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Repository Citation

Genevieve F.E. Birren and Tyler J. Schmitt, *Mixed Martial Artists: Challenges to Unionization*, 28 Marq. Sports L. Rev. 85 (2017)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol28/iss1/4>

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MIXED MARTIAL ARTISTS: CHALLENGES TO UNIONIZATION

GENEVIEVE F.E. BIRREN* AND TYLER J. SCHMITT**

I. INTRODUCTION

Acquired for \$4 billion in July of 2016,¹ the Ultimate Fighting Championship (UFC) is the world's premier professional mixed martial arts (MMA) organization. MMA is a combat sport involving both stand-up and ground fighting, in which competitors, known as mixed martial artists, utilize various techniques from disciplines such as wrestling, boxing, Muay-Thai kickboxing, Brazilian jiu-jitsu, judo, karate, and taekwondo. As with any sport, the amount of money paid to athletes is of great interest among fans, promoters, and fighters alike. In recent years, the amount fighters are paid to compete in the UFC has come under serious scrutiny.² In 2016, median per-fight-pay in the UFC was around \$42,000,³ and most fighters on the promotion's roster of over 500⁴ would be considered lucky to fight three times a year.

Due to the low per-fight-pay and the few number of fights available to athletes, calls for a fighters' union have intensified within the MMA community.⁵ The National Labor Relations Act (NLRA) grants and protects employees' rights to organize and participate in union activity.⁶ The creation

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1. Phil Terrigno, *Does the UFC's Sale Have a Sports Business Parallel?*, FIGHTLAND BLOG (July 11, 2016), <http://fightland.vice.com/blog/does-the-ufcs-sale-have-a-sports-business-parallel>.

2. John S. Nash, *Why Isn't There a Union in MMA?*, BLOODY ELBOW (July 19, 2013), <http://www.bloodyelbow.com/2013/7/19/4533358/why-isnt-there-a-union-in-mma>.

3. Scott Harris, *For Love, Not Money: How Low Fighter Pay is Undermining MMA*, BLEACHER REPORT (Jan. 11, 2017), <http://bleacherreport.com/articles/2685605-for-love-not-money-how-low-fighter-pay-is-undermining-mma>.

4. *Weight Class Index*, UFC, http://www.ufc.com/fighter/Weight_Class?id= (last visited Dec. 14, 2017).

5. Nash, *supra* note 2.

6. Phillip L. Wright, Jr., *Major League Soccer: Antitrust, the Single Entity, and the Heightened*

of a union would allow the majority of mixed martial artists, particularly in the UFC, to have a greater say in their compensation and other issues related to their sport.⁷ While the idea of a fighters' union is great, one obstacle remains in the athletes' way; currently those that fight in the UFC do so as independent contractors.⁸ Before the fighters can benefit from the protections of the NLRA, the National Labor Relations Board (NLRB) must first rule that they are, in fact, employees.⁹ Fortunately for the fighters, in 2014 the NLRB issued the *FedEx Home Delivery* decision, which provides an updated test for determining if workers qualify as employees.¹⁰ By applying the outline set forth in the decision to the UFC, the athletes should be able to prove that they are, in fact, employees, which would then allow them to work toward unionization.

II. EVOLUTION OF THE UFC

The UFC has become “one of the largest and fastest growing sports brands in the world” since its inception.¹¹ As the largest pay-per-view event provider in the world, “[t]he organization produces more than 40 live events annually . . . broadcast in over 156 countries and territories, to nearly 1.1 billion television households worldwide, in 29 different languages.”¹²

First appearing in a primitive form in 1993, the original UFC, produced by WOW Productions, did not feature professional athletes trained in a multitude of fighting styles, but rather combatants from several fighting disciplines all intent on showcasing their chosen style as the most effective martial art.¹³ As strengths and weaknesses of various martial arts were revealed, fighters intuitively began training in multiple disciplines.¹⁴ Coinciding with this shift in the training of fighters was a shift in the nature of mixed martial arts competition itself, from a no-holds-barred martial arts tournament spectacle to

Demand for a Labor Movement in the New Professional Soccer League, 10 SETON HALL J. SPORT L. 357, 370 (2000).

