the court determined that part-time self-employment was not an absolute bar to benefits. The court based part of its reasoning on its conclusion that the claimant was available for, and performing, work outside of his self-employment. In doing so, the court created a question of whether availability is a factor in partial-unemployment cases or whether the court simply mixed the questions of unemployment status and benefits

77. *Id*. at *2-3.

78. *Id*. at *4-5.

79. Viewed at a high level of abstraction, this exception can be seen as a less forceful version of the sideline-business exception since both address situations where individuals perform self-employment work but remain available for other, full-time work. *See infra* Part III(C).

80. No. S10A-05-003-ESB, 2011 WL 2698620 (Del. Super. Ct. July 1, 2011).

81. *Id*. at *2. Partial unemployment is addressed by the second half of the definition of "unemployment" within section 3302(17), which provides that partial unemployment is subject to regulation by the Department.

eligibility. Additionally, the court determined that it was error for the UIAB to deny the claimant benefits "merely because he owned his own company."[82] While the *Annand* court's reasoning is clear in isolation, its decision is vexing in the context of the other self-employment cases. In particular, the *Annand* court's refusal to address *Herschmann,* is indicative of the lack of consensus regarding the factors in the self-employment analysis.

Perhaps nowhere was this lack of consensus more evident than in *Workman v. Delaware Department of Labor*.[83] As a matter of outcome, *Workman* was relatively straightforward. As a matter of analysis, however, *Workman* remains Delphic.

Like *O'Brien, Workman* involved the self-employment ventures of an out-of-work attorney.[84] In April 2008, the claimant had started an internet-based retail business for income. In April 2009, the claimant had started his own law practice to increase his marketability to other firms. Neither venture yielded a net profit. The claimant collected unemployment benefits from December 2008 until May 2009, when he reported income from the law firm. Upon review, the Claims Deputy, the Appeals Referee, and the UIAB all concluded that the claimant was not unemployed under section 3302(17). The claimant appealed, arguing that his lack of wages rendered him unemployed under the first definition of unemployment, and alternatively, that his lack of full-time work and wages rendered him unemployed under the second definition of unemployment.[85] The claimant also characterized his business as a "side-line" business.[86]

The *Workman* court began its discussion by citing to *O'Brien* and *Weeraratne III* for the general principle that self-employment acts as a bar to unemployment benefits. The court acknowledged that neither the legislature nor the courts had clearly defined "self-employment."[87] For its own purposes, the court determined that, "self-employment exists where an individual has made more than *de minimis* efforts on behalf of an operating business that he or she owns, regardless of whether the business is profitable or the individual remains available for other work."[88] The court cited *Herschmann, Jones,* and *Bachman* as the basis for its definition. The Workman court did not discuss, or mention, Annand, which had been decided approximately two months earlier.[89]

Applying the definition to the claimant's case, the *Workman* court determined that the claimant was not unemployed.[90] The court distinguished *Bachman* since the business in *Bachman* was not operational whereas the *Workman*

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82. *Id*.

83. No. N10A-03-002 WCC, 2011 WL 3903793 (Del. Super. Ct. Sept. 1, 2011).

84. *See id*. at *1. The plight of the unemployed attorney has led to much of the development of the self-employment rule, both in Delaware and in Pennsylvania. For a concise discussion of this phenomenon in Pennsylvania, see James Bradley & Daniel Schuckers, *Eligibility of Attorneys for Unemployment Compensation*, 74 Pa. B. Ass'n. Q. 71, 73, 75-76 (2003).

85. *Id*. at *3.

86. *Id*. at *4.

87. *Id*. at *3.

88. *Id*.

89. *Annand* was submitted on April 11, 2011 and decided on July 11, 2011. 2011 WL 2698620, at *1. *Workman* was submitted on May 19, 2011 and decided on September 1, 2011. 2011 WL 3903793, at *1. While *Annand* may not have been included in third-party legal databases within that short a time frame, *Annand* almost certainly was available through Superior Court's own database at http://courts.delaware.gov/opinions/. *See, e.g.*, Hitchens v. Unemployment Insurance Appeal Board, No. 11A-01-008 MMJ, 2011 WL 5345222, at *4-5 (Del. Super. Ct. Nov. 4, 2011) (citing to *Workman*, which had been decided approximately 60 days prior).

