The Unexpected Consequences of Classifying Exotic Dancers as Employees or Independent Contractors Under the FLSA*

INTRODUCTION

While reminiscing about family holiday gatherings, most people probably think of great food and taking countless pictures. I, however, fondly remember trying to avoid everyone and going into a bedroom to play video games so that I did not have to answer incessant questions like "How is school going?" or "How many points did you score in the last game, honey?" While ducking my family in a side room, my nephew would come in begging to play, but naturally I would not want to actually play video games with a toddler. Instead, I would hand him a controller, unplugged from the console. This way, I could play my game, and he thought he had received what he wanted.

In *McFeeley v. Jackson Street Entertainment, LLC*,[1] the Fourth Circuit might have handed exotic dancers[2] an unplugged controller. The plaintiffs believed they were gaining additional employment rights, but the ruling could have done as much good for the dancers as the unplugged controller did for my nephew. The *McFeeley* court was tasked with determining whether the U.S. District Court for the District of Maryland properly held that the plaintiff exotic dancers were employees under the Fair Labor Standards Act[3] (the "FLSA") and not independent contractors.[4] After considering the "totality of the circumstances" of the relationship between exotic dancers and their clubs, the Fourth Circuit upheld the district court's holding that the exotic dancers were employees under the FLSA, and as such, were entitled to back pay for the unpaid minimum wage.[5] The court reached this conclusion, just as other courts have,[6] by looking to the economic realities factors

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1. 825 F.3d 235 (4th Cir. 2016).

2. "Exotic dancer" in this Recent Development means nude dancer, topless dancer, erotic dancer, pole dancer, or any other similar dancer.

3. Fair Labor Standards Act of 1938, ch. 676, § 3, 52 Stat. 1060, 1060 (codified as amended at 29 U.S.C. §§ 201–19 (2015)).

4. *McFeeley*, 825 F.3d at 239.

5. *Id.* at 240, 245.

6. *See, e.g.*, Stevenson v. Great Am. Dream, Inc., No. 1:12-CV-3359-TWT, 2013 WL 6880921, at *3–4 (N.D. Ga. Dec. 31, 2013); Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 926–27, 934 (S.D.N.Y. 2013); Clincy v. Galardi S. Enters., Inc., 808 F. Supp. 2d 1326, 1350 (N.D. Ga. 2011); Harrell v. Diamond A Entm't, 992 F. Supp. 1343, 1348, 1353–54 (M.D. Fla.

previously articulated by the court in *Schultz v. Capital International Security, Inc.*[7] Nonetheless, the *McFeeley* opinion is reflective of the shortcomings of the FLSA and the case law that derives from it, as it applies to protecting exotic dancers. This Recent Development examines the Fourth Circuit's decision and questions whether it actually protects dancers in a manner consistent with the underlying humanitarian purposes of the FLSA. This Recent Development argues that *McFeeley* and other decisions holding that exotic dancers are employees[8] are superficial in that they do not address significant underlying problems caused by unique characteristics of the exotic dancing industry. Being classified as an employee under the FLSA could actually harm the dancers' interests in privacy, flexibility, and profits. To address these problems and the potential for negative unintended consequences, this Recent Development recommends the creation of a simpler framework for determining whether a worker is an employee and the creation of a third employee category that addresses the unique industry of exotic dancing and is capable of providing the type of employee protections consistent with the overarching goals of the FLSA.

Analysis proceeds in four parts. Part I briefly explains the FLSA, sets forth the facts and background of *McFeeley*, and outlines why the *McFeeley* court held that the exotic dancers in question are employees. Part II provides guidance about the purposes of the FLSA and explains why the FLSA, as currently applied, provides inadequate safeguards for exotic dancers. Part III argues that the *McFeeley* holding could lead to more exotic dancers being classified as employees under the FLSA, despite the unintended harms that might result from such a classification. Part IV explores current FLSA precedent and the consequences of other holdings similar to *McFeeley*. Part IV recommends the creation of a new, third category of workers that would be more tailored for occupations like exotic dancing capable of providing employee protections and effectuating the underlying purpose of FLSA. Part IV concludes by suggesting legislative reform that takes dancers perspectives into consideration.

1997) (noting that "[w]ithout exception, [the] courts have found an employment relationship and required . . . nightclub[s] to pay its dancers a minimum wage").

7. Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 304–05 (4th Cir. 2006) (articulating a six-factor test); *see infra* text accompanying notes 24–27.

8. *See, e.g.*, *Clincy*, 808 F. Supp. 2d at 1350.

I. FACTS AND BACKGROUND

A worker's classification as either an independent contractor or an employee has significant legal consequences. Employees[9] are usually able to take advantage of certain regulations and federal statutory protections that safeguard against discrimination,[10] provide health insurance,[11] entitle them to minimum wage,[12] and other benefits.[13] Independent contractors are not "employees," and are therefore not entitled to these same protections.[14] However, independent contractors can usually deduct their business expenses from their income for tax purposes and have more flexibility in their schedules than employees.[15]

In *McFeeley*, former exotic dancers employed by two different clubs during various periods between 2009 and 2012 brought a collective action suit[16] against defendant Uwa Offiah, who owned and operated both clubs.[17] The plaintiffs alleged that the clubs had misclassified the dancers as independent contractors instead of employees and accordingly claimed that the clubs were required to pay the dancers minimum wage and overtime as required by the FLSA.[18] The plaintiffs were seeking back pay over a three-year period from 2009 to 2012.[19] The district court held for the plaintiffs and the Fourth Circuit subsequently affirmed.[20]

9. The FLSA broadly defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (2015).

10. Civil Rights Act of 1964 tit. 7, 42 U.S.C. §§ 2000e-1 to 2000e-17 (2012).

11. 26 U.S.C. § 5000A (2012).

12. 29 U.S.C. §§ 201–19.

13. 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).

14. *See, e.g.*, Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1161 (5th Cir. 1986) (determining that the plaintiff was not an employee and was therefore not entitled to Title VII protections).

15. *See* Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 345 (2016) ("[M]odern independent contractors are their own bosses; they can choose where they work, when they work, for whom they work, and for what rate of pay they work.").

16. Collective actions under the FLSA operate like class actions that plaintiffs must opt into. 29 U.S.C. § 216(b); *see, e.g.*, Green v. Plantation of La., LLC, No. 2:10-0364, 2010 U.S. Dist. LEXIS 133441, at *13–14 (W.D. La. Oct. 24, 2010).

17. McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235, 239 (4th Cir. 2016).

18. *Id.* The *McFeeley* plaintiffs raised both federal and state law claims. *Id.* This Recent Development will be focusing on the FLSA analysis alone, just as the *McFeeley* court did, because the FLSA and Maryland state laws are analogous. *Id.* at 240; *see also* Maryland Wage and Hour Law, MD. CODE ANN., LAB. & EMPL. §§ 3-401 to 3-431 (West, Westlaw through ch. 2, 2017 Reg. Sess.); Wage Payment and Collection Law, MD. CODE ANN., LAB. & EMPL., §§ 3-501 to 3-509 (West, Westlaw through ch. 2, 2017 Reg. Sess.).

19. *McFeeley*, 825 F.3d at 239.

20. *Id.* at 247.

Since the early 1990s, many courts have held that exotic dancers are employees rather than independent contractors under the FLSA.[21] *McFeeley* just happens to be the most recent case to arrive at the same conclusion.[22] Courts have concluded that Congress enacted the FLSA to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others."[23] To determine whether a worker fits within this definition of employee, courts look to the " 'economic realities' of the relationship between the worker and the putative employer."[24] If the economic realities of the relationship show that there is an employer-employee relationship rather than an independent contractor relationship, the FLSA requires that employers pay minimum wage and overtime pay to employees, keep adequate records, and adhere to child labor standards.[25]

The *McFeeley* court examined six factors in applying this economic realities test: (1) control of the putative employer over the worker; (2) the worker's dependence on managerial skill regarding profits; (3) the worker's investment in equipment, clothing, or material; (4) the degree of skill required for the work; (5) the permanence or transience of the working relationship; and (6) the degree to which the worker and/or worker's services are an integral part of the business.[26] Except for the transient nature of the exotic dancer moving from club to club, the court found that the factors clearly weighed in favor of an employer-employee relationship.[27] The court heavily emphasized the control factor.[28] The court stressed the amount of control the defendant clubs had over the dancers' schedules, the many guidelines the dancers were required adhere to while at work, and even the fact the dancers could not dance to their own choice of music.[29] The court analyzed the second and third factors—the worker's dependence on the managerial skill regarding profits and the worker's investment in equipment or

21. *See, e.g.*, Stevenson v. Great Am. Dream, Inc., No. 1:12-CV-3359-TWT, 2013 WL 6880921, at *2–4 (N.D. Ga. Dec. 31, 2013); Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 926–27, 934 (S.D.N.Y. 2013); Clincy v. Galardi S. Enters., Inc., 808 F. Supp. 2d 1326, 1350 (N.D. Ga. 2011); *see also* Reich v. Priba Corp., 890 F. Supp. 586, 594 (N.D. Tex. 1995).

