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Inconsistency at the Pole: Exotic Dancer's Employment Status Should Be Uniform Throughout the U.S.

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INCONSISTENCY AT THE POLE: EXOTIC DANCER'S EMPLOYMENT STATUS SHOULD BE UNIFORM THROUGHOUT THE U.S.

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INTRODUCTION

For a customer, there is no business more honest than a strip club. The social contract between the customer and the entertainer[2] is simple: the customer pays money; the entertainer provides a fantasy. That's it. For an entertainer, in at least twenty states, there is no business more dishonest than a strip club. In these states, where courts or legislatures have not yet classified exotic dancers as employees, clubs are almost certainly violating the Fair Labor Standards Act (FLSA) by not employing the entertainers, but retaining them as independent contractors. The precedent has been set by the majority of courts and legislatures across the country; the remaining courts and legislatures need to fall in line to avoid unnecessary costly litigation. In recent years, there have been a few circuits (and state legislatures) that have determined that exotic dancers should be considered employees under the Fair Labor Standards Act.[3] The act established minimum wage, overtime pay eligibility, recordkeeping requirements, and other downstream implications including the mental health benefits of stability and eligibility for other state and federal benefits.[4] The goal of this note is to act as a road map for club owners and legislators in those states which have not yet followed suit and provide insight into how to avoid litigation – giving them a chance to catch up instead of just hoping that this issue will never reach their

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[2] Throughout this article the word stripper, entertainer, and exotic dancer will be used interchangeably.
[3] *See infra* text accompanying notes 12-13.
[4] *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/whd/flsa (last visited Nov. 20, 2020).

corner of the world. The most recent court decision, *Verma v. 3001 Castor Inc.*, awarded $4.5 million in damages for the dancers who sued for wages under the FLSA.[5] Although gentlemen's clubs[6] in the US are currently an $8 billion dollar industry, as there is no major player with a market share greater than 5%.[7] Thus, $4.5 million is a substantial percentage of their revenue. For smaller "mom and pop" type clubs, a lawsuit like this could completely bury them. Thus, legislators and club owners should collaborate to pre-empt court decisions and avoid excessive damages.

This article will analyze this issue in four parts; Part IV, the analysis, will be split into four substantial sections. Part I will give a short summary of the history and purpose of the FLSA. It will then review the relevant facts and holdings of three circuit court cases in which exotic dancers were classified as employees under the FLSA. Finally, it will conclude with a short discussion of the test used in these cases to make that determination. Part II will start with a broader geographical analysis of the United States and summarize the current groups of states in relation to the laws surrounding exotic dancers as employees. It will then analyze the industry impact of states which mandated dancers be recognized as employees and states that still do not have such mandate. It will also discuss the potential impact on states which have not yet followed suit. Part II will then

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[5] 937 F.3d 221, 227 (3d Cir. 2019).
[6] This term will be used interchangeably with "strip club" throughout this note.
[7] *Strip Clubs Industry in the US - Market Research Report*, IBIS WORLD, https://www.ibisworld.com/united-states/market-research-reports/strip-clubs-industry/ (last visited Feb. 25, 2020).

analyze the practical implications of holding exotic dancers as employees of clubs. Part III will present an anomaly in the current framework of the industry that has the potential to lead to a destructive loophole with feature entertainers. Part IV will compare the labor rights of strippers to other sex workers. Part V will be a brief conclusion with broad recommendations for club operators and legislators, reiterating the potential impact on the health and wellbeing of the entertainers.

I. BACKGROUND

A. The FLSA: History and Purpose

The Fair Labor Standards Act was signed into law in 1938 and has been amended over time to keep up with the evolution of social policy and industries within the United States.[8] In its final form [in 1938], the Act applied to industries whose combined employment represented only about one-fifth of the labor force.[9] In these industries, it banned oppressive child labor and set the minimum hourly wage at 25 cents, and the maximum workweek at 44 hours."[10] The primary motivation of the FLSA was to eliminate child labor and set a minimum wage.

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[8] Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage,* U.S. DEP'T OF LABOR, https://www.dol.gov/general/aboutdol/history/flsa1938 (last visited Nov. 20, 2020).
[9] *Id*.
[10] Harry S. Kantor, *Two Decades of the Fair Labor Standards Act*, MONTHLY LABOR REV., 1097, 1097-98 (1958).

However, the FLSA has been expanded over the years to protect workers from "the dangers of unregulated capitalism."[11]

Today the FLSA covers any employee who engages in interstate commerce, or who is employed by an organization engaging in interstate commerce, unless otherwise exempted.[12] Exemptions from the FLSA include independent contractors, volunteers, and white-collar workers.[13] Being classified as an employee comes with various advantages, including the "[protection] of certain regulations and federal statutes that safeguard against discrimination, [in some instances] providing health insurance"[14] and eligibility for other benefits.[15]

B. The six-factor test applied by circuit courts in the leading cases

Recently, in 2016 and 2019 respectively, the 4th and 3rd Circuits held that exotic dancers should be classified as employees under the FLSA.[16] These cases continued a trend which began with the 5th Circuit in *Reich v. Circle C.*

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[11] Peter Cole, *The Law That Changed the American Workplace*, TIME (June 24, 2016, 9:30 AM) https://time.com/4376857/flsa-history/.
[12] 29 U.S.C. §203.
[13] *Id*. White collar exemptions include professional, administrative, and executive employees, generally classified as salaried employees who are otherwise not eligible for overtime pay. *Id*.
[14] Demarr W. Moulton, *The Unexpected Consequences of Classifying Exotic Dancers as Employees or Independent Contractors Under the FLSA*, 95 N.C. L. REV. 83, 85 (2017).
[15] Other statutes that provide benefits to employees include the Family Medical Leave Act, Social Security, and Medicare. *See* 29 U.S.C. § 2612(a)(1) (FMLA); 42 U.S.C. §§ 413-14 (Social Security); 42 U.S.C. § 1395c (Medicare).
[16] *See* Verma v. 3001 Castor, Inc., 937 F.3d 221, 232 (3d Cir. 2019)*; see also* McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235 (4th Cir. 2016).

Investments, Inc. in 1993.[17] In *Reich* a five-factor test[18] was applied to determine if exotic dancers should be classified as employees:

(1) the degree of control exercised by the alleged employer;

(2) the extent of the relative investments of the dancer and alleged employer;

(3) the degree to which the dancer's opportunity for profit and loss is determined by the dancer's managerial skills;

(4) the skill and initiative required in performing the job; and

(5) the permanency of the relationship.[19]

Most recently, in both *Verma* and *Mcfeeley,* an additional factor was added to the test: (6) whether the service rendered is an integral part of the alleged employer's business.[20]

1. Factor 1 - Degree of Control

Under the first factor, the courts evaluated the level of control the clubs exercised over the dancers.[21] Although no single factor was dispositive on its

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[17] *See* Reich v. Circle C Inv., 998 F.2d 324 (5th Cir. 1993).
[18] *Id.* The five factors are also known as The Economic Realities Test. Todd Lebowitz, *What is the Economic Realities Test?*, WHO IS MY EMPLOYEE (Jan. 10, 2017), https://whoismyemployee.com/2017/01/10/what-is-the-economic-realities-test/.
[19] *Id.*
[20] *See Verma*, 937 F.3d at 229; *see also McFeeley*, 825 F.3d at 241.
[21] *See Verma*, 937 F.3d at 229; *see also McFeeley*, 825 F.3d at 241.

own,[22] all 3 circuits weighed this factor most heavily for determining that exotic dancers are employees under the FLSA.[23] In *Verma,* the court recognized that the dancers had limited control over a few things, namely, setting their own hours, opting among different shifts, determining how many shifts they are committed to, working past their scheduled shift, and having the freedom to accept or reject requests for private dances. [24] In *Mcfeeley* the defendants argued that the dancers were "free in the clubs' view to determine their own work schedules, how and when they performed, and whether they danced at [other] clubs."[25] And in *Reich*, the defendants argued that any control the club exerted was to maintain decorum or to keep the club legal.[26]

All three c ourts held that the first factor weighed strongly in favor of employee status because clubs exerted an overwhelming amount of control over the dancers through the following behavior:

- Requiring compliance with weekly work schedules
- Fining dancers for absences and tardiness
- Setting prices for private dances
- Setting standards for costumes to promote the desired atmosphere
- Determining the music to which the dancers perform

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[22] *See McFeeley*, 825 F.3d at 241.
[23] *See Verma*, 937 F.3d at 230; *see also McFeeley*, 825 F.3d at 244; *Reich*, 998 F.2d at 327.
[24] *Verma*, 937 F.3d at 230.
[25] *McFeeley*, 825 F.3d at 241.
[26] *Reich*, 998 F.2d at 327.

