POM POMS, PIGSKIN & JIGGLE TESTS: IS IT TIME FOR THE NATIONAL FOOTBALL LEAGUE CHEERLEADERS TO UNIONIZE?

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INTRODUCTION

The professional sports industry is one of the largest, most popular industries in the United States. The National Football League (NFL) leads the pack by grossing over $9.5 billion dollars annually, making football the most popular and lucrative sport in America.[1] Due to its astonishing financial

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1. Chris Isidore, *Why Football Is Still a Money Machine*, CNN MONEY (Feb. 1, 2013, 10:00 AM), http://money.cnn.com/2013/02/01/news/companies/nfl-money-super-bowl/index.html ("On the eve of the Super Bowl, the National Football League is playing defense over a rash of concussions to players and dealing with more empty seats in the

success, the NFL has dealt with several labor disputes and labor issues over the years, including the players' strike in 1982,[2] the 2011 players' lockout,[3] and the most recent 2012 NFL referee lockout.[4] Each of these labor disputes brought

stands. But it remains by far the most popular and lucrative sport in America, raking in nearly $10 billion in 2012. What puts football at the top in terms of profitability are the league's pricey broadcast rights deals. The $4 billion in revenue it pulls in from television deals is roughly equal to the total sales for the National Basketball Association and more than the Sales of the English Premier League, the world's most lucrative soccer league. Advertisers are forking over $4 million for spots during the Super Bowl.").

2. The player's strike began on September 21, 1982 and lasted for 57 days. During this time no NFL games were played. The strike occurred because the union demanded that a wage scale based on percentage of gross revenues be implemented. For 57 days, as an NFL season wasted away, management and players stuck their tongues out at each other. The NFL Players Association demanded, among other things, that its members receive 55 percent of the league's gross revenues. The owners told the players to take a hike. So they did, and didn't return until seven regular-season games had been lost, to say nothing of $275 million in revenues and wages. The owners also were forced to return $50 million to the networks. The strike ended on November 16, 1982 with a players' revolt against their own union. Gene Wojciechowski, *NFL Strike: 1982: A History Lesson*, LA TIMES (Sep. 23, 1987), http://articles.latimes.com/1987-09-23/sports/sp-6303_1_nfl-strike; *see also* Wade Forrester, *November 16, 1982: The NFL Players Strike Ends*, ON THIS DAY IN SPORTS (Nov. 13, 2013), http://onthisdayinsports.blogspot.com/2013/11/november-16-1982-nfl-players-strike-ends.html.

3. The National Football League Player lockout was a work stoppage imposed by the owners of the NFL's 32 teams that lasted from March 12, 2011 to July 25, 2011. When the owners and the NFL players, represented by the National Football Players Association, could not come to a consensus on a new collective bargaining agreement, the owners locked out the players from team facilities and shut down league operations. The major issues disputed were the salary cap and player's safety and health benefits. They also disputed revenue sharing and television contracts, transparency of financial information, rookie contract length, and free agency guidelines. During the 18 week and four day period, there was no free agency or training camp. Players were restricted from seeing team doctors, entering team facilities, working with team trainers or communicating with any members of the coaching staff. The lockout ended with a new collective bargaining agreement prior to the start of the 2011 regular season. CNN Wire Staff, *Players, Owners Sign Deal to End NFL Lockout*, CNN (July 25, 2011), http://edition.cnn.com/2011/SPORT/07/25/nfl.deal/ [hereinafter Players NFL Lockout] ("NFL player representatives and the league's owners on Monday signed a collective-bargaining agreement to end a lockout that threatened to derail the 2011 season").

4. The 2012 NFL referee lockout was a labor dispute between the National Football League and the NFL Referees Association that resulted in the use of replacement officials through week three of the 2012 NFL season. The lockout began in June 2012 after both sides failed to come to a compromise on a collective bargaining agreement. The major issues disputed were retirement plans, salaries, additional crews, and full time officials. The NFL began hiring replacement officials for the start of the 2012 season, most of whom were officials from arena football or lower college divisions. Games officiated by the replacement officials were often deemed to have a slow pace, lack of discipline, and overall poor officiating. On September 26, 2012, an agreement was reached to end the lockout after increasing criticism of the NFL and the performance of the replacement officials. Bryan Knowles, *Breaking Down the NFL's Referee Lockout*, THE BEST SPORTS BLOG, http://www.thebestsportsblog.com/breaking-down-the-nfl-referee-lockout.html; *see also* Mike Garafolo, *NFL, Referees End Lockout After Reaching New Labor Deal*, USA TODAY SPORTS: NFL (Sept. 27, 2012, 1:52 AM),

new labor agreements, providing more favorable and auspicious conditions for both parties involved, including the players and the NFL referees.[5] However, there is one group within the NFL that has not yet resolved its labor issues: the cheerleaders. These hardworking women, who can bring in up to an additional one million dollars annually in revenue for their respective teams,[6] are subjected to long hours with little pay and demeaning work conditions.[7]

This Comment analyzes if it is an appropriate and logical time for the NFL cheerleaders to unionize. First, I will discuss the NFL's role in shaping gender norms in today's society and how NFL cheerleaders are part of that social influence. Second, I will briefly explain the history of the NFL cheerleaders as well as their current employment situation. Third, I will discuss the five lawsuits NFL cheerleaders brought against their respective teams alleging violations of the Fair Labor Standards Act (FLSA) and the respective state wage and hour claims. Finally, in response to these lawsuits, I will explore whether NFL cheerleaders should consider unionizing and the various obstacles the cheerleaders could face under the National Labor Relations Act (NLRA).

I. BACKGROUND

Professional football, as the most popular sport in the United States,[8] plays a major role in American life.[9] The NFL engages fans at a level much deeper and more profound than mere entertainment on Sundays. Whether we are die-hard fans who never miss a game or are only aware of the spillover stories that make headlines, the NFL is a powerful cultural force that connects people all over the world.[10] This is demonstrated by the Super Bowl, which began in 1967

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http://usatoday30.usatoday.com/sports/nfl/story/2012/09/27/nfl-referees-end-lockout-after-reaching-new-labor-deal/57846906/; *see also Refs Due Back Thursday Night*, ESPN, (Sep. 27, 2012), http://espn.go.com/nfl/story/_/id/8429885/nfl-reaches-agreement-officials-end-lockout.

5. *See NFLRA Reach Eight-Year Agreement*, NFL NEWS, (Sept. 27, 2012, 12:34 AM), http://www.nfl.com/news/story/0ap1000000066739/article/nfl-nflra-reach-eightyear-agreement ("The NFL and the NFL Referees Association agreed tonight to the terms of a new eight-year contract that will return the game officials to the field"); *see also* Players NFL Lockout, *supra* note 3.

6. *Dallas Cowboys Make $1 Million for Their Franchise*, SPORTS PRO LIVE (Aug. 3, 2010), http://www.sportspromedia.com/notes_and_insights/dallas_cowboys_cheerleaders_make_us1_million_for_franchise.

7. Julie Lurie & Nina Liss-Schultz, *Jiggle Tests, Dunk Tanks, and Unpaid Labor*, MOTHER JONES (May 22, 2014, 5:00 AM), http://www.motherjones.com/media/2014/05/nfl-cheerleader-lawsuits-sexism [hereinafter *Jiggle Tests*].

8. *What Is Your Favorite Sport to Watch?*, GALLUP, http://www.gallup.com/poll/4735/sports.aspx#1 (based on a poll by Gallup, football has been America's favorite sport to watch since 2003).

9. John Nauright, *Writing and Reading American Football: Culture, Identities and Sports Studies*, 13 SPORTING TRADITIONS 109, 109-10 (1996).

10. *International Appeal: The Rise of the NFL*, REPUCOM (Jan. 28, 2015), http://repucom.net/international-appeal-rise-nfl/.

as just another American sports championship.[11] As time passed, it has become "an unofficial civic holiday and national ritual."[12] "The NFL's staging of the game as a grand festival of sport, entertainment, super-patriotism, and consumption has made the Super Bowl more of a cultural phenomenon than a mere sporting contest."[13]

The NFL has a wide appeal for the millions of men and, in growing numbers, women,[14] who gather in person at various stadiums across the United States or watch in the comfort of their homes each Sunday in the fall to analyze, discuss, and relish the games.[15] For many of these football enthusiasts, professional football is about more than the weekly contests staged to entice audiences and generate advertising income; it is about deeply held connections to friendships, family relationships, home, status, and self-worth.[16] In addition, when professional football is the topic of discussion there are many other ideas passionately exchanged among observers, including: masculinity, race, accountability, and collective achievement. In a city like Green Bay, Wisconsin, little matters more during football season than the outcomes of the Packers' games. Countless cheese-headed fans huddle in bars and in negative-degree weather to watch the Packers every Sunday, hoping for victory.[17] The NFL leaves a footprint on culture, perspectives, and society every single season.

The NFL also shapes attitudes toward women and dominant social norms regarding gender. The NFL was built on a "bedrock of masculinity, whose players are idolized as modern-day gladiators."[18] Turn on the TV on any given Sunday and the traditional gender norms are right in front of you; tough, hyper-masculine football players, wearing uniforms that further accentuate those masculine traits, tackling each other on the field, and the "girls" wearing

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11. *NFL Superbowl History*, NFL, http://www.nfl.com/superbowl/history (last visited Nov. 18, 2015) (the Green Bay Packers opened the Super Bowl series, at this time it was called "The First World Championship," by defeating the AFL champion Kansas City Chiefs).

12. Gina Mahalek, *Author Q&A with Michael Oriard Author of Brand NFL: Making and Selling America's Favorite Sport*, UNIV. OF N.C. PRESS, http://www.uncpress.unc.edu/browse/page/498.

13. *Id.*

14. Eric Chemi, *The NFL Is Growing Only Because of Women*, BLOOMBERG (Sept. 26, 2014), http://www.businessweek.com/articles/2014-09-26/the-nfl-is-growing-only-because-of-female-fans.

