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UFC Fighters Are Taking a Beating Because They are Misclassified as Independent Contractors. An Employee Classification Would Change the Fight Game for the UFC, Its Fighters, and MMA

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UFC Fighters Are Taking a Beating Because They are Misclassified as Independent Contractors. An Employee Classification Would Change the Fight Game for the UFC, Its Fighters, and MMA

Abstract

The current state of affairs in the sport of mixed martial arts (MMA) is overwhelmingly in favor of the companies promoting the fights and not in favor of the athletes actually putting their health and lives at risk. This article looks at the Ultimate Fighting Championship (UFC) and how it classifies its fighters as independent contractors rather than employees, even though it treats the fighters more like employees. This article addresses issues fighters are having with the current classification and then examines how the fighters could be classified as employees. Finally, the article will address what an employee classification would mean for the UFC, its fighters, and MMA in general.

Keywords

mixed martial arts, UFC, MMA, NLRA, labor law, professional fighting, independent contractors, employees

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Vincent Salminen

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INTRODUCTION

Mixed Martial Arts (MMA) is one of the fastest growing sports in the United States and also the world.¹ MMA is a combat sport that allows fighters to use combinations of many different martial arts disciplines such as wrestling, Brazilian jiu-jitsu, boxing, muay thai, and taekwondo, to name a few.² Two fighters enter a cage or a ring and fight for a pre-determined number of rounds and time per round.³ Fighters can win the fight when their opponent is knocked out, their opponent taps out due to submission, the referee stops the fight, or by a judge's decision.⁴

The sport of MMA is currently led by the promotion company named the Ultimate Fighting Championship (UFC).⁵ The UFC is said to control almost ninety percent of the revenue from professional mixed martial arts fights worldwide.⁶ Although there are other MMA promotions, the UFC is the biggest and most competitive promotion, so it is the brass

¹ Matthew Scott, *UFC's rise from 'barbarity' to 'fastest-growing sport' didn't come easy*, SOUTH CHINA MORNING POST, (September 16, 2012), <http://www.scmp.com/sport/other-sport/article/1037816/ufcs-rise-barbarity-fastest-growing-sport-didnt-come-easy>.

² *Discover UFC: The Sport*, UFC, (last visited November 10, 2016), <http://www.ufc.com/discover/sport>.

³ *Discover UFC: Rules and Regulations*, UFC, (last visited November 10, 2016), <http://www.ufc.com/discover/sport/rules-and-regulations>.

⁴ *Discover UFC: Ways to Win*, UFC, (last visited November, 10, 2016), <http://www.ufc.com/discover/sport/ways-to-win>.

⁵ Tim Bissel, *Feature: Working undercover for the UFC*, BLOODY ELBOW, (September 12, 2016), <http://www.bloodyelbow.com/2016/9/12/12586828/zuffa-anti-piracy-ppv-working-undercover-ufc-feature-interview-detective-investigation-mma-news>.

⁶ Kartikay Mehrotra & Eben Novy-Williams, *UFC's \$4 Billion Sale Is Fodder for Fighters' Antitrust Suit*, BLOOMBERG, (July 12, 2016 — 1:21 PM PDT), <http://www.bloomberg.com/news/articles/2016-07-12/ufc-s-4-billion-sale-is-new-fodder-for-fighters-antitrust-suit>.

ring for most fighters. The UFC's prestige and competitiveness allows it to draw the biggest names in the sport such as: Conor McGregor, Ronda Rousey, and Georges St. Pierre. By the end of 2015, it was reported the "UFC was being watched . . . in 1.2 billion households in 158 countries" across the world.⁷ Because of the UFC's rising popularity worldwide, it has been making massive amounts of money, as demonstrated by its \$600 million in earnings in 2015.⁸

The UFC started in 1993 with essentially no rules for the fights and an underground following.⁹ In the early days, MMA and the UFC faced a great deal of opposition in the United States.¹⁰ U.S. Senator John McCain compared the sport to "human cockfighting" back in the early 1990s.¹¹ McCain also encouraged "states to prohibit or ban MMA altogether."¹² McCain's statements spurred "nearly all fifty states [to] enact[] laws to regulate [MMA fights] and [ban] cable companies from broadcasting them,

⁷ Andy Bull, *The fight game reloaded: how MMA and UFC conquered the world*, THE GUARDIAN, (Friday 4 March 2016 08.43 EST), <https://www.theguardian.com/sport/2016/mar/04/the-fight-game-reloaded-how-mma-conquered-world-ufc>.

⁸ *Id.*

⁹ *Discover UFC: The UFC*, UFC, (last visited November 10, 2016), <http://www.ufc.com/discover/ufc>.

¹⁰ Matthew G. Miller, *Fertittas Made Billionaires by Head Blows With Chokeholds*, BLOOMBERG, (July 31, 2012 — 9:00 PM PDT), <http://www.bloomberg.com/news/articles/2012-08-01/fertittas-made-billionaires-by-head-blows-with-chokeholds>.

¹¹ *Id.* (quoting John McCain).

¹² Jeffery B. Same, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contracts in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1063 (2012) (quoting Same) (citing Jordan T. Smith, *Fighting for Regulation: Mixed Martial Arts Regulation in the United States*, 58 DRAKE L. REV. 617, 622 (2010)).

while thirty-six states banned [MMA] altogether.”¹³

In 2001, the UFC was purchased by brothers Lorenzo and Frank Fertitta, under the name Zuffa, LLC (Zuffa), for a modest \$2 million.¹⁴ Although it did not happen overnight, since the Fertitta’s took control of the UFC, it has experienced an exponential rise in popularity and value.¹⁵ The UFC, under Zuffa, worked tirelessly to have the regulations imposed in the early 90’s lifted and put MMA and the UFC onto the same stage as the NFL or NBA.¹⁶ “In 2011, the UFC burst into the mainstream with a landmark seven-year broadcast agreement with FOX Sports Media Group.”¹⁷ Because of the UFC, MMA is now broadcast on cable television, and sanctioned in all 50 states and most countries around the world.¹⁸

In July 2016, Zuffa sold the UFC for \$4 billion dollars to an investment group from Los Angeles called William Morris Endeavor-International Management Group (WME-IMG).¹⁹ Zuffa’s sale of the UFC

¹³ Same, *supra* note 12. (quoting Same).

¹⁴ Mehrotra & Novy-Williams, *supra* note 6.

¹⁵ Jonathan Snowden, *For Dana White and Fertittas, UFC Sale Leaves Behind Complex Legacy*, BLEACHER REPORT, (July 11, 2016), <http://bleacherreport.com/articles/2651522-for-dana-white-and-fertittas-ufc-sale-leaves-behind-complex-legacy>.

¹⁶ Damon Martin, *New York legalizes MMA after nearly 20-year ban on the sport*, FOX SPORTS (March 22, 2016), <http://www.foxsports.com/ufc/story/ufc-new-york-legalizes-mma-after-nearly-20-year-ban-on-the-sport-032216>.

¹⁷ *Discover UFC: The UFC*, *supra* note 9.

¹⁸ Chuck Mindenhall & David Shoemaker, *How to Fix the UFC*, THE RINGER, (August 1, 2016), <https://theringer.com/how-to-fix-the-ufc-3e5264e60eee#.k191eb27d>.

¹⁹ Paul Gift, *Is the UFC really worth \$4 billion? Probably*, BLOODY ELBOW, (Jul 14, 2016, 9:00a), <http://www.bloodyelbow.com/2016/7/14/12187052/is-ufc-really-worth-4-billion-wme-img-silver-lake-mma-editorial>.

was the largest sports franchise sale in history.²⁰ Zuffa realized a 2000% return on the \$2 million dollar investment the Fertitta brothers made in 2001.²¹ A sale of this magnitude likely makes the UFC fighters wonder what is in store for them and where their share of the sale is, considering the low payment most fighters earn for fighting for a living.

From the UFC's rise in popularity to its recent sale, many issues have arisen and will continue to rise between the UFC and its fighters. Many fighters believe the UFC has misclassified them as independent contractors when in reality, it treats them like employees. This is significant because the fighters would receive significant benefits if they were treated as employees. But as independent contractors, they suffer many disadvantages. Recently the UFC has demonstrated its control over its fighters, which reveals that someone needs to fight back on this important issue.