22. *McFeeley*, 825 F.3d at 244.

23. *Id.* at 240 (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944)); *see also* Benshoff v. City of Va. Beach, 180 F.3d 136, 140 (4th Cir. 1999) (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944)).

24. Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 304 (4th Cir. 2006) (citing Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 570 (10th Cir. 1994)).

25. 29 U.S.C. §§ 201–19 (2015).

26. *McFeeley*, 825 F.3d at 241 (citing *Schultz*, 466 F.3d at 304).

27. *Id.* at 241–44.

28. *Id.* at 241–42.

29. *See id.* at 242.

material—together.[30] The court found the defendant-clubs controlled the clientele and pricing, affecting the dancers' ability to make profits, while the dancers' investments were limited to their own clothing, costumes, and decorations.[31] The fourth factor, the degree of skill required, also weighed in favor of an employee relationship because the dancers were not required to have prior dancing experience.[32] The fifth factor, the (lack of) permanence of the working relationship is the only factor that the *McFeeley* court considered to be indicative of an independent contractor relationship, but the court accorded this factor little weight.[33] As for the final factor, the indispensability of the worker to the business, even the defendants conceded "an exotic dance club could [not] function, much less be profitable, without exotic dancers."[34] Weighing all the factors, the court held that an employer-employee relationship existed between the clubs and the exotic dancers.[35] Further, because the court recognized plaintiffs as employees, they were entitled to unpaid minimum wage and overtime compensation under the FLSA.[36] Whether receiving these two purported benefits, standing alone, sufficiently effectuates the purpose of the FLSA in the exotic dancing industry is, however, another question.

II. THE FLSA'S PROTECTIONS ARE INADEQUATE FOR EXOTIC DANCERS

In the unique industry of exotic dancing, classification as an employee results in only marginal increases in employee benefits and protections. Congress enacted the FLSA as a major part of President Franklin D. Roosevelt's New Deal to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others."[37] President Roosevelt emphasized that he

30. *Id.* at 243.

31. *Id.*

32. *Id.* at 244.

33. *Id.* (citing Harrell v. Diamond A Entm't, Inc., 992 F. Supp. 1343, 1352 (M.D. Fla. 1997)) (noting the inherently "itinerant" nature of exotic dancing).

34. *Id.*

35. *Id.*

36. *See id.* at 247. The dancers were awarded unpaid minimum wage from April 2009 until September 2011, not for the entire time alleged by the plaintiffs, because in 2011 the defendant consulted an attorney about potential misclassification of workers, and afterward reasonably believed he was not violating the FLSA. *Id.* at 240.

37. *Id.* at 240 (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944)); *see also* Benshoff v. City of Va. Beach, 180 F.3d 136, 140 (4th Cir. 1999) (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944)).

wanted to protect farmers and laborers who worked in factories,[38] not managerial or upper-level employees. So, the FLSA was designed to protect lesser-skilled workers who do not have much bargaining power.[39] It entitles these employees to minimum wage and overtime pay, demands that employers practice more stringent recordkeeping, and promulgates child labor standards.[40]

Due to the nature of their job requirements and lack of educational prerequisites,[41] exotic dancers are the type of lesser-skilled workers that Congress intended the FLSA to protect. For example, as one federal judge stated, "[t]aking your clothes off on a nightclub stage and dancing provocatively are not . . . special skills."[42] However, the benefits exotic dancers receive from being classified as employees under the FLSA are minimal. First, this classification does not affect employee status or protections under other statutes.[43] Second, exotic dancers do not receive the full array of benefits that the FLSA provides because most dancers do not work enough weekly hours to qualify for overtime pay.[44] Moreover, since they receive tips, exotic dancers are entitled to a lower minimum wage than non-tipped workers.[45]

The *McFeeley* holding was narrow in the sense that it only determined whether or not the plaintiffs in question were employees, as opposed to independent contractors, solely under the FLSA.[46] Notably,

38. *See* FRANKLIN D. ROOSEVELT, *The President Recommends Legislation Establishing Minimum Wages and Maximum Hours* (May 24, 1937), *in* 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT bk. 1, at 209, 214 (Samuel Irving Rosenman ed., 1937) (advocating for legislation "to help those who toil in factory and on farm").

39. *See* Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV., Dec. 2000, at 32, 36 ("We are seeking . . . legislation to end starvation wages and intolerable hours; more desirable wages are and continue to be the product of collective bargaining." (quoting Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1938), *in* 7 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: FRANKLIN F. ROOSEVELT 6, 6 (1938))).

40. 29 U.S.C. §§ 201–19 (2015).

41. Many courts have found, when analyzing the degree of skill prong of the economic realities test, that exotic dancers do not require specialized skills or other prerequisite qualifications such as specific education or prior dance instruction. *See, e.g.*, *McFeeley*, 825 F.3d at 244; Thompson v. Linda & A., Inc., 779 F. Supp. 2d 139, 149 (D.D.C. 2011); Harrell v. Diamond A Entm't, Inc., 992 F. Supp. 1343, 1351 (M.D. Fla. 1997).

42. Stevenson v. Great Am. Dream, Inc., No. 1:12-CV-3359-TWT, 2013 WL 6880921, at *5 (N.D. Ga. Dec. 31, 2013).

43. The FLSA only affects the FLSA statutory rights, not other statutory rights. *See infra* note 49.

44. *See* Susannah Breslin, *How Your Journalism Sausage Gets Made, Part Nine: How Much Do Strippers Make?*, FORBES (Oct. 25, 2011), http://www.forbes.com/sites/susannahbreslin/2011/10/25/how-much-do-strippers-make/#720f935336f8 [https://perma.cc/UA47-SS86].

45. 29 U.S.C. § 203(m), (t) (2015).

46. *McFeeley*, 825 F.3d at 239.

classification as an employee under the FLSA does not result in automatic employee protections under other important employment and labor statutes. Other employee protections such as Title VII, worker's compensation, the National Labor Relations Act ("NLRA"), and Occupational Safety and Health Administration standards[47] are undisturbed by a ruling, such as *McFeeley*, that is confined to the FLSA.[48] For example, a dancer classified as an employee under the FLSA does not necessarily allow that dancer to bring Title VII discrimination claims[49] or to unionize under the NLRA.[50]

Nonetheless, for employees, the FLSA provides substantial advantages, including minimum wage and overtime pay.[51] As applied to

47. 42 U.S.C. §§ 2000e-1 to 2000e-17 (2012) (Title VII); 5 U.S.C. §§ 8101–93 (2015) (workers' compensation); 29 U.S.C. §§ 151–69 (NLRA); 29 U.S.C. §§ 651–78 (OSHA).

48. However, a FLSA ruling could possibly be used as persuasive authority in a case regarding classification of workers under other statutes.