90. 2011 WL 3903793, at *4.

claimant's business was operational. The court also noted that the claimant had started the two businesses, worked to make them successful, and accepted payments on behalf of both businesses.[91] The court found these conditions rendered the claimant self-employed.

The court rejected the claimant's assertion that his businesses were sideline businesses. The court noted that Delaware courts had not recognized a sideline exception.[92] For purposes of argument, the court also noted the claimant's businesses would not be sideline businesses since he started them after becoming unemployed and used them as a means of primary support.[93] The court determined that the claimant was barred from benefits.

Workman, at its heart, represents a missed opportunity. Through the case's facts, the court had the chance to clarify many aspects of the self-employment rule, yet did not. The resulting *Workman* analysis is challenging for several reasons. While *Workman's* distillation of the self-employment cases into a single definition is appealing, it is also incomplete. *Workman's* definition of self-employment fails to include several existing factors in the self-employment analysis. The definition does not address Annand or a full reading of the second definition of unemployment. Though the *Herschmann* decision might explain the latter, there is no explanation for the former. Moreover, *Workman* cites to *Bachman* for its proposition that a business must be operational, yet *Workman* fails to address *Bachman's* discussion of wages. *Workman's* only nod to the issue of wages is the suggestion that the self-employment venture's profitability is not a factor to analyze.

Workman's definition is laudable for at least one reason: it excludes availability for work (an eligibility criterion) from the analysis of unemployment status. Thus, the definition does help to resolve the persistent confusion between unemployment status and benefits eligibility.

Outside of the definition, the *Workman* court also missed an opportunity to connect the self-employment rule to the statute. Furthermore, the *Workman* court ironically suggested that any perceived unfairness in the self-employment rule was for the legislature, not the court, to correct—even though the self-employment rule was entirely judicially created.[94] The court's assertion appears even more perplexing given that *Workman* itself cited to some of the Pennsylvania case law that the *O'Brien* court used to establish the self-employment rule in Delaware.[95]

C. *Workman*'s Aftermath and Continued Uncertainty

Since *Workman,* the self-employment cases have been more uniform, at least from an outcome perspective. Additionally, virtually all of the cases from *Workman* forward have involved the UIAB's denial of benefits based solely on section 3302. None of the cases has involved eligibility as a primary issue. Still, courts have continued to disagree about the relevant factors and the viability of the sideline exception.

Shortly after *Workman,* the court decided *Hitchens v. Unemployment Insurance Appeal Board*[96] which involved the appeal of a claimant who admitted self-employment. The UIAB had determined that the claimant was not unemployed

91. *Id*. Though it did not directly state so, the *Workman* court appeared to be applying the standards from *Jones* and *Herschmann* to the claimant's facts.

92. *Id*. This assertion is questionable. *See infra* Part III(C); note 140 and accompanying text.

93. 2011 WL 3903793, at *4. *See infra* Part III (C).

94. 2011 WL 3903793, at *4. ("While this result may be unfair, it is up to the legislature to correct, not the Court.") *See O'Brien*, 1993 WL 603363, at *2-3.

95. *See Workman*, 2011 WL 3903793, at *3, n. 36.

96. 2011 WL 5345222.

since her self-employment ventures were her primary means of support. On appeal, the claimant's argument appeared to be one for a sideline exception: she asserted that she remained available for other work, and she disputed whether self-employment was her primary source of livelihood.[97] Nevertheless, relying on the *Workman* definition, the court determined that the claimant was unemployed. The *Hitchens* court did not specifically address the sideline exception.

In *Miller v. Unemployment Insurance Appeal Board,*[98] the court again endorsed *Workman*. The case involved a claimant who had started a business during the period he received unemployment benefits. Factually, the case mirrored *Jones*: the claimant argued that his business receipts were minimal and that he remained available for other work.[99] The *Miller* court used *Workman's* self-employment definition and *Workman's* analysis of *Herschmann* and *Jones.*[100] The court affirmed the UIAB's decision that the claimant was self-employed, not unemployed.