Section one of this article will explain some recent instances of the UFC exercising control over its fighters and ultimately treating them like employees rather than independent contractors. Section two will lay out the current law for making the classification between employees and independent contractors and how it applies under the National Labor Relations Act (NLRA). Section three will apply relevant factors from IRS

²⁰ Patrick Wyman, *Why Is the UFC Worth \$4 Billion?*, BLEACHER REPORT, (July 25, 2016), <http://bleacherreport.com/articles/2652797-why-is-the-ufc-worth-4-billion>.

²¹ Mindenhall & Shoemaker, *supra* note 18.

Twenty Factor Test to the UFC and its fighters, ultimately making the determination the fighters are UFC employees and not independent contractors. In section four, the article will explain what an employee classification will mean for the future of the UFC, its fighters, and MMA.

I. RECENT EXAMPLES OF HOW THE UFC EXERCISES CONTROL OVER ITS FIGHTERS AND HOW SOME FIGHTERS ARE FIGHTING BACK

A. *Reebok Deal*

Since the Zuffa era of the UFC began in 2001, UFC fighters were able to obtain their own sponsorships, which gave them another form of income.²² For some fighters, the sponsorship money they raised was their livelihood, considering the low pay most fighters receive for their fights in the UFC.²³ The fighter-secured sponsorships were displayed on fighters' clothing and fight gear at UFC events.²⁴ Essentially, this was a form of advertising for the sponsors because their names and logos were broadcasted on cable TV and live PPV events. The sponsorships were a huge moneymaker for the fighters, especially fighters not in the upper echelon of the UFC pay scale.²⁵ In July 2015, the UFC put a stop to the fighters displaying sponsors in the UFC.²⁶ The UFC decided to make an

²² Greg Howard, *The New UFC-Reebok Deal Is Screwing Fighters Out Of So Much Money*, DEADSPIN, (5/13/15 4:40pm), <http://deadspin.com/the-new-ufc-reebok-deal-is-screwing-fighters-out-of-so-1704258703>.

²³ *Id.*

²⁴ *Id.*

²⁵ Howard, *supra*, note 22.

²⁶ *Id.*

official uniform for the fighters competing in the Octagon²⁷ by signing a six-year deal with Reebok.²⁸ The deal gave Reebok exclusive rights to be the worldwide clothing and gear provider for the UFC and it allowed the UFC to profit enormously in spite of its fighters lost sponsorships.²⁹ Although this deal also came with a compensation package for the fighters paid by Reebok, it is mere pittance in comparison to what the fighters made before with their own sponsorships.³⁰ Former UFC champion, Vitor Belfort, said the deal cost him “millions” in sponsorships because the deal allows Reebok to have total control and dominance over sponsorships during fight week.³¹ The Reebok uniform policy shows the UFC controls its fighters by telling them what they can wear and when they must wear it to be employed by the UFC. It also shows the UFC was willing to take away a large portion of the fighters’ income, which is not being recouped through the Reebok deal.

B. USADA Drug Testing

On July 1, 2015, the UFC put its Anti-Doping Program into effect

²⁷ Brendan S. Maher, *Article: Understanding and Regulating the Sport of Mixed Martial Arts*, 32 HASTINGS COMM. & ENT. L. J. 209, 215 (2010) (explaining “The Octagon is a mat surrounded by an eight sided cage” used only in the UFC).

²⁸ Damon Martin, *UFC signs landmark uniform deal with Reebok*, FOX SPORTS, (Dec 2, 2014 at 11:30a ET), <http://www.foxsports.com/ufc/story/ufc-signs-landmark-uniform-deal-with-reebok-120214>.

²⁹ *Id.*

³⁰ Andrew Brennan, *Why Is The UFC-Reebok Deal Exploiting UFC Fighters And Condoning Pay Gaps?*, FORBES, (May 16, 2016 @ 01:22 PM), <http://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#68f9b548657f>.

³¹ *Id.* (quoting Vitor Belfort).

by externalizing its anti-doping program and gave the USADA full authority over all of the drug testing for the UFC fighters no matter where they live in the world.³² The UFC and the USADA have strict policies the fighters must follow or else suffer punishment that can result in suspension from the UFC.³³ One major thing this policy requires is for the UFC and USADA to know the whereabouts of the fighters at all times.³⁴ Former UFC Bantamweight Champion T.J. Dillashaw said, “They treat us like employees, [without] benefits like employees. We have to tell them where we're at at all times, so USADA can show up and drug test us. But we don't get health benefits.”³⁵ The USADA drug testing can be seen as another form of control the UFC is exercising over its fighters, thus treating them in fact as employees while classifying them as independent contractors.

C. Conor McGregor's Removal from UFC 200

Another recent instance of the UFC showing the dominance it has over its fighters occurred in April 2016, when it dropped Conor McGregor

³² *About USADA's Role in the UFC Anti-Doping Program*, USADA, <http://ufc.usada.org/> (last visited September 22, 2016).

³³ *Id.*

³⁴ UFC Anti-Doping Program, USADA, ULTIMATE FIGHTING CHAMPIONSHIP POLICY FOR WHEREABOUTS, (2015), <http://ufc.usada.org/wp-content/uploads/UFC-whereabouts-policy-EN.pdf>.

³⁵ Marc Raimondi, *T.J. Dillashaw Slams the UFC for Treating Fighters like Employees Minus the Benefits*, MMA FIGHTING, (Jul 16, 2016, 9:00a), <http://www.mmfighting.com/2016/7/16/12204380/t-j-dillashaw-slams-the-ufc-for-treating-fighters-like-employees> (quoting T.J. Dillashaw).

from the UFC 200 main event.³⁶ McGregor was dropped because he chose not to participate in promotional activities.³⁷ McGregor, who is considered the UFC's biggest star, made a stand against the UFC and would not show up to the required promotional events because he said, "I'm paid to fight, not to promote."³⁸ McGregor reportedly lost his cut of over \$10 million in PPV revenue the UFC was going to make off of him fighting on the UFC 200 card.³⁹ The UFC requires its fighters "to cooperate and assist in the advertising, publicity, and promotion of the bouts."⁴⁰ The UFC's requirement for its fighters to be at certain places, like promotional events, when the UFC says, is another example of how it controls its fighters.⁴¹

D. Fighting Back

Currently there is a pending class action lawsuit against the UFC initiated by a group of ex-UFC fighters called, *Cung Le v. Zuffa*, in the U.S. District Court, District of Nevada, where the District Court denied Zuffa's motion to dismiss the claim.⁴² The ex-UFC fighters are claiming the UFC

³⁶ Thomas Gerbasi, *Conor McGregor Pulled From UFC 200*, UFC (April 19, 2016), [http://www.ufc.com/news/McGregor-Pulled-from-UFC-200?id=.](http://www.ufc.com/news/McGregor-Pulled-from-UFC-200?id=)

³⁷ Gerbasi, *supra* note 36.

³⁸ Mehrotra & Novy-Williams, *supra* note 6 (quoting Conor McGregor).

³⁹ Matt Connolly, *Conor McGregor UFC 200 Standoff Signals Shifting Power Structure In MMA*, FORBES, (April 28, 2016), <http://www.forbes.com/sites/mattconnolly/2016/04/28/conor-mcgregor-ufc-200-standoff-signals-shifting-power-structure-in-mma/#59aa1976101c>.

⁴⁰ Zane Simon, *UFC fighter contract details revealed and analyzed*, BLOODY ELBOW, (May 14, 2013), <http://www.bloodyelbow.com/2013/5/14/4330572/ufc-fighter-contracts-revealed-dana-white-fertitta-mma-news> (quoting Jonathan Snowden).

⁴¹ *Id.* (quoting Jonathan Snowden).

⁴² Mehrotra & Novy-Williams, *supra* note 6; *see* *Cung Le v. Zuffa, LLC*, No. 2:15-cv-01045-RFB-PAL, 2016 U.S. Dist. LEXIS 145478 (D. Nev. Oct. 19, 2016).

has partaken in anticompetitive conduct to illegally acquire, maintain, and dominate the market by “swallowing [other promotions] to monopolize the sport and suppress compensation for the [fighters].”⁴³ John Fitch, an ex-UFC title challenger and named plaintiff in *Cung Le v. Zuffa*, said, “They made a lot of money off the broken bodies of a lot of people,” in regards to the UFC.⁴⁴ Fitch was dropped from his contract with the UFC, with two fights remaining on it, when he refused to sign a lifetime agreement to waive his rights to his name and likeness for a UFC video game.⁴⁵ Fitch said the UFC gave him no option and was coercive in the way it presented the agreement to him, which left him with no bargaining power.⁴⁶

The UFC base contract was made public in 2013, due to litigation between former Bellator Sport Worldwide (Bellator)⁴⁷ fighter and current UFC fighter, Eddie Alvarez, and Bellator.⁴⁸ Northwestern University Labor Law Professor Zev Eigen evaluated the UFC fighters’ contract from the

⁴³ Mehrotra & Novy-Williams, *supra* note 6 (explaining how UFC acquired three smaller promotions in 2008 and “Zuffa President, Dana White, uploaded a video on YouTube in which he held a mock tombstone inscribed with “RIP” and the logos of the three promoters, according to the complaint.”).