- Limiting breaks and expecting mingling with the customers
- Requiring sign in and approval of appearance
- Prohibiting of certain behavior including drinking, smoking, loitering, leaving and returning, bringing friends and family to the club, chewing gum, or changing into street clothes[27]

2. Factors Two - Relative investments

The second factor dealt with the relative investment of the worker as compared to the alleged employer. The *Reich* court stated succinctly that "a dancer's investment is limited to her costumes and a padlock."[28] All the courts recognized that the dancer's investment was marginal compared to a club who "owns the liquor license, owns the inventory of beverages and refreshments, leases fixtures for the nightclub (e.g., the stage and lights), owns sound equipment and music, maintains and renovates the facilities, and advertises extensively."[29]

3. Factor Three - Managerial Skills of the Worker

Regarding the dancer's managerial skills, the third factor is closely tied to the second in evaluating how much the dancer's profit or loss is determined by their own managerial skills. The factor test says: the more the dancer's earnings depend on his/her own ability to manage the work, and the more he/she is personally invested in the capital and labor of the enterprise, the less the worker is

[27] *See Reich*, 998 F.2d at 327; *Verma*, 937 F.3d at 230; *McFeeley*, 825 F.3d at 242.
[28] *Reich*, 998 F.2d at 327.
[29] *Id*.

"economically dependent on the business" and the more he/she is "in business for [her]/himself" and hence an independent contractor.[30] The clubs tried to argue that the dancers had the opportunity to advertise for themselves (possibly through social media) and drive customers in to see them; that part of their success was based on how much work they did outside of the club to get patrons into the club.[31] However, all the c ourts rejected this argument stating that this work, while having the potential for impact, was marginal compared to the effect the club's managerial decisions had on the economic success of the dancers.[32]

4. Factor Four - Special Skills

The fourth factor calls for an independent contractor to have special skills and initiative in performing the job. In the case of an exotic dancer, the c ourts agree that the dancers "do not exhibit the skill or initiative indicative of persons in business for themselves."[33] Additionally, "clubs conceded that they did not

[30] McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235, 243 (4th Cir. 2016).
[31] *Id*.
[32] *See Id.* But this factor also weighs in favor of employee status. Although each dancer had some degree of control over her profits and losses, "managerial skill"—the relevant factor here—had minimal influence on them. It was the Club, not the dancers, that determined its hours, decided whether to charge admission fees, set the price for drinks and food, determined the length and price of dances on stage and in private rooms, and managed its atmosphere, operations, and advertising. Further, the dancers' skills in "dancing" and "creating a fantasy" are not the kinds of "managerial skills" that can weigh in favor of independent-contractor status. *See* Verma v. 3001 Castor, Inc., 937 F.3d 221, 231 (3d Cir. 2019).
[33] *Verma,* 937 F.3d at 231; *citing* Reich v. Circle C Inv., 998 F.2d 324, 328 (5th Cir. 1993).

require dancers to have prior dancing experience."[34] Thus, this factor easily weighed against the dancers being independent contractors.

5. Factor Five - Permanence of the relationship between worker and alleged employer

The fifth factor looks at the degree of permanency of the working relationship. Even though this factor strongly supports a finding in favor of recognizing exotic dancers as independent contractors,[35] all three courts assigned little weight to this factor.[36]

6. Factor Six - Do you need strippers to have a strip club?

The final factor weighs heavily in favor of an employee relationship;[37] without exotic dancers a club is at best just a bar, and if the club does not serve alcohol or food then it's just a room with chairs, music, and a stage.[38] In weighing the factors together, all three courts used the dancer's lack of control as the

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[34] *McFeeley*, 825 F.3d at 244.
[35] *See Verma*, 937 F.3d at 231. The *Verma* court notes that exotic dancers are especially transient, don't generally work 40 hours in a given week, and on average only work for 7 weeks out of a given year. The Court rejected these arguments because the Defendant did not give any compelling reason to divert from the precedent set by the previous courts. *Id.* The *Reich* court additionally rejected the argument that, although creatively construed, exotic dancers are not tenants who rent stages, lights, dressing rooms, and music. *Reich*, 998 F.2d at 329.
[36] *See Verma*, 937 F.3d at 232; *accord McFeeley*, 825 F.3d at 244; *Reich*, 998 F.2d at 328–29. The *McFeeley* Court also noted that the relationship between the dancers and the club was effectively at will, which could be a characterization of either an employee or an independent contractor. *McFeeley*, 825 F.3d at 244.
[37] *See Verma*, 937 F.3d at 232 (noting that the club markets itself regarding its primary offering: topless dancers).
[38] *See McFeeley*, 825 F.3d at 244.

primary driver of their holdings that the dancers are employees and *not* independent contractors. There are no Circuits that have taken up this issue and ruled contrarily.

II. ANALYSIS

The analysis section will start off with a breakdown of which states recognize exotic dancers as employees under the FLSA, and how that has been enforced. This section will primarily be a pictorial diagram of a map showing the current status of this issue, state by state. It will then analyze the industry impact to date, examining how these rulings have affected both small and large clubs. It will then examine the potential implicit impact in the states that have not yet been directly affected. The analysis will then wrap up in a discussion regarding the practical implications for clubs and dancers.

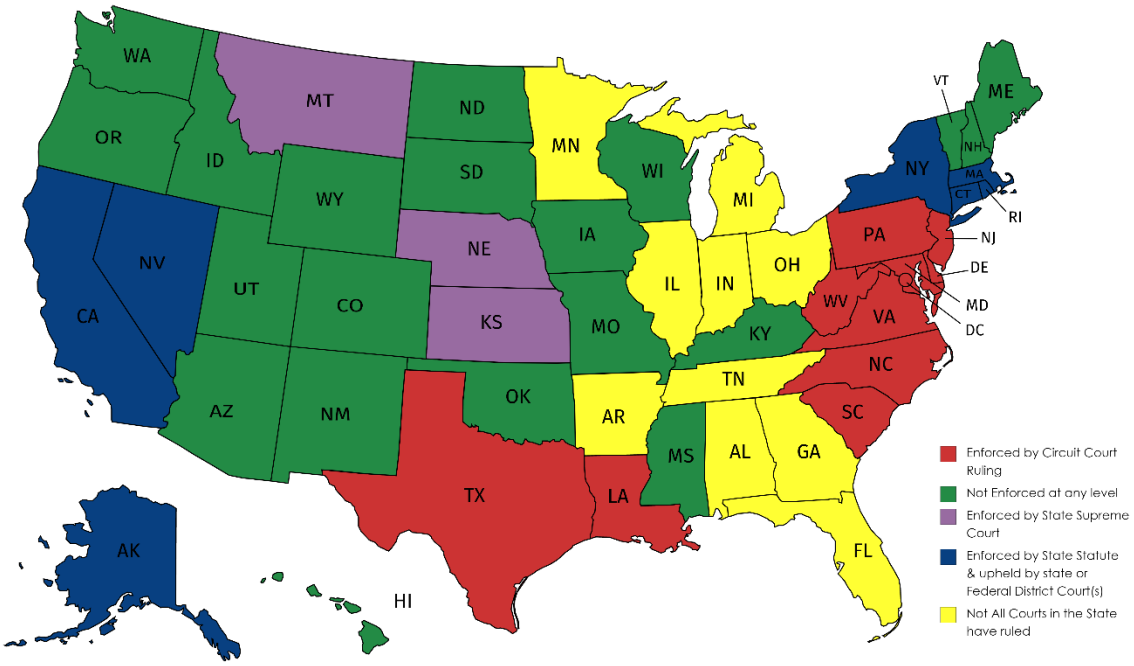
A. State by State breakdown

The United States does not consistently enforce the status of exotic dancers as employees under the FLSA.[39] The map below shows ten (10) states that are bound by the three Circuit Court decisions, seven (7) are governed by statutes that are enforced by state or district courts, three (3) states have upheld the application of the FLSA to exotic dancers at the state supreme court level, ten (10) states are

[39] *See supra* text accompanying note 33.

split by lower courts having discrepancies in ruling or not all districts/divisions have ruled, and twenty (20) states have no court rulings on the topic:[40]