In *Husband v. Environmental Design, LLC,*[101] the claimant appealed a UIAB determination that she was not unemployed. After a layoff and after filing for benefits, the claimant resurrected her previously-closed landscaping business. The claimant worked near full-time hours at the business, and she reported her self-employment status to the Division. Still, the claimant argued that she deserved benefits because of the venture's minimal receipts.[102] The claimant rested her argument on *Annand,* suggesting that the reduced hours in *Annand* were analogous to her reduced wages.[103] The court disagreed. The court distinguished *Annand* on the grounds that the claimant in *Annand* had reduced hours whereas the current claimant did not.[104] The court also rejected the claimant's arguments about wages.[105] Citing *Jones*, the court noted that the claimant performed work for her business, and as a result, her business received payments for her work. The court determined that the claimant was not unemployed.

The court partially limited the bounds of self-employment in *Delaware Division of Unemployment Insurance v. Scott.*[106] In *Scott,* the claimant filed for benefits after being laid off from a corporation in which he owned a 49% interest. The Appeals Referee found that his ownership stake rendered him self-employed and therefore, barred from benefits. The UIAB reversed, and the Division appealed. In its appeal, the Division suggested that the court should endorse substance over corporate form, and if necessary, pierce the corporate veil.[107] The court noted that the Division's position had merit

97. *Id*. at *1-2.

98. No. S11A-06-005, 2012 WL 1414014 (Del. Super. Ct. Jan. 17, 2012).

99. *See id*. at *2; *Jones*, 2001 WL 755379, at *2-3.

100. *Jones*, 2001 WL 755379, at *3. In fact, the decision quotes almost a page of *Workman*.

101. No. N11A-03-004-JRJ, 2012 WL 14113595 (Del. Super. Ct. Feb. 3, 2012).

102. *Id*. at *2. In describing the claimant's situation, the court interchangeably described the claimant's status in terms of eligibility and qualification even though neither was technically an issue in the case.

103. *Id.* at *3.

104. *Id*. Without explicitly saying so, the court seemed to be differentiating between full and partial unemployment. *Annand* was a partial unemployment case. *See infra* text accompanying notes 81-82.

105. *Husband*, 2012 WL 14113595, at *3.

106. No. N11A-09-003 MMJ, 2012 WL 2580820 (Del. Super. Ct. June 21, 2012).

107. *Id*. at *2.

as a matter of policy since there is little functional difference between a sole proprietor and a sole corporate owner.[108] However, the court decided that "a corporation is a creation of statute [with] independent legal significance" and that the Superior Court lacked jurisdiction to pierce the corporate veil.[109] Ultimately, the court agreed that the claimant was an employee of the corporation, not self-employed. Thus, *Scott* appears to stand for the proposition that a formal corporate structure may shield an individual from the self-employment rule.

In *Brown v. Unemployment Insurance Appeal Board,*[110] the court considered the appeal of a claimant who had started a consulting business. The claimant worked ten hours per week for one client for approximately one month. The *Brown* court decided the case under the first definition of unemployment. The court stated, "[t]he law is clear that a claimant is not an 'unemployed individual' unless the claimant performs no services and collects no wages …"[111] Thus, the *Brown* court again divorced services and wages. The court also considered that the claimant had left her previous employment to start her consulting business and that the claimant had restricted her work searches to certain business types.[112] Neither fact was relevant to the question of whether the claimant was unemployed: separation issues are matters of qualification,[113] and work searches are matters of eligibility.[114] The *Brown* court represented the self-employment rule as an absolute bar, and under that representation, denied benefits.[115]

These recent decisions highlight the continued confusion surrounding the self-employment rule. The decision in *Brown* indicates that, almost twenty years after *O'Brien*, courts continue to grapple with how the self-employment rule interacts with the statutory scheme. This confusion leads to the insertion of irrelevant factors into the analysis, such as the discussion of availability in *Annand* or the discussion of separation issues in *Brown*. Additionally, there is continued disagreement about how, and if, to factor wages into the analysis. The decisions in *Herschmann* and *Brown* indicated that wages do not matter. By contrast, *Bachman* indicated that wages matter greatly. Beyond wages, recent decisions suggest that the self-employment rule is triggered by virtually all self-employment ventures whereas other decisions suggest the rule is trigged by only full-time self-employment.[116]