⁴⁴ *Id.* (quoting John Fitch).

⁴⁵ Same, *supra* note 12, at 1058-59 (explaining Fitch was a well-known and successful fighter, but UFC President Dana White made it clear he was only willing to work with fighters who respected what he was trying to do for the UFC and MMA); *see also* Kevin Iole, *UFC Drops Fitch, AKA Fighters*, YAHOO! SPORTS, (Nov. 20, 2008), <https://www.yahoo.com/news/ufc-drops-fitch-aka-fighters-054200825--mma.html>.

⁴⁶ *Id.* (quoting John Fitch); *see also* Kevin Iole, *UFC Drops Fitch, AKA Fighters*, YAHOO! SPORTS, (Nov. 20, 2008), <https://www.yahoo.com/news/ufc-drops-fitch-aka-fighters-054200825--mma.html>.

⁴⁷ *See* BELLATOR MMA, (last visited November 10, 2016), <http://bellator.spike.com/>.

⁴⁸ *See* Bellator Sport Worldwide, LLC v. Alvarez, Civil Action No. 13-63 (JLL), 2013 U.S. Dist. LEXIS 54879 (D.N.J. Apr. 16, 2013).

Alvarez litigation and said the UFC fighters' contracts are the worst he has seen in either sports or the entertainment fields.⁴⁹ Eigen also said the contract gives nothing that sets a minimum or basic standard below which the company can't go.⁵⁰

Stars like Conor McGregor make millions off of a single fight, however, other UFC fighters barely survive because of the huge gap in payment between the highest ranked and lower ranked fighters.⁵¹ “When you look at who gets the money, at the end of the day, it's disproportionately [the UFC] and disproportionately not the fighter.”⁵² The UFC gives about 20% of its revenues back to its fighters which is less than half of what other sports promotions give back to their athletes.⁵³ “Unlike UFC, the top four team sports in the U.S. share their profit with players almost evenly.”⁵⁴ If you compare the UFC to other sports franchises such as the NFL which had an average salary of \$2 million in 2014 or the NBA who had an average salary of \$4.9 million in 2014, the average UFC fighters' pay is much lower because they fight two to four times a year and make

⁴⁹ Simon, *supra* note 40 (quoting Zev Eigen).

⁵⁰ *Id.* (quoting Zev Eigen).

⁵¹ Ernesto Aguilar, *Ronda Rousey makes \$3m a year but most UFC fighters don't get what they deserve*, THE GUARDIAN, (Last modified on Monday 4 April 2016 09.02 EDT), <https://www.theguardian.com/sport/blog/2015/may/26/ronda-rousey-makes-3m-a-year-but-most-ufc-fighters-dont-get-what-they-deserve>.

⁵² Simon, *supra* note 40 (quoting Zev Eigen).

⁵³ Mehrotra & Novy-Williams, *supra* note 6.

⁵⁴ *Id.* (explaining the “National Football League players get a 47 percent cut, with team owners getting the other 53 percent, according to their latest union pact. Major League Baseball's revenue sharing with players ranges from 43 to 50 percent; the National Basketball League shares 49 to 51 percent with players”).

around \$68k per fight if they win and half as much if they lose.⁵⁵ The fighters with little or no fights in the UFC make even less. The UFC's failure to offer proper compensation to its fighters has made fighters shy away from MMA and seek other employment opportunities.⁵⁶

II. CURRENT EMPLOYMENT LAW DISTINGUISHING BETWEEN INDEPENDENT CONTRACTORS AND EMPLOYEES

A. *Background on Employee and Independent Contractor Classification*

Making the determination between who is an employee or an independent contractor is a dilemma that has plagued American jurisprudence for over 100 years.⁵⁷ In the past century, U.S. federal and state courts have failed to create a uniform test to make the determination and the line between employee and independent contractor is still undefined.⁵⁸ There is no single test in statutes or case law for determining whether a person is an employee or an independent contractor.⁵⁹ Currently, when courts make the determination, there are four different tests applied: the common law right to control test,⁶⁰ the IRS 20 factor test,⁶¹ the ABC

⁵⁵ Aguilar, *supra* note 51.

⁵⁶ *Al Iaquinta Is The Latest Fighter To Stand Up To The UFC's Archaic Pay Structure*, YAHOO SPORTS, (Sep 20, 2016), <http://sports.yahoo.com/news/al-iaquinta-latest-fighter-stand-150000890.html>.

⁵⁷ Jennifer Pinsof, *NOTE: A NEW TAKE ON AN OLD PROBLEM: EMPLOYEE MISCLASSIFICATION IN THE MODERN GIG-ECONOMY*, 22 MICH. TELECOMM. TECH. L. REV. 341, 343 (2016).

⁵⁸ *Id.*

⁵⁹ ROBERT WOOD, *XPERTHR EMPLOYMENT LAW MANUAL*, 266, (2015).

⁶⁰ *See* RESTATEMENT (SECOND) OF AGENCY, § 220 (2nd 2010).

⁶¹ *See* David Cowley, *NOTE: EMPLOYEES V. INDEPENDENT CONTRACTORS AND PROFESSIONAL WRESTLING: HOW THE WWE IS TAKING A FOLDING-CHAIR*

test,⁶² and the economic realities test.⁶³ If UFC fighters challenge their classification as independent contractors in a court of law, the determination will most likely be made under the common law right-to-control test, which the IRS 20 Factor test encompasses.⁶⁴ This is because the common law right-to-control test is used for federal income taxes, Medicare taxes, Social Security taxes, federal unemployment taxes, and the National Labor Relations Act (NLRA).⁶⁵ The right-to-control test also applies to state income taxes, state unemployment taxes and laws, and other state related payroll taxes, depending on which state the case is heard in.⁶⁶

It would be assumed that if a person is classified as an employee under one set of laws and its relevant tests, that person would then be an employee under all other law, but that is not true.⁶⁷ However, once a person is classified as an independent contractor or employee, the classification will help make supporting arguments for any other cases regarding the same

TO THE BASIC TENETS OF EMPLOYMENT LAW, 53 U. LOUISVILLE L. REV. 143, 154-69 (2014) (explaining the IRS Twenty Factor Test and how it applies to WWE professional wrestlers in determining whether they are employees or independent contractors; *citing* Rev. Rul, 87-41, 1987-1 C.B. 296, 296-99).

⁶² *See* LITTLER MENDELSON, P.C., LITTLER MENDELSON'S THE NATIONAL EMPLOYER, § 24.2, 3 (2014) (explaining the ABC Test and how it is used in about half the states when determining whether a person is an employee or independent contractor for state unemployment laws).

⁶³ *See Id.* (explaining the economic realities test and also how it applies when making a determination under federal employment laws, such as the Fair Labor Standards Act (FLSA) or the Family and Medical Leave Act (FMLA), and how the definition of employee differs from the usual common-law rules).

⁶⁴ LITTLER MENDELSON, *supra* note 62.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ WOOD, *supra* note 59.

person and the classification.⁶⁸ The UFC fighters are currently being hampered because they are classified as independent contractors rather than employees. If they could get an employee classification, they would have the NLRA to help them unionize.

B. Right to Control Test under the NLRA

“The Supreme Court in *United Insurance* held the common law [right-to-control] test was applicable under the NLRA.”⁶⁹ The common law right-to-control test is derived from the law of agency and *respondeat superior* liability, which predates modern tax law, labor law, and employment law.⁷⁰ The Supreme Court recognized the common law right-to-control test in *Community for Creative Non-Violence v. Reid*, using the law of agency and the factors it states.⁷¹ The test is usually comprised of ten or more factors which can change in accordance with the facts available.⁷² However, no one of these factors is determinative.⁷³ Legal distinctions between who is an independent contractor or employee are dependent on

⁶⁸ WOOD, *supra* note 59.