49. While both the FLSA and Title VII definitions of employee are similar and use very broad language, they have been construed very differently. *See* Butler v. Drive Auto. Indus. of Am., 793 F.3d 404, 412 & n.10 (4th Cir. 2015); Benjamin F. Burry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 1 U. CHI. LEGAL F. 561, 562–66 (2009). Courts have consistently held the FLSA definition to be much broader than Title VII. Burry, *supra*, at 566. Courts interpreting the FLSA apply the economic realities test, while courts interpreting Title VII apply a narrower common-law agency test. *See id.* at 565–66. Title VII also has other problems when analyzed in the exotic dancing industry. There are arguments that exotic dancers waive their rights to sexual harassment claims and assume the risk of sexual harassment by choosing to work in a sexualized industry. *See generally* Kelly A. Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995) (advocating for an assumption of risk defense for employers "as long as sex appeal is a substantial part of the employer's business and of the employee's particular job"). *But see* Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 108 (2006) (arguing that "unwelcome severe or pervasive behavior that falls sufficiently outside of the terms or conditions of employment may create an actionable violation of Title VII" even in a sexualized environment). Additionally, the bona fide occupational qualification ("BFOQ") exception of Title VII allows discrimination based on qualifications that are "reasonably necessary to the normal operation of that particular business or enterprise." *See* 42 USC § 2000e-2(e)(1). Therefore, the BFOQ exception potentially gives club managers the discretion to discriminate against exotic dancers on the basis of weight, height, age, or gender under the guise of heightened attractiveness standards. *See* Margot Rutman, *Exotic Dancers' Employment Law Regulations*, 8 TEMP. POL. & CIV. RTS. L. REV. 515, 533 (1999).

50. 29 U.S.C. § 157 (stating only employees have the right to unionize). *But see* BERNADETTE BARTON, STRIPPED: INSIDE THE LIVES OF EXOTIC DANCERS 158 (2006) (noting exotic dancers in San Francisco were able to unionize after years of contract negotiations and bought the establishment after the owners decided to close the business); Rutman, *supra* note 49, at 552–56 ("The union contract is impressive because it exists despite the challenges that the exotic dancers faced, but generally, the contract fails to offer work benefits comparable to those of other more established unions."). Courts interpreting the NLRA apply a different test than the FLSA to determine employee status. *See* FedEx Home Delivery, 849 F.3d 1123, 1128 (D.C. Cir. 2017) (looking to various common-law factors).

51. *See* § 206(a)(1) (minimum wage); *id.* § 207(a)(1) (overtime pay).

exotic dancers, however, these two benefits carry less force for those reasons. First, in reality, the overtime benefits do not affect exotic dancers much because these benefits are not available unless employees work over forty hours a week, and almost all dancers work far less than that.[52] Second, although minimum wage is a significant benefit for most occupations, under the FLSA, employees who receive tips are entitled to a substantially lower minimum wage than non-tipped workers.[53] Since the FLSA defines a "tipped employee" as an employee who receives more than thirty dollars in tips per month,[54] almost every exotic dancer would almost certainly be designated as a "tipped employee" under this definition. Forbes ran a nine-part story series about exotic dancing and one dancer interviewed stated that her range of daily tips could be anywhere from $31 to $414 per night.[55] Another dancer claimed she made $4,402 in only nine days of work.[56] If the dancer's tips make up a difference, employers are only required to pay the dancers $2.13 per hour instead of the regular federal minimum wage of $7.25.[57] Most dancers will indeed make this difference in tips. If a dancer is not making up the $5.12 difference in tips, the dancer probably will not (or should not) be working as an exotic dancer for much longer. In sum, although the FLSA is intended to assist workers, this goal is not effectuated in the context of the exotic dancing industry because most, if not all, exotic dancers are likely to earn more than the prevailing minimum wage. Furthermore, FLSA overtime benefits, in the context of the exotic dancing industry, are illusory because most exotic dancers work less than thirty hours per week.

III. CLASSIFYING EXOTIC DANCERS AS EMPLOYEES COULD COMPROMISE THE DANCERS' INTERESTS

McFeeley and similar cases that hold that exotic dancers are employees under the FLSA appear to be progressive developments. For example, cases like *McFeeley* spawn news articles with titles such as "Strippers Notch Significant Victory"[58] or "Strippers Win Labor Fight."[59] When framed as victories for vulnerable categories of workers,

52. *See* Breslin, *supra* note 44 (discussing real examples of working hours and pay of dancers per month). An important reason dancers choose this line of work is because of the high pay that can be earned with "relatively few working hours." *See* Dana Meepos, *The Purgatory of Pole Dancing*, 19 UCLA WOMEN'S L.J. 213, 219 (2012); *see also* Breslin, *supra* note 44.

53. *See* § 203(m), (t).

54. *Id.* § 203(t).

55. Breslin, *supra* note 52.

56. *Id.*

57. *See* § 203(m)(1).

many see these holdings as critical steps in pushing for positive change. While holdings like *McFeeley* seem like victories for the dancers, classifying them as employees under the FLSA, in many respects, provides only an illusory gain. Moreover, classifying exotic dancers as employees can actually harm, rather than protect them. Specifically, once an exotic dancers is classified as an employee instead of an independent contractor, the dancer might suffer harms to her privacy, flexibility, and profits.[60]

First, dancers' privacy interests could be compromised when they are classified as employees because the FLSA subjects employers to increased employee recordkeeping requirements. Second, classifying exotic dancers as employees could harm work schedule flexibility because employers would have no incentive to avoid exercising increased control over how and when the dancers work. Finally, the dancers could lose money because of tax implications associated with their employee status and because employers, in attempting to finance some of the benefits they are required to provide to employees, such as minimum wage, would be likely to deduct a larger percentage of the dancers' profits from service charges and potentially fire their employees.

A. Classifying Exotic Dancers as Employees Compromises Privacy Interests

"Privacy is key in this industry," said Viva Las Vegas, who has worked as an exotic dancer in Portland for over eighteen years.[61] The *McFeeley* holding threatens this desired privacy. Employers are subject to more stringent recordkeeping requirements for employees.[62] For example, the FLSA requires employers to keep payroll records for at least three years and to maintain certain information such as the employee's full name, address, birthday, occupation, and time and days of the week when the employee works.[63] Furthermore, Equal

58. Bryce Covert, *Strippers Notch Significant Victory in Quest to Be Treated Fairly*, THINKPROGRESS (June 8, 2016), https://thinkprogress.org/strippers-notch-significant-victory-in-quest-to-be-treated-fairly-50cb15c2499e#.w592gf4c1 [https://perma.cc/9UM8-ZX8X].

59. Emily J. Fox, *Strippers Win Labor Fight in New York*, CNN (Sep. 11, 2013), http://money.cnn.com/2013/09/11/news/economy/strippers-labor-rights/ [https://perma.cc/ZX34-NSZC].

60. *See* Meepos, *supra* note 52, at 244 ("[M]any dancers actually prefer independent contractor status because of the flexibility and profitability it can offer.").

61. Covert, *supra* note 58.

62. 29 U.S.C. § 211(c) (2012); 29 C.F.R. § 516.2(a) (2016). *See, e.g.*, Shultz v. Jim Walter Corp., 314 F. Supp. 454, 458 (M.D. Ala. 1970) (holding that the recordkeeping requirements of the FLSA apply only to employees and not independent contractors).

63. 29 C.F.R. § 516.5; *id.* § 516.2.

Employment Opportunity Commission regulations require that employers keep all personnel or employment records during employment and for at least one year after termination.[64] Understandably, this is information many dancers do not want known or readily accessible because of the stigma associated with exotic dancing. Moreover, inadvertent disclosure of this private data could also threaten the dancer's physical safety.[65] FLSA recordkeeping requirements could also make it easier for people with nefarious intentions to find private information about the dancers in order to identify and exploit them.[66]

Even though exotic dancing is a legal industry, it carries with it a stigma that causes many people to disassociate themselves with people in the industry.[67] Many exotic dancers report experiences of frequent shame and unfair treatment because of their occupation.[68] Courts have also helped perpetuate this stigma by upholding regulations on exotic dancers because of the purported effects exotic dancing might have on the community, such as decreased property values, increases in prostitution and other crime, and transmission of STDs.[69] This stigma is also seen in laws that permit courts to revoke the parole status of a

64. *Id.* § 1602.14.

65. *See No Privacy 'Right' Found in Stripper's Registration*, REPS. COMMITTEE FOR FREEDOM PRESS (June 6, 2001), https://www.rcfp.org/browse-media-law-resources/news/no-privacy-%E2%80%98right%E2%80%99-found-stripper%E2%80%99s-registration [https://perma.cc/H6XY-ZGA6].