As these recent cases demonstrate, the Superior Court decisions have created an inconsistent view of the self-employment rule and an unpredictable outcome for the individual claimants. The next section of this article argues that Delaware's General Assembly should take steps to resolve the lingering questions and to simplify matters for courts, claimants, and the Division.

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108. *Id*. at *3.

109. *Id*. at *3 (citing sources). As the court noted, under Delaware law, only the Court of Chancery may pierce the corporate veil. *Id.* at *7.

110. N12A-02-005 RRC, 2012 WL 3090834 (Del. Super. Ct. July 23, 2012).

111. *Id*. at *2 (emphasis in original).

112. *Id*. at *1, 3.

113. *See* § 3314(1). Like the court in *Husband*, the court in *Brown* alternated discussions of the claimant's status, eligibility, and qualification. *See supra* note 102.

114. *See* § 3315(3).

115. 2012 WL 3090834, at *3.

116. This dichotomy hints at a more nuanced question: is self-employment actually a bar to, or merely a presumption against, unemployment benefits? While the language the courts have used suggests the former, the analytical methods that courts have employed suggest the latter.

II. THE NEED FOR LEGISLATIVE INTERVENTION

Given that the Superior Court's decisions have endorsed differing statutory and policy justifications for the self-employment rule, it is apparent that this conflict of authority needs a resolution. Legislative intervention is the most direct and efficient way of addressing the self-employment rule because intervention would afford the General Assembly the opportunity to address all of the outstanding statutory, analytical, and policy concerns.

A. The Deficiency of Other Options

This ability to take a wide-ranging approach to the self-employment rule is one reason why legislative intervention is more workable than waiting on the Delaware Supreme Court to resolve the lower court confusion. The problems of waiting on a court decision are myriad. If the Superior Court cases are any indication, it would likely take multiple Supreme Court cases to flesh out the self-employment rule's grounding, factors, and exceptions. Moreover, confusion alone does not mandate swift resolution; confusion must be coupled with a case. This would require both the resolve of the claimants to bring the cases[117] and willingness of the Division and the UIAB to defend their respective interpretations of the self-employment rule.[118] Even then, the process can be a long one. It was decades before the Supreme Court defined "good cause," the central issue in voluntary separation cases (*i.e., resignations and quits)*.[119] Thus, logistical difficulties and practical realities reduce the likelihood of the Supreme Court resolving the entire self-employment issue quickly.

Department rule-making is also infeasible without legislative intervention.[120] Long-standing case law states that the Department cannot exclude an individual from benefits unless there is clear legislative intent to do so.[121] Given that the Superior Court had to reach to Pennsylvania law to create the self-employment rule, it is hard to see where Delaware's statute includes the requisite intent for the Department to accomplish its goals through rule-making. However, rule-making may be part of the tools that the legislature could use. For instance, the General Assembly has created a mixed system of statutes and regulations to address partial unemployment.[122] The statute specifies that partially-unemployed individuals are unemployed but then directs the Department to establish regulations to differentiate between unemployment and partial unemployment.[123] Until August 2013, the Department defined and limited partial unemployment through its

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117. The claimants' resolve would have to be paired with financial ability. After all, these are unemployed individuals.

118. So far, both have been keen to do so. *See infra* Part II.

119. *See Thompson*, 25 A.3d 778. It is also worth noting that the Delaware Supreme Court has already passed on the self-employment issue once. *See Weeraratne*, 676 A.2d 909; *see also infra* text accompanying note 74.

120. The Department possesses the statutory authority to promulgate administrative rules and regulations. *See* § 3122; Del. Code Ann, tit. 29, § 10115 (West 2013).

121. Harper v. Unemployment Ins. Appeal Bd., 293 A.2d 813, 816 (Del. Super. Ct. 1972).

122. § 3302(17). *See supra* note 81.