15. *See generally* Travis Brody, *What Is the Appeal of American Football?*, THE GROWTH OF GAME: THE GENESIS, DEVELOPMENT AND FUTURE OF AMERICAN FOOTBALL IN EUROPE, http://www.growthofagame.com/2014/11/appeal-american-football/ (last visited Oct. 23, 2015).

16. *Id.*

17. *See* Christina Settimi, *The NFL's Best Fans*, FORBES (Aug. 20, 2014), http://www.forbes.com/sites/christinasettimi/2014/08/20/the-nfls-best-fans-2/.

18. *See* Christopher Heine, *After Ray Rice, the NFL Needs to Go Big to Restore Brand With Women, It May Be "Toast" if It Doesn't, Marketers Say*, ADWEEK (Sept. 9, 2014), http://www.adweek.com/news/advertising-branding/after-ray-rice-nfl-needs-go-big-restore-brand-women-160009.

skimpy cheerleader uniforms, cheering on the sidelines. The NFL has reinforced traditional gender norms for years, such as "men should use brute force" and "women are delicate".[19] In addition, the way the NFL franchises compensate their employees supports the notion that men are the breadwinners in the family and their female counterparts are the sidelined support system. With society changing right in front of us, shouldn't the NFL take notice?

Gone are the days when men were the only ones watching the NFL on Sundays and talking about the issues within the League, such as trades, contract details, and who is playing in the "Game of the Week". Women make up an estimated 45 percent of the NFL's more than 150 million person fan base.[20] Women have become the NFL's "Most Valuable Players".[21] Female viewers also make up approximately one third of the NFL's viewing audience.[22] Sunday Night Football ranked first among women ages 18-49 for the first time during the 2013-14 season, and FOX has also said its female football viewing audience has hit a record high.[23] The NFL's popularity with women does not stop in the regular season. Super Bowl XLVIII was the most-watched TV program for women in 2014, recording 45 million female viewers.[24] In addition, recent Super Bowls have logged higher female viewership than the Oscars, Grammys, and Emmys combined.[25]

Female fans, a group loved by advertisers, represent the League's biggest opportunity for growth.[26] However, marketing has its limits. People will try new products for a variety of reasons, including the price and quality of the product. But brand loyalty, as Amazon, Apple, and YouTube shareholders will tell you,[27] is driven by something deeper. The most successful companies do

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19. Emily Rothman, *NFL Controversy: 'Teachable Moment' for SPH Domestic Violence Expert*, BOSTON UNIV. SCH. OF PUB. HEALTH (Sept, 25, 2014), http://www.bu.edu/sph/2014/09/25/nfl-controversy-teachable-moment-for-sph-domestic-violence-expert/.

20. Drew Harwell, *Women Are Pro Football's Most Important Demographic. Will They Forgive the NFL?*, WASH. POST (Sept. 12, 2014), http://www.washingtonpost.com/business/economy/women-are-pro-footballs-most-important-market-will-they-forgive-the-nfl/2014/09/12/d5ba8874-3a7f-11e4-9c9f-ebb47272e40e_story.html [hereinafter Women Most Important Demographic].

21. *Id.*

22. Dr. C. Keith Harrison, *NFL Game Day Experiences of Female Spectators and Influential Patterns*, NFL DIVERSITY AND INCLUSION, 6, *available at* https://www.nflplayerengagement.com/media/466069/diversity_inclusion_female_spect_infl_vol2_v7.pdf.

23. Richard Deitsch, *An NFL Ratings Bonanza*, SPORTS ILLUSTRATED (Jan. 8, 2014), http://mmqb.si.com/2014/01/08/nfl-tv-ratings-nbc-cbs-espn-fox-playoffs/.

24. *See* Harwell, *supra* note 20.

25. *Id.*

26. *Id.*

27. "This year, the top 10 on the Brand Keys Loyalty Leaders rank as follows: 1. Amazon: tablets, 2. Apple: tablets, 3. Apple: smartphone, 4. YouTube: social networking." Robert Passikof, *Which Brands Have the Most Loyal Customers*, FORBES (Oct. 20, 2014, 6:01 AM), http://www.forbes.com/sites/robertpassikoff/2014/10/20/the-2014-brand-keys-loyalty-leaders-list/.

not just sell their product; they sell a specific culture.[28] The NFL is no different. Women will need additional incentives other than personalized pink jerseys or team logo jewelry to continue to be fans of the NFL if the culture does not further develop and promote its support of women. Women will truly embrace the League when they believe the NFL's values and beliefs align with their own.[29] The NFL should pay special attention to its group of "most valuable players." Paying attention to its on-field female employees is just a small step in this direction.

Unlike the rest of the United States, which has arguably improved gender equality in the workplace, albeit slowly,[30] the NFL is headed in the opposite direction. Even though these cheerleaders are not the "featured players" football fans come to watch every Sunday, they are featured in NFL advertising and are almost always spotted leading in and out of nearly every commercial break.[31] The NFL franchises should reconsider the compensation model for their cheerleaders. The model should reflect the impact these cheerleaders have on the total NFL entertainment product and the hours of hard work and dedication these mothers, daughters, sisters, and aunts put in week after week to help create the ultimate NFL fan experience. This reconsideration will show society that women are valued within the NFL organization.

II. HISTORY OF NFL CHEERLEADERS

The history of the NFL dates back to the 1890s,[32] but it was effectively created on September 17, 1920 as the American Professional Football Association (APFA).[33] The APFA only lasted two seasons and was reorganized on June 24, 1922 into the National Football League.[34] The rival

28. *Id.*

29. According to one fan, "I'll always love football, but this just makes me mad." The League's actions, she adds, will make it harder for her to recruit other female fans, including her own daughter. "They'll say, 'Why should I be interested in a sport that doesn't support women?'" Mina Kimes, *Dear NFL, Women Matter. . .*, ESPN W (Jul. 25, 2014), http://espn.go.com/espnw/news-commentary/article/11262500/espnw-why-ray-rice-light-punishment-bad-business-nfl.

30. *Gender Inequality and Women in the Workplace*, HARVARD SUMMER SCHOOL BLOG, NEWS, AND EVENTS, http://www.summer.harvard.edu/blog-news-events/gender-inequality-women-workplace (last visited Nov. 18, 2015) (the gender wage gap in the United States is lower than in many other countries and has narrowed since the mid-1990s).

31. Colin Ronan, *NFL Cheerleaders: Not All Ra-Ra-Shish-Boom-Ba*, N.Y. L. SCH.: THE OFFICIAL REVIEW (Nov. 25, 2013), http://www.theofficialreview.com/nfl-cheerleaders-not-all-ra-ra-shish-boom-bah/ [hereinafter NFL Cheerleaders].

32. Former All-American guard William Heffelfinger was paid $500 by the Allegheny Athletic Association to play in a game against the Pittsburgh Athletic Club, making him the first professional football player. *NFL History 1869-1910*, NFL, http://www.nfl.com/history/chronology/1869-1910 (last visited Jan. 30, 2015).

33. The American Professional Football Association was formed on September 17, 1920 and included ten teams from four different states. *NFL History 1911-1920*, NFL, http://www.nfl.com/history/chronology/1911-1920 (last visited Jan. 30, 2015).

34. *NFL History 1921-1930*, NFL, http://www.nfl.com/history/chronology/1921-1930 (last visited Jan. 30, 2015).

American Football League (AFL) was founded in 1959 and played its inaugural season in 1960.[35] The AFL and the older NFL merged in 1970, forming the combined league that would retain the name "National Football League."[36]

In 1954, pre-merger, the Baltimore Colts became the first NFL team to have cheerleaders.[37] After the Buffalo Bills suspended its cheerleaders in May 2014,[38] currently 25 of the 32 NFL teams include a cheerleading squad in their franchise.[39]

In their 50 years of existence, NFL cheerleaders have entertained fans, motivated NFL players, supported charitable causes, and added glitz and glamour to a sport that is otherwise known for its rough and uncouth culture.[40] The NFL cheerleaders have made a great product even better. The cheerleaders are instrumental in generating revenue for the NFL as they are featured in NFL advertising and game-day television coverage.[41] Despite the cheerleaders' prominent face time for the NFL and their significant commitment and hard work producing a product that grosses over $9.5 billion dollars annually,[42] cheerleaders are paid on average about $95 per game.[43] At the same time, NFL mascots can make up to $65,000 per year,[44] and most NFL stadium contractors pay their concession workers nearly double the federal minimum wage.[45]

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35. *NFL History 1951-1960*, NFL, http://www.nfl.com/history/chronology/1951-1960 (last visited Jan. 30, 2015).

36. *NFL History 1961-1970*, NFL, http://www.nfl.com/history/chronology/1961-1970 (last visited Jan. 30, 2015).

37. Joe Nawrozki, *Colts Cheerleaders' Spirit 'Got the Stadium Rocking'*, BALTIMORE SUN (Nov. 06, 2004), http://articles.baltimoresun.com/2004-11-06/news/0411060331_1_colts-cheerleaders-baltimore-colts-memorial-stadium.

38. In May 2014, the Buffalo Jills's manager, Stephanie Mateczum suspended all cheerleading activity "until this legal matter can be resolved." Ira Boudway, *What Are NFL Cheerleaders Worth? Inside Their Fight for Minimum Wage*, BLOOMBERG BUS. (Sept. 10, 2014), http://www.businessweek.com/articles/2014-09-10/nfl-cheerleaders-battle-teams-for-minimum-wage#p1.

39. Kyle Meinke, *Detroit Lions Proud to Be Among Just 6 NFL Teams Without Cheerleaders*, MLIVE.COM (Mar. 26, 2014), http://www.mlive.com/lions/index.ssf/2014/03/detriotlions_proud_to_be_1_of.html; *see also* NFL Cheerleaders, *supra* note 31.