⁶⁹ Mitchell H. Rubinstein, *Article: Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-And-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 621 (2012) (citing NLRB v. United Ins. Co. of America, 390 U.S. 254, 256 (1968)).

⁷⁰ Adam H. Miller, *ISSUES IN VERMONT LAW: CURBING WORKER MISCLASSIFICATION IN VERMONT: PROPOSED STATE ACTIONS TO IMPROVE A NATIONAL PROBLEM*, 39 VT. L. REV. 207, 219-220 (2014).

⁷¹ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (holding a person who was hired to create a sculpture was an independent contractor under the common law right-to-control test in accordance with the Copyright Act of 1976).

⁷² LITTLER MENDELSON, *supra* note 62 (describing the common law right-to-control test and how no one factor is determinative).

⁷³ *Hilton Int'l Co. v. NLRB*, 690 F. 2d 318, 321 (1982).

the facts and also the industry in which the person is a part of.⁷⁴

The NLRA was created to stop employers from implementing unfair business practices that pushed employees to go on strike and interrupt commerce in the United States.⁷⁵ The Act made it so employees could organize, join unions, and collectively bargain for better wages, employment benefits, and better working conditions.⁷⁶ The NLRA excludes independent contractors from the definition of employee, which precludes independent contractors from organizing, joining unions, or participating in collective bargaining.⁷⁷ If the UFC fighters are classified as employees, they will have opportunities to organize their own union, join an existing union, and bargain collectively for better wages and conditions. Although the NLRA uses the common law right-to-control test in making the classification,⁷⁸ the IRS Twenty Factor Test can be used as a guide to help make determinations under many different laws that use the common law test.⁷⁹

C. IRS Twenty Factor Test

⁷⁴ FedEx Home Delivery v. NLRB, 563 F.3d 492, 496 (D.C. Cir. 2009) (quoting North Am. Van Lines, Inc. v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989)).

⁷⁵ National Labor Relations Act, ch. 372, §1, 49 Stat. 449 (current version at 29 U.S.C.S. § 151 (2016)).

⁷⁶ National Labor Relations Act, *supra* note 75.

⁷⁷ *Id.* (citing U.S.C.S. § 151-52).

⁷⁸ Mitchell H. Rubinstein, *Article: Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-And-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 621 (2012) (citing NLRB v. United Ins. Co. of America, 390 U.S. 254, 256 (1968)).

⁷⁹ LITTLER MENDELSON, *supra* note 62.

The IRS Twenty Factor Test was created by the IRS in 1987 in Revenue Ruling 87-41, as a guide to making the classification between independent contractor and employee for federal income tax purposes.⁸⁰ The IRS Twenty Factor Test encompasses the common law right-to-control test and adds other factors that have been applied in cases and rulings that have dealt with employee classifications.⁸¹ Application of each factor in the test and the weight each factor carries is dependent on the industry or relationship under review as well as the relevant facts.⁸² As mentioned *supra*, the IRS Twenty Factor Test has been used in place of the common law right-to-control test when making classification decisions under laws which traditionally used only the common law right-to-control test. Therefore, this article will use only factually relevant factors from the IRS Twenty Factor Test to make the determination that UFC fighters are employees and not independent contractors.

III. FACTORS FROM THE IRS 20 FACTOR TEST APPLIED TO UFC FIGHTERS

The scope of work the UFC fighters do involves what the fighters do overall as contracted UFC fighters. This includes everything from training for fights, attending mandatory promotional events, participating in USADA drug testing, participating in weigh-ins before a fight, travelling across the world for fights, and fighting inside the Octagon.

⁸⁰ LITTLER MENDELSON, *supra* note 62.

⁸¹ Rev. Rul. 87-41, 1987-1 C.B. 296, 1987 IRB LEXIS 254.

⁸² *Id.*

1. Instructions

If the hired worker must comply with instructions the employer gives him in regards to how, when, and where the work is to be performed, and the worker must comply, then he is usually an employee.⁸³ The UFC controls its fighters by giving them instructions on when to make appearances at promotional events,⁸⁴ what UFC fight cards they can fight on,⁸⁵ and also what they are supposed to wear during fight week and inside the Octagon.⁸⁶ If these instructions are not followed by the fighters, they are subject to being removed from fight cards, losing money, or even losing their contract with the UFC.⁸⁷ Conor McGregor chose not to attend a required promotional event for UFC 200 and he was dropped from the card.⁸⁸ The UFC gave instructions to John Fitch in regards to signing away his rights for the UFC video game, which he refused to do at the time, and then lost his UFC contract because he did not follow instructions.⁸⁹ The UFC also requires the fighters to abide by a set of rules pertaining to conduct.⁹⁰ These rules restrict fighters from having certain tattoos, wearing

⁸³ WOOD, *supra* note 59.

⁸⁴ Simon, *supra* note 40; Gerbasi, *supra* note 36.

⁸⁵ Brandon Hinchman, *Anderson Silva vs. Chael Sonnen: Why UFC Matchmaking Needs To Be Fixed*, BLEACHER REPORT, (April 21, 2010), <http://bleacherreport.com/articles/382084-anderson-silva-vs-chael-sonnen-why-ufc-matchmaking-needs-to-be-fixed>.

⁸⁶ Martin, *supra* note 28.

⁸⁷ Gerbasi, *supra* note 36.

⁸⁸ *Id.*

⁸⁹ Same, *supra* note 12 at 1058-59.

⁹⁰ Jonathan Snowden, *The Business of Fighting: A Look Inside the UFC's Top-Secret*

certain clothing even when they are not competing inside the Octagon, and restricting the fighters from saying anything that is offensive to the UFC.⁹¹ These examples show how the UFC exercises control over its fighters when the fighters disobey instructions. This factor points toward the UFC fighters being employees rather than independent contractors.

2. *Integration*

If the success or continuation of the employer's business is dependent on the workers service, then there is a substantial amount of control by the employer.⁹² If the worker is integral to the employer's business, the worker is usually an employee.⁹³ The UFC prides itself in being the world leader in MMA.⁹⁴ Without the fighters, who the UFC deems as independent contractors, there would not be a UFC to rule the world or any other MMA promotion for that matter. The MMA business revolves around the athletes that compete in the ring, cage, or Octagon. It is no different than the NFL or the NBA relying on its athletes to make those sports what they are today. If the UFC did not have its fighters, then Zuffa,

Fighter Contract, BLEACHER REPORT, (May 13, 2013), <http://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract/page/9>.

⁹¹ Snowden, *supra* note 90.

⁹² WOOD, *supra* note 59.

⁹³ Alexandre Zucco, NOTE: INDEPENDENT CONTRACTORS AND THE INTERNAL REVENUE SERVICE'S "TWENTY FACTOR" TEST: PERSPECTIVE ON THE PROBLEMS OF TODAY AND THE SOLUTIONS FOR TOMORROW, 57 Wayne L. Rev. 599 (citing Rev. Rul. 87-41, 1987-1 C.B. 296, 1987 IRB LEXIS 254).

⁹⁴ The UFC, UFC, <http://www.ufc.com/discover/ufc> (last visited Oct. 6, 2016).

LLC, and soon to be WME-IMG, would not have made billions of dollars.⁹⁵

In regards to this factor, the UFC fighters can be compared to Uber drivers. In *O'Connor v. Uber Technologies*,⁹⁶ the court said Uber drivers performed a service for Uber and Uber could not exist without its drivers.⁹⁷ Uber made money off of the rides its drivers provided, and without the drivers, Uber would make no money period.⁹⁸ Similarly, the fighters are integral to the UFC, but the UFC is not integral to the fighters. The fighters could get employment elsewhere if there was not a UFC by working for another promotion as MMA fighters or just get a different job. The UFC would be in a “world of hurt” without its fighters because, without fighters, there is no UFC. This factor is enormously significant for the fighters being classified as employees rather than independent contractors because it shows how important they are to the UFC and MMA in general.

3. *Services Rendered Personally*

If the work must be done personally, that shows an employee

⁹⁵ Gift, *supra* note 19.