123. § 3302(17) ("The Department shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs and other forms of short-time work as the Department deems necessary.").

formal regulations, but currently, the Department has no regulations in place to address partial unemployment.[124] As the partial unemployment example illustrates, rule-making may be a tool for the General Assembly to use in its intervention, but rule-making is not sufficient on its own.

B. The Possible Legislative Paths

As an initial matter, intervention provides the General Assembly with the opportunity to decide whether Delaware should endorse a self-employment rule. In theory, the legislature could reject the self-employment rule. In reality, this is unlikely. The legislature's three most recent amendments to the statutory scheme have all addressed the need to stabilize the unemployment benefits fund.[125] An atmosphere of economic apprehension would be conducive to the legislature's adoption of the rule. This economic reality coincides with *O'Brien's* prudent policy point: unemployment benefits are a safety net for individuals, not a launch pad for new businesses. On the whole, then, economic and policy concerns indicate that the General Assembly would likely adopt the self-employment rule if it addressed the issue.

By amending the unemployment benefits scheme to include the self-employment rule, the General Assembly could clarify the most confounding issue: how the self-employment rule connects to the statutory scheme. As previously explained, the case law progression of the self-employment rule has led to an intertwining of the concepts of unemployment status and benefits eligibility. The legislature could solve this problem simply and efficiently by codifying the rule, and thus, deciding whether self-employed individuals are not unemployed or are unemployed but ineligible for benefits.

The legislative solution should be comprehensive but not limitless or overly complicated. Current case law shows that unlimited review of a case's factual posture, including the use of a multiplicity of factors, will only complicate later analyses. Additionally, the case law approach has led to an analysis with unpredictable outcomes.[126] To avoid these faults, the legislature should limit the factors of the self-employment analysis, as the Department previously did through rule-making for partial unemployment[127] or as the legislature currently does statutorily for independent contractors.[128] For

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124. 19-1000-1202 Del. Code Regs. § 15, *amended by* 17 Del. Reg. Regs. 325 (Sept. 1, 2013).

125. *See* 79 Del. Laws 82 (2013) (confirming charges to employers who fail to respond to Department inquiries); 79 Del. Laws 117 (2013) (instituting a one week waiting period for new claims); 79 Del. Laws 173 (2013) (imposing an additional penalty for fraud). *See also* H. Comm. Rep. 147-168, Reg. Sess. (Del. 2013) (House Bill 168, 79 Del. Laws 117, is "necessary to maintain the solvency of the unemployment insurance program in a fair manner.")

126. This has also been the case in Pennsylvania where the statutory scheme includes the self-employment rule but does not define self-employment. *See* Kotanchik v. Unemployment Comp. Bd. of Review, No. 2347 C.D. 2011, 2013 WL 3156581 (Pa. Cmmw. Ct. June 10, 2013) (noting that courts derive the definition of self-employment from different sections of the statutory scheme since the term is not specifically defined). *See also* Jia v. Unemployment Comp. Bd. of Review, 55 A .3d 545 (Pa. Cmmw. Ct. 2012); Buchanan v. Unemployment Comp. Bd. of Review, 581 A.2d 1005 (Pa. Cmmw. Ct. 1990).

127. *See infra* text accompanying notes 122-124.

128. § 3302(10) provides that:

> "Employment" means: …(K) services performed by an individual for wages, unless and until it is shown to the satisfaction of the Department that: (i) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under the individual's contract for the performance of services and in fact; and (ii) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

independent contractors, the General Assembly has specified a three-part, conjunctive test that determines whether an individual is an employee or an independent contractor.[129] There is a presumption of employment, and the employer must establish all three factors to overcome the presumption.[130] Thus, the independent contractor analysis boils a complex issue down to a three-part test.