40. Abigail Perdue, *Tackling the Culture of Cruelty in the NFL*, HUFFINGTON POST SPORTS (Oct. 6, 2014, 9:45 PM), http://www.huffingtonpost.com/abigail-perdue/tackling-the-culture-of-c_b_5932196.html.

41. *See* NFL Cheerleaders, *supra* note 31.

42. Isidore, *supra* note 1.

43. The Cincinnati Ben-Gals are paid $90 per game, and the cheerleaders for the Baltimore Ravens and Tampa Bay Buccaneers make $100 per game. The Oakland Raiderettes and the Jets Flight Crew make slightly more: $125 and $150 per game, respectively. The Buffalo Jills aren't paid for games at all. Instead, they receive a $90 game ticket and a $25 parking pass for each home game for which they cheerlead. *See Jiggle Tests*, *supra* note 7.

44. Marie Gentile, *Salary of an NFL Mascot*, EHOW, http://www.ehow.com/info_12211938_salary-nfl-mascot.html, (last visited Nov. 8, 2015), (according to online magazine Imagined, an NFL mascot's salary can range from as low as $23,000 per season to upward of $65,000 annually, and NFL teams take the roles of mascots

III. THE "GLAMOROUS" DAY TO DAY LIFE OF AN NFL CHEERLEADER[46]

Despite the glitz, working as an NFL cheerleader is not as glamorous as the pictures in the NFL calendars would suggest. These women are subjected to long game days, with little or no pay and high scrutiny of their bodies. Most NFL cheerleaders are paid a flat fee per game regardless of how many hours they actually worked.[47] Other cheerleaders are only given one game ticket and a parking pass per game,[48] and still others are paid a lump sum at the end of the season.[49] Typically cheerleaders will work approximately nine to ten hours on a game day, which translates to each cheerleader being paid at a rate of a few dollars an hour for home games,[50] significantly lower than the federal (or any state) minimum wage. However, if a cheerleader does not perform on a given game day, no matter the reason, she will not be compensated for that game.[51] For example, one Cincinnati Bengals cheerleader was not paid one week because she had to attend a funeral.[52]

Cheerleaders will not be paid for a game that they are "benched".[53] Usually a cheerleader is benched for violating a team rule or not adhering to the physical requirement standards.[54] If a cheerleader is benched she still has to come to the stadium, but instead of participating with the cheerleading squad on field, she is forced to sit in the locker room for the duration of the game, typically about three hours.[55] A cheerleader can be benched for the most trivial

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into consideration when awarding playoff bonuses, giving team mascots bonuses to a maximum of $10,000 depending on how far teams make it in the postseason).

45. Diane Todd, *Behind the Cheers, Serious Labor Strife*, NY DAILY NEWS (Sept. 7, 2014, 5:00 AM), http://www.nydailynews.com/opinion/behind-cheers-serious-labor-strife-article-1.1929771 (some stadium contractors pay concession workers $12-$18 per hour).

46. One thing to note about this section is the facts below describing the NFL cheerleaders' day-to-day do not represent the NFL cheerleaders' experiences across the League. The allegations and factual references are from the specific teams listed only.

47. *See generally Jiggle Tests*, *supra* note 7.

48. *Id.* (the Buffalo Jills aren't paid for games at all. Instead they receive a game ticket (worth $90) and a parking pass (worth $25) for each game they cheerlead at); *see also* Complaint ¶ 36, Jaclyn S. et al. v. Buffalo Bills, Inc. et al. (W.D.N.Y. 2014), *available at* https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=i0tcm6_PLUS_Hml0bcLxf3FxTew [hereinafter Jills Complaint].

49. The entire amount of compensation to which a Raiderette is entitled for performance and participation in home games is not paid until the conclusion of all of the Raiders' home games, which occurs at least eight months after they began working for the Raiders. *See* Complaint ¶ 29, Lacy T. et al. v. The Oakland Raiders (Cal. Super. Ct. 2014)]. *available at* http://www.levyvinick.com/images/SKMBT_60014012209230.pdf [hereinafter Raiderette Complaint].

50. *Id.* ¶ 14.

51. *Id.* ¶ 15.

52. Complaint ¶ 29, Brenneman v. Cincinnati Bengals, Inc., No. 1:14CV-136 (S.D. Ohio 2014), *available at* http://hr.cch.com/ELD/Brenneman.pdf [hereinafter Bengals Complaint].

53. Raiderette Complaint, *supra* note 49, ¶ 15.

54. Jills Complaint, *supra* note 48, ¶ 52.

55. *Id.* ¶ 55.

things, like weighing more than three pounds over her "goal weight" at the beginning of the season.[56]

The lack of compensation does not only apply to game time. The cheerleaders are not paid to practice, make charity appearances, or participate in other "required" activities.[57] Across all cheerleading squads in the NFL, cheerleaders are required to attend multiple rehearsals per week before the season begins, as well as during the season.[58] For several NFL franchises these rehearsals are unpaid.[59] There are deductions from the cheerleader's salary if she is late for a rehearsal.[60] There are also special repercussions for missing a final rehearsal prior to a game day performance.[61] In some instances, if a cheerleader misses the final rehearsal she will be "benched" and not permitted to cheer in that game, resulting in no pay.[62]

Cheerleaders are also required to make appearances at charity events and other corporate functions.[63] Across the NFL, whether the cheerleaders will be compensated varies team to team.[64] If they are compensated, the team usually charges a higher rate to have the cheerleaders appear than the actual compensation the cheerleaders receive.[65] For example, the Baltimore Ravens charge anywhere from $175 to $300 per hour per cheerleader for an appearance, but the cheerleader only takes home around $50 per hour.[66] The cheerleaders are also not reimbursed for travel expenses to and from these events.[67]

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56. *See generally Jiggle Tests*, *supra* note 7.

57. *Id.*

58. *Dallas Cowboys Cheerleaders Rules and Regulations*, DALLAS COWBOYS CHEERLEADERS (last visited October 31, 2015), http://www.dallascowboys.com/content/rules-regulations, ("CANDIDATES WHO DO NOT FEEL THEY CAN ATTEND ALL REHEARSALS SHOULD NOT CONTEMPLATE BEING A DALLAS COWBOY CHEERLEADER"); *see also Jiggle Tests*, *supra* note 7.

59. *See generally Jiggle Tests*, *supra* note 7 (the Ben-Gals, Jills, Raiderettes, Flight Crew, and Buccaneers cheerleaders are not paid for practicing. Cheerleaders for these teams are required to practice between 6 and 15 hours per week); *see also* Jills Complaint, *supra* note 48, ¶ 37; *see also* Raiderette Complaint, *supra* note 49, ¶ 23 (Raiderettes are required to attend rehearsals twice a week, but often three times a week. Each rehearsal lasts approximately three hours and pursuant to the Raiders' policies and procedures, the cheerleaders are not paid for the rehearsals).

60. Raiderette Complaint, *supra* note 49, ¶ 24.

61. *Id.* ¶ 25.

62. *Id.*

63. Raiderette Complaint, *supra* note 49, ¶ 17; Jills Complaint, *supra* note 48, ¶ 38.

64. Jills Complaint, *supra* note 48, ¶ 38-39; *see also Jiggle Tests*, *supra* note 7 (the Ben-Gals, Raiderettes, Jills and Buccaneer cheerleaders all allege that they work about 20 hours a week for free. This 20 hours includes charity and promotional events.).

65. Jills Complaint, *supra* note 48, ¶ 38-39; *see also Jiggle Tests*, *supra* note 7.

66. *Baltimore Ravens Cheerleaders Appearances*, BALTIMORE RAVENS CHEERLEADERS, http://www.baltimoreravens.com/ravenstown/cheerleaders/appearances.html, (last visited Feb. 5, 2015) (depending on the event/location, appearance fees range from $175 to $300 per cheerleader, per hour); *see also Jiggle Tests*, *supra* note 7.

67. Raiderette Complaint, *supra* note 49, ¶ 31.

In addition to these unreasonably low wages, the NFL franchises have adopted a punitive practice of fining the cheerleaders when they do not adhere to the rules.[68] For one cheerleading squad, the fines start at $10 and double after the first violation.[69] The cheerleaders may be fined for reasons such as: forgetting to bring the correct pom-poms to practice, wearing the wrong workout clothing to rehearsals, failing to bring a yoga mat to practice, or having the incorrect shade of fake tan.[70] This punitive practice utilized by some NFL franchises resembles the strategy used at strip clubs to fine dancers for not adhering to club rules.[71] After some dancers settled with their respective employers, some would argue that exotic dancers have more labor rights than NFL cheerleaders.[72]

In addition to disciplinary fines for trivial mistakes, cheerleaders are usually not reimbursed for expenses they incur during the season.[73] These expenses may include the requirement to use a specific, team approved hairstylist and cosmetic sponsor, professional skin tanning, and even the cheerleading uniform.[74] One cheerleader reported that she spent approximately $650 in one season for which she was not reimbursed.[75]

The cheerleaders do not only experience monetary hardships; they are also subjected to demeaning and degrading rules and proscriptions. This degradation starts in the team handbook that each cheerleader receives once she earns a spot on an NFL cheerleading squad. These handbooks have sexist and draconian tones from front to back. Some contract rules dictate things like how much bread to eat at a formal dinner,[76] how to properly eat soup, how much to tip restaurant waiters, wedding etiquette, how to properly wash 'intimate areas',

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68. *Id.* ¶ 22; *see also* Nichi Hodgson, *Cheerleaders Make the NFL's Billions. They Deserve to Be Paid Minimum Wage*, THE GUARDIAN (Mar. 30, 2014, 7:30 AM), http://www.theguardian.com/commentisfree/2014/mar/30/cheerleaders-make-minimum-wage-nfl-labor-rights; *see also* Jills Complaint, *supra* note 48, ¶ 52.