66. The records are not made publicly available but are foreseeably more prone to exposure because of their required collection. For a discussion of the potential dangers that could result from these records being disclosed, see *infra* text accompanying notes 68–82.

67. Carrie B. Fischer, *Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees*, 14 LAW & INEQ. 521, 527 (1996) ("Society perceives women working as sexual entertainers as 'bad girls,' yet simultaneously encourages women to enter into sex work through economic demand for the industry. This stereotyping creates a class of marginalized and forgotten women. Nude dancers become 'throwaway' women, who are dispensable and available for whimsical sexual access, rather than human beings with human needs.").

68. Meepos, *supra* note 52, at 219.

69. *See, e.g.*, Peek-A-Boo Lounge, Inc. v. Manatee Cty., 630 F.3d 1346, 1356–57 (11th Cir. 2011) (upholding regulations on exotic dancing clubs in the interest of curtailing effects such as a decrease in property values); Flanigan's Enter., Inc. v. Fulton Cty., 596 F.3d 1265, 1280–81 (11th Cir. 2010) (upholding an ordinance because it was reasonable for the County to believe alcohol coupled with nude dancing would cause an increase in crime and deterioration of neighborhoods); Colacurcio v. City of Kent, 163 F.3d 545, 554 (9th Cir. 1998) (upholding a regulation requiring ten-foot buffer zone between the exotic dancers and the customers because a shorter distance would permit verbal communication and fail to prevent prostitution or drug dealing); Blue Movies, Inc. v. Louisville/Jefferson Cty. Metro Gov't, 317 S.W.3d 23, 33 (Ky. 2010) ("The no-direct-tipping provision is intended to work in conjunction with the staging requirement and proximity limit to reduce the secondary effects associated with the adult entertainment—prostitution, sexually transmitted diseases, and drug transactions. Indeed, it would defeat the purpose of the buffer zone or a valid 'no touch' provision if patrons were allowed to directly tip performers during their performances.").

convicted felon if they enter a place that has nude dancers.[70] Because of this stigma, public revelation of an individual dancer's occupation can ruin relationships and put dancers at risk.

This stigma causes a reinforced circle of discrimination that often goes unpunished[71] because many dancers stay silent about the discriminatory practices they face for fear of revealing their occupation to others.[72] For example, exotic dancers are discriminated against when seeking housing, but stay silent because they do not want their friends, family, or the community in general to know they are working in a stigmatized profession.[73] In particular, many dancers do not want their information to be discovered by certain groups and persons, including family and friends, anti-stripper social or religious groups, stalkers, landlords, child protection services, or potential future employers outside of the exotic dancing industry. Without adequate safeguards, FLSA's employment documentation requirements increase the risk that these parties will be able to discover the fact that a woman is, or has worked, as an exotic dancer. This information privacy risk is exacerbated in the present age where data breaches are commonplace.[74]

70. *See, e.g.*, MICH. COMP. LAWS. ANN. § 771.3(3) (West, Westlaw through P.A. 2017, No. 22 of 2017 Reg. Sess.) ("The court may impose other lawful conditions of probation as the circumstances of the case require or warrant or in its judgment are proper."); *Restrictions for Criminals Placed on Probation in Michigan; Nighthawks Make Random Visits for Violators in Some Michigan Counties*, MICH. CRIM. LAW. BLOG (May 25, 2011), http://www.michigancriminallawyer-blog.com/2011/05/restrictions-for-criminals-pla.html (noting someone placed on probation may be prohibited from entering into a strip club or from using a computer); Krista M. Torralva, *Prosecutors: Strip Club Visit Lands Murder Suspect Back in Jail*, CORPUS CHRISTI CALLER-TIMES (Mar. 8, 2016), http://archive.caller.com/news/local/crime/prosecutors-strip-club-visit-lands-murder-suspect-back-in-jail-2d3f6119-e156-4b56-e053-0100007fddd2-371424161.html (government witness against murder suspect on bail had his supervised release revoked because he allegedly went to a strip club); *see also* Deja Vu of Nashville, Inc. v. Metro. Gov't, 274 F.3d 377, 392 (6th Cir. 2001) (upholding ordinance that prohibited felons or those with misdemeanor sex crimes from operating or dancing in clubs).

71. *See* BARTON, *supra* note 50, at 79 ("The stripper or ex-stripper hides the stigmatized behavior, thus colluding in and reinforcing dominant stereotypes about women who work in the sex industry.").

72. Meepos, *supra* note 52, at 251; *see* BARTON, *supra* note 50, at 79–81.

73. *See* Meepos, *supra* note 52, at 251.

74. *See, e.g.*, Eric Lichtblau, *Hackers Get Employee Records at Justice and Homeland Security Depts.*, N.Y. TIMES, Feb. 9, 2016, at A11; David E. Sanger & Scott Shane, *Russian Hackers Acted to Aid Trump in Election, U.S. Says*, N.Y. TIMES, Dec. 10, 2016, at A1; Steve Eder, *Julian Assange Releases More Emails and Defends WikiLeaks' Mission*, N.Y. TIMES (Nov. 8, 2016), http://www.nytimes.com/2016/11/09/us/politics/julian-assange-wikileaks-emails.html?rref=collection%2Ftimestopic%2FWikiLeaks&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection [https://perma.cc/D8MN-5BQ2]; Robert McMillan, *Password Hacking Forces Big Tech Companies to Act*, WALL ST. J. (Aug. 7, 2016, 8:26 PM), http://www.wsj.com/articles/password-hacking-forces-big-tech-companies-to-act-1470562202 [https://perma.cc/D2DK-PVRK].

In addition to social stigma, there is ample evidence of people wishing to physically harm exotic dancers. One heinous example is Gary Ridgeway, a convicted serial killer known as the "Green River Killer."[75] He is considered one of the most prolific serial killers in United States history, infamous for preying exclusively on sex workers and exotic dancers.[76] Examples of serial killers who preyed on these women are legion. Serial killers justify murdering these women by relying on the stereotype that they do not have families, are drug addicts, and face societal isolation.[77] Requiring employee records of exotic dancers can put the dancers in grave danger because a prospective attacker could access club records and discover where these women live.

Other, more common threats exist as well. Stalkers, harassers, and anti-stripping advocacy groups might cause different kinds of harm to dancers. An example of today's technologically-savvy harasser is an individual who creates a facial recognition program that takes the faces from pornographic videos and pictures, runs these images through social media to find real names, and then posts and shares harassing comments.[78] Also, in a recent case, *Roe v. Anderson*,[79] a Washington

75. *See generally* ANN RULE, GREEN RIVER, RUNNING RED: THE REAL STORY OF THE GREEN RIVER KILLER—AMERICA'S DEADLIEST SERIAL MURDERER (2004) (detailing the story of serial killer Gary Ridgeway).

76. *Corrections Officials: Green River Killer Gary Ridgway to Return to Washington State Prison*, FOX NEWS (Sept. 18, 2015), http://www.foxnews.com/us/2015/09/18/corrections-officials-green-river-killer-gary-ridgway-to-return-to-washington.html [https://perma.cc/U79B-RZ6M] (stating Ridgeway has been convicted of forty-nine murders, the most by any recorded United States serial killer, and suspected of dozens more); Manny Fernandez, *Prostitutes' Disappearances Were Noticed Only When the First Bodies Were Found*, N.Y. TIMES, Apr. 8, 2011, at A22 (recounting that Ridgeway targeted sex workers because he "knew they would not be reported missing right away and might never be reported missing" (quoting Statement of Defendant on Guilty Plea, State v. Ridgway, No. 01-1-10270-9, 2001 WL 36040118 (Wash. Super. Ct. 2001))).