With the self-employment rule, the legislature could take a similar approach. As an example, the legislature could limit the analysis to a review of the venture's duration; the amount of time the individual has spent to build or perform services; and whether the individual or the venture has received payments for services. Though not exhaustive, these three factors incorporate the bulk of the analysis from the self-employment cases while weeding out the factors that lead to statutory confusion. Duration would address not only when the venture began but also whether it continues to operate. The time-spent requirement addresses concerns about whether the venture is the individual's primary focus while avoiding the slippery slope of adding availability for work (and thus, eligibility) to the analysis. Both the time-spent and the payment factors address the statutory requirements of "unemployment" from section 3302(17), while incorporating some of the case law concerns about individuals who perform work but receive no wages. Evaluation of the factors could be as simple as a rebuttable presumption that the presence of two or more factors means a finding of self-employment and a disentitlement to benefits.[131]

In going this route, the legislature could also correct the linguistic confusion surrounding the self-employment rule.[132] If the legislature linked the self-employment rule to the definition of unemployment, the legislature could further specify that individuals who are not "unemployed" should be referred to as "not entitled to benefits" rather than "ineligible for benefits." The legislature has taken this approach in other sections. For instance, section 3314(6) specifies that a disqualification under that section is known as a "disqualification due to fraud."[133]

Alternatively, the legislature could determine that self-employment is a matter of eligibility rather than unemployment status. This second approach would likely focus on whether the individual remained available for other work. To incorporate the current case law, the Department could set out a regulatory presumption that self-employed individuals are not eligible for benefits. It would then be up to the claimant to prove his or her availability for work. This is already the approach the Division uses for individuals who were, or are, medically disabled.[134]

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129. *Id*. *See* Spar Mktg. Servs., Inc. v. Unemployment Ins. Appeal Bd., No. K11A-03-003 WLW, 2013 WL 3788874 (Del. Super. Ct. July 9, 2013), *aff'd* 74 A.3d 655 (Del. 2013) (table).

130. *Spar Mktg. Services, Inc.*, 2013 WL 3788874, at *3 (citing State Dep't of Labor v. Med. Placement Servs., Inc., 457 A.2d 382 (Del. Super. Ct. 1982), *aff'd* 467 A.2d 454 (Del. 1983) (table)).

131. For instance, an individual with an operational business who had performed substantial work on behalf of that business could be self-employed, regardless of whether he or she had received payments for the work. By contrast, an individual with an operational business who had taken no steps other than obtaining a business license and who had not received any payments for services might not be self-employed.

132. *See supra* p. 11.

133. § 3314(6).

134. *See* § 3315(3). *See also* § 3314(1) ("[I]f an individual has left work involuntarily because of illness, no disqualification shall prevail after the individual becomes able to work and available for work … but the Department shall require a doctor's certificate to establish such availability …"). This is also the approach that the Division takes toward students, though that presumption is derived from a long-standing case-law interpretation of "availability for work" under the eligibility requirements. *See* Passwaters v. Unemployment Ins. Appeal Bd., No. S12A-10-007 RFS, 2013 WL 3338680 (Del. Super. Ct. June 17, 2013); Morgan v. Unemployment Ins. Appeal Bd., 416 A.2d 1227, 1230 (Del. Super. Ct. 1980). Interestingly, this concept was also imported from Pennsylvania, albeit from case law. *See Morgan*, 416 A.2d at 1230 (adopting a test based upon Reardon v. Unemployment Comp. Bd. of Review, 373 A.2d 146, 148 (Pa. Cmmw. Ct. 1977)).

Certain factors, such as wages, need not be an issue under the eligibility approach. The Division already has mechanisms for reducing or eliminating benefits for individuals who receive wages, pensions, or other monetary benefits while filing for unemployment benefits. Each week that a claimant claims benefits, the claimant must report any wages earned or monetary benefits received, and the Division reviews those self-reports.[135] Most pensions and worker's compensation benefits are subtracted dollar-for-dollar from a claimant's benefits.[136] Individuals who receive benefits for partial unemployment may earn wages up to 50% of their benefit amount.[137] Past that, wages are subtracted dollar-for-dollar.[138] Individuals who earn or receive wages more than certain amounts may not be entitled to any benefits at all.[139] Since the Division's current procedures already track and limit claimant wages, it would be duplicative to conduct a separate inquiry into wages as part of an eligibility-based self-employment analysis.