69. Raiderette Complaint, *supra* note 49, ¶ 22.

70. *Id.*

71. Dancers are charged for wearing the wrong shoes or underwear. They are also fined for not stripping fast enough on stage. Two dancers sued the Portland strip club, Casa Diablo, for harassment and unpaid wages. Anna Walters, *The Devil's Due*, W WEEK, (Jan. 14, 2015, 12:01 AM), http://www.wweek.com/portland/article-23812-the_devils_due.html; *see also* Stephanie Hoops, *Spearmint Rhino Exotic Dancers Settles Suit for Nearly 13 Million*, HUFFINGTON POST, (Jan. 14, 2013, 5:12 AM), http://www.huffingtonpost.com/2012/11/14/spearmint-rhino-exotic-dancers-settle-suit_n_2128458.html (at the end of 2012, Spearmint Rhino dancers successfully sued and received $13 million in back wages and compensation).

72. Hodgson, *supra* note 68.

73. Raiderette Complaint, *supra* note 49, ¶ 31; Bengals Complaint, *supra* note 52, ¶ 45; Jills Complaint, *supra* note 48, ¶ 57.

74. Raiderette Complaint, *supra* note 49, ¶ 31; Bengals Complaint, *supra* note 52, ¶ 45; Jills Complaint, *supra* note 48, ¶ 57.

75. Raiderrettes Complaint, *supra* note 49, ¶ 37.

76. *See Jiggle Tests*, *supra* note 7 ("If you are served pasta, never cut it to eat. Twirl a small portion on your fork with the assistance of a spoon").

and how often to change tampons.[77] One handbook goes so far as to instruct the cheerleaders what undergarments are permissible and appropriate to wear under practice clothes and uniforms.[78]

Some NFL teams subject their cheerleaders to demeaning and degrading behavior during charity events. Some cheerleaders were required to wear a bikini, be auctioned off, and were forced to sit on the highest bidder's laps.[79] Perhaps the most degrading activity an NFL cheerleader could go through is the "jiggle test" to assess her body's firmness.[80] The Buffalo Jills were subjected to these weekly "physique evaluations".[81] The team's management would analyze the cheerleader's entire body, including her stomach, arms, legs, hips, and butt, while she was doing jumping jacks.[82] These evaluations would determine whether she was permitted to perform at the next Buffalo Bills game.[83]

Since the NFL cheerleaders often act as the face of the NFL, no matter what the NFL teams ask of their cheerleaders, it is most important that they always participate with a smile on their faces. In their etiquette manual, the Buffalo Jills are instructed: "Do not be overly opinionated about anything. . . . be positive and consistently optimistic about everything and never complain!"[84] This shows the strength of the NFL's control over their respective cheerleaders, and therefore, the cheerleaders must participate in any activity asked of them with a smile on their faces.

IV. THE LAWSUITS

In the last year, cheerleaders for five NFL teams have filed lawsuits against their respective teams for violating minimum wage laws.[85] Two

77. *Id*. (the manual discusses "lady body maintenance" and the correct way to use a tampon. "A tampon too big can irritate and develop fungus." "Products should be changed at least every 4 hours").

78. The Cincinnati Ben-Gals Rule Book explains that no panties are to be worn under practice clothes or uniform, not even thong panties. Stephen Rex Brown, *Ben-Gal Cheerleader's Suit: Bengals Require 'No Slouching Breasts' or Panties*, NY DAILY NEWS (Feb. 13, 2014, 8:36 PM), http://www.nydailynews.com/news/national/ben-gal-suit-reveals-cincinnati-bengals-requires-no-slouching-breasts-panties-article-1.1613961.

79. Jills Complaint, *supra* note 48, ¶ 42.

80. *Id.* at ¶ 62; *see also Jiggle Tests*, *supra* note 7.

81. Jills Complaint, *supra* note 48, ¶ 62.

82. *Id*.

83. *Id.*

84. The Ben-Gals are required to follow rules guiding their "attitude and behavior," as follows (emphasis): "Insubordination – Webster defines this word as 'not submitting to authority; disobedient.' Syn. Rebellious, mutinous, defiant. Insubordination to even the slightest degree IS ABSOLUTELY NOT TOLERATED!!! You will be benched or dismissed!!!; "Authority – ABSOLUTELY NO ARGUING OR QUESTIONING THE PERSON IN AUTHORITY." Bengals Complaint, *supra* note 52, ¶ 47.

85. *See* Nathaniel Grow, *Pro Sports Teams and the Fair Labor Standards Act*, SPORTS LAW BLOG (May 29, 2014), http://sports-law.blogspot.com/2014/05/pro-sports-teams-and-fair-labor.html; *see also Blood, Sweat & No Cheers?*, ESPN (July 19, 2014), http://espn.go.com/video/clip?id=11231194 (reporting by Shelley Smith and discussing the case of Caitlin Yates (a.k.a. Caitlin Y), an Oakland Raiders cheerleader and the eleventh

cheerleading teams have also sued the NFL outright.[86] The defendant teams and their cheerleading squad's names are the following: the Oakland Raiders (*Raiderette*s), Cincinnati Bengals (*Ben-Gals*), Buffalo Bills (*Jills*), New York Jets (*Flight Crew*), and the Tampa Bay Buccaneers (*Cheerleaders*).[87] Primarily, the cheerleaders argue that they are employees, and therefore are entitled to the same minimum wage that all other employees are due under the Fair Labor Standard Act (FLSA).[88] The FLSA sets the federal minimum wage, which is currently $7.25 per hour,[89] and requires overtime pay for hours worked beyond 40 hours per week.[90] Twenty-three states and the District of Columbia have set their own minimum wages above the federal floor.[91] In order for the FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the organization.[92] The FLSA does not apply to independent contractors.[93] Section 203(g) of the FLSA defines "employ" as including to "suffer or permit to work."[94] When determining whether a worker is an employee or an independent contractor under the FLSA, the Department of Labor analyzes a number of factors, including: (1) the extent to which the work performed is an integral part of the employer's business, (2) whether the worker's managerial skills affect his or her opportunity for profit or loss, (3) the relative investments in facilities and equipment by the worker and the employer, (4) the worker's skill and initiative, (5) the permanency of the worker's relationship with the employer, and (6) the nature and degree of control by the employer.[95]

The cheerleaders believe they should be classified as employees under the FLSA. The teams, in turn, have responded that the cheerleaders are independent contractors who are not covered by the FLSA.[96] If the cheerleaders can prove that they are employees covered under the FLSA, NFL franchises and possibly the NFL would likely have to compensate the cheerleaders with back pay and other damages, including attorneys' fees.[97]

NFL cheerleader to file a lawsuit related to the minimum wage against her team at that time, but the first to include the NFL itself as a defendant).

86. *Blood, Sweat & No Cheers?*, *supra* note 85.

87. Grow, *supra* note 85.

88. *Id.*

89. 29 U.S.C. § 206(a)(1)(C) (2011).

90. 29 U.S.C. § 207(a)(2) (2011).

91. *Minimum Wage Laws in the States*, WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, http://www.dol.gov/whd/minwage/america.htm (last visited Jan. 30, 2015).

92. 29 U.S.C. § 203(e)(1) (2011).

93. *Id.*

94. 29 U.S.C. § 203(g).

95. *Fact Sheet 13: Am I an Employee?: Employment Relationship Under the Fair Standards Act*, WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, http://www.dol.gov/whd/regs/compliance/whdfs13.htm (last visited Jan. 30, 2014).

96. *California Bill Gives Pro Cheerleaders Minimum Wage, OT and Sick Leave*, NY DAILY NEWS (July 1, 2015), http://www.nydailynews.com/sports/football/calif-bill-cheerleaders-minimum-wage-ot-sick-leave-article-1.2277850.

97. *See* 29 U.S.C. 203(e)(1); s*ee also* 29 U.S.C § 216 (2011).

On September 4, 2014, the first NFL cheerleader group settled with its respective team.[98] The Oakland Raiderettes reached a settlement with the Oakland Raiders for $1.25 million in back pay, on top of a new contract, which raised the Raiderettes' wages to comply with state and federal labor law requirements.[99] The settlement also eliminated several unlawful practices, such as fines for "minor infractions" like showing up slightly late to practice and withholding paychecks until the end of the season.[100] The annual compensation for an Oakland Raiderette will increase from about $1,250 per season to about $3,200 per season.[101] In response to this lawsuit, the Governor of California, Jerry Brown, signed a new law that requires professional sports teams to treat their cheerleaders like employees for purposes of the FLSA in the state of California.[102] This makes California the first state in the country to expressly make cheerleaders employees for the purposes of the FLSA.[103]

Bringing lawsuits against their respective teams under the FLSA and organizing an effort to become a union are two completely different obstacles for the cheerleaders. Being considered employees under the FLSA will provide the cheerleaders with minimum wage requirements.[104] However, these FLSA cases will not only provide the NFL cheerleaders with just compensation; they demonstrate that there has been a shift in the legal consciousness of cheerleaders and that they are capable of legal mobilization to have their rights in the workplace recognized.[105] Thus, if they have a colorable and legitimate claim under the National Labor Relations Act (NLRA), the NFL should be prepared for the cheerleaders to assert their rights to organize a union. Forming a union will allow the NFL cheerleaders to collectively bargain for wages and more favorable working conditions.

Twenty years ago, a Regional Director of the National Labor Relations Board (NLRB) ruled that one group of NFL cheerleaders were employees under the NLRA and therefore, were eligible to vote in a representative election.[106] The 1995 Buffalo Jills formed a union, the first of its kind.[107]

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98. Robin Abcarian, *Cheerleaders Wage-Theft Lawsuit to Cost Oakland Raiders $1.25 Million*, LA TIMES (Sept. 4, 2014, 3:12 PM), http://www.latimes.com/local/abcarian/la-me-ra-raiders-settle-cheerleader-lawsuit-20140904-column.html.