7. Nash, *supra* note 2.

8. *Id.*

9. Wright, *supra* note 6, at 370.

10. FedEx Home Delivery, Inc., 361 N.L.R.B. No. 55 (Sep. 30, 2014).

11. WME | IMG, *WME | IMG To Acquire UFC®*, PR NEWSWIRE (July 11, 2016), <http://www.prnewswire.com/news-releases/wme--img-to-acquire-ufc-300296320.html>.

12. *Id.*

13. Geoff Varney, Note, *Fighting for Respect: MMA's Struggle for Acceptance and How the Muhammad Ali Act Would Give It a Sporting Chance*, 112 W. VA. L. REV. 269, 271 (2009).

14. *The Sport: What is MMA and the UFC?*, UFC, <http://www.ufc.com/discover/sport/index> (last visited Dec. 14, 2017).

the regulated and recognizable sport that MMA is today.¹⁵

In fact, the landscape of the UFC has changed so much since its humble beginnings that a viewing of the earliest events barely resembles today's pay-per-views, save for the company's signature octagon cage, where the fights have always taken place. Rather than a tournament style competition, UFC fighters compete in a single bout on an event, which typically entails three five-minute rounds, or five five-minute rounds in the case of a headlining or championship fight, scored on a ten-point must system, ala boxing, and where punches, kicks, knees, elbows and submission holds are all legal.¹⁶ The Unified Rules of MMA provides a list of thirty-one fouls that constitute illegal moves and required equipment for all competitors, which include mouth guards, groin protectors for males, chest protectors for females, and four to six ounce gloves.¹⁷ Additionally, the promotion now boasts twelve weight classes, including four female divisions.¹⁸

Fighters on the UFC's roster hail from all over the world and train at their own chosen facilities. To fight in the UFC, they are signed to multi-bout contracts, referred to as the UFC's Standard Promotional and Ancillary Rights Agreement, which situates the company as their exclusive fight promoter.¹⁹ The standard agreement pays each athlete a negotiated upon base figure for showing up to their fight, as well as a bonus typically of equal value for winning the fight.²⁰ Successive wins result in lock-step increases in base pay and win bonuses, while losses keep a fighter at the same pay figures for their next fight, should they not be cut from the promotion.²¹

The transformation of MMA from its primitive stages in the early-1990's to the regulated sport it is now was largely the result of the fledgling, near-bankrupt UFC being purchased by Las Vegas casino moguls, Frank and Lorenzo Fertitta, for \$2 million on January 9, 2001, "provid[ing] the UFC with the financial backing to push for the acceptance of MMA as a legitimate

15. *Id.*

16. *Rules and Regulations – Unified Rules and Other MMA Regulations*, UFC, <http://www.ufc.com/discover/sport/rules-and-regulations> (last visited Dec. 14, 2017) [hereinafter *Rules and Regulations*].

17. *Id.*

18. *Fighters – Official Website of the Ultimate Fighter Championship*, UFC, <http://www.ufc.com/fighters> (last visited Dec. 14, 2017).

19. *Promotional and Ancillary Rights Agreement*, EDDIE ALVAREZ CONTRACT 1, <https://docs.google.com/file/d/0B4Tw9Kwt3agyc1MwRDVFZ05EY0U/edit?pli=1> (last visited Dec. 14, 2017) [hereinafter *Contract*].

20. *Id.* at 7.

21. *Id.*

sport.”²² It was under the Fertittas’ ownership that the UFC became the world’s leading MMA promoter. In 2001, the company generated approximately \$4.6 million of revenue.²³ By 2014, that number had jumped to approximately \$522 million.²⁴ Over those thirteen years, the Fertittas’, along with UFC President Dana White, brought the company into the mainstream sporting world with landmark distribution and sponsorship deals.²⁵ In 2011, the company signed a pair of large television contracts; one in the U.S. with FOX Sports Media Group, worth a reported \$832 million over seven years, and one in Brazil with Globo, worth a reported \$232 million over five years.²⁶ In 2014, the UFC signed an official uniform deal with Reebok, worth a reported \$70 million over six years, to outfit its fighters during the week leading up to their fights and in the cage.²⁷