[40] NEV. REV. STAT. ANN. § 612.085 (West 2022); MASS. GEN. LAWS. ANN. ch. 149 § 148B (West 2022); Cal. Assemb. B. No. 5 (2019); Tyad, Inc., A Mt. Corp. v. Independent Contractor Central Unit, 2004-1186 MTWCC 16A (Mont. Work. Comp. Ct. Apr. 8, 2005); Mays v. Midnite Dreams, Inc. 915 N.W.2d 71 (Neb. 2018); Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 907 (S.D.N.Y. 2013); Labriola v. Clinton Ent. Mgmt., LLC, No. 15 C 4123, 2016 WL 1106862, at *3 (N.D. Ill. Mar. 22, 2016); Tijerino v. Stetson Desert Project LLC, 2017 WL 9511247, at *4 (D. Ariz. 2017); Thornton v. Crazy Horse, Inc., No. 3:06-CV-00251-TMB, 2012 WL 2175753, at *16 (D. Alaska June 14, 2012); Whitworth v. French Quarter Partners, LLC, No. 6:13-CV-6003, 2014 WL 12594213, at *7 (W.D. Ark. June 30, 2014); Does 1, 2 & 3 v. Coliseum Bar & Grill, Inc., No. CV 17-12212, 2018 WL 3429984 (E.D. Mich. July 16, 2018), Morse v. Mer Corp., No. 1:08-CV-1389-WTL-JMS, 2010 WL 2346334, at *6 (S.D. Ind. June 4, 2010); Kimbrel v. DEA Corp., No. 3:14-CV-161-TAV-CCS, 2016 WL 7799340, at *10 (E.D. Tenn. Aug. 2, 2016); Goodykoontz v. Diamond's Gentlemen's Club, 187 F. Supp. 3d 1332 (S.D. Ala. 2016); Clincy v. Galardi S. Enters, Inc., 808 F. Supp. 2d 1326, 1350 (N.D. Ga. 2011); Pizzarelli v. Cadillac Lounge, L.L.C., 15-254 WES, 2018 U.S. Dist. LEXIS 117338 (D.R.I. Apr. 13, 2018) Doe v. ABCDE Operating, LLC, No. 18-1907, 2019 U.S. App. LEXIS 9214 (6th Cir. Apr. 25, 2019).



In many of the green colored states, labeled as "not enforced at any level," there have been many lawsuits settled out of court.[41] While these settlements can be great for the entertainers at issue,[42] settling out of court does not help establish precedent which would otherwise encourage change in the industry.[43] The blue colored states vary in regard to how the state statutes

[41] *See* Chile, *infra* 47.

[42] *Eastern District of Michigan Judge Approves $6.5 Million Settlement for Exotic Dancers*, WAGE AUTH. GROUP, (June 30, 2017), https://www.owedunpaidwages.com/michigan-judge-approves-6-5-million-settlement-exotic-dancers/.

[43] Robert H. Mnookin & Lewis Komhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979). Precedent helps non-litigants shape their conduct. People also settle disputes "in the shadow of the law," and that law includes precedent. *Id.*

protect exotic dancers. Not even California, which has the strongest laws in support of the employee protections for exotic dancers, explicitly references them, but instead broadly addresses independent contractors.[44]

B. Industry impact – how costly is this both from the specific lawsuit perspective as well as the overall impact

The impact to the adult entertainment industry varies depending on the magnification of the microscope used to analyze it. Individual clubs/chains, that were defendants in the cases where data is available, have suffered millions in damages.[45] Clubs in the affected jurisdictions had to make strategic decisions about how (and if) they were going to change their business based on the circuit court holdings. Some decisions made were based on individual clubs assessing the risk of being a target of litigation, instead of what the law actually is.[46] Finally, there are many jurisdictions, representing almost half of all clubs in the country, which have not yet felt this change. .

1. Cost of lawsuits

"Despite its long history, the FLSA has not always been a hotbed for lawsuits; today, however, the plaintiffs' employment bar actively pursues FLSA collective actions, which have become a major source of potential exposure for

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[44] Cal. Assemb. B. No. 5 (2019).
[45] *See* Verma v. 3001 Castor, Inc., 937 F.3d 221, 224 (3d Cir. 2019). (A jury awarded 4.5 million to a class of dancers at the penthouse club).
[46] Erin Mulvaney & Andrew Wallender, *Strippers Winning Employee Status Challenges Gig Economy's Norms*, BLOOMBERG L., (Oct. 21, 2019, 6:04 AM), https://news.bloomberglaw.com/daily-labor-report/strippers-winning-employee-status-challenges-gig-economys-norms.

employers."[47] Lawsuits regarding exotic dancers suing for backpay and employee status under the FLSA have been "skyrocketing".[48] An analysis done by Bloomberg Law reports that exotic dancers filed 406 lawsuits between 2005 and 2019, with an average of one lawsuit every four days in 2019.[49] A 2017 study showed that "[i]n thirty-eight cases, [35] courts ruled that dancers were employees; only three courts ruled that dancers were independent contractors.[50] Courts often awarded dancers minimum wages, overtime, and liquidated damages."[51]

Whether the court holds in favor of the dancers, or the club decides to settle,[52] there is still the potential for millions of dollars exchanging hands.[53] So

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[47] Lisa Nagele-Piazza, *The FLSA After 80 Years: How Has It Changed and What Lies Ahead?*, SOC'Y FOR HUM. RES. MGMT (Apr. 16, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/flsa-after-80-years.aspx.
[48] Kati L. Griffith & Leslie C. Gates, *Milking Outdated Laws: Alt-Labor as a Litigation Catalyst*, 95 CHI. KENT L. REV. 245, 266 n. 98 (2020).
[49] Patricio Chile, *Exotic Dancers Push for Employee Status*, BLOOMBERG L. (Oct 21, 2019, 5:55 AM), https://www.bloomberglaw.com/product/blaw/document/XC45QF8K000000.
[50] Only 38 were actually ruled on, as the majority of lawsuits filed on this topic end up being settled out of court. *Id*.
[51] Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249, 262 (2017).
[52] Over half of the 299 cases which were resolved ended in settlement. Mulvaney & Wallender, *supra* note 44.
[53] Does 1-2 v. Déjà vu Consulting Inc., 925 F.3d 886, 893 (6th Cir. June 3, 2019). (This ended in a $6.5 million settlement in Michigan.); Holli Hartman, *Exotic Dancers Continue to Rake in Class Action Dollar Bills*, EMP. CLASS ACTION BLOG, (Nov. 21, 2012) (detailing a $13 million settlement), https://www.employmentclassactionreport.com/flsa/exotic-dancers-continue-to-rake-in-class-action-dollar-bills/ ; Trauth v. Spearmint Rhino Co. Worldwide, No. EDCV 009-01316-VAP, 2012 WL 4755682, at *1–2 (C.D. Cal. Oct. 5, 2012) ($10 million settlement).

why do clubs keep settling if it is so costly to the clubs? As one plaintiff's attorney stated, "When they settle a case, they pay cents on the dollar; it's so lucrative to violate the law, they continue to do that, even if they pay another settlement."[54] The other legal fiction which is a pervasive driver for settlement is that settlement does not make precedent.[55] Accordingly, clubs may be continuing to settle to prevent the courts from making a ruling which would recognize exotic dancers as employees in their jurisdiction.[56]

2. Cost of changing over

In states where the laws have been clearly established, clubs have had to change their business practices. The practical impact of changing over was the increased cost in managing payroll.[57] Classifying workers as employees is "purely more costly—there's payroll tax, Social Security, Medicare tax, FICA, and they may have to pay for workers' compensation insurance—all those taxes automatically attach, then if they're tipped workers, the company has to manage wage-and-hour compliance, break rules and mealtimes.".[58] "Deja-vu", a large chain that operates 200 strip clubs throughout the country, reported an immediate

[54] Mulvaney & Wallender, *supra* note 44.
[55] *See generally* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221 (1999).
[56] Mulvaney & Wallender, *supra* note 44.
[57] Jenny B. Davis, *Why Exotic Dancers and Other Gig Workers are Seeing Employment Law Gains, COVID-19 Losses*, ABA J., (May 12, 2020, 8:00 AM), https://www.abajournal.com/web/article/exotic-dancers-are-seeing-employment-law-gains-and-covid-19-losses.
[58] *Id*.

50% decrease in income in locations where the dancers are now considered employees.[59]

In order to successfully change over, club operators have to be cognizant of the potential penalties which they could incur if they do not accurately report and pay all relevant taxes on their employees.[60] Club operators have also stated that, in an effort to ensure a seamless transition, they have tried to keep operations the same as when the dancers were independent contractors.[61] However, those same clubs found that the highest earning dancers still decided to "jump ship" after being classified as an employee.[62] Despite these facts the clubs noted that

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[59] *Id*. They also noted that they haven't seen those numbers recover from the initial loss. *Id*. In contrast, however, some clubs have reported making more money with the new mandate. Larry Kaplan, *"Gig Economy" Creates New Law in California – Is Your State Next?*, EXOTIC DANCER MAG., Nov. 2019, at 36.