99. *Id.*

100. *Id.*

101. *Id.*

102. Chris Isidore, *California Cheerleaders Win Right to Be Paid and Treated Like Regular Employees*, CNN (July 17, 2015, 6:17 AM EST), http://money.cnn.com/2015/07/16/news/companies/california-cheerleader-law/.

103. *Id.*

104. 29 U.S.C. § 206(a)(1).

105. Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83 (2005).

106. Buffalo Jills Cheerleaders, N.L.R.B., Case No. 3-RC-10223 (1995), http://cohornlaw.com/wp-content/uploads/2015/05/NLRB-decision.pdf.

However, the success was short-lived because the cheerleaders lost their sponsorship the following year, leaving the team with no funding.[108] With the NLRA case law developing over that 20-year period, the ultimate question is: will the NLRB rule the same way it did in 1995, and will NFL cheerleaders be given another chance to form a union?

V. WILL THE PAST REPEAT ITSELF?

In 1995, one of the NLRB's Regional Directors determined that the Buffalo Jills cheerleaders were employees and affirmed their right to vote to form a union.[109] The Buffalo Jills cheerleaders named Mighty Taco, Inc. and the Buffalo Jills Cheerleaders, Inc. (BJCI) as employers.[110] Mighty Taco and BJCI took the position that, if the cheerleaders were found to be employees covered by the NLRA, then BJCI was the sole employer of the cheerleaders.[111] The corporations further contended that if the cheerleaders were found to be employees covered by the NLRA, they should be classified as temporary seasonal employees who should not be eligible to vote in a representative election.[112] The corporations also took the position that the Board should decline to assert jurisdiction over the cheerleaders.[113]

Based on BJCI's positions, the Regional Director came to several conclusions.[114] First, he asserted jurisdiction over the NFL cheerleaders.[115] Second, he decided that the Buffalo Jills were employees and protected under the NLRA.[116] He used the "right of control" test to determine whether the cheerleaders were employees or independent contractors.[117] Third, the Regional

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107. Ira Boudway, *What Are NFL Cheerleaders Worth? Inside Their Fight for Minimum Wage*, BLOOMBERG BUS. (Sept. 10, 2014), http://www.businessweek.com/articles/2014-09-10/nfl-cheerleaders-battle-teams-for-minimum-wage#p1.

108. *Id.*

109. Buffalo Jills Cheerleaders, N.L.R.B., Case No. 3-RC-10223, 13.

110. Andrew Gerovac is the sole shareholder and officer of BJCI. Gerovac also owns 50% of the shares of Mighty Taco. Mighty Taco is a Mexican fast food retail outlet. The cheerleaders contended that the common ownership of BJCI and Mighty Taco by Gerovac and Gerovac's managerial authority with both coupled the companies together and therefore should result in a finding of joint employer status. *Id*. at 1-2.

111. Buffalo Jills Cheerleaders, N.L.R.B., Case No. 3-RC-10223, 2.

112. *Id*. at 11.

113. *Id*. at 4.

114. *Id*. at 5.

115. *Id.*

116. *Id.* at 11.

117. Buffalo Jills Cheerleaders, Inc., N.L.R.B. Case No. 3-RC-10223, 8-9 (1995); *see generally* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (establishing that the right of control test should be used to determine who is an employee.); *see also* Gary Enterprises, 300 N.L.R.B. 1111, 1112 (1990) ("If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished, the person who performs the services is an employee. If only the results are controlled, the person who performs the services is an independent contractor.").

Director determined that BJCI was the sole employer of the Buffalo Jills.[118] Whether two employers are joint employers hinges on whether the two companies codetermine matters governing essential terms and conditions of employment.[119] The Regional Director did not believe that Mighty Taco and BJCI fit this standard.[120] Finally, he held that the cheerleaders were not temporary seasonal workers because of the substantial likelihood of reemployment and because the cheerleaders work on a year-to-year basis, rather than only for a specified season.[121]

If any NFL cheerleader group were to bring a case in front of the NLRB today, they would likely use the same arguments the Buffalo Jills used in 1995. The jurisdictional standard and seasonal employee standards have not changed substantially since 1995. However, the independent contractor test and the joint employer standard have both developed and changed.[122] The next section will analyze the legal claims the NFL cheerleaders have under the NLRA.

VI. THE CALL OF UNIONIZATION FOR NFL CHEERLEADERS UNDER THE NATIONAL LABOR RELATIONS ACT

In 1935, Congress enacted the NLRA to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses, and the U.S. economy.[123] Under Section Seven of the Act, employees have the right to engage in protected concerted activity for mutual aid and to collectively improve their working situation.[124] Cheerleaders will face several specific challenges under the NLRA.

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118. Buffalo Jills Cheerleaders, Inc., N.L.R.B., Case No. 3-RC-10223, 4.

119. Int'l Transfer of Florida, 305 N.L.R.B. 150 (1991); TLI, Inc., 271 N.L.R.B. 798 (1984).

120. Buffalo Jills Cheerleaders, N.L.R.B., Case No. 3-RC-10223, 4.

121. *Id.* at 13.

122. *See* Todd Lebowitz, *NLRB New Test for Independent Contractor Misclassification, Applies It to Find FedEx Drivers Are Employees Who Can Unionize*, EMPLOYMENT LAW SPOTLIGHT (Oct. 10, 2014), http://www.employmentlawspotlight.com/2014/10/nlrb-adopts-new-test-for-independent-contractor-misclassification-applies-it-to-find-fedex-drivers-are-employees-who-can-unionize/ (explaining that the NLRB adopts a new test for independent contractor misclassification by adding a new entrepreneurial factor); *see also* Marilyn A. Pearson, *Prepare for NLRB's New Joint Employer Standard – They May Be Your Employees After All*, INSIDE COUNSEL, http://www.insidecounsel.com/2014/07/01/prepare-for-nlrbs-new-joint-employer-standard-the (explaining that the NLRB looks to modify the joint employer standard under the NLRA).

123. *National Labor Relations Act*, NAT'L LABOR RELATIONS BD. (last visited Nov. 18, 2015), http://www.nlrb.gov/resources/national-labor-relations-act.

124. Under the NLRA:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may

First, the NFL cheerleaders must fall under the jurisdiction of the NLRA.[125] Second, the cheerleaders must establish an employment relationship with their respective NFL teams.[126] If they are considered to be independent contactors, rather than employees, they will be excluded from the coverage of the NLRA.[127]The NLRA and the FLSA use different tests to determine whether a worker is an employee; the FLSA test is more inclusive.[128] Differences in interpretation mean that a worker might be deemed an employee for purposes of the FLSA, but an independent contractor for purposes of the NLRA.[129] Third, the NFL cheerleaders must establish that they are not considered temporary seasonal employees under the NLRA. Finally, the cheerleaders need to establish the individual clubs as their employers and whether they have a joint employer claim with a third-party or the NFL.[130]

A. Jurisdictional Analysis

The first issue that must be addressed is whether the coverage of the NLRA is broad enough to include the industry in question. The constitutional basis for the enactment of the NLRA is the commerce clause.[131] The commerce clause grants Congress the authority to regulate matters directly or indirectly affecting interstate commerce.[132] In the 1930s, the interstate commerce clause was interpreted narrowly, allowing congressional interventions only in the

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> be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (2011).

125. 29 U.S.C. § 160(a) (2011)

126. 29 U.S.C. § 157.

127. 29 U.S.C. § 152(3) (2011).

128. The National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA) each have their own definition of employee and its own way of drawing the line between employees and independent contractors. The NLRA uses the common law right to control test. In this test an employment relationship exists if the employer as the right to control the working life of its workers. This is determined by evaluating the totality of the specific factors. The FLSA uses the economic realties test. In this test an employment relationship exists if an individual is economically dependent on a particular business (its alleged employer) for continued employment. *See* Charles Muhl, *What Is An Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV., (Jan. 2007), http://www.bls.gov/opub/mlr/2002/01/art1full.pdf.

129. *Id.*

130. 29 U.S.C. § 152(2).

131. The commerce clause states:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States . . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

U.S. Const. art. I § 8.

132. *Id.*

matter of commerce where the impact on multiple states was direct and obvious.[133] In *NLRB v. Jones Laughlin Steel Corporation*, the Supreme Court held that the effect on interstate commerce could be either direct or indirect as long as there was a substantial impact.[134] After *Jones Laughlin*, the NLRB's jurisdiction broadened.[135]

In order for the professional sports industry to be covered by the NLRA, the Board needed to find that their activities had a substantial impact on interstate commerce.[136] Years ago this may have been an issue of merit; however, the Supreme Court announced in 1972 that "[p]rofessional baseball is a business and it is engaged in interstate commerce."[137] This decision came after the Board asserted jurisdiction in *American League of Professional Baseball Clubs*, a case involving baseball umpires.[138] The Board found that "the Employer is engaged in an industry affecting commerce, and that it will effectuate the policies of the NLRA to assert jurisdiction herein."[139] The Supreme Court made similar determinations with regards to football,[140] basketball,[141] boxing,[142] hockey,[143] and golf.[144] It can be said with confidence that the NLRA's coverage includes professional team sports. Therefore, it is very likely the NLRB will find that NFL franchises and their cheerleaders fall under this professional team sports umbrella.

The NLRB has also imposed discretionary standards for asserting jurisdiction over cases based on the industry of the employer.[145] However, the NLRB is free to disregard those standards because they are self-imposed and not statutorily required.[146] As long as the case affects interstate commerce, courts will not intervene in the application of the discretionary jurisdictional standards, unless extraordinary circumstances exist or the NLRB has abused its

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133. David Forte, *Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause*, THE HERITAGE FOUND. (Jan. 18, 2011), http://www.heritage.org/research/reports/2011/01/commerce-commerce-everywhere-the-uses-and-abuses-of-the-commerce-clause.

134. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

135. *Id.*

136. *Id.*

137. Flood v. Kuhn, 407 U.S. 258, 282 (1972); *see also* Cym H. Lowell, *Collective Bargaining and the Professional Team Sports Industry*, 38 LAW & CONTEMP. PROBS. 3-41 (1973); *see generally* Phillip L.Martin, *The Labor Controversy in Professional Baseball: The Flood Case*, 23 LAB. L.J. 567 (1972).

138. Am. League of Prof'l Baseball Clubs, 180 NLRB 190 (1970).

139. *Id.* at 192.

140. Radovich v. Nat'l Football League, 352 U.S. 333 (1957).

141. Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1972).

142. United States v. Int'l Boxing Club of New York, Inc., 348 U.S. 236 (1954).

143. Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972); Boston Prof'l Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972).

144. Deesen v. Prof'l Golfers' Ass'n, 358 F.2d 165 (9th Cir.) *cert denied*, 385 U.S. 846 (1966); Blalock v. Ladies Prof'l Golf Ass'n, 359 F. Supp 1260 (N.D. Ga. 1973).

145. *Jurisdictional Standards*, NAT'L RELATIONS LABOR BD. (last visited Feb. 28, 2015) http://www.nlrb.gov/rights-we-protect/jurisdictional-standards.

146. NLRB v. Erlich's 814, Inc., 577 F. 2d 68 (8th Cir. 1978).

authority.[147] However, because BJCI challenged this issue in the 1995 Buffalo Jills case, this Comment will analyze which discretionary standard the NFL cheerleaders should fall within.[148]

The NLRB's discretionary jurisdictional standards are typically stated in terms of volume of business, and vary based on the type of enterprise involved.[149] These standards measure volume with direct and indirect inflows and outflows.[150] Employers in retail business fall under the Board's jurisdiction if they have gross annual revenue of $500,000 or more.[151] For non-retailers, the Board takes jurisdiction when annual inflow or outflow is at least $50,000.[152]

In the 1995 case, the employer, BJCI, took the position that the Regional Director should apply the retail standard for jurisdiction because the cheerleaders were providing services directly to the football fans as the ultimate consumer, therefore making them a retailer.[153] BJCI concluded that the Regional Director should not assert jurisdiction over the Buffalo Jills because BJCI did not meet the retail standard for $500,000 in gross revenues for a one-year period.[154]

The Regional Director disagreed with BJCI and decided that the Buffalo Jills simply added to the NFL team's product, which is ultimately the fielding of a professional football team.[155] The Regional Director disagreed that the cheerleaders provide services directly to the fans.[156] He supported this view with the fact that the fans do not pay the NFL teams specifically for the cheerleaders' services.[157] For these reasons, the Regional Director found that the non-retail standard for jurisdiction applied and that BJCI met this standard.[158] Since the non-retail and retail discretionary standards under the NLRA have not changed since then, the NFL cheerleaders will likely still fall under the non-retail standard and the Board will have jurisdiction over them.

B. Employee vs. Independent Contractor Analysis

The second issue that must be considered is which workers are covered by the NLRA, and whether the worker is classified as an employee or an independent contractor. The Act draws a fine line between "employees" and "independent contractors."[159] The NLRA grants to employees "the right to self-

147. *Id*.

148. Buffalo Jills Cheerleaders, N.L.R.B., Case No. 3-RC-10223, 4.

149. *Jurisdictional Standards*, NAT'L RELATIONS LABOR BD. (last visited Feb. 28, 2015) http://www.nlrb.gov/rights-we-protect/jurisdictional-standards.

150. *Id*.

151. *Id*.

152. *Id*.

153. Buffalo Jills Cheerleaders, N.L.R.B., Case No. 3-RC-10223, 4.

154. *Id*.

155. *Id*. at 5.

156. *Id.*

157. *Id.*

158. *Id.*

159. 29 U.S.C. § 152(3).

organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[160] In contrast, workers classified as independent contractors are excluded from NLRA coverage. Since the NLRA gave organizing and collective bargaining rights only to employees, the important question is whether a particular worker is an employee. Therefore, the starting point for an employee/independent contractor analysis is to define the terms "employee" and "employer." Unfortunately the statutory language in the NLRA fails to distinguish the prominent characteristics of either employer[161] or employee[162] from other classes of entities, persons, or workers. The NLRB and the judicial systems have been guided primarily by common law principles in analyzing the meaning of the terms "employee" and "employer."[163]

i. The Traditional "Common Law Right to Control" Test

The traditional test used in an employee/independent contractor analysis is the "common law right to control."[164] This test is articulated in the Restatement (Second) of Agency § 220.[165] The courts have summarized the common law right to control test by using the following factors: (1) the extent of control by the employer, (2) whether the individual is involved in a distant occupation or business, (3) whether the work is usually done with or without supervision, (4) do the workers have specialized skills, (5) who provides the supplies and tools, (6) the length of employment, (7) the method of payment, (8) whether the work is part of the employer's regular business, (9) the parties' belief about the nature of the relationship, and (10) whether the employer is in the business that the worker performs.[166]

160. 29 U.S.C. § 157.

161. "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . . ." 29 U.S.C. § 152(2).

162. "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . . but shall not include any individual . . . . having the status of an independent contractor, or any individual employed as a supervisor . . ." 29 U.S.C. § 152(3).

163. *See* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 37-38 (2d ed. 2004) (describing courts' early efforts to distinguish between employees under the Act and other persons); *see also* Field Packing Co, 48 N.L.R.B. 850, 852-53 (1943) (demonstrating the Board's early adoption of the common law test for employee). The U.S. Supreme Court faced a similar problem when it considered the meaning of "employee" under the Employee Retirement Income Security Act (ERISA). *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-25 (1992). There, the Court wrote: "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished . . . ." *Id.*

164. *See* Field Packing Co, 48 N.L.R.B. 850, 852-53 (1943) (holding that truck drivers were employees and, therefore, not independent contractors because the employer had not fully divested itself of the right to control drivers' work).

165. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1933).

166. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

The Board has applied the factors with no one factor being determinative, however the extent of the actual supervision exercised is the most important element.[167] The list of factors determining who is an employee for purposes of the NLRA is not used as a checklist, but rather used to balance the arguments on both sides.[168] The list of factors above is not an exhaustive list, meaning the Board can consider other relevant factors, depending on the factual circumstances in each case.[169] In conclusion, the cheerleaders will prevail if more factors weigh in favor of their classification as employees rather than independent contractors under the NLRA.

ii. "Refining" the Right to Control Test

In September 2014, the NLRB, disagreeing with a decision by the District of Columbia circuit court,[170] issued a decision that clarified and refined its analysis in employee/independent contractor cases.[171] The Board declined to adopt the D.C. court's holding, which essentially treated entrepreneurial opportunity as a decisive factor rather than the right to control element.[172] The Board held that the entrepreneurial opportunity consideration is part of a broader factor that takes into account the constraints on an employee's ability to render services as part of an independent business.[173] The Board did not view this as a new test for employee status, but simply refined its emphasis on how to use the right to control test.[174] After the decision in *FedEx Home Delivery*, the NLRB will use the "refined" test for determining who is an employee eligible to join a union.[175]

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167. Since the common law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *See* NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968); *see also* Roadway Package System, 326 N.L.R.B 842, 850 (1998) (the Board rejected the notion that the predominant factor in its independent contractor analysis is whether an employer has a right to control the manner and means of the work performed by an individual).

168. When evaluating the independent-contractor status: (1) all factors must be assessed and weight; (2) no one factor is decisive; (3) other relevant factors may be considered, depending on the circumstances; and (4) the weight to be given a particular factor or group of factors depends on the factual circumstances of each case. *See, e.g.*, Lancaster Symphony Orchestra, 357 N.L.R.B. 152, slip op. at 3 (2011); *see also* St. Joseph News-Press, 345 N.L.R.B. 474, 477-478 (2005) (the Board has continued to repudiate efforts to give primary emphasis to any factor in evaluating an individual's status).

169. Lancaster Symphony Orchestra, 357 N.L.R.B. No. 152, (2011).

170. This case was in response to the decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) where the DC circuit court interpreted Board law as signaling that the Board considers "entrepreneurial opportunity" as a decisive factor when determining whether a work is an employee or an independent contactor. FedEx Home Delivery, 361 N.L.R.B. No. 55, (2014).

171. FedEx Home Delivery, 361 N.L.R.B. No. 55, at *4-5, *8-11, *37-39 (2014).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

iii. Right of Control: The Daily Lives of NFL Cheerleaders Demonstrate that They Are Controlled by Their Franchises

The cheerleaders have several strong arguments to be considered employees for purposes of the NLRA. The most persuasive argument the cheerleaders have is the amount of control the NFL franchises have over every detail in a cheerleader's life. The individual NFL franchises, as the cheerleaders' employers, have enormous power over their respective cheerleaders, including providing them with written rules and regulations that set forth conditions under which the cheerleaders perform,[176] selecting the uniforms the cheerleaders will wear,[177] requiring the cheerleaders to use a certain hairstylist and cosmetics specialist,[178] benching the women for not meeting certain physical standards,[179] and prohibiting the cheerleaders from fraternizing with the team's football players and staff.[180] The franchises also control their rehearsal schedules, their routines, the times and places of performances,[181] and require each to maintain a specified weight.[182] All significant business decisions are made by the franchises, which alone decide if and when the appearances are made, as well as how much, if anything, the cheerleaders will be paid for the performances.[183] In the past, other types of workers were categorized as independent contractors because, even though the employer advised its workers and offered opinions and suggestions, it was ultimately up to the workers to make certain business decisions.[184] However, this is the opposite situation for the cheerleaders. In fact, if the cheerleaders do not comply with certain demands, they risk being benched, leaving them without compensation or out of a job.[185] The franchises make the final determinations as to the manner and means of the cheerleaders' performances. In conclusion, because the individual clubs seem to have control over nearly

176. *See generally* Raiderette Complaint, *supra* note 49; Bengal Complaint, *supra* note 52; Jills Complaint, *supra* note 48.