77. *See* Fernandez, *supra* note 76 (mentioning a number of different serial killers who targeted sex workers, and detailing how sex workers are perceived as "invisible, vulnerable prey" to serial killers because of the media's lack of incentive to report on sex workers going missing); *see also Alaska Serial Killer Robert Hansen Dies at 75*, USA TODAY (Aug. 22, 2014, 12:30 AM), http://www.usatoday.com/story/news/nation/2014/08/22/alaska-serial-killer-dies/14426941/ [https://perma.cc/32CW-Z5RD] ("Hansen was convicted in 1984 after confessing to killing 17 women, mostly dancers and prostitutes, during a 12-year span."); James A. Fox, *Serial Killers Find Prostitutes Easy Prey: Column*, USA TODAY (Oct. 23, 2014, 7:03 AM), http://www.usatoday.com/story/opinion/2014/10/23/james-alan-fox-indiana-prostitute-killings/17726177/ [https://perma.cc/7A5F-RX7S].

78. *See* Laura Mills, *Facial Recognition Software Advances Trigger Worries*, WALL ST. J. (Oct. 10, 2016, 6:29 PM), http://www.wsj.com/articles/facial-recognition-software-advances-trigger-worries-1476138569 [https://perma.cc/BX26-DECZ]. Admittedly, this is a possibility regardless of whether employee records are kept. *See id.*

79. Roe v. Anderson, No. 3:14-CV-05810, 2015 WL 4724739, at *1 (W.D. Wash. Aug. 10, 2015).

man attempted to acquire the employee licensing records of an exotic dancing club so that he could obtain the dancers' private information and, as he claimed, pray for the dancers "by name," among "many [other] protected reasons."[80] This case involved state public disclosure and licensing laws that could also compromise the privacy interests of dancers.[81] Finally, another Washington man, a convicted stalker incarcerated at the time for stalking, requested and *even received* employee records from exotic dancing clubs.[82] As these cases show, there is a potential risk of real harm to exotic dancers as a result of employee recordkeeping.

Some, however, argue that exotic dancers cannot legitimately claim these privacy interests, believing that if dancers really wanted privacy then they would not expose their bodies to strangers every night.[83] However, many individuals who choose this line of work do so out of economic necessity, because their socioeconomic status, personal backgrounds, or educational experiences effectively prohibit them from securing alternative employment with comparable compensation and

80. *Id.* at *1 n.2. The district court granted the plaintiff dancers' request for an injunction preventing the defendant from accessing the records only as to the named defendant, not the greater public as a whole. *Id.* at *4. However, the judge said afterwards that the decision might not be upheld on appeal because of the state's public disclosure laws and First Amendment concerns of the public's right to information. *See Strippers to Judge: Keep Our Real Names Private*, KIRO 7 (Oct. 23, 2014, 11:38 AM), http://www.kiro7.com/news/strippers-judge-keep-our-real-names-private/82167970#__federated=1 [https://perma.cc/96Z4-JZ68] (reporting the presiding judge's statements after the court's ruling).

81. *Roe*, 2015 WL 4724739, at *1. Some jurisdictions have licensing requirements for exotic dancers that require dancers or adult entertainers to apply for an entertainer's license. *See* ASHEVILLE, N.C., CODES OF ORDINANCES ch. 9, art. IV, § 9-173(b) (2016); TACOMA, WASH., TACOMA MUNICIPAL CODE 6B.30.040 (2016). All states have some sort of public disclosure laws that allow residents to retrieve information stored by government bodies under certain circumstances. *See, e.g.*, N.C. GEN. STAT. § 132-1(b) (2015). *See generally* SOPHIE WINKLER, NAT'L ASS'N OF COUNTIES, OPEN RECORDS LAWS: A STATE BY STATE REPORT (2010), http://studylib.net/doc/8442968/open-records-laws--a-state-by-state-report [https://perma.cc/66YL-9A24] (examining all fifty states' public disclosure laws). If licensing for exotic dancing is required, then the dancers will have to apply for a license with a government agency, such as the county auditor's office. Therefore, because of the right to public information under public disclosure laws, residents could request employee information from the government agency and receive the information with little difficulty. *See* N.C. GEN. STAT. § 132-1(b) ("The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost.").

82. Jon Humbert, *Strippers Sue to Keep Personal Files Away from Tacoma Man*, KOMONEWS.COM (Feb. 4, 2013), http://komonews.com/archive/strippers-sue-to-keep-personal-files-away-from-tacoma-man [https://perma.cc/ECP3-7ZY].

83. *See No Privacy 'Right' Found in Stripper's Registration*, *supra* note 65.

flexibility to exotic dancing.[84] Just because dancers take their clothes off for a living does not mean they should be stripped of their privacy once they step off the stage. The potential harm stemming from recording and retaining dancers' personal information substantially outweighs the reasons that motivate retaining such records. The FLSA's current employee framework, as it currently stands, does not adequately protect against this type of harm.

B. Classifying Exotic Dancers as Employees Inhibits Workplace Flexibility

Flexibility is very high on almost all workers' priority list when grading their workplaces. As a general matter, Ernst & Young conducted a study that surveyed 9700 employees across the United States, the United Kingdom, Germany, Brazil, Mexico, India, China, and Japan, and seventy-four percent of those surveyed indicated work flexibility in their schedule and fair hours as desired elements of their employment.[85] Compensation was the only factor that ranked above flexibility.[86] On one hand, it is true that neither the FLSA nor any other employment statutes legally *require* employers to exert more control over employees than independent contractors. Therefore, the FLSA does not technically reduce employees' flexibility. However, as a practical matter, *McFeeley* and the many other holdings similar to it that classify exotic dancers as employees[87] will likely cause employers to take actions that reduce the flexibility of their workers. For example, the various benefits employers must provide, such as minimum wage and overtime pay, incentive them to exercise more control over the schedules of their employees so that they can more fully recoup the costs of providing these benefits. The incentive for the employer to keep an arms-length relationship is nonexistent once a worker is deemed an employee. When the relationship is less clear, the case law incentivizes

84. *See* Fischer, *supra* note 67, at 534 n.77 (mentioning an interview that a dancer stated that she and the other dancers "were always aware of their inability to find 'straight' jobs because of their lack of education"); Meepos, *supra* note 52, at 219.

85. KARYN TWARONITE, ERNST & YOUNG, GLOBAL GENERATIONS: A GLOBAL STUDY ON WORK-LIFE CHALLENGES ACROSS GENERATIONS 2, 14 (2015), http://www.ey.com/Publication/vwLUAssets/EY-global-generations-a-global-study-on-work-life-challenges-across-generations/$FILE/EY-global-generations-a-global-study-on-work-life-challenges-across-generations.pdf [https://perma.cc/T9NP-3QEA].

86. *Id.* at 15; *cf.* Jessica, *New Survey: Drivers Choose Uber for Its Flexibility and Convenience*, UBER: NEWSROOM (Dec. 7, 2015), https://newsroom.uber.com/driver-partner-survey/ [https://perma.cc/3J7M-JHU4] (finding that eighty-eight percent of Uber drivers joined Uber because of the expected flexibility).

87. *See, e.g.*, Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 926–27, 934 (S.D.N.Y. 2013).

employers to maintain an arms-length relationship to avoid having workers deemed employees. However, once workers are deemed as such, this safeguard is destroyed.

Uber, which has been the subject of much controversy and litigation over whether its workers are independent contractors or employees, offers a prime comparison.[88] In a press conference, Uber's counsel, Ted Boutrous, said that even though laws governing employers do not require more control over employees, the laws basically "require [them] to exert much more control over their employees."[89] He adds that it would be "inevitable [that] the flexibility and autonomy that drivers crave would have to be limited" if Uber drivers are classified as employees.[90] Some drivers spoke out against the litigation that sought to have Uber drivers classified as employees. More control by the employer could be such things as minimum hour requirements and non-compete agreements. According to Uber CEO and Co-Founder Travis Kalanick, one driver has even threatened to quit if the other drivers are deemed employees because the driver "value[s] [his] freedom as an independent contractor too much."[91] Others oppose classification as employees because they like to work only a few hours or work for Uber and Lyft simultaneously.[92] Even those opposed to Uber's position that its workers are independent contractors state that although there are no labor laws forcing Uber to exert more control over its employees, it would make "perfect business sense to eliminate flexibility if Uber were required to incur additional costs in reclassifying its workers."[93] These additional costs would include having the company having to pay payroll and income taxes, in addition to minimum wage and overtime. Uber is currently still litigating class action suits where some drivers are claiming to have been misclassified as independent contractors under the FLSA. Uber and the drivers had agreed to a $100 million settlement, but a

88. *See* Mohamed v. Uber Techs., Inc., 836 F.3d 1102, 1106 (9th Cir. 2016); Yucesoy v. Uber Techs., Inc., 109 F. Supp. 3d 1259, 1261 (N.D. Cal. 2015); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

89. Benjamin Sachs, *Uber: Employee Status and "Flexibility"*, ON LABOR (Sept. 25, 2015), https://onlabor.org/2015/09/25/uber-employee-status-and-flexibility/ [https://perma.cc/PUK2-AWNC].