[60] *See* Kaplan *supra* note 57. The article goes to lay out the extent of the risk: "It could be $5,000 per federally misclassified worker plus 20% of unpaid taxes. State penalties are equally severe, plus potential misdemeanor convictions with $1,000 fines or a year imprisonment. There are also civil penalties from $5,000-$25,000, per classification. In addition, the employee may also sue under a wage-and-hour action for not providing proper wage records, adding even more penalties." *Id*.

[61] *Id*. Although it was also noted that the club needed to be aware that, as employee's, the dancers are afforded additional protections in the workplace for which the clubs had not otherwise been administratively prepared. *See* Moulton, *supra* note 12, at 89. Here, specifically, they were discussing Title 7 and state laws which protect employees from sexual harassment and discrimination; laws which did not protect them as independent contractors. *Id*. Although it has been also noted that Title VII might not protect exotic dancers because of the test used to determine employee status under Title VII being narrower than the one used under the FLSA. *Id*. There are even arguments that go so far as to say that even if Title VII would otherwise protect exotic dancers, that they waive their right to sexual harassment claims by assuming the risk of harassment by working in the adult entertainment industry. *Id*. (citing Kelly A. Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims*?, 48 VAND. L. REV. 1107 (1995).

[62] *See* Kaplan *supra* note 57.

while it might feel like doomsday, because they are less immersed in the show and have shifted their focus to "do more paperwork and follow the rules like the rest of mainstream corporations," embracing the change does not signify an end of the industry.[63] Clubs can no longer be successful just by "having the most entertainers", their focus needs to change to raising up the consistent earners.[64] On a positive note, clubs in jurisdictions that have changed no longer need to spend time and money combatting the negative image that clubs are exploiting the dancers since they now share in the protections afforded to an employee.[65]

3. Club Closings

A survey completed in 2011 showed the following distribution of clubs throughout the United States:[66]

[63] *Id*. Although some of the data might. *See infra* table 2 .
[64] Larry Kaplan, *The Truth About Dynamex, Part 1*, EXOTIC DANCER MAG., Sep. 2019, at 62. The article states changes were supposed to protect workers, however now many workers are out of a job if they don't produce. *Id*. What they do not do is mention that the low producers were still a source of revenue for the club in terms of rental fees, fines, tip outs, etc. *Id*.
[65] *Id*.
[66] Bumrubber, *Which States Have the Most Strip Clubs for Their Population*, ULTIMATE STRIP CLUB LIST (March 7, 2011), https://tuscl.net/discussion/14845/190950. This data was pulled off a post in 2011 based on data from The Ultimate Strip Club List. These numbers will be used as baselines in comparison to how numbers of clubs have altered since *McFeeley* in 2016 and *Verma* in 2019).

State	Clubs	Population	Per Capita	Color on map	Color category	% of total clubs
Alabama	29	4779736	164818.48	yellow	Enforcement Varies	1.2%
Alaska	7	710231	101461.57	blue	FLSA Enforced	0.3%
Arizona	55	6392017	116218.49	green	Not Enforced	2.2%
Arkansas	11	2915918	265083.45	yellow	Enforcement Varies	0.4%
California	183	37253956	203573.53	blue	FLSA Enforced	7.5%
Colorado	24	5029196	209549.83	green	Not Enforced	1.0%
Connecticut	35	3574097	102117.06	blue	FLSA Enforced	1.4%
Delaware	5	897934	179586.8	red	FLSA Enforced	0.2%
Florida	201	18801310	93538.86	yellow	Enforcement Varies	8.2%
Georgia	65	9687653	149040.82	yellow	Enforcement Varies	2.7%
Hawaii	18	1360301	75572.28	green	Not Enforced	0.7%
Idaho	8	1567582	195947.75	green	Not Enforced	0.3%
Illinois	70	12830632	183294.74	yellow	Enforcement Varies	2.9%
Indiana	74	6483802	87618.95	yellow	Enforcement Varies	3.0%
Iowa	31	3046355	98269.52	green	Not Enforced	1.3%
Kansas	29	2853118	98383.38	red	FLSA Enforced	1.2%
Kentucky	38	4339367	114193.87	green	Not Enforced	1.6%
Louisiana	42	4553372	108413.62	red	FLSA Enforced	1.7%
Maine	4	1328361	332090.25	green	Not Enforced	0.2%
Maryland	52	5773552	111029.85	red	FLSA Enforced	2.1%
Massachusetts	32	6547629	204613.41	blue	FLSA Enforced	1.3%
Michigan	83	9883640	119080	yellow	Enforcement Varies	3.4%
Minnesota	28	5303925	189425.89	yellow	Enforcement Varies	1.1%
Mississippi	10	2967297	296729.7	red	FLSA Enforced	0.4%
Missouri	35	5998927	171397.91	green	Not Enforced	1.4%
Montana	8	989415	123676.88	red	FLSA Enforced	0.3%
Nebraska	12	1826341	152195.08	red	FLSA Enforced	0.5%
Nevada	44	2700551	61376.16	blue	FLSA Enforced	1.8%
New Hampshire	3	1316470	438823.33	green	Not Enforced	0.1%
New Jersey	119	8791894	73881.46	red	FLSA Enforced	4.9%
New Mexico	7	2059179	294168.43	green	Not Enforced	0.3%
New York	120	19378102	161484.18	blue	FLSA Enforced	4.9%
North Carolina	88	9535483	108357.76	red	FLSA Enforced	3.6%
North Dakota	6	672591	112098.5	green	Not Enforced	0.2%
Ohio	121	11536504	95343.01	yellow	Enforcement Varies	4.9%
Oklahoma	45	3751351	83363.36	green	Not Enforced	1.8%
Oregon	90	3831074	42567.49	green	Not Enforced	3.7%
Pennsylvania	107	12702379	118713.82	red	FLSA Enforced	4.4%
Rhode Island	10	1052567	105256.7	blue	FLSA Enforced	0.4%
South Carolina	56	4625364	82595.79	red	FLSA Enforced	2.3%
South Dakota	13	814180	62629.23	green	Not Enforced	0.5%
Tennessee	30	6346105	211536.83	yellow	Enforcement Varies	1.2%
Texas	202	25145561	124482.98	red	FLSA Enforced	8.3%
Utah	9	2763885	307098.33	green	Not Enforced	0.4%
Vermont	3	625741	208580.33	green	Not Enforced	0.1%
Virginia	34	8001024	235324.24	red	FLSA Enforced	1.4%
Washington	14	6724540	480324.29	green	Not Enforced	0.6%
West Virginia	50	1852994	37059.88	red	FLSA Enforced	2.0%
Wisconsin	69	5686986	82420.09	green	Not Enforced	2.8%
Wyoming	8	563626	70453.25	green	Not Enforced	0.3%

A follow up survey done in 2020 showed that, overall, there was a 22.2% decrease in the number of clubs in the United States.[67]

Table 2				
Category	**# of clubs in 2011**	**# of clubs in 2020**	**Difference**	**% change**
McFeeley	**280**	**187**	**-93**	**-33.2%**
Reich	**254**	**218**	**-36**	**-14.2%**
Verma	**231**	**170**	**-61**	**-26.4%**
Blue	**431**	**344**	**-87**	**-20.2%**
Green (No Regulation)	**480**	**372**	**-108**	**-22.5%**
Purple	**49**	**40**	**-9**	**-18.4%**
Yellow	**712**	**566**	**-146**	**-20.5%**
All	**2437**	**1897**	**-540**	**-22.2%**

The states with no FLSA regulation (green on the map) aligned with that average at 22.5%.[68] The states with the highest decrease (33.2%) came from the 4th Circuit, in which the *Mcfeeley* case was decided 4 years ago.[69] This decrease came from a total of 93 clubs that have closed. The rate of closure doubled after the case was decided.[70] The second highest decrease, 26.4%, came from the 3rd Circuit which most recently decided *Verma* last summer, in which a total of 61 clubs have closed since 2011.[71] If the 3rd Circuit courts follow the same trend as the 4th, over the next 3 years we can expect to see that percentage increase dramatically as compared to the rest of the country.

[67] *See infra* Table 2.
[68] *See supra* Table 2.
[69] *Id*.
[70] *Id*.
[71] *Id*.