177. Jills Complaint, *supra* note 48, ¶ 57.

178. Raiderettes Complaint, *supra* note 49, ¶ 31 (Raiderettes are required to use a hairstylist selected by the Raiders. They are also required to have a specific hair style and color that is selected by the Raiders or by an approved hair stylist).

179. Bengals Complaint, *supra* note 52, ¶ 31 n.12; Jills Complaint, *supra* note 48, ¶ 52.

180. Jills Complaint, *supra* note 48, ¶ 52.

181. *Id*. ¶ 35; *see generally Jiggle Tests*, *supra* note 7.

182. *See Jiggle Tests*, *supra* note 7, at 3; *see also* Jills Complaint, *supra* note 48 ¶ 62.

183. Jills Complaint, *supra* note 48, ¶¶ 35-39; The Jills were prohibited from participating "in any other capacity or employment in promotions, advertising, modeling or photography with other than the Buffalo Jills . . . without first having obtained the written or verbal consent of the Director." Jills Complaint, *supra* note 48, ¶ 68.

184. Comedians were found by the Board to be independent contractors because, while the employer gave advice, opinions and suggestions, the comedians made the final determinations as to the content, order and style of their presentations and were not required to follow the employer's advice. Comedy Store, 265 N.L.R.B. 1422 (1982).

185. Jills Complaint, *supra* note 48, ¶¶ 52, 53.

every aspect of the cheerleaders' working lives, they should be classified as employees.

Some facts support the NFL's position, including the length of employment and the method of payment. The cheerleaders are employed for one year, with their contracts being renewed at the start of each season.[186] The method of payment for working the home football games is different depending on the club, but some examples include: the cheerleaders being paid at the end of a season rather than an hourly rate;[187] cheerleaders given one game ticket for each game worked, valued at $90.00/each, and one parking pass, valued at $25.00/each;[188] and cheerleaders compensated $90.00 for working a home game,[189] which ends up resulting in a 10-hour work day.[190] The length of employment and method of payment both support the classification of independent contractor. While these characteristics are analogous to that of an independent contractor, it is at the discretion of the court to weigh all of the factors of the *FedEx* test, and no single factor is determinative.[191]

Analyzing the other factors from the *FedEx* test, the cheerleaders have additional arguments supporting their employee status. The cheerleaders may not work as cheerleaders for any sports club other than the NFL franchise for which they cheer.[192] Even though the cheerleaders purchase their cheerleading uniforms and the accompanying accessories,[193] the individual franchises decide what uniform and accessories the cheerleaders must buy.[194] The amount of control each club has over every aspect of the cheerleaders' lives significantly outweighs the factors that support the opposite finding. When the Board considers the totality of the circumstances, they should come to the conclusion that the cheerleaders are employees of the NFL franchises under the NLRA.

C. Seasonal Employer Issue

If the NFL cheerleaders are classified as employees, it must still be determined if they are seasonal or temporary. Generally seasonal or temporary employees are not eligible to vote in a representation election under the

186. Buffalo Jills Cheerleaders, NLRB, Case No. 3-RC-10223, 13.

187. *See* Raiderette Complaint, *supra* note 49, ¶ 29; *see also Jiggle Tests*, *supra* note 7.

188. *See* Jills Complaint, *supra* note 48, ¶ 36.

189. Bengals Complaint, *supra* note 52, ¶¶ 4, 42.

190. *Id.* ¶¶ 38, 44.

191. Since the common law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *See* NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968); *see also* Roadway Package Sys., 326 N.L.R.B 842, 850 (1998).

192. Buffalo Jills Cheerleaders, NLRB, Case No. 3-RC-10223, 9.

193. Raiderette Complaint, *supra* note 49, ¶ 31 (The Raiderettes are also required to purchase false eyelashes, tights and a white bra); *see also* Bengals Complaint, *supra* note 52, ¶ 45 (Ben-Gal cheerleaders must pay for specialized clothing, make up, skin tanning and other gear related to their role as a cheerleader); *see also* Jills Complaint, *supra* note 48, ¶ 57.

194. Jills Complaint, *supra* note 48, ¶ 57.

NRLA.[195] However, this does not apply to seasonal or temporary employees who have an expectation of future employment.[196] The Board has held that expectancy of recall is the key factor in determining the eligibility of employees employed on a temporary or seasonal basis.[197] In assessing the likelihood of employment in the following season, the Board has considered the following factors: (1) size of the labor force from which the seasonal employees are recruited, (2) the stability of the employer's labor requirements and the extent to which the employer is dependent upon seasonal labor, (3) the actual season-to-season reemployment, and (4) the employer's preference or recall policy regarding reemployment of seasonal employees.[198]

The cheerleaders have a strong claim against classification as seasonal, temporary employees because they have to re-audition every year and are chosen on a yearly basis.[199] In addition, the cheerleaders work prior to and after the National Football League season each year.[200] The annual turnover rate of NFL cheerleaders is very low; about one half to two thirds of the incumbent cheerleaders are chosen as the cheerleaders for the following season.[201] The fact that the majority of cheerleaders who choose to reapply, are chosen in succeeding years supports the assertion that they are not seasonal, temporary employees.[202] In addition, the annual number of cheerleaders chosen is a steady figure, with an average of 36 cheerleaders on each NFL club's cheerleading squad.[203] While applicants may come from outside the general geographic area of the individual NFL team, the minimal compensation received by the cheerleaders makes it likely that most applicants are from the cities the NFL teams are located in and its surrounding communities, another characteristic

195. Maine Apple Growers, 254 N.L.R.B 501, 502 (1981).

196. *Id.*

197. L&B Cooling Inc., 267 N.L.R.B 1 (1983); Knapp-Sherrill Co., 196 N.L.R.B. 1072, N. 2 (1972).

198. *Id*. at 2.

199. *See Cheerleaders, Auditions FAQ*, DALLAS COWBOYS, http://www.dallascowboys.com/content/auditions-faq (last visited Nov. 1, 2015); *see also* Heather Cartonia, *Making the Cut*, PRO PLAYERS INSIDER (Apr. 5, 2011, 9:36 AM), http://proplayerinsiders.com/nfl-player-team-news-features/making-the-cut (explaining that a common misconception is that once a NFL cheerleader makes the team, she never has to try out again; only captains are exempt from trying out and help to run the audition process and guide girls that need help).

200. Buffalo Jills Cheerleaders, NLRB, Case No. 3-RC-10223, 13.

201. *Id.*

202. *Id.*; *see also Cheerleader, Ben-Gals Roster*, CINCINNATI BENGALS, http://www.bengals.com/cheerleaders/ben-gals.html (last visited Nov. 1, 2015) (showing only 10 of 27 roster spots for the 2015 Ben-Gals Cheerleaders were first-year cheerleaders for the organization).

203. *Compare Cheerleaders*, DALLAS COWBOYS, (last visited Nov. 1, 2015) (showing the Dallas Cowboy Cheerleaders have 34 roster sports this year) *with Ben-Gals Roster*, *supra* note 203 (27 roster spots for the Ben-Gals Cheerleaders this year) *and Raiderettes*, OAKLAND RAIDERS, http://www.raiders.com/raiderettes/roster.html (last visited Nov. 1, 2015) (35 roster spots for the Oakland Raiderettes this year).

that is in the cheerleaders' favor.[204] It is likely the Board would agree with the Regional Director's decision in 1995[205] and find that the cheerleaders are not temporary, seasonal employees because there is a substantial likelihood of reemployment in the succeeding year for those desiring such reemployment.

D. Joint Employer Analysis

If an employee/employer relationship is found between two entities, the employer would be responsible for complying with the NLRA, and in turn, will be liable for any claims an employee brings against the employer under the NLRA.[206] If a joint employer relationship is found between two or more employers, the liability and responsibility will be shared.[207] The old standard the NLRB used to determine whether a joint employer relationship existed was whether the alleged joint employers *shared or codetermined* those matters governing the essential terms and conditions of employment.[208] Essential terms and conditions of employment include hiring, firing, discipline, supervision, and direction over the employees covered by the other.[209] Under the old standard, the joint employers' control over these employment matters needed to be direct and immediate.[210] However, under the new standard, the Board expanded the old standard by construing what it means to "share or codetermine" broadly.[211]

Traditionally under the NLRA, franchises and franchisors operated as separate and independent businesses because they do not share "direct and immediate" control over matters governing the essential terms and conditions of employment.[212] However, in the NLRB's recent decision, *Browning-Ferris*, the Board overruled the joint employer standard set forth in *TLI* and *Laerco.* In *Browning-Ferris Industries* (BFI), the Regional Director, applying the established standard articulated in *TLI* and *Laerco*, concluded that BFI and a staffing agency, Leadpoint, were not the joint employers of workers at recycling facilities that BFI owned because BFI did not have control over the

204. *Cf.* Tim Heitman, *5 Things You Need to Know About the Dallas Cowboys Cheerleaders*, USA TODAY SPORTS (Aug. 8, 2014, 9:07 AM), http://ftw.usatoday.com/2014/08/5-things-you-need-to-know-about-the-dallas-cowboys-cheerleaders-reality-tv-show (the Dallas Cowboy Cheerleaders are the exception to this statement. Due to their increased popularity from their reality television show, more than 500 women from all over the world, including New York, Miami, Australia, and Japan, came to Dallas in hopes of becoming a Dallas Cowboys Cheerleader).

205. Buffalo Jills Cheerleaders, NLRB, Case No. 3-RC-10223, 13.

206. Mitchell H. Rubinstein, *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. 606, 647 (2012).

207. *Id.* at 648.