Other significant advances in the sport under the Fertittas’ ownership of the UFC include the introduction of accident insurance for the promotion’s fighters²⁸ and the breaking ground of an athlete performance center set to open in May 2017.²⁹ While practically all of the significant strides in the sport of MMA were developed under the Fertittas’ guidance, after more than fifteen years of ownership, the brothers cashed in on their investment, selling the company to WME-IMG on July 11, 2016, for a reported \$4 billion,³⁰ the largest sum ever paid for a sports organization.³¹

III. EMPLOYEE V. INDEPENDENT CONTRACTOR

Workers generally fall into one of two categories: employees or independent contractors. The NLRA and the Fair Labor Standards Act

22. Varney, *supra* note 13, at 275.

23. John S. Nash, *What Investors Are Being Told About UFC Revenues*, BLOODY ELBOW (Oct. 20, 2015), <http://www.bloodyelbow.com/2015/10/20/9547333/what-deutsche-bank-moodys-and-standard-poors-tell-us-about-the-ufc/in/9372195>.

24. *Id.*

25. *Id.*

26. *Id.*

27. *UFC/Reebok Uniform Deal Reportedly Worth \$70 Million Over Six Years*, CAGE POTATO, <http://www.cagepotato.com/ufc-reebok-uniform-deal-reportedly-worth-70-million-over-six-years/> (last visited Dec. 14, 2017).

28. *UFC Announces Accident Insurance Coverage for Athletes*, UFC (May 9, 2011) <http://www.ufc.com/news/UFC-Announces-Accident-Insurance-Coverage-For-Athletes?id=> [hereinafter *UFC Announces*].

29. Case Keefer, *Athlete Performance Center Built as the Heart of New UFC Campus: Fighting Promotion Prepares for Move to New Headquarters in May*, LAS VEGAS SUN, Jan. 19, 2017, <https://lasvegassun.com/news/2017/jan/19/athlete-performance-center-heart-new-ufc-campus/>.

30. Terrigno, *supra* note 1.

31. *Id.*

(FLSA) both apply only to employees. The NLRA gives employees the right “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”³² The FLSA addresses a variety of working conditions, including working hours and overtime pay, minimum wage, and child labor.³³ Additionally, employers must generally withhold income, Medicare, and Social Security taxes from compensation paid to employees, as well as pay for worker’s compensation insurance and unemployment taxes.³⁴ Many employers also pay for retirement and healthcare plans, among other benefits, and often these items are part of a collective bargaining agreement. Lastly, employees are covered by various anti-discrimination statutes, such as Title VII,³⁵ the Americans with Disabilities Act,³⁶ and the Age Discrimination in Employment Act.³⁷ However, none of these laws and regulations apply to independent contractors, which makes identifying workers as independent contractors appealing to employers because it saves them money and allows them to avoid legal requirements and restrictions.

A. Current Status of UFC Athletes

While on its meteoric rise in the sporting world, the UFC’s management has, and continues to, consider their athletes independent contractors, avoiding the set salaries and other benefits, such as retirement and health insurance, enjoyed by professional athletes in other sports.³⁸ Compared to the four major sports leagues in the United States (the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League(NHL)), which split revenues with players upwards of fifty percent, the UFC keeps an estimated eighty-five percent of revenues.³⁹

To date, two organizations have formed with the goal of collectively

32. 29 U.S.C. § 157 (2017).

33. Fair Labor Standards Act, 29 U.S.C. §§ 201–262 (2017).

34. *Independent Contractor (Self-Employed) or Employee?*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> (last visited Dec. 14, 2017).

35. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2017).

36. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2017) (amended 2008).

37. Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (2017).

38. PROFESSIONAL FIGHTERS ASS’N, <http://profighters.org/> (last visited Dec. 14, 2017).

39. *Id.*

bargaining with the UFC to combat this inequity. In August 2016, sports agent Jeff Borris, labor attorney Lucas Middlebrook, and economist Andrew Zimbalist formed the Professional Fighters Association (PFA).⁴⁰ The stated goal was to organize UFC athletes so that they may collectively bargain with the promotion, pursuant to the NLRA.⁴¹ On November 30, 2016, the Mixed Martial Arts Athletes Association (MMAAA) was formally announced in a media conference call held by UFC star, Georges St-Pierre,⁴² along with high-profile UFC fighters Tim Kennedy, Cain Velasquez, Donald Cerrone, T.J. Dillashaw, and former Bellator MMA owner Bjorn Rebney.⁴³ The three stated goals of the MMAAA are to earn a settlement from the UFC for current and past UFC athletes, increase the revenue split for fighters to fifty percent, and to negotiate a collective bargaining agreement with the UFC.⁴⁴