90. Carmel Deamicis, *Despite Uber's Arguments, Flexibility for Employees Is a Company's Choice*, RECODE (Aug. 11, 2015), http://www.recode.net/2015/8/11/11615468/despite-ubers-arguments-flexibility-for-employees-is-a-companys-choice [https://perma.cc/JS8U-BNZH].

91. Travis Kalanick, *Growing and Growing Up*, UBER: NEWSROOM (Apr. 21, 2016), https://newsroom.uber.com/growing-and-growing-up/ [https://perma.cc/B4ZB-E6TB].

92. *See id.*; Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1541–42 (2016).

93. Deamicis, *supra* note 90.

federal judge in California ruled that the settlement was "not fair, adequate, and reasonable."[94]

Employers, whether it be Uber or club owners, might sensibly try to recoup some of their newfound expenses by dictating an employee's work schedule. Such changes might include mandating certain minimum hour requirements and implementing strict work schedules. Employers, as Uber's comments allude to, would not want workers who might work thirty hours one week and then nine hours the next week to receive the same benefits that a regular full-time employee would receive. Exotic dancers, like Uber drivers, are attracted to these professions because these occupations allow flexibility.[95] Furthermore, like Uber drivers who also drive simultaneously for Lyft, many dancers prefer to dance at different clubs different days of the week.[96] Classifying exotic dancers as employees indirectly limits this flexibility because now employers must comply with more regulation such as having to pay city payroll taxes, state and federal income taxes, in addition to the employees' minimum wage and overtime benefits.[97] Because employers now have more stringent requirements to comply with, they will likely exert more control over the employees to compensate for the fact that dancers now are entitled to more benefits and the company is bound to pay more in taxes.

C. Classifying Exotic Dancers as Employees Negatively Impacts Compensation

Ironically, compensation can be negatively impacted when exotic dancers are classified as employees. Classification as an employee imposes different tax obligations, creates a distinction between tips and

94. Mike Isaac, *Judge Overturns Uber's Settlement with Drivers*, N.Y. TIMES (Aug. 18, 2016), https://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html [https://perma.cc/KGV9-BHXP]. Uber is currently still trying to reach an out of court settlement. *See* Justin Worland, *Uber Wants to Settle a Lawsuit with Its California Drivers for Just $1 Each*, FORTUNE (Feb. 2, 2017), http://fortune.com/2017/02/02/uber-california-lawsuit-settlement/ [https://perma.cc/QN4E-3TVB].

95. *See* Meepos, *supra* note 52, at 219; Means & Seiner, *supra* note 92, at 1538.

96. Rutman, *supra* note 49, at 563.

97. *See* Sachs, *supra* note 89 (arguing that if Uber drivers were found to be employees, Uber would generally not be mandated to impose more control on drivers, but would be "required to comply with minimum wage laws, safety and health laws, and anti-discrimination laws, . . . to contribute to unemployment insurance and withhold payroll taxes" and abide by state break time laws and overtime laws); *see also* Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 BERKELEY J. EMP. & LAB. L. 143, 150–51 (2005) (noting possible tax and back pay liability after misclassification of workers as independent contractors).

service charges, and creates more expenses for the employer, all of which impact the bottom line for exotic dancers.

Even though independent contractors are taxed at a higher rate than employees,[98] for exotic dancers, the overall tax benefits associated with classification as independent contractors outweigh those associated with classification as an employees. First, some dancers would rather stay independent contractors because doing so allows them to deduct all of their expenses for makeup, clothing, costumes, tanning sessions, shoes, and hairstyling.[99] Second, many dancers would prefer to remain independent contractors because they do not claim all of their income and are not well versed in bookkeeping and tax law.[100] Realistically, a majority of dancers probably do not claim 100% of their income and might not even file taxes at all.[101] Even if the dancers tried to pay their taxes, they might be exposed to increased risk of penalty in the event they are audited. This is because because dancers receive the bulk of their income in cash bills and do not provide the customer with a receipt.[102] Furthermore, many large payments to dancers go unnoticed by club management because they are given directly to dancers, often in secluded "VIP" rooms.[103] However, the IRS has an easier way to take notice of and potentially audit exotic dancers once they are placed on an employer's employee payroll, which is required by the FLSA.[104]

In addition to these tax issues, the FLSA's minimum wage requirement and tipped worker element can also result in economic losses for dancers. Under the FLSA, there is a distinction between "tips" and "service charges." According to the FLSA, tips come directly from the customer—the customer determines if he or she wants to tip, how much, and who receives the tip—and the tip is for a service beyond the services to which a customer is entitled in return for mandatory

98. *Independent Contractor (Self-Employed) or Employee?*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee [https://perma.cc/CF6R-4ZQF] (last updated Mar. 23, 2017) ("Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.").

99. *See* 26 U.S.C. § 162(a)(3) (2012).

100. Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMPLE L. REV. 1, 38 (2004) (stating exotic dancers are notoriously known for underreporting their income).

101. *Id.*

102. *Confessions of an Ex Scores Stripper*, N.Y. POST (July 6, 2008, 7:44 AM), http://nypost.com/2008/07/06/confessions-of-an-ex-scores-stripper/ [https://perma.cc/22LQ-H5EL].

103. *Id.*

104. *See* Angus Loten & Emily Maltby, *Payroll Audits Put Small Employers on Edge; Tax Crackdown Comes as Use of Contract Workers Grows; Companies Find Rules Unclear*, WALL ST. J. (Mar. 13, 2013), http://www.wsj.com/articles/SB10001424127887324392804578358473085106876 [https://perma.cc/JV6R-PXAK].

payments.[105] Service charges under the FLSA, on the other hand, are fixed prices for a service or a compulsory charge, such as a required ten percent gratuity.[106] In a strip club setting, the tips often include money thrown on stage by customers or money the customer chooses to give directly to the dancer beyond the fixed service charge. Examples of service charges include a preset $20 lap dance fee, $100 for fifteen minutes in a private room, or $300 for champagne in a VIP section. Dancers are the sole owners of any tips they receive, and tips cannot be taken into account as part of the tipped minimum wage.[107] Service charges cannot be used to offset the difference, but service charges "distributed by the employer to its employees . . . may be used in their entirety to satisfy the monetary requirements of the [FLSA]."[108] In other words, tips can constitute the difference between $7.25 and $2.13, while service charges can only be used to satisfy the $2.13 tipped minimum wage requirement.

Once clubs are forced to pay minimum wage and other benefits, they will need to find ways to offset this new, significant business expense that is added to their books.[109] Therefore, strip clubs, like Uber, are likely to offset benefit costs by subtracting from dancer compensation.[110] For example, tips belong to the dancers and service charges cannot be used to offset the wage difference. However, service charges can be used to pay the remaining $2.13 of the tipped worker minimum wage obligation. Therefore, clubs facing new FLSA obligations have an economic incentive to withhold higher percentages of the lap dance and other private dance service charges.[111]

Returning to the Uber comparison, Uber itself and other experts believe establishing drivers as employees would not improve driver compensation, and could even result in downsizing jobs at the

105. 29 C.F.R. § 531.52 (2016).

106. *Id.* § 531.55.

107. *Id.* § 531.52.

108. *Id.* § 531.55(b).

109. *See Employer Costs for Employee Compensation—September 2016*, BUREAU LAB. STAT. (Dec. 8, 2016, 10:00 AM), http://www.bls.gov/news.release/ecec.htm [https://perma.cc/TMA5-KHT3] (stating that benefits account for 31.4% of employees total compensation).