The most interesting and unexpected piece of data was the trend in the 5th circuit. Only a 14.2% decrease occurred since 2011;[72] 8% *below* the industry average! As mentioned above, the 5th Circuit was the first to rule in favor of exotic dancers being employees under the FLSA in *Reich v. Circle C. Investments, Inc.* in 1993.[73] While there are likely many relevant variables, the data indicates that the industry in those states were substantially more stable than the industry in other states with less regulation.[74]

4. Potential impact to states which have not yet followed suit

Looking at the table and map above, almost half the clubs in the country are not yet in jurisdictions in which courts or statutes are enforcing the employee classification for exotic dancers. [75] Twenty percent (20%) of the total clubs in the country are in "green" unaffected jurisdictions and an additional 29.1% are in jurisdictions which are varied in their enforcement.[76] If the trends indicated by Table 2 are taken as a forecasting indicator, the industry can expect to lose at least an additional 10% of clubs once jurisdictions uniformly enforce the FLSA.[77]

C. Real Impact to "Mom and Pop" Clubs

Most of the articles which have been written on this topic have been focused on large chains (e.g. Deja-Vu) or on the multi-million-dollar lawsuits

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[72] *Id*.
[73] 998 F.2d 324 (5th Cir. 1993).
[74] *See supra* Table 2.
[75] *See supra* Table 1.
[76] *See* Bumrubber, *supra* note 64.
[77] *See supra* Table 2 (comparing trends in green no regulation states to the Third and Fourth Circuit trends).

brought against large clubs. However, the perspective of the standalone small to medium sized club was not heavily reported on. Thus, I took it upon myself to conduct an extensive interview with a forthright club owner and his general manager at a medium sized club who still operates with dancers as independent contractors. The club is situated in a midwestern state which has not yet ruled completely on whether exotic dancers are employees.[78] The club can seat over 300 customers, has a total roster of 30 and 40 dancers spread across multiple shifts 7 days per week,[79] and generates ~$30k/week in gross revenue.[80]

When asked about pros and cons for the dancers as employees of the club, it was stated that the biggest pro is the opportunity to exert more control regarding schedules, outfits, and stage presence.[81] For cons, the biggest issue is the need for more overhead on payroll/tips tracking which currently the dancers do for themselves. Every dollar thrown on stage, and every dollar that is handed to the dancer, would need to be accounted for by the club. The club also recognized that

[78] *See supra* Map (This club is located in one of the yellow split states).
[79] Interview with [redacted], Club Owner/Operator, in Ohio (Oct. 15, 2020) [hereinafter Interview]. Winter months for midwestern strip clubs are not very lucrative for the club or the dancers. *Id*. Because of this, dancers are known to follow the snowbirds and spend time in southern markets such as Florida and Georgia. *Id*.
[80] This compares to larger clubs in more populated/tourist markets which bring in $200 – 300k per week. *Id*.
[81] At the moment this club recognizes that they have no real way to enforce girls to dance on stage in the independent contractor model. *Id.* Additionally the club operates much more conservatively than twenty years ago as the prevalence of litigation on the issue of dancers being employees under the FLSA continues to increase. *Id*.

this potentially increases the risk of clubs getting audited by the IRS in the case of girls potentially being dishonest and not reporting all their tips.[82]

Additionally, the club will likely only employ the dancers as part timers to avoid having to take on the additional expense of providing health insurance to them.[83] Under the Affordable Care Act, companies with more than 50 full time equivalent employees must provide health insurance or pay a penalty.[84] One full time equivalent does not necessarily equate to one individual, but could be 100 individuals who work part time and whose hours add up to 50 full time equivalents.[85] To avoid the additional cost, the club would also likely have to consider cutting back on the club hours to skirt this line.[86]

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[82] *Id*. an article in ED publications also comes out directly and attacks the statutes and judicial decisions, stating: "Make no mistake, while couched as workers' rights protection, this legislation is all about money and power. States could never collect withholding and other taxes from non-employees to help balance budgets; [a]nd organized labor unions have had no leverage to get them to join and pay dues." Larry Kaplan, *First California – now New York and New Jersey?!*, EXOTIC DANCER MAG., Mar. 2020, at 66 [hereinafter *First California*]. The article then goes on to say that employees will be paying thousands more than comparable contractors. *Id*.

[83] *Affordable Care Act (ACA)*, EMP. L. HANDBOOK, https://www.employmentlawhandbook.com/federal-employment-and-labor-laws/aca/#:~:text=Under%20the%20ACA%2C%20a%20full,to%20comply%20with%20the%20ACA (last visited Nov. 1, 2020). Under the ACA, companies with more than 50 full time equivalent employees must provide health insurance or pay a penalty. *Id.* 1 Full time equivalent doesn't necessarily equate to one individual, but can be 100 individuals who work part time, whose hours add up to 50 full time equivalents. To avoid the additional cost, the club would probably have to cut back on the total hours open as well to skirt this line. Grossman*, supra* note 6.

[84] Id.

[85] Id.

[86] *See* IBIS WORLD, *supra* note 7.

In my last lines of questioning, I asked why they have not yet changed over if the risk of lawsuits exist, and what would happen to the business if suddenly a court ruled that all dancers in his jurisdiction were employees. The club leadership said that until all the clubs in his region are forced to change over, they cannot risk being trailblazers and potentially losing their entertainers. However, they feel that they could make the change and still survive the additional costs and potential loss of entertainers. When asked why they are willing to still shoulder the risk of being sued they responded, "we are not a big enough target to sue; but if we were sued then we would probably lose, the lawyers would take everything, and there wouldn't be anything left for the dancers."[87]

D. Pros and Cons to the Entertainers

Despite the large number of lawsuits, possibly instigated by attorneys looking for lawsuits where one may not exist,[88] there is a fair amount of

[87] Additional note, the club leadership feels that they have gone out of their way to comply with the FLSA standards by exhibiting very little control and giving broad freedom to the entertainers. *Id*. However, the leadership still feels that they would still lose in court because of the stigma against gentleman's clubs in the courts. *Id*. The sentiment is not completely misplaced considering the win loss rate of clubs vs. dancers. LeRoy, *supra* note 49.

[88] Stoy Law Group, *Beware! What You Need to Know About Ambulance Chasers*, WARRIORS FOR JUST., (Apr. 12, 2017), https://www.warriorsforjustice.com/what-you-need-know-ambulance-chasers/#:~:text=What%20are%20Ambulance%20Chasers%3F,up%20with%20an%20unethical%20attorney. In the aforementioned interview there was note that some dancers informed the club management that they were being contacted by attorneys in the hopes of initiating action against the club. *See* Interview, *supra* note 77.

opposition to the employee classification by the dancers.[89] One of the main concerns of the dancers is the preference for anonymity; most exotic dancers do not want to share detailed personal information about themselves because of the sensitive nature of the work they do.[90] Under the FLSA, the club operators would have to keep historical payroll records and maintain personal information including name, address, birthday, and schedule.[91] This contrasts with the freedom that a dancer has as an independent contractor where they need not provide anything more than a stage name and are paid entirely in cash.[92] As independent contractors, a dancer can refuse to dance for a customer if they do not feel comfortable; as an employee they might not have that freedom.[93]

Additional concerns include the inability to write off clothes and makeup as business expenses under the employee classification.[94] Furthermore, some

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[89] *See, e.g.*, Stormy Daniels, *Stormy Daniels: Strippers Need to be Treated as Freelancers, Not Employees*, L.A. TIMES, (Feb. 5, 2019, 1:55 PM), https://www.latimes.com/opinion/op-ed/la-oe-stormy-daniels-strippers-dynamex-california-20190205-story.html.

[90] *Id*. *See also* Moulton, *supra* note 12, at 91.

[91] Daniels, *supra* note 84 (citing 29 U.S.C. §211(c) (2012)).

[92] *See* Interview *supra* note 77.

[93] *Id*.

[94] Larry Buhl, *Strippers Clash Over Employment Status in Dueling L.A. Protests*, KQED, (Apr. 3, 2019), https://www.kqed.org/news/11737567/strippers-clash-over-employment-status-in-dueling. A personal note of concern also revolves around the possibility of clubs using this article as a road map to employing exotic dancers, and then instead of paying them an hourly wage, making them salaried exempt employees and forcing them to work more than a 40-hour work week, making their relative hourly wage below minimum wage. Currently, to be salaried, an "[employee] generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $684* per week." *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB. https://www.dol.gov/whd/overtime/fs17a_overview.pdf (last visited Mar. 6.

dancers feel that they no longer have the potential to make as much money as they used to.[95] One of the strongest, albeit no longer valid,[96] arguments, is the idea that the most successful strippers are entrepreneurs. However, the courts[97] and many exotic dancer labor organizations disagree with the idea that being paid minimum wage will kill the need for the entrepreneurial spirit.[98]

"Soldiers of the Pole," a labor movement of sex workers and strippers, have been reacting positively to the changes in classification and the resulting

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2022). The closest category that exotic dancers could fall into would be that of a creative professional where "[t]he employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." *Id*. However, this exemption is most likely meant to target specific types of employees who are already well compensated, and the type of work was difficult to quantify. Shelley Attadgie, *Combating the Actor's Sacrifice: How to Amend Federal Labor Law to Influence the Labor Practices of Theaters and Incentivize Actors to Fight for Their Rights*, 40 CARDOZO L. REV. 1045 (2018). However, the "special skills" factor of the economic realities test has regularly, albeit potentially erroneously, been ruled against the exotic dancer; this would be in favor of preventing a club from exploiting the dancers by forcing them into an exempt role. *See supra* text accompanying note 27.