208. TLI Inc., 271 N.L.R.B 798 (1984).

209. Laerco Transp., 269 N.L.R.B 324 (1984).

210. TLI Inc., 271 N.L.R.B 798.

211. Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186, 25, 204 L.R.R.M. (BNA) 1154 (Aug. 27, 2015). (Miscimarra, Johnson, III, Members, dissenting).

212. *Id.*

essential terms and conditions of the workers' employment.[213] For example, BFI had no control over the workers' wages and benefits, it had no authority to control the recruitment, hiring, counseling, discipline, and termination of the workers, and it did not control or co-determine the workers' daily work.[214] Therefore, the Regional Director determined that Leadpoint was the sole employer of the workers and directed an election.[215] The employees appealed with the belief that this case presented the opportunity to evaluate the joint employer test for purposes of franchisor/franchise relationships under the NLRA.[216] After granting the union's request for review, the NLRB extended an invitation for interested parties to file amicus briefs addressing whether it should maintain the existing joint-employer standard or adopt a new one.[217] This invitation prompted several parties to draft briefs, which support both sides of the argument.[218] Most notably, the General Counsel of the NLRB sent in a brief with the position that the Board should abandon its existing joint employer doctrine because it undermines the fundamental policy of the NLRA, which is to encourage stable and meaningful collective bargaining.[219] The

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213. Browning-Ferris Indus. Inc., N.R.L.B. Case 32-RC-109684, 2013 WL 8480748 (Director of Region 32 Aug. 16, 2013) *available at* http://apps.nlrb.gov/link/document.aspx/09031d45813ac6d0.

214. *Id.* at 9.

215. *Id*. at 11.

216. Request for Review of the Regional Director's Decision and Direction of Election, Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186 (Sept. 3, 2013), Case 32–RC–109684, *available at* http://apps.nlrb.gov/link/document.aspx/09031d45813e45ff.

217. Notice and Invitation to File Briefs, Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186 (May 12, 2014), Case 32–RC–109684, 2014 WL 1692776, *available at* http://apps.nlrb.gov/link/document.aspx/09031d45816da958. The NLRB invited amici to address the following:

> Under the NLRB's current joint-employer standard, is Leadpoint the sole employer of the petitioned for employees?
>
> Should the NLRB adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the NLRB's decision in this regard?
>
> If the NLRB adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

Id.

218. *See, e.g*., Brief of Amicus Curiae The Chamber of Commerce of the U.S., Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186 (Jun. 26, 2014), Case 32–RC–109684, *available at* http://apps.nlrb.gov/link/document.aspx/09031d45817b2056 (arguing that the NLRB should adhere to the Laerco/TLI standard); Brief Submitted by Professors of Labor and Emp't Law Amicus Curiae, Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186 (Jun. 26, 2014), Case 32–RC–109684, *available at* http://apps.nlrb.gov/link/document.aspx/09031d45817b187a (arguing that the NLRB should revise its approach to joint employer status).

219. Amicus Brief of the General Counsel, Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186 (Jun. 26, 2014), Case 32–RC–109684, *available at* http://apps.nlrb.gov/link/document.aspx/09031d4581.

NLRB eventually overturned the Regional Director and decided to expand the joint-employer standard.[220] The Board removed all limitations on what kind of degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding.[221] The new test evaluates the exercise of control by construing "share or codetermine" broadly.[222] For example, the Board explained that a joint-employer relationship would exist if employers engage in genuinely shared decision-making or if they confer or collaborate to set a term of employment.[223] Under this new standard, a company who traditionally was considered to be a separate entity and not a joint employer is now liable for its employees.

In the context of this paper, the NFL cheerleaders brought joint employer suits against two separate groups: third party companies that help manage the cheerleaders[224] and the NFL. Since the issue of whether a third party company is a joint employer of the individual NFL franchise is case-specific, this Comment will focus on whether the NFL will be a joint employer of its individual franchises.

The NFL's purpose is to promote professional football through its supervision of competition among member franchises.[225] The franchise activities are governed by the League's Constitution and the regulations promulgated by a majority vote of the clubs.[226] The Commissioner, selected and compensated by the clubs, is the League's chief officer.[227] The Commissioner has broad authority in disputes between clubs, players, coaches, and employees.[228] He is the "principal executive officer"[229] of the NFL and also has authority in hiring League employees, negotiating television contracts, and disciplining individuals that have violated League bylaws or committed "conduct detrimental to the welfare of the League, its member clubs or employees, or to professional football."[230] Additionally, a Board of Directors composed of the 32 NFL team owners assists the Commissioner in managing the League.[231] The League's control over the individual franchises' labor relations begins with restrictions on which players may be acquired.[232]

220. Browning-Ferris Indus., Inc., 362 N.L.R.B. No. 186, 25, 204 L.R.R.M. (BNA) 1154 (Aug. 27, 2015).

221. *Id.*

222. *Id.*

223. *Id.*

224. Jills Complaint, *supra* note 48, ¶24.

225. Constitution and Bylaws of the Nat'l Football League, art. II, § 1(A) (2006), *available at* http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf [hereinafter NFL Constitution].

226. *Id.*, art. I, § 2.

227. *Id.*, art. VIII.

228. *Id.*

229. *Id.*

230. NFL Constitution, art. VIII.

231. *Id.*, art. III, § 1(A).

232. *Id.*, art. XII, § 1(A) ("No person shall be eligible to play or be selected as a player unless all college football eligibility of such player has expired, at least 5 years have

However, the League exercises less control over the acquisition of "free agent" players.[233] The bylaws govern interclub player trades and empower the Commissioner to void trades not deemed to be in the best interest of the League.[234] Termination of player contracts is conducted through a waiver system in accordance with procedures specified in Bylaw 18.1 of the NFL Constitution.[235] The League also exercises considerable control over the contractual relationships between the clubs and their players.[236] Every player contract must be submitted to the Commissioner, who is empowered to disapprove a contract deemed not in the best interest of the League.[237] "The Commissioner shall have the power to disapprove any contract between a player and a club executed in violation of or contrary to the Constitution and Bylaws of the League."[238] Disputes between a club and a player must be submitted to the Commissioner for final and binding arbitration.[239]

The NFL Constitution supports an argument that the NFL is a joint employer with its clubs for *the football players*. The NFL, through the terms agreed upon in the collective bargaining agreement, does exercise control over players' work conditions, schedules, rules, regulations, structure of compensation, drug testing, and discipline. However, does the language in the Constitution extend to the cheerleaders for each individual club? The NFL cheerleaders could argue that because the NFL exerts control over its individual franchises that it also has control over all of the workers the clubs choose to employ. However, even under the new expansive joint-employer standard, it is unclear as to whether the NFL has enough control over the individual hiring, firing, and day-to-day supervision of the cheerleaders. If the NLRB finds the NFL is a joint employer of the NFL cheerleaders, the NFL would be also be liable for the same NLRA claims the cheerleaders bring against their respective NFL franchises.

VII. CONCLUSION

Employment and labor law issues are popular subjects in the sports industry today. Three former minor league baseball players filed a lawsuit against Major League Baseball, Commissioner Emeritus Bud Selig, and their former teams alleging similar claims made by the NFL cheerleaders.[240] We

elapsed since the player first entered a recognized college or university or such player receives a diploma from a recognized college or university prior to September 1 of the next season of the League.")

233. NFL Constitution, art. XII, § 4(A).

234. *Id.*, art. XV, § 4.

235. *Id.*, art. XVIII, § 1.

236. *Id.*, art. XV, § 4.

237. *Id.*

238. *Id.*

239. NFL Constitution, art. VIII, § 3.

240. *See* Josh Leventhal, *MLB States its Defense in Minor League Players Lawsuit*, BASEBALL AM.

have also seen student-athletes at Northwestern University attempt to organize.[241] The NFL cheerleaders could do the same. The *Jenkins* and *Ed O'Bannon* lawsuits against the NCAA assisted in changing the concept of the unpaid student-athlete.[242] The Raiderette cheerleader lawsuit could play the same role for the NFL cheerleaders. If the cheerleaders decide to unionize it is going to be up to the NLRB to assess the legal obstacles discussed above.

Currently, the cheer from the sideline is being heard loud and clear by five NFL franchises, S-U-E! If NFL franchise owners do not act on these working conditions, the cheer from the sidelines could severely change. Give me a U, give me an N, give me an I, give me an O . . . what does that spell? Unionize.

(June 11, 2014), http://www.baseballamerica.com/minors/mlb-states-its-defense-in-minor-leagueplayers-lawsuit (interviewing Professor Nathaniel Grow, who "says the decision will come down to which side of the argument the court favors: that baseball is a year-round business or that it is a seasonal operation that does most of its business during a baseball season").

241. *See* Alejandra Cancino, *NLRB: Northwestern Football Players Can Unionize*, CHI. TRIB. (Mar. 27, 2014), http://articles.chicagotribune.com/2014-03-27/business/ct-northwestern-football-union-nlrb-0327-biz-20140327_1_labor-law-northwestern-football-players-national-labor-relations-board; *see also* Matt Bonesteel, *In Unanimous Vote, NLRB Rejects Northwestern Football Team's Attempt to Unionize*, WASH. POST (Aug. 17, 2015), https://www.washingtonpost.com/news/early-lead/wp/2015/08/17/in-unanimous-vote-nlrb-rejects-northwestern-football-teams-attempt-to-unionize.

242. Tom Farrey, *Ed O'Bannon: Ruling Is Tip of Iceberg*, ESPN (Aug. 10, 2014), http://espn.go.com/espn/otl/story/_/id/11332816/ed-obannon-says-antitrust-ruling-only-beginning-change**;** Paul Barrett, *The Insurgents Who Could Bring Down the NCAA*, BLOOMBERG BUS. (Aug. 21, 2014), http://www.bloomberg.com/bw/articles/2014-08-21/paying-ncaa-college-athletes-inside-the-legal-battle.