C. The Sideline-Business Exception

Regardless of which statutory approach the legislature took, it would be prudent to add a sideline-business exception to the self-employment rule. When the *O'Brien* court adopted Pennsylvania's statutory self-employment rule, the court cited to, but neglected to adopt, Pennsylvania's sideline-business exception, which is part of Pennsylvania's self-employment rule. Presumably, the *O'Brien* court did not adopt the exception because it was inapplicable to that particular claimant. As previously explained, some subsequent courts have applied principles from the sideline-business exception, but none has adopted it.[140] The absence of the sideline-business exception has left a glaring gap in Delaware's self-employment cases.

Properly understood, the sideline-business exception is a limited defense to the application of the self-employment rule.[141] Under Pennsylvania law, the sideline-business exception applies to claimants whose self-employment (1) began prior to termination from full-time employment; (2) continued without substantial change after the full-time employment was terminated; (3) does not affect the individual's availability for new full-time employment; and (4) was not the primary source of the claimant's livelihood.[142] From its plain language, the sideline-business exception is of restricted application. It would not apply to individuals who started the venture after becoming unemployed or who increased their self-employment activity upon becoming unemployed. Thus, the factors that create the sideline-business exception also limit its application.

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135. *See supra* note 9.

136. § 3313(p).

137. § 3313(m).

138. *Id*.

139. *Id*.

140. This may be because the Division is already utilizing the sideline-business exception when evaluating individual claims. Individual cases are not public record; thus, there is no way to know if the sideline-business exception is a manner of practice. Superior Court discussions of UIAB decisions suggest that the UIAB is using the sideline-business exception in some cases. *See Weeraratne III*, 1995 WL 840722, at *2; *O'Brien*, 1993 WL 603363, at *3. *But see Workman*, 2011 WL 3903793, at *3 (noting, perhaps erroneously, that "Delaware courts have never recognized a side-line exception …"); *Weeraratne II*, 1994 WL 164559, at *1 (noting that neither the UIAB nor the Appeals Referee had considered "side-line" activities).

141. In this way, it is similar to the independent contractor rule. *See infra* text accompanying notes 129-131.

142. 43 Pa. Stat. Ann. § 802(h).

All of these factors are in keeping with Delaware's existing rules since regular employment that met these criteria would not necessarily exclude an individual from the definition of "unemployment" or render an individual ineligible for benefits. As a matter of practicality, the sideline-business exception could even simplify the entire self-employment analysis—if an individual met the four factors, it might obviate the need for the more complicated standard self-employment analysis.

Moreover, the sideline-business exception would provide a reasonable protection against the self-employment rule's blunt application. Delaware's statutory scheme already includes measures to foster empowerment and promote self-employment as an alternative to long-term unemployment.[143] The sideline-business exception would continue to foster those goals. In all fairness, it seems contrary to the purpose of the unemployment statute to deny a laid-off individual benefits just because that individual sells items on eBay or markets products from Avon.[144] Likewise, it seems artificial to cite to Pennsylvania's rule and policy rationale while adopting only half of its statutory scheme. Given the strictures of the exception's application, and the wage limits previously discussed,[145] there is no indication that the sideline-business exception would undermine the viability of the benefits scheme. Rather, it would merely complete the legislative framework.

III. CONCLUSION

In *O'Brien,* the Superior Court created Delaware's self-employment rule by importing a Pennsylvania statutory concept based upon the similarity between Delaware and Pennsylvania's policy statements. Since then, courts have struggled to define the rule's statutory connection and bounds. After 20 years, the rule's connection to the statutory text is still unclear, and its application is still unpredictable. The General Assembly should settle these issues by codifying the self-employment rule. Not only would legislative intervention resolve the outstanding legal and policy issues, but also it would solidify the scheme that O'Brien introduced.

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143. *See* § 3328 (describing the "Self-Employment Assistance Program").

144. Courts have already recognized the rule's potentially unfair applications. *See Scott*, 2012 WL 2580820, at *3; *Workman*, 2011 WL 3903793, at *4.

145. *See supra* note 9.