[95] One dancer estimated that her overall pay is down 30 – 60 percent, saying that her best night averages $500 a night vs. the $1500 she used to get. Mulvaney, *supra* note 44. This is attributed to the clubs capping their work to 40 hours a week, because they are unwilling to pay them overtime; as opposed to letting the dancers work as long as they want to make as much money as possible. *Id*.

[96] Derek Thompson, *The Myth of the Millennial Entrepreneur*, ATLANTIC, (July 6, 2016), https://www.theatlantic.com/business/archive/2016/07/the-myth-of-the-millennial-entrepreneur/490058/.

[97] *See* Verma v. 3001 Castor, Inc., 937 F.3d at 232; *See also* McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235 (4th Cir. 2016).

[98] Sascha Cohen, *Strippers Are Turning to Old-School Union Tactics to Fight for Fair Wages*, HUFFINGTON POST, (June 14, 2019), https://www.huffpost.com/entry/strippers-union-fair-wages_n_5cf97c7ae4b06af8b505a2f2.

opportunities for unionizing.[99] They feel that in unionizing, they can address other issues that have always existed within the industry (even while working as independent contractors) that they were unable to address as independent contractors, including "racism, discrimination, wage theft, assault, racketeering, and exploitation."[100] Other advantages of being an employee come through FMLA benefits, Social Security benefits, and potential healthcare benefits under the Medicare and the Affordable Care Act.[101] However, it has been noted that classification of an employee under the FLSA does not immediately grant the same status under other federal statutes.[102] Yet, recent rulings from the National Labor Relations Board seem to indicate that strippers can unionize if they are employees of the club.[103]

In 2020, yet another facet of this debate was uncovered: Covid-19 and the CARES Act. Many clubs were closed temporarily (and some may remain that

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[99] Antonia Crane, *Soldiers of the Pole: Strippers Fight Back Against Wage Theft*, LOS ANGELENO, (May 2, 2019) https://losangeleno.com/features/strippers-strike-los-angeles/#:~:text=Soldiers%20of%20Pole%2C%20the%20group,of%20other%20labor%20law%20violations.

[100] *Id*. A plaintiff's lawyer also characterized that the way that club operators frame the issue is a false dichotomy: "It's all in how you ask the questions. If you say, 'Do you want to have a flexible schedule and not have a boss peering over your shoulder?' the answer is yes, but that's a false choice. The real question is, 'Do you want the protection of laws?'" Davis, *supra* note 57.

[101] *See supra* text accompanying note 13.

[102] *See also* Moulton, *supra* note 12, at 84 (*stating* that the NLRA, OSHA, and Title VII aren't immediately applied to exotic dancers just because of the ruling under the FLSA. But that the "FLSA ruling could possibly [be] used as a persuasive authority in a case regarding classification of workers under other statutes").

[103] Nolan Ent., Inc, 09-CA-220677, 2019 JD-60-19 (N.L.R.B. Jan. 24, 2019), https://apps.nlrb.gov/link/document.aspx/09031d4582cdaaed. This decision is unpublished and nonbinding.

way) as a result of the Coronavirus. The extent which the coronavirus will have on the adult entertainment industry, and the economy as a whole, will likely not be realized until we are well into 2022 or beyond. At the time this article was first written, there was no vaccine on the horizon and no way to know for sure whether the economy was on its way to recovery or headed into a deep recession. [104] Some dancers had to resort to creatively incorporating their talents with the industries which were still operating, which gave birth to Boober Eats (a play on words of the food courier service Uber Eats).[105] Dancers who were classified as employees had the opportunity to apply for unemployment; however, the dancers who were still considered independent contractors were left with no financial relief.[106] Although it may still be challenged in court, the Small Business Administration has rules against loaning money to those engaged in activities of a "prurient sexual nature." [107] This issue would not even be of consideration if all exotic dancers were uniformly classified as employees. The end result, entertainers were left without income or an ability to rely on the same Pandemic Unemployment Assistance (PUA) benefits that every other employed worker relied on throughout the country. This in turn led to many strippers turning to other forms of virtual sex

[104] *See* Davis *supra* note 57.
[105] Nick Hall *Out of Work Strippers Launch Boober Eats, the Topless Meal Delivery Service*, Man of Many, (June 1, 2020), https://manofmany.com/lifestyle/food/boober-eats-topless-delivery-service.
[106] *See* Davis *supra* note 57.
[107] *Id*. The clubs themselves also suffered because they were not able to apply for PPP loans due to the SBAs clause against prurient activities. Camelot Banquet Rooms, Inc. v. United States SBA, 7th Cir. No. 21-2589, 2022 U.S. App. LEXIS 2460, at *20 (Jan. 26, 2022). This was upheld in a recent 7th Circuit decision. *Id*.

work, which was less anonymous and localized. [108] As clubs began to open up, and entertainers engaged in "encounters as socially un-distant as lap dances, [the entertainers were] forced to choose between income and safety.[109]

III. ARE ALL EXOTIC DANCERS' CONSIDERED EMPLOYEES AS DEFINED BY THE FLSA?

A. Feature Entertainers

As mentioned, three circuit courts found that strippers are employees as defined by the FLSA by applying a six-factor test. Some club owners who operate outside of those jurisdictions feel strongly that their model satisfies the factors and, barring any bias, would expect the courts to hold differently in their case. This section will not examine whether, based on the holdings of courts, a club legally have dancers be independent contractors under the six-factor test, because thinking up a hypothetical new club that fits that mold seems like a paper within itself. Instead, this section will highlight a problem with the holding of the courts; as it does not seem to pertain to "feature" entertainers at the moment, but maybe it should.

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[108] Charlotte Dean, *Skins Star Megan Prescott Turned to OnlyFans during the Pandemic to Survive*, DAILY MAIL (Jan. 11, 2022 12:06 PM), https://www.dailymail.co.uk/tvshowbiz/article-10390253/Skins-star-Megan-Prescott-turned-OnlyFans-pandemic.html.

[109] Samantha Cole, *National Labor Relations Board Rules in Favor of Strippers Who Want to Unionize,* VICE (Aug. 6, 2020 9:00 AM), https://www.vice.com/en/article/qj4xeb/national-labor-board-rules-in-favor-of-strippers-who-want-to-unionize.

In the March 2020 issue of ED Publications, a survey showed that only 17% of clubs do not use feature entertainers.[110] A feature entertainer is an individual who is signed to an agency which books them to perform shows in a multitude of clubs across the country. These entertainers generally have notoriety for having unique attributes which attract customers to the club.[111] Through their agents, the feature entertainers' contract to perform at a club,[112] doing some manner of stage dance, and possibly performing private dances as well.[113]

While it is notable that none of the factors analyzed by the courts asked whether the worker signed an agreement stating that she is an "independent contractor," there are only a few differences[114] between the independent contractor contracts which were deemed unacceptable and the ones which feature entertainers use.[115] The main driver of this issue not finding attention today is likely the fact that feature entertainers are guaranteed some money, whereas a standard independent contractor entertainer has the possibility of losing money. A

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[110] *First California, supra* note 80.
[111] In the past, many feature entertainers were porn stars, however with the decline of the traditional porn stars, more feature entertainers have popped up that achieve notoriety through other means. *See* Interview *supra* note 77.
[112] Usually 2 – 3 shows a night on a weekend. *Id*.
[113] Author's note: When Stormy Daniels was doing her tour after the scandal with the sitting POTUS, I felt compelled to see what the fuss was about. In addition to her performing a stage dance, in which she solicited tips directly from the audience, she performed private dances for additional tips above and beyond her contract.
[114] *See infra* Part III for analysis.
[115] *See* Verma v. 3001 Castor, Inc., 937 F.3d 221, 230 (3d Cir. 2019).

standard feature contractor will be compared/contrasted under the same six factor test:[116]

1. The Degree of Control Exercised by the Alleged Employer

The courts have held that this factor is the one which weighed most in favor of the strippers being employees under the FLSA. It could be argued that the club has even *more* control over a feature entertainer than a standard entertainer in the club. This control comes through more explicit contracts with feature entertainers which dictate exact show times and lengths. The contracts can also include expectations around engaging with customers, prohibition of certain behaviors, and wardrobe requirements. If anything, this factor weighs more heavily against a feature entertainer being a contractor than a standard entertainer who might have some wiggle such as when the standard entertainer can take breaks, when they go on stage, to name a few examples.