110. *See* Rutman, *supra* note 49, at 526. When dancers are independent contractors, they "are entitled to keep all of their earnings from the private dances." *Id.* at 529–30. When classified as employees, the money earned through private dances are included in the club receipts as revenue, and therefore clubs are entitled to all or a percentage of the private dance fees. *Id.*; *see also* Meepos, *supra* note 52, at 247.

111. *See* Meepos, *supra* note 52, at 247 ("If an exotic dancer is classified as an employee who demands minimum wage, the money she earns from private dances could possibly be taken in whole or in part by the management as revenue for the club.").

company.[112] Arun Sundararajan, a New York University business school professor and an expert on the sharing economy, told *The New Yorker* that it is "very unlikely drivers' take-home pay would rise" and that ultimately "there also would be fewer drivers."[113] If drivers are classified as employees, it is likely that some drivers will lose their jobs and others will see decreased compensation. This projection of loss of pay could translate similarly to the exotic dancing industry. Say a private dance is $100 and the club usually only keeps $40; now that the club is liable for at least $2.13 per hour wages, they might decide to take a $50 cut from the dancer to offset their costs. Alternatively, dancers could be fired altogether as labor demand decreases when longer hours are imposed upon existing dancers.

McFeeley's holding that exotic dancers are employees, which in turn requires that they be paid minimum wage, frustrates the FLSA's underlying goals of increasing and stabilizing the wages of lesser-skilled workers like exotic dancers due to the reality of the industry. Under the current FLSA, employee protective measures that would appear to benefit employees, such as a minimum wage and overtime pay, could actually require exotic dancers to give up things that entice them to the industry (i.e., privacy, flexibility, or earning potential). In order for the FLSA to combat these deficiencies and better balance the actual interests of exotic dancers, the law must change to reflect the real world challenges facing workers in this unique industry.

IV. FUTURE CONSEQUENCES AND RECOMMENDATIONS

McFeeley provides precedent that could be persuasive in the Fourth Circuit and elsewhere in future cases seeking to classify exotic dancers as employees under the FLSA.[114] This precedent could also lead club owners to preemptively change their employment practices and treat the dancers as employees, so that the employer clubs are not liable for back pay and benefits like the *McFeeley* defendants.[115] Moreover, state legislatures and Congress are unlikely to assist exotic dancers by placing restrictions on the industry.[116] For some legislators, it is easier to step in

112. James Surowiecki, *Gigs with Benefits*, NEW YORKER, July 6 & 13, 2015, at 31.

113. *Id.*

114. The economic realities test is a case-by-case test; therefore *McFeeley* is not binding in future litigation involving different parties. *See* McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235, 241 (4th Cir. 2016) ("[T]he court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case.").

115. *Id.* at 244–45.

116. *See* Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 MICH. J. OF GENDER & L. 339, 365–66 (2013) ("Beyond the fact that most of these regulations offer little protective value to strippers, some

"as protectors of the innocent constituents who suffer from the strip club's presence in their neighborhoods"[117] rather than come to the aid of the minority of women who are stained with this stigma.[118] As the Supreme Court in *NAACP v. Button*[119] stated, "groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."[120] Because exotic dancers might not have enough political capital to push legislators to thoroughly investigate exactly how exotic dancers are protected under current employment laws, the courts should be more careful and cautious with their rulings and consider potential unintended consequences.[121] Nonetheless, courts cannot, and should not carry this burden alone. The current statutory framework used to classify whether a worker is an independent contractor or employee is flawed, especially as it is applied to non-traditional professions. This Part explores the current FLSA economic realities test and its shortcomings as applied to today's economy. It then recommends the creation of an additional category of worker for occupations that do not fit clearly into either of the FLSA employee or independent contractor worker categories. It concludes by identifying future legislative measures that can better protect dancers.

A. The Current FLSA Economic Realities Analysis Is Outdated

The problem of fitting all occupations into one of only two categories has been an issue for far too long. In 1944, in *NLRB v. Hearst Publications, Inc.*,[122] the Supreme Court stated that "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."[123] This judicial dilemma was recognized over

argue their sole purpose is to drive business away from strip clubs. If legislatures achieve this goal, regulations exert further economic strain on the stripper as business becomes slower and tips become even more difficult to collect.").

117. *Id.* at 365; *see also* Meepos, *supra* note 52, at 237.

118. *See* Alemzadeh, *supra* note 116, at 366 ("Where local lawmakers have not had to disrupt the baseline assumption that strippers are undeserving of protection, they have vigorously pushed to regulate the tawdry world of the strip club.")

119. 371 U.S. 415 (1963).

120. *Id.* at 429.

121. *See* Meepos, *supra* note 52, at 237 (stating that legislators ignoring dancers' interests and focusing on secondary effects to restrict exotic dancers "essentially communicates that the dancers' welfare is not a concern" to legislators); Rutman, *supra* note 49, at 558 (arguing that "the possibility of people within the adult entertainment industry actually passing legislation that benefits the industry is unlikely" because "[p]oliticians do not want to publicly acknowledge a position that is favorable" to the adult entertainment industry).

122. 322 U.S. 111 (1944).

123. *Id.* at 121.

seventy years ago, indicating the long-standing deficiencies of the current framework and proving it is both out of touch and outdated for the modern economy. Moreover, the rapid growth of disruptive business models, which rely on technology to connect available workers directly to customers (e.g., Uber, Lyft, Task Rabbit, etc.), makes distinguishing between employees and independent contractors under FLSA an even more challenging judicial task.

The FLSA "economic realities" test, like any factor test, can be difficult to apply. Since none of the six factors[124] are determinative, there is room for subjective judgments of individual courts. While the *McFeeley* court emphasized the control factor, other courts might choose to emphasize other factors, resulting in inconsistent results.[125] When the factors conflict, courts need some sort of guidance to decide "which factors best illuminate the economic reality of the situation."[126]

As of now, no clear guidelines exist as to how courts should apply the "economic realities" test in cases implementing emerging technology.[127] Two cases out of the Ninth Circuit, *O'Connor v. Uber Technologies, Inc.*[128] and *Cotter v. Lyft, Inc.*,[129] are illustrative. In both cases, the district court denied the defendants' motions for summary judgment, which asked the courts to rule that as a matter of law the drivers of Uber and Lyft were independent contractors and not employees under the FLSA.[130] The court in *O'Connor* even stressed doubt about the potential jury being able to reach an adequate answer to the question posed because of its "outmoded" analysis.[131] The court stated that the "application of the traditional test of employment . . . to Uber's business model creates significant challenges" because many factors in that test appear to be "outmoded in this context."[132] The

124. The economic realities factors, once again, are the following: (1) control of the putative employer over the worker; (2) the worker's dependence on managerial skill regarding profits; (3) the worker's investment in equipment, clothing, or material; (4) the degree of skill required for the work; (5) the permanence or transience of the working relationship; and (6) the degree to which the worker and/or worker's services are an integral part of the business. McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235, 241 (4th Cir. 2016) (citing Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 304 (4th Cir. 2006)).

125. *See* FedEx Home Delivery, Inc. v. NLRB, 563 F.3d 492, 497–503 (D.C. Cir. 2009) (focusing on whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss).

126. Means & Seiner, *supra* note 92, at 1527.

127. *Id.*

128. 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

129. 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

130. *O'Connor*, 82 F. Supp. 3d at 1153; *Cotter*, 60 F. Supp. 3d at 1082.

131. *O'Connor*, 82 F. Supp. 3d at 1153.

132. *Id.* The court also argues that additional considerations "such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and

Cotter opinion, handed down on the same day as *O'Connor*, expressed similar concerns. The *Cotter* court also recognized that the current law regarding employees and independent contractors under the FLSA "provides no clear answer" in today's economy.[133] The court compared classifying Lyft drivers into either of the employee or independent contractor categories to handing the jury "a square peg and [asking them] to choose between two round holes."[134] These two cases, along with *McFeeley*, show that there is a dire need to clarify the basis for distinguishing employees from independent contractors. Or, as this Recent Development argues, these cases show that there is a need to create a different category of unique worker that better reflects the modern economy and employment industries that straddle the line between the two current FLSA categories.