⁹⁶ *O'Connor v. Uber Techs.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

⁹⁷ *Id.* at 1142; *see Yellow Cab Coop. v. Workers' Comp. Appeals Bd.*, 226 Cal. App. 3d 1288, 1293-94 (1991) (holding cab drivers provided service to cab company because “the enterprise could no more survive without [drivers] than it could without working cabs”); *see JKH Enterprises, Inc. v. Department of Industrial Relations*, 142 Cal. App. 4th 1046, 1054 (2006) (finding delivery drivers were employees of courier service as a matter of law in part because “the worker's duties are an integral part of the operation,” and “their work is the basis for [defendant's] business”).

⁹⁸ *Id.*

classification because the employer is interested in the worker's methods for achieving the result.⁹⁹ However, if the worker can delegate his services to someone else, there is support for an independent contractor classification.¹⁰⁰ UFC fighters cannot delegate their work or fights to other fighters who work for the UFC. However, the UFC can delegate the fighters' contract to another promoter or organization without the fighters consent.¹⁰¹ The UFC creates the bouts and when a fighter cannot compete for any reason, the UFC, not the fighter, either reassigns a new fighter to fight in his or her place, or the bout is cancelled. The UFC does give fighters some decision making ability in the contract because they can choose whether to take a fight or not as long as it is not unreasonable.¹⁰² The UFC expects its fighters to perform the work themselves and therefore all fighter work must be done personally and cannot be assigned. This factor points towards the fighters being employees rather than independent contractors.

⁹⁹ WOOD, *supra* note 59.

¹⁰⁰ *Id.*

¹⁰¹ Jonathan Snowden, The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract, BLEACHER REPORT, (May 13, 2013), <http://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract/page/12>.

¹⁰² Jonathan Snowden, The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract, BLEACHER REPORT, (May 13, 2013), <http://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract/page/4>.

4. Continuing Relationship

If the relationship between the employer and worker is continuous, even if it is not regular or sporadic, an employer-employee relationship is established.¹⁰³ The duration of the relationship will also be a consideration.¹⁰⁴ The longer the relationship, the more it looks like the worker is an employee.¹⁰⁵

The UFC fighters may not be fighting every day or every week, but they sign contracts that lock them into a predetermined number of fights.¹⁰⁶ In the Eddie Alvarez and Zuffa, LLC contract, Alvarez was required to have eight fights in the UFC or be under the contract for 40 months, whichever occurred first, unless the contract was terminated or extended.¹⁰⁷ This fighter was required to be under contract for almost four years according to the UFC's contract, this shows a continuous relationship regardless of how distant or sporadic the actual fights are. There is also a chance the relationship can be extended "automatically" if the fighter is the champion when the contract comes to an end and the extension is either one year or three fights, whichever comes first.¹⁰⁸ Zev Eigen said, "I think it's

¹⁰³ Rev. Rul. 87-41, 1987-1 C.B. 296, 1987 IRB LEXIS 254.

¹⁰⁴ WOOD, *supra* note 59.

¹⁰⁵ *Id.*

¹⁰⁶ Jonathan Snowden, The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract, BLEACHER REPORT, (May 13, 2013), <http://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract/page/5>.

¹⁰⁷ *Id.*

¹⁰⁸ Snowden, *supra*, note 106.

potentially a violation of the Thirteenth Amendment . . . You can't force someone to work for you. I don't know how, under contract law, that would be enforceable.”¹⁰⁹ The contract does not state whether this clause will repeat itself if the fighter remains champion, so it is possible the UFC could require a fighter to continue fighting for it for a number of years after the fighter's original contract has expired, regardless of whether he or she wants to leave.¹¹⁰ This shows the UFC can determine the length of the relationship because an almost four year contract is continuous and can be extended with these clauses in the contract. There is also a “Right to Match” provision in the contract that forces fighters to allow the UFC to match any offer they get from another promotion for up to one year after the end of their UFC contract.¹¹¹ This allows the UFC to retain fighters even when they want to pursue other ventures or fight for other promotions. This factor points towards the fighters being employees.

5. *Full Time Required*

“If the worker must work substantially full time for the business of the employer, the employer obviously has control over the time the worker

¹⁰⁹ Snowden, *supra*, note 106 (quoting Zev Eigen).

¹¹⁰ *Id.*

¹¹¹ Jonathan Snowden, The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract, BLEACHER REPORT, (May 13, 2013), <http://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract/page/14>.

spends working.”¹¹² This type of control also restricts the worker from partaking in other gainful work which shows evidence of an employee classification.¹¹³ The UFC contract does not allow the fighters to fight for any other MMA promotion while they are under contract with the UFC.¹¹⁴ This prevents the fighters from seeking other gainful employment while working for the UFC. Because professional MMA fighters are professional athletes, many of them train for MMA only. The UFC fighters do not have much time to devote to other forms of work outside of MMA. So the UFC has control of the fighters in regards to their profession as MMA fighters and therefore they are essentially working full time for the UFC. There are some fighters who work non-MMA jobs on the side, but this is no different than a person who is deemed an employee having a second job. The fighters cannot seek other gainful employment as an MMA fighter due to UFC control. Therefore, the fighters are employees under this factor.

6. *Performing Work on Employer's Premises*

“If the work is performed on the premises of the [employer], that factor suggests control over the worker, especially if the work could be done elsewhere.”¹¹⁵ Control over the place of work also is indicated when the employer has the right to compel the worker to travel a designated route,

¹¹² WOOD, *supra* note 59.

¹¹³ *Id.*

¹¹⁴ Snowden, *supra* note 111.

¹¹⁵ Rev. Rul. 87-41, 1987-1 C.B. 296, 1987 IRB LEXIS 254 (citing Rev. Rul. 56-660, 1956-2 C.B. 693, 1956 IRB LEXIS 160).

to canvass a territory within a certain time, or to work at specific places.¹¹⁶

The UFC does not own any venue in which it holds UFC events. It leases venues like Madison Square Garden (New York, New York) for its events. Because the work of a UFC fighter is currently done at UFC leased arenas and venues, the location of the work is on premises of the UFC. There is an argument that the fighters train on their own premises, their gym or training camp, but the actual work they do for the UFC, be it promotional or a fight in the Octagon, is done on a UFC leased premises. Therefore, this factor points towards the fighters being employees.

7. *Order or Sequence Set*

If a worker must perform services in an order or sequence set by the employer, the worker is not free to do the work as he sees fit and this shows the worker is an employee.¹¹⁷ The UFC sets a sequence the fighter must follow such as: showing up to promotional events and shooting commercials in the months and weeks leading up to the fight, they must attend the weigh-in for the fight, and then the UFC determines what fight they will be on the fight card. If you look at the job of the fighter overall, it can be shown the UFC controls the fighters because it imposes an order or sequence the fighters must follow. So this factor leans more towards the fighters being employees because this analysis is looking at what the

¹¹⁶ WOOD, *supra* note 59.

¹¹⁷ *Id.*

fighters do for the UFC overall.

8. *Oral or Written Reports*

“A requirement that the worker submit regular oral or written reports to the employer indicates a degree of control.”¹¹⁸ The fighters are subjected to USADA drug testing which occurs on a random basis and regularly after they have a fight.¹¹⁹ These tests can be considered a form of written reports because after the fighter is subjected to the physical test, a written report is submitted to the UFC by the USADA.¹²⁰ The fact the USADA submits fighters’ testing reports to the UFC is not dispositive of the fighters being employees, but it does show a report is submitted on the fighters’ behalf. If you also look at the amount of control the UFC has over the fighters through the USADA Whereabouts Policy,¹²¹ the argument for this factor showing the fighters as employees is strengthened. This factor can point towards the fighters being employees.

9. *Payment of Business or Travel Expenses*

“If the employer ordinarily pays the worker's business or travel expenses, the worker is ordinarily an employee. To control expenses, an employer generally retains the right to regulate and direct the business

¹¹⁸ WOOD, *supra* note 59.

¹¹⁹ USADA, *supra* note 32.

¹²⁰ *Id.*

¹²¹ UFC Anti-Doping Program, *supra* note 34.

activities of employees, but not of independent contractors.”¹²² The UFC pays for fighters to travel to fights in the United States and across the world.¹²³ However the UFC does not pay for the fighters to train leading up to the fight.¹²⁴ This factor deals more with whether the employer pays travel costs and expenses rather than training. The UFC pays for fighters’ transportation, lodging, meals, meal allowances, and bout tickets when they are scheduled to fight, regardless of where in the world the fight is.¹²⁵ The UFC also pays for one other person’s airline ticket to accompany the fighter, as well as their hotel room.¹²⁶ If the fight is for a title, then the UFC will pay for two other people to accompany the fighter and for two hotel rooms.¹²⁷ Independent contractors would normally pay for these things from their own pocket and not be reimbursed by an employer. The UFC’s willingness to pay for fighters and their affiliates to attend fights demonstrates they are treating the fighters more like employees rather than independent contractors.