2. The Extent of the Relative Investments of the Worker and Alleged Employer

Aside from any unique and expensive props, this factor remains unchanged in comparing a feature entertainer to a standard entertainer. The courts noted that the clubs maintain the premises, pay the licensing fees, purchase

[116] I obtained a handful of feature contracts from the same club owner who provided the interview above. *See* Interview *supra* note 77. The contracts were from 3 different agencies and were essentially identical in regard to the terms of the contract.

alcohol, and more.[117] However, a feature entertainer is not investing substantially more than a standard entertainer would, so there is no evidence that this factor should weigh differently between the two types of entertainers.

3. The Degree to Which the Worker's Opportunity for Profit and Loss is Determined by the Dancer's Managerial Skills

Here, the courts continued to lean on the first factor as a justification for why the factor weighed in favor of the dancers being employees.[118] On the other hand, a feature entertainer, on her own or through her agent, works hard to "hustle to increase their profits."[119] The hustle is greater than that of a standard entertainer because the feature not only has to hustle to obtain notoriety to attract the customers to the club, but they also have to sell that brand to the club operators in order for them to book their shows. This factor would likely weigh more heavily in favor of the feature entertainer being an independent contractor as compared to the standard entertainer who can rely on the club's "hustle" to bring customers in for them.

4. The Skill and Initiative Required in Performing the Job

The *Verma* court refused to recognize being on stage, providing private dances for customers, and having good appearance and hygiene as special

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[117] *Verma*, 937 F.3d at 231.
[118] *Id*. Although each dancer had some degree of control over her profits and losses, "managerial skill"—the relevant factor here—had minimal influence on them. *id*.
[119] McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235, 244 (4th Cir. 2016).

skills.[120] A feature entertainer show varies between 10 – 30 minutes, as compared to a standard entertainer who is generally only on stage for 3 – 6 minutes at a time. Additionally, the feature entertainer may be performing a show which does require skills that a standard entertainer may not otherwise possess.[121] Comparing the two populations, the courts may find some additional weight in this factor in favor of the independent contractor status. However, it is unlikely that this would tip the scales, because, as the *McFeeley* Court noted, "skill displayed by the most accomplished dancers in a ballet company would hardly by itself be sufficient to denote an independent contractor designation."[122]

5. The Permanence of the Relationship

The *Mcfeeley* court also clearly stated that given the inherently itinerant nature of the work of an exotic dancer, the factor did not weigh heavily one way or another.[123] In contrasting a feature entertainer to a standard entertainer there is an obvious difference in time spent at one establishment as compared to another. However, since the courts said that the amount that a standard entertainer spends

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[120] *Verma*, 937 F.3d at 231. Authors note: I think that some implicit bias fueled by the stigma against strip clubs influenced that statement. I would challenge any of those judges to dance mostly naked on a stage for 6 minutes and still look and smell attractive to the average customer right after the stage dance.
[121] Although I don't think that just being a porn actor and being in the building would qualify as a special skill. However, some feature entertainers do have extensive showgirl routines and engage in more physically demanding acrobatic activities. *See* Interview *supra* note 77.
[122] *McFeeley*, 825 F.3d at 244.
[123] *Id*.

at a club already does not weigh in favor of the employee classification, this factor does not change the outcome.

6. Whether the Service Rendered is an Integral Part of the Alleged Employer's Business

If the feature entertainer was doing her show at a concert or a country club, then this factor could be weighed in favor of the entertainer being an independent contractor. However, for the purposes of this analysis we will assume that feature entertainers are primarily performing their acts for strip clubs. And, as noted above, this factor weighs heavily in favor of the entertainer being an employee. Although, it can be argued that without a feature entertainer there are still standard entertainers;[124] without any entertainer, the club is, at best, a bar or restaurant, or a theater worst.

7. The Problem

Assuming that feature entertainers would not fall into an employee category despite the above reasons, how much of a problem does this pose as a loophole in the industry? Could a club owner create a separate entity which is the agency for the entertainers, then sign an extended contract with the club for these entertainers to be "booked" for "shows"? Could entertainers who do not want to be classified as employees reclassify themselves as agent/entertainers and negotiate a contract with the club which precludes them from employee status? Could clubs require that of the entertainers they allow to dance in their clubs?

[124] This idea would weigh in favor of the feature entertainer being an independent contractor.

There are some unanswered questions in this space which can be leveraged or exploited.

B. Outcall Entertainers

The focus up until now has been the stripper inside the club because that is the locale where the issue of whether or not they should be employees of the club exists. Even in the above discussion regarding feature entertainers, the focus was still on the entertainer going from club to club. But there exists a whole other category of exotic dancers which should offers a stark contrast. In other words, there exists exotic dancers who are true, unmistakable, independent contractors: the outcall stripper. These are the entertainers who will come to a hotel room, office, or residence and perform for their audience in that space. Some of these entertainers are booked via agencies.[125] However, these agencies are nothing more than middlemen facilitating introductions and taking a cut.[126] Weighed with the factors of the economic realities test, these entertainers will always come out as independent contractors. There is no employer controlling them. All of the investments into costumes/music/transportation are their own, and their success is completely based on their own entrepreneurship. Additionally, aside from the referral services, there is no relationship with a potential employer to even analyze, let alone weigh in favor of employment. Contrasting a dancer at a club, who doesn't have a shred of this freedom, there is no question that these outcall

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[125] A cursory google search yielded dozens of results including hotpartystripper.com and hbstrippers.net.
[126] *See e.g. Stripper Jobs Available*, HUNKS & BABES https://www.hbstrippers.net/hiring-strippers/ (last visited Feb. 8, 2021).

entertainers are independent contractors. This contrast illustrates yet another argument in favor of club entertainers to being considered employees.

IV. COMPARISON OF EXOTIC DANCERS' LABOR RIGHTS TO THOSE OF SIMILAR PROFESSIONS

There are two groups of professionals that are most similar to the exotic dancer, which are other stage entertainers (e.g. actors, musicians, circus folk, and comedians)[127] and sex workers (e.g. prostitutes, porn actors, and phone sex operators). Regarding other stage entertainers, some of these professions have long traditions of established labor rights[128] while others are only recently engaging in the battle.[129] By contrast, aside from porn actors,[130] labor rights for sex workers have taken a back seat to the general fight for decriminalization.[131] However, in comparison to strippers, it seems that where legal, sex workers are better protected than their less prurient counterpart.

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[127] This article will not go into too much depth regarding the other non-sex worker type stage entertainer.
[128] *See* Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins, 189 F.2d 865 (2d Cir. 1951); *see also About Equity*, ACTOR'S EQUITY https://www.actorsequity.org/aboutequity/ (last visited Feb 5, 2021).
[129] Gayla Johnson, *Do Standup Comedians Need to Join a Union? Here's What You Should Know*, BACKSTAGE (Sept. 16, 2019, 10:00 AM), https://www.backstage.com/magazine/article/standup-comedians-unions-68987/.
[130] *About I.E.A.U.*, INT'L ENT. ADULT UNION https://www.entertainmentadultunion.com/ (last visited Feb 7, 2021).
[131] *See* LaLa B Holston-Zennel, *Sex Work is Real Work, and it's Time to Treat it That Way*, ACLU (June 10, 2020), https://www.aclu.org/news/lgbt-rights/sex-work-is-real-work-and-its-time-to-treat-it-that-way/; *see also* Oliver J. McKinstry, *We'd Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 UNIV. PA. J. LAB. & EMP. 679, 693-94 (2007).

A. Workers Engaging in Consensual Sexual Contact for Compensation

In the continuum of sex workers, "workers" [132] are the only ones who actually have sex with their clients. Presuming that there is not an additional person in the room monitoring the technique and performance, one would presume that the economic realities test would favor the status of independent contractor over employee. However, Nevada's restrictive laws, that force workers to work only in licensed brothels, changes the dynamic.[133] The brothels are required to enforce dozens of laws in order to operate legally. This includes placing certain restrictions on the workers.[134] As a result, in 2016, the Nevada Department of Employment made a determination that workers in legal brothels are employees and not independent contractors.[135] Whether that ruling will be

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[132] Typically workers in area of sex work refer to themselves as sex workers, but for the sake of clarity this paper must distinguish between the overarching category of sex worker that includes strippers, porn actors, and other related to the sex industry and this specific type of worker that engages in consensual sexual contact for profit. For the duration of the paper, this specific sex workers will simply be refered to as "workers."