Creating a new worker category under FLSA is likely to be the better solution, at least for exotic dancers. Neither of the existing categorical characterizations adequately addresses the unique context of exotic dancing. Even if wholesale recharacterization of exotic dancers as employees were feasible, such a classification harms dancer privacy, flexibility, and profits.[135] On the other hand, if dancers were deemed to be independent contractors under the FLSA, they might have to forego minimum wage for the flexibility that drew them to the job in the first place and the privacy that allows them to leave their work at club and sleep safely at night.[136] As Dana Meepos stated, when it comes to employment law, "exotic dancers find themselves stuck between a rock and a hard place."[137]

B. Creation of a Third Category of Worker

Because exotic dancing is such a unique industry, it does not fit neatly into either of the existing categories. This loose fit suggests a need for a third category to provide for workers who fall between the categories, like exotic dancers and Uber or Lyft drivers.[138] To remedy this problem, this Recent Development proposes that employment

the range of alternatives available to each" might be other factors to consider in today's economy. *Id.*

133. *O'Connor*, 82 F. Supp. 3d at 1082; Means & Seiner, *supra* note 92, at 1531.

134. *Cotter*, 60 F. Supp. 3d at 1081–82 ("The test California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem.").

135. *See* discussion *supra* Part III; *see also* Meepos, *supra* note 52, at 250.

136. *See* Meepos, *supra* note 52, at 250.

137. *Id.* at 251.

138. *Cotter*, 60 F. Supp. 3d at 1082 ("[P]erhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections.").

statutes, and the FLSA particularly, adopt a new hybrid category. To deal with the occupations that dwell in "between [this] rock and a hard place," scholars have suggested a multitude of approaches.[139]

Some scholars have proposed creating a new class of worker called or "independent worker"[140] or "dependent contractor."[141] Seth Harris and Alan Krueger's proposal for an "independent worker" classification would allow workers collective bargaining rights, civil rights protections, tax withholding, and employer contributions for payroll taxes.[142] However, because their model is based on an economy that independent contractors use intermediaries to find work, and because it would be difficult to distinguish hours worked for any one intermediary, Harris and Krueger would not award minimum wage or overtime benefits to independent workers.[143] Another approach is Doug Hass's recommendation of a "dependent contractor" classification.[144] Hass's dependent-contractor recommendation is similar to Harris and Krueger's proposed independent worker classification, but he emphasizes that a third category would ease the courts' problems of

139. *See* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 665–66 (2013) (advocating an employee analysis based on participation); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 367 (2011) (arguing that the common-law employee analysis framework needs reformed regarding the NLRA, which has been "a template for other labor and employment laws"); Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 266 (1997) (advocating that antidiscrimination laws should apply to all independent contractors); Means & Seiner, *supra* note 92, at 1535–45 (arguing that flexibility should be the deciding factor and that flexibility should be assessed within each factor of the FLSA test); Henry H. Perritt, Jr., *Should Some Independent Contractors Be Redefined as Employees Under Labor Law Symposium: Should American Labor Law Be Applied to Small Business*, 33 VILL. L. REV. 989, 1034–35 (1988) (advocating that antidiscrimination statutes should apply to independent contractors who do not have employees of their own); Kennedy, *supra* note 97, at 148 (recommending creating a dependent contractor relations board); *see also* David Weil, U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1, at 3 (July 15, 2015), http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf [https://perma.cc/LH8T-FSTT] (stating that the FLSA has been interpreted by DOL to be applied liberally in favor of employment status).

140. *See* SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, DISCUSSION PAPER NO. 2015-10, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 2 (2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/K3DL-ZAAW].

141. *See* Doug Hass, *Protecting the Sharing Economy: Creating an FLSA Dependent Contractor Status*, DAY SHIFT (Sept. 22, 2015), https://dayshift.com/2015/09/22/protecting-the-sharing-economy-creating-an-flsa-dependent-contractor-status/56/ [https://perma.cc/K8D5-QVZK].

142. HARRIS & KRUEGER, *supra* note 140, at 2.

143. *Id.*

144. *See* Hass, *supra* note 141.

fitting all occupations into only two categories, especially with the growth of the internet and sharing economy.[145]

Similarly, this Recent Development suggests there should be a hybrid worker category that suits occupations where the worker is more like a part-time worker, but the employer still exercises much control over the workers. This hybrid classification would allow workers that do not clearly fit within the FLSA categories, like exotic dancers, to access shorter-term benefits that provide reimbursement of expenses, discrimination protection, worker's compensation, and injury insurance. Minimum wage would also be included, as far as a worker could establish the number of hours the employee worked and for whom the employee worked. Meanwhile, this classification would relieve companies from having to provide longer-term, more economically substantial benefits such as health care or retirement plans.[146] Since employers would not be required to incur massive new expenses, it would no longer make "perfect business sense" to limit worker flexibility.[147] Employers could still impose some rules, but they could not exert pervasive control. For example, in this hybrid class as applied to exotic dancers, maybe the club could impose restrictions on attire and music choice, but the club could not control what days the dancers are required to work. The system would be flexible rather than rigid, allowing room for judges to maneuver when considering unique occupational contexts. This hybrid category would protect unconventional workers without abolishing the current business model or worker's choice of level of participation.[148]

C. Involving Exotic Dancers in the Legislative Process

Another recommendation that might help alleviate this problematic dichotomy is to involve relevant stakeholders in all future legislative proposals. Legislators should incorporate dancers and dancer advocacy groups into the drafting process to ensure that dancers can voice their perspective. This Recent Development reveals a significant disconnect between lawmakers, judges, and the exotic dancing industry. Lawmakers should draw on the valuable perspectives of those who are most affected by employment laws, such as exotic dancers, before promulgating policy. When exotic dancers or advocates who have the dancers' interests in

145. *See id.* ("Under a dependent contractor classification, regulators and courts can more easily distinguish among the three classifications, using them to decide and explicitly state which groups of people should be covered by each regulation.").

146. *See* Surowiecki, *supra* note 112.

147. Deamicis, *supra* note 90.

148. *See* Hass, *supra* note 141.

mind are not included in the lawmaking process, proposed legislation is likely to harm these individuals. For example, in Pennsylvania, religious groups (who often oppose exotic dancers) lobbied for the creation of a registry for exotic dancers, claiming the purpose was to help combat sex trafficking.[149] The rule was never enacted, but would have forced dancers to register their personal information with the state, which would have curbed dancers from pursuing their profession for fear of sacrificing their privacy.[150]

Instead of this approach, future legislation can be created to protect exotic dancers from invasive employment practices, regardless of how they are classified under the FLSA. More states should take the approach California has taken. In 2000, Assembly Bill 2509, an amendment to existing law which has the effect of prohibiting employers from requiring payment of "stage fees," "commissions," or "quotas" from any portion of dancers' tips, was signed by the governor.[151] Even if exotic dancers cannot muster up enough political capital on their own for legislators to address, if combined with other unique professions that do not clearly fit within the two FLSA categories such as Uber drivers, legislation can be proposed that benefits the dancers, as well as other occupations.

CONCLUSION

The *McFeeley* court, just as many other courts have done over the past couple decades, held exotic dancers were employees instead of independent contractors. Through this decision, it seems the Fourth Circuit intended to protect the dancers. However, the courts must contemplate other underlying considerations before ruling that exotic dancers are employees. The potential loss of privacy, flexibility, and profits far outweigh the benefits that some legislators and judges, who are likely detached from the industry, believe they are providing by classifying dancers as employees under the FLSA. However, giving the courts the benefit of doubt, decisions like *McFeeley* are most likely the product of an outdated FLSA framework that is in dire need of modification to fit our changing economy. Neither employee nor independent contractor classifications fully addresses the unique characteristics of exotic dancing. Regardless, classifying exotic dancers as employees and stripping them of privacy, flexibility, and profits in

149. H.B. 262, 2015 Gen. Assemb, Reg. Sess. (Pa. 2015).

150. *See* discussion *supra* Section III.A.

151. *See* Act of Sep. 28, 2000, ch. 876, sec. 9, § 351 2000 Cal. Stat. 6505, 6510 (codified at CAL. LAB. CODE § 351).

return for a $2.13 hourly minimum wage is certainly not the best approach.

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