10. Furnishing Tools and Materials

¹²² WOOD, *supra* note 59.

¹²³ Damon Martin, *John Cholish Explains the Costs of Being a UFC Fighter*, BLEACHER REPORT, (May 23, 2013), <http://www.mmaweekly.com/john-cholish-explains-the-costs-of-being-a-ufc-fighter>.

¹²⁴ *Al Iaquinta Is The Latest Fighter To Stand Up To The UFC's Archaic Pay Structure*, *supra* note 66.

¹²⁵ Snowden, *supra* note 90.

¹²⁶ Snowden, *supra* note 90. (explaining Fighter's Affiliates shall include, but not be limited to, his manager, agent, trainer, seconds, sparring partners and other persons associated with Fighter who are connected with the Bouts).

¹²⁷ *Id.*

“If the employer furnishes significant tools, materials and other equipment, it tends to show the existence of an employer-employee relationship. A worker who provides equipment is more likely to be characterized as an independent contractor.”¹²⁸ Equipment must be defined for this factor to help in making the determination because the necessity of the equipment and its use shows how important it is for the work.¹²⁹ The Reebok deal made it so the UFC furnishes the fighters with uniforms required to be worn during promotional events, fight week activities, and when fighting inside the Octagon.¹³⁰ Prior to the Reebok deal, the fighters could wear any fight gear they chose. Now the UFC provides them with a uniform which must be worn. The UFC also require the fighters to use UFC fight gloves when competing inside the Octagon. The UFC furnishes the tools needed for competition. Therefore, this factor points towards the fighters being employees.

11. Working for More Than One Firm at a Time

If a person does more than minimal or inconsequential tasks for more than one employer at a time, that person is generally considered an independent contractor.¹³¹ Independent contractors traditionally have the freedom to work for more than one

¹²⁸ WOOD, *supra* note 59.

¹²⁹ *Id.*

¹³⁰ Martin, *supra* note 28.

¹³¹ WOOD, *supra* note 59.

employer.¹³² UFC fighters cannot fight for any other promotion when they are working for the UFC.¹³³ The UFC has unrestricted worldwide rights to promote the fighter during the contract term.¹³⁴ This is a huge factor for the fighters being employees because independent contractors are free to work for whoever they want and whenever they want. The UFC fighters do not enjoy this freedom and are restricted to fighting only for the UFC. Therefore, they are employees under this factor.

12. Making Services Available to General Public

The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.¹³⁵ The UFC fighters cannot make their services available to the general public at any given time when they are under contract with the UFC because the UFC does not allow them to work or fight for other promotions.¹³⁶ Fighters cannot participate in any other MMA bout while they are a UFC fighter.¹³⁷ This factor shows UFC fighters are employees.

¹³² WOOD, *supra* note 59.

¹³³ Jonathan Snowden, The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract, BLEACHER REPORT, (May 13, 2013), <http://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract/page/2>.

¹³⁴ *Id.*

¹³⁵ Rev. Rul. 87-41, 1987-1 C.B. 296, 1987 IRB LEXIS 254; see Rev. Rul. 56-660 1956-2 C.B. 693, 1956 IRB LEXIS 160.

¹³⁶ Snowden, *supra* note 133.

¹³⁷ *Id.*

13. Right to Discharge

The right to discharge a worker suggests the worker is an employee and the person possessing the right to discharge is an employer.¹³⁸ Employers exercise control over employees by having the right to fire, which controls how employees act in order to not be fired.¹³⁹ Independent contractors cannot be fired as long as they produce results required under the contract.¹⁴⁰ If an employer cannot discharge a worker without cause, the worker is an independent contractor.¹⁴¹ “Consequently, some employers attempt to make their workers appear to be independent contractors by executing contracts that either limit the employer's right to discharge the worker except for specified reasons or provide for a notice period before discharge.”¹⁴²

The UFC lays out reasons why it can fire a fighter in its contract with the fighter.¹⁴³ There is a laundry list of reasons why the UFC can fire a fighter, including firing the fighter for simply losing a fight.¹⁴⁴ Although the UFC lays out its reasons for firing fighters in its contract, the UFC has a reputation with threatening

¹³⁸ WOOD, *supra* note 59.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² WOOD, *supra* note 59.

¹⁴³ Snowden, *supra* note 101.

¹⁴⁴ *Id.*

fighters with being released from the UFC contract for not agreeing to terms.¹⁴⁵ Zev Eigen said the term in the contract is unconscionable because it gives the UFC a one sided power over the fighters and makes it so any breach by a fighter could cause them to be fired, but there is nothing written into the contract in regards to the UFC being accountable.¹⁴⁶ The UFC has the power to fire a fighter for reasons within the contract and also outside of it because of the one-sidedness of the contract.¹⁴⁷ There is nothing contractually stopping the UFC from firing a fighter and then just claiming the fighter breached one of the provisions in the contract.¹⁴⁸ This shows the UFC retains the power to fire its fighters for any reason it sees fit even though its contract says otherwise. This factor is not a “knockout” for the fighters being employees under the contract. However, the UFC’s past dealings with its fighters shows a history of unfair treatment. Therefore, the fighters can likely be seen as employees under this factor due to the power the UFC has over them in regards to firing.

The fighters would have a valid argument since thirteen of the twenty factors show the fighters are employees and not

¹⁴⁵ Same, *supra* note 12, at 1058-59.

¹⁴⁶ Snowden, *supra* note 101 (quoting Zev Eigen).

¹⁴⁷ *Id.*

¹⁴⁸ Same, *supra* note 12, at 1058-59.

independent contractors. Therefore, it could be shown in a court of law the UFC fighters are employees and not independent contractors.

IV. WHAT AN EMPLOYEE DETERMINATION MEANS FOR THE UFC, ITS FIGHTERS, AND MMA

A. *How the UFC Would be Affected*

Since 2000, state legislatures have been cracking down on businesses who misclassify their workers as independent contractors when they are actually employees.¹⁴⁹ Millions of dollars in state and federal taxes are being lost because of these misclassifications and legislatures are enacting new laws to stop and punish these practices every year.¹⁵⁰ “The Government Accountability Office estimates worker misclassification costs the federal treasury \$ 4.7 billion dollars annually in income tax revenues.”¹⁵¹ FedEx was billed \$319 million dollars in back taxes when the 9th Circuit Court of Appeals determined 13,000 of its drivers were employees and not independent contractors.¹⁵² FedEx’s rise and fast growth has been attributed to the fact it misclassified its drivers as independent

¹⁴⁹ Anna Deknatel & Lauren Hoff-Downing, *ARTICLE: ABC ON THE BOOKS AND IN THE COURTS: AN ANALYSIS OF RECENT INDEPENDENT CONTRACTOR AND MISCLASSIFICATION STATUTES*, 18 U. PA. J.L. & SOC. CHANGE 53, 55-57 (2015).

¹⁵⁰ *Id.* at 57.

¹⁵¹ Deknatel & Hoff-Downing, *supra* note 149, at 61 (citing Effects of Misclassifying Workers as Independent Contractors: Hearing Before the H. Subcomm. on Income Sec. & Family Support and Subcomm. on Select Revenue Measures of the Comm. on Ways & Means, 110th Cong. (2007) (quoting Richard E. Neal, Chairman, H. Subcomm. on Select Revenue Measures)).

¹⁵² *Id.* at 62 (citing Todd D. Saveland, *FedEx's New "Employees": Their Disgruntled Independent Contractors*, 36 TRANSP. L.J. 95, 115 (2009)).

contractors.¹⁵³

The UFC is similar to FedEx because it hires hundreds of fighters and classifies them as independent contractors rather than employees.¹⁵⁴ Laws pertaining to misclassifications are mostly applied through state law.¹⁵⁵ Depending on the state, an action brought by a fighter or a government agency for misclassification may subject the UFC to civil penalties, criminal penalties, and stop-work orders.¹⁵⁶ If the UFC is also forced to pay back taxes by the IRS, it may be subject to hundreds of millions in fines and back taxes, like FedEx.¹⁵⁷ This would have a substantial effect on the valuation of the business.