[133] NEV. REV. STAT. ANN. § 201.354 (West 2022).

[134] Such as NEV. REV. STAT. ANN. § 201.390 (West 2022) (requiring condoms) and NEV. REV. STAT. ANN. § 201.356 (West 2022) (requiring periodic STI testing).

[135] This ruling is still highly disputed in a recent court case requiring the Department to release records used to make the determination. *See Records to be Released on Nevada Prostitute Employee Ruling*, ASSOCIATED PRESS (Mar. 27, 2020), https://apnews.com/article/86217228ffd84a8cdb497d77f38421b7; *see also* State Dep't of Emp., Training & Rehab., Emp. Sec. Div. v. Sierra Nat'l Corp., 460 P.3d 18 (Nev. 2020). Additionally, it seems that it isn't being uniformly enforced as exhibited by recent complaints of prominent workers stating, "Sex workers are considered independent contractors, but they are not allowed to do work outside of brothels, meaning the house always takes 50 percent and sex workers have to pay their own taxes and business expenses and they don't get any benefits." Eve Peyser, *Nevada Sex Workers Are Getting Stiffed by COVID*, INTELLIGENCER (Dec. 9, 2020), https://nymag.com/intelligencer/2020/12/nevada-sex-workers-are-getting-stiffed-by-covid.html.

upheld and uniformly enforced throughout the state has yet to be determined. It does, however, seem that workers are on their way to enjoying the protection of employee status which many of their exotic-dancer counterparts do not have.[136] In comparing the legal workers of Nevada to exotic-dancers, the workers are most like the exotic-dancers who perform in clubs.[137] The fact that the workers have no legal choice other than to be a part of a brothel does not negate the fact that dancers who perform in clubs should be considered employees. If anything, it strengthens the argument by showing that if workers in a brothel are employees, then so should strippers in a club, whose performance is being monitored,be considered employees.[138]

B. Porn actors

Although it is still very recent, there is a union[139] which was founded specifically to combat issues within the porn industry focusing on "positive change."[140] Among the union's twelve goals, the top one is to change work status

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[136] Side notes: First, it is common knowledge that Nevada is the only state in the union in which prostitution is legal and second, logic dictates that it is easier to get one state to change than all 50.

[137] As opposed to the outcall stripper discussed above.

[138] The conclusion here is drawn based on the idea that strip clubs and brothels both exhibit more control over the respective worker than an independent "outcall" worker would enjoy.

[139] INT'L ENT. ADULT UNION, *supra* note 117. Granted official approval by the Department of labor in 2015, the International Entertainment Adult Union has since registered 3 chapters, the most active of which is the Adult Performers Actors Guild. *Id.*

[140] Ruby, *The Vice President of the Adult Performers Actors Guild has Penned an Official Statement: WHY WE ARE HERE*, PORN NEWS TODAY (Feb. 3, 2019), https://www.pornnewstoday.com/index.php/2019/02/03/the-vice-president-of-the-adult-performers-actors-guild-has-penned-an-official-statement-why-we-are-here/.

from independent contractor to employee throughout the country.[141] This aligns with the 2014 ruling by the California OSHA Appeals Board[142] and a California Court of Appeals, that porn actors are employees.[143] These rulings were later was solidified via legislation by the passing of Assembly Bill 5 regarding gig workers in California.[144] All of this will make unionizing and regulating the industry much easier.[145]

Although they perform different functions, porn actors and exotic dancers deserve the same protections afforded by employee status. Unfortunately,

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[141] *Goals for 2018 & 2019*, INT'L ENT. ADULT UNION https://www.entertainmentadultunion.com/?zone=/unionactive/view_page.cfm&page=GOALS (last visited Feb. 13, 2021).

[142] Holding that porn actors are employees and are thus covered by occupational safety and health standards. *Potential Misclassification of Workers in the Adult Film Industry*, RHDTLAW https://www.rhdtlaw.com/potential-misclassification-of-workers-in-the-adult-film-industry/ (last visited Feb. 2, 2021).

[143] Deupree v. Workers' Comp. Appeals Bd. (Doe), 2 Cal. WCC 1025 (2008) (holding of employee status was regarding a worker's compensation claim). The court used a test similar to the economic realities test (explored in depth above); they stated that the producer controlled "[a]ll meaningful aspects of the business relationship and had the primary power over work safety, including the types of HIV tests for performers, the collection of test results, the use of condoms, and the direction of the filming." *Id.* at *1.

[144] *AB5 Passes in California Making Many Independent Contractors Employees*, ADULT PERFORMERS ACTORS GUILD (Sep. 30, 2019), https://apagunion.com/2019/09/30/ab5-5-passes-in-california-making-many-independent-contractors-employees/. This statute also extended to cam girls and cam girl websites hosted in California. *How California AB5 Impacts Camming Models*, WEBCAM STARTUP, https://webcamstartup.com/california-ab5/ (last visited Feb. 7, 2021).

[145] Having one law that clearly states porn actors are employees is way easier than trying to navigate "[t]he nexus of employment law, healthcare law, First Amendment free speech rights, Fourth Amendment privacy interests, Fourteenth Amendment equal protection, the Commerce Clause, and the Civil Rights Act of 1964," which all loosely regulate the porn industry. Claire Mellish, *Regulating the Porn Industry: Change from the Inside*, 24 PUB. INT. L. REP. 34 (2018).

California's progressive laws do not protect exotic dancers outside of the state.[146] Thus, porn actors have better protection in this country than exotic dancers; not because of federal court rulings regarding the FLSA, but because of state court rulings and state statutes.[147]

V. CONCLUSION

There is currently no uniformity across the country in terms of how[148] and whether[149] exotic dancers are recognized as employees under the Fair Labor Standards Act. Recent trends in precedent have indicated that, when lawsuits are brought to trial and not settled out of court, there is no question as to whether exotic dancers are employees.[150] "The fact that dancers win 93% of their wage lawsuits means that clubs should abandon this exploitative model and pay dancers wages in an employment relationship."[151] Additionally, as compared to porn

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[146] Obviously.

[147] In the back of your mind, you may be thinking "well, what about porn stars in the other 49 states?". Well, every other state other than New Hampshire views the production of hardcore pornography as prostitution, and since prostitution is only legal in Nevada, the production of pornography is illegal throughout the majority of the country. *The Problem with Producing Porn Outside California*, ADULT BIZ LAW, https://adultbizlaw.com/2012/09/21/the-problem-with-producing-porn-outside-california/ (last visited Feb. 11, 2021); *see also* People v. Harold Freeman, 758 P.2d 1128 (Cal. 1988) (holding that porn is not prostitution in California); State v. Theriault, 960 A.2d 687 (N.H. 2008) (holding that producing pornography is covered under the 1st amendment). Thus, the labor rights of porn actors is not a widespread issue.

[148] Via statute, state court, or federal court.

[149] *See supra* Map.

[150] *See generally* McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235 (4th Cir. 2016); Verma v. 3001 Castor, Inc., 937 F.3d 221 (3d Cir. 2019).

[151] Leroy, *supra* note 49, at fn.164 (quoting *Strip Clubs Get Away with Exploiting Dancers Every Day*, THINKPROGRESS, (Nov. 4, 2015),

actors and workers, exotic-dancers enjoy the least amount of protection in a similarly vulnerable profession.[152] As we saw in the most recent COVID-19 pandemic, this classification forced strippers into more unsafe practices of sex work (e.g. OnlyFans), or just returned to work and putting themselves and their loved ones at risk because there were no unemployment benefits to protect them. This is discrimination against strippers, in leaving them without a safety net will only lead to more risky behavior, stress, and health issues.

State legislators have the opportunity to take control of the issue and pass statutes, such as AB5 in California, to preclude the need for the courts to hear cases which have a forgone conclusion. However, without such statutes, and absent any precedent, the courts would have to engage in lengthy and costly litigation. Club operators can also lobby state legislators to prioritize this process so that they are not forced to burden the risk of lawsuits just to compete with each other. In parallel, club operators should modify their business to be as close to compliant with the FLSA as they can so that they avoid the cost of a jarring transition. All these paths should be taken to protect the industry and, in turn, protect the dancers.

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https://thinkprogress.org/strip-clubs-get-away-with-exploiting-dancers-every-day-but-these-strippers-are-fighting-back-fb3a204bcc5a#.g9tgbb6ew).

[152] *See supra* section IV.