If the UFC fighters are classified as employees, the UFC will likely have to face the National Labor Relations Board (NLRB) and comply with requirements under the NLRA.¹⁵⁸ The fighters will finally have the opportunity to organize and collectively bargain with the UFC for fair working conditions and contracts, however, they must either choose a union

¹⁵³ David Bauer, *ARTICLE: THE MISCLASSIFICATION OF INDEPENDANT CONTRACTORS: THE FIFTY-FOUR BILLION DOLLAR PROBLEM*, 12 RUTGERS J.L. & PUB. POL'Y 138, 145 (2015); *See FedEx Ground vs. UPS: Two Worldviews*, BRAUN CONSULTING NEWS, (last visited Feb. 1, 2015), <http://www.braunconsulting.com/bcg/newsletters/winter2004/winter20041.html> (analyzing the differences in worker status between FedEx Ground and UPS).

¹⁵⁴ Jeffery B. Aris, *The Fight as an Independent Contractor*, SHERDOG, (June 29, 2013), <http://www.sherdog.com/news/articles/The-Fight-as-an-Independent-Contractor-53481>.

¹⁵⁵ Deknatel & Hoff-Downing, *supra* note 149, at 74.

¹⁵⁶ *Id.* at 74-78.

¹⁵⁷ Deknatel & Hoff-Downing, *supra* note 149, at 62.

¹⁵⁸ National Labor Relations Act, *supra* note 75.

or association to represent them or form their own.¹⁵⁹ Currently, there are already entities acting on behalf of MMA fighters and two particularly on behalf UFC fighters only. The Mixed Martial Arts Fighters Association is an association comprised of entirely MMA fighters and their trainers.¹⁶⁰ The MMAFA was created to maximize earning capacity of its members, provide litigation help for members, and provide a way for MMA fighters' interests to be lobbied for.¹⁶¹ There is also the Professional Fighters Association (PFA) which is focusing its attention on the UFC fighters only.¹⁶² The PFA is backed by other notable sports unions from the MLB, NHL, MLS, and NFL.¹⁶³ The PFA claims it will help unify UFC fighters, to make the fight fair between the fighters and the UFC, in order to stop the UFC from taking advantage of the fighters.¹⁶⁴ Recently, five UFC stars, including UFC legend Georges St. Pierre, started the Mixed Martial Arts Athletes Association (MMAAA).¹⁶⁵ This association is what MMA has needed for

¹⁵⁹ *Employer/Union Rights and Obligations*, THE NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> (last visited November 2, 2016).

¹⁶⁰ *MMAFA Mission Statement*, MMAFA, <http://mmafa.tv/about-mmafa/> (last visited November 2, 2016).

¹⁶¹ *Id.*

¹⁶² Zane Simon, *New UFC fighters association launches, claims support of NFL, MLB, & NHL unions*, BLOODY ELBOW, (August 11, 2016), <http://www.bloodyelbow.com/2016/8/11/12440574/ufc-fighters-association-pfa-launches-nfl-mlb-nhl-mls-support-players-union-mma-news>.

¹⁶³ *Id.*

¹⁶⁴ *Why Do Baseball, Basketball, Football, and Hockey All Have Associations?*, PROFESSIONAL FIGHTERS ASSOCIATION, <http://profighters.org/> (last visited November 2, 2016).

¹⁶⁵ Chuck Mindenhall, *Emergence of MMAAA effectively deals blow to fear culture in UFC*, BLOODY ELBOW, (December 1, 2016),

reform and proper treatment of fighters, because current UFC fighters and one of the sports legends are involved.¹⁶⁶ MMAAA is looking for three things in regards to the UFC: “A settlement for current and former fighters for shady, ongoing business practices; a percentage tilt in the fighter-to-ownership revenue landscape from the range of 8 to 15 percent to a solid 50 percent; and to negotiate a collective bargaining agreement with the UFC.”¹⁶⁷ Only time will tell as to which association will take the reins for the fighters.

Any of these associations or an established union could step in and take the reins for the UFC fighters in dealing with the UFC through the NLRB. Once a classification of employee is actually made, the union or association backing the fighters will meet with the UFC at a “reasonable time[] to bargain in good faith about wages, hours, vacation time, insurance, safety practices and other mandatory subjects.”¹⁶⁸ The negotiation for a contract under the NLRA would alleviate many of the issues in the current UFC contracts that give the UFC total power and control over the fighters.¹⁶⁹ It would allow the fighters, especially the lower tiered fighters, to be paid competitively and make a living as MMA fighters and also give

<http://www.mmafighting.com/2016/12/1/13806390/emergence-of-mmaaa-effectively-deals-blow-to-fear-culture-in-ufc>.

¹⁶⁶ Mindenhall, *supra*, note 165.

¹⁶⁷ *Id.*

¹⁶⁸ *Employer/Union Rights and Obligations*, *supra* note 159.

¹⁶⁹ Simon, *supra* note 40.

the fighters benefits such as family health insurance.¹⁷⁰

Therefore, the UFC will be directly affected by an employee classification of its fighters. It will likely be subject to misclassification penalties under both state laws and also federal tax laws which will affect the UFC's corporate value.¹⁷¹ The UFC will also be subject to the NLRA and will have to comply with the procedures for collective bargaining regulated by the NLRB.¹⁷² The collective bargaining and contract change will alter the amount of control the UFC has over its fighters and make it so the fighters are treated fairly.¹⁷³ The UFC's corporate valuation will be affected further because the UFC will now be required to pay federal and state taxes as well as fringe benefits they previously did not have to pay when the fighters were classified as independent contractors.¹⁷⁴ These changes to the UFC are only scraping the surface of how this classification will affect the way the UFC functions worldwide.

B. How the UFC Fighters Would be Affected

Similar to other sports like football, basketball, and baseball, who all have players unions, the UFC fighters would be able to use the NLRB and NLRA to get the contracts and working conditions they have literally fought

¹⁷⁰ Mindenhall & Shoemaker, *supra* note 18.

¹⁷¹ Bauer, *supra* note 153, at 174-75.

¹⁷² *Employer/Union Rights and Obligations*, *supra* note 159.

¹⁷³ *Id.*

¹⁷⁴ Bauer, *supra* note 153, at 145-46.

so hard for as mentioned *supra*.¹⁷⁵ The fighters will finally be able to receive employee fringe benefits like unemployment insurance, workers' compensation, and employer paid family health insurance.¹⁷⁶

MMA is a dangerous sport, there is no doubt about it.¹⁷⁷ Every time UFC fighters step inside the Octagon they put their health, career, family, and life on the line.¹⁷⁸ The chances for injury are very high and they are currently not protected by common fringe benefits which employees traditionally receive.¹⁷⁹ If a UFC fighter gets injured, they do not make any money, because they cannot fight.¹⁸⁰ They must pay for most of the hospitalization, treatment, and recovery, themselves.¹⁸¹ Considering how little most fighters are paid, this situation may be financially impossible for them.¹⁸² However, if the fighters are classified as employees, they can bargain for better health insurance which would cover more costs of injuries and also their families.¹⁸³

A fighter could die from taking a beating during an MMA fight.¹⁸⁴ If

¹⁷⁵ Simon, *supra* note 162.

¹⁷⁶ *Employee Benefits*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/employee-benefits> (last visited November 3, 2016).

¹⁷⁷ John Barr & Josh Gross, *UFC fighters say low pay simply brutal*, ESPN, (January 15, 2012), http://www.espn.com/espn/otl/story/_/page/UFCpay/ufc-fighters-say-low-pay-most-painful-hit-all.

¹⁷⁸ *Id.*

¹⁷⁹ Aris, *supra* note 154.

¹⁸⁰ Martin, *supra* note 123.

¹⁸¹ Martin, *supra* note 123.

¹⁸² *Id.*

¹⁸³ *Employee Benefits*, *supra* note 176.

¹⁸⁴ Jonathan Bradley, *MMA fighter Joao Carvalho dies two days after TKO loss to Charlie Ward, Conor McGregor tribute*, FOX SPORTS, (April 13, 2016, 8:22am),

this happened to any fighter, it would likely decimate the fighter's family because fighters currently have poor accidental death insurance and no protection under state workers' compensation laws because they are not employees.¹⁸⁵ The fighters need to bargain for better accidental death insurance under a contract with the UFC. In April of 2016, Joao Carvalho, took a beating in a Dublin, Ireland, MMA fight (not promoted by the UFC), and died 48 hours later from massive head trauma.¹⁸⁶ This was the fifth death from a sanctioned MMA fight since 2007.¹⁸⁷ These fighter deaths show MMA is a dangerous sport and fighters need to have the proper insurance in place to cover them and their families in the event of a tragedy.

The fighters can also try to claim workers' compensation when injured, if they are classified as employees.¹⁸⁸ This benefit would help injured fighters, who cannot train or fight due to an injury related to their employment, stay afloat financially until they get healed. Workers' compensation for non-federal employees is run by state laws and is different

<http://www.news.com.au/sport/mma-fighter-joao-carvalho-dies-two-daysafter-tko-loss-to-charlie-ward-conor-mcgregor-tribute/news-story/2134e044d68b8a5a62563403441c4459>.

¹⁸⁵ Marc Raiminodi, *UFC required to pay nearly \$2,000 per fighter in insurance for NYC debut*, MMA FIGHTING, (October 30, 2016), <http://www.mmafighting.com/2016/10/30/13469688/ufc-required-to-pay-nearly-2000-per-fighter-in-insurance-for-nyc-debut>; See also John S. Nash, *What could an association do for UFC fighters? Labor law expert explains*, BLOODY ELBOW, (June 5, 2015), <http://www.bloodyelbow.com/2015/6/5/8733233/what-could-an-association-do-for-ufc-fighters-labor-law-expert>.

¹⁸⁶ Bradley, *supra* note 184.

¹⁸⁷ *Id.*

¹⁸⁸ John S. Nash, *What could an association do for UFC fighters? Labor law expert explains*, BLOODY ELBOW, (June 5, 2015), <http://www.bloodyelbow.com/2015/6/5/8733233/what-could-an-association-do-for-ufc-fighters-labor-law-expert>.

all across the United States.¹⁸⁹ So the state where the claim is filed can play a huge role in whether a fighter will be able to collect workers' compensation. There is also an issue for fighters filing claims, because MMA is an individual sport and fighters do not fight for a designated UFC team in a certain state.¹⁹⁰ The NFL, MLB, and NBA have teams the players are employed by in certain states, therefore the athletes have a state where they can file and be subject to those state laws.¹⁹¹ The UFC fighters do not have this option and would likely only be able to file in the state where they suffered an injury during a UFC sanctioned fight. There are also questions of whether their training would be covered under workers' compensation, or, how would the fighters who are foreigners working for the UFC file a claim in a state if they do not live in the United States, even though they are employed by a United States employer? Also, how would an American fighter file a claim if he gets injured during a fight in a foreign country? So determining how and when a UFC fighter can file in is an issue outside the scope of this article. The issue will need to be addressed though if the fighters get classified as employees.

The fighters' contracts most likely will be totally revamped if they

¹⁸⁹ Bobbi N. Roquemore, *Comment: Creating a Level Playing Field: The Case For Bringing Workers' Compensation For Professional Athletes into a Single Federal System By Extending The Longshore Act*, 57 LOY. L. REV. 793, 799 (2011).

¹⁹⁰ Gab Pangalangan, *MMA and the team aspect of an individual sport*, DOJO DRIFTER, (August 18, 2016), <http://dojodrifter.com/2016/08/mma-team-sport-individual-ufc-scrap-pack-nate-diaz-mcgregor>.

¹⁹¹ Roquemore, *supra* note 189, at 794.

are allowed to collectively bargain under the NLRA.¹⁹² This will eradicate many of the one sided parts of the contract that gives the UFC all the bargaining power in the employment relationship.¹⁹³ The contracts the UFC has right now with its fighters are terrible for the fighters but great for the UFC, so the contract would be a major part of the collective bargaining.¹⁹⁴

The UFC fighters would finally have a say in what their future is as professional MMA fighters if they are classified as employees. The dominance the UFC has had over them since the beginning of the promotion will finally be diminished and the fight may finally be a fair one. The UFC needs its fighters to make a profit, without the fighters, the UFC will fold. So the tide needs to change for these men and women in the near future because they have been subjected to poor conditions for far too long.

C. How MMA Would be Affected

MMA would be affected if the largest MMA promoter had its fighters classified as employees because it would set a precedent for all other MMA promotions world-wide. The boxing reform act also known as the Muhammed Ali Boxing Reform Act may also be more easily implemented to MMA with a union representing the fighters pushing it towards Congress.¹⁹⁵ The Muhammed Ali Boxing Reform Act or 15 U.S.C.

¹⁹² Nash, *supra* note 188.

¹⁹³ *Id.*

¹⁹⁴ Snowden, *supra* note 101.

¹⁹⁵ John S. Nash, *Is the Ali Act coming to MMA? Plans to introduce legislation is in*

§ 6307b (Ali Act), “was intended to protect the economic interest of boxers by banning certain ‘coercive contracts’ between promoters and boxers and by creating conflict of interest ‘firewalls’ between regulatory personnel, promoters, and managers.”¹⁹⁶ Currently MMA is not covered under the Ali Act, but there have been actions taken by the MMAFA and others towards getting the federal law amended to include MMA through different lobbying strategies.¹⁹⁷ The Ali Act Expansion was brought before Congress by Congressman Markwayne Mullin of Oklahoma, who was a former MMA fighter himself.¹⁹⁸ The proposed Expansion would have to go through committee, be passed by the house and the senate, then be signed by the president as a new law, which shows there is still a lot that must be done to get MMA covered under the Ali Act.¹⁹⁹ However, the proponents of having MMA covered under the Ali Act have come a long way and it is now time for something to happen.²⁰⁰ If the proponents could get an association or union to back them with the lobbying, then the chances of

the works, BLOODY ELBOW, (April 10, 2016), <http://www.bloodyelbow.com/2016/4/10/11391924/is-mma-ready-for-the-ali-act-plans-to-introduce-amendment-is-underway>.

¹⁹⁶ Maher, *supra* note 27 at 242 (quoting 15 U.S.C. § 6307(b)).

¹⁹⁷ Nash, *supra* note 188.

¹⁹⁸ Mark Raimondi, *UFC hires lobbying firm to combat extension of Ali Act to MMA*, MMA FIGHTING, (June 11, 2016), <http://www.mmfighting.com/2016/6/11/11910628/ufc-hires-lobbying-firm-to-combat-extension-of-ali-act-to-mma>. See also H.R.5365 - Muhammad Ali Expansion Act.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

getting the Ali Act amended would be much higher.²⁰¹ However, there is still the issue of all fighters, including UFC fighters, being classified as independent contractors. Getting the employee classification would allow unions to form, and that would help the proponents get the Ali Act amended.²⁰² The Ali Act Expansion may or may not be passed through this time, however, the tide is changing for the fastest growing sport due to its rising popularity and worldwide appeal.

CONCLUSION

MMA is exponentially growing and it is not going anyway anytime soon.²⁰³ So it is imperative changes are made sooner rather than later. The fighters need to be classified as employees to counter the mistreatment they have received since the inception of MMA, especially under the banner of the UFC.²⁰⁴ This classification will change the fight game for the UFC, its fighters, and MMA overall. The sport of MMA is at a turning point, as other professional sports have been in the past, where the athletes who make the sport are no longer willing to accept the circumstances they are in.²⁰⁵ Similar to professional football's past, with players' strikes and associations being formed, this is what is coming next for MMA. The fighters have had

²⁰¹ Nash, *supra* note 195.

²⁰² *Id.*

²⁰³ Bull, *supra* note 7.

²⁰⁴ Keenan Mayo, *UFC Fighters Get Pummeled for a Living, and the Pay Stinks*, BLOOMBERG, (July 3, 2016), <http://www.bloomberg.com/news/articles/2013-07-03/ufc-fighters-get-pummeled-for-a-living-and-the-pay-stinks>.

²⁰⁵ *About NFLPA: History*, NFLPA, (last visited November 13, 2016), <https://www.nflpa.com/about/history>.

enough and are ready for change, however, the UFC and other promotions who have been controlling their fighters are definitely not willing to back down. It is going to be a fight until either the federal government regulates MMA by implementing the Ali Act to MMA, or the fighters are classified as employees and then have the backing of the NLRB. Only time will tell, but the direction MMA is headed is promising for the men and women who put their bodies on the line in the world's fastest growing sport.