The greatest obstacle to forming a UFC fighters' union comes from the current classification of UFC athletes; rather than being employees of the promotion, they are currently recognized as independent contractors, and therefore unable to form a union.⁴⁵ This is where the NLRB's decision in *FedEx Home Delivery* regarding FedEx drivers in Hartford, Connecticut provides a detailed ten-criteria test, with room for additional criteria on a case-by-case basis, used to determine if workers classified as independent contractors are, in fact, employees.⁴⁶ In the PFA's initial press conference held on August 18, 2016, Middlebrook explained that, should a complaint be brought to the NLRB regarding the status of UFC fighters, "[u]nder NLRB case law[,] . . . the burden [of proof] is on the party who's saying that you're an independent contractor. [T]hey have to come forward with the evidence to convince the NLRB that you're not an employee."⁴⁷ Applying the outline set forth in the 2014 NLRB decision to UFC fighters, it is likely that, if a complaint were ever to be brought to the board, the athletes would be found to, in fact, be employees of the UFC; thus providing the PFA or the MMAAA,

40. MMAjunkie Staff, *Professional Fighters Association Announces Formation of Union Geared Toward UFC Athletes*, MMAJUNKIE (Aug. 11, 2016), <http://mmajunkie.com/2016/08/professional-fighters-association-announces-formation-of-union-geared-toward-ufc-athletes>.

41. *Id.*

42. Marc Raimondi, *Georges St-Pierre, Four Other UFC Stars Announce Launch of MMA Athletes Association*, MMA FIGHTING (Nov. 30, 2016), <http://www.mmafighting.com/2016/11/30/13800624/georges-st-pierre-four-other-ufc-stars-announce-launch-of-mma>.

43. *Id.*

44. *Id.*

45. Nash, *supra* note 2.

46. FedEx Home Delivery, Inc., 361 N.L.R.B. No. 55 (2014).

47. *Professional Fighters Ass'n Press Conference*, YOUTUBE (Aug. 18, 2016), <https://www.youtube.com/watch?v=m7r9LNVAjzY>.

2017]

MIXED MARTIAL ARTISTS

91

whichever organization remains relevant or becomes dominant, the legal grounds to work towards unionization.

B. Changes from Unionization

The formation of a recognized fighters' union within the UFC would allow fighters to negotiate with the promotion on such issues as minimum fight guarantees, pensions, health care, grievance procedures, disability benefits, physical therapy and training, agent supervising, revenue splits, and other pressing issues.⁴⁸ Beyond the benefits from unionization, merely being declared employees instead of independent contractors would result in the UFC athletes being covered by various anti-discrimination and equal pay laws.

In November of 2016, a PFA document was released noting ten goals they wish to accomplish if they become the certified bargaining representative of the UFC's athletes.⁴⁹ The list included an increase in fighter base pay, comprehensive health insurance coverage for fighters and their families, an experience-based pension system, a mutually agreed upon drug policy, a procedure for resolving disputes between fighters and the promotion that involves an independent arbitrator, a share of revenues, agreed upon weight classes, a ranking system independent of the UFC that determines fighter matchups, a board of fighters that evaluates officiating, and a rehab allowance that provides medically suspended fighters a \$2,000 monthly stipend to support themselves while injured.⁵⁰

IV. NLRB DECISION IN *FEDEx HOME DELIVERY*

FedEx Home Delivery revolved around the issue of whether FedEx drivers in Hartford, Connecticut, were independent contractors excluded from insurance coverage, or employees covered under Section 2(3) of the NLRA.⁵¹ Prior to the decision, the drivers operated under an independent contractor framework.⁵² To determine employee status, the board identified ten distinguishing factors, plus an additional relevant factor for the case, between

48. PROFESSIONAL FIGHTERS ASS'N, *supra* note 38.

49. John Morgan & Steve Marrocco, *Document: Professional Fighters Association's Goals Include Experience-Based Pensions, Minimum \$25k/\$25k Purses, Monthly Rehab Stipend*, MMAJUNKIE (Nov. 7, 2016), <http://mmajunkie.com/2016/11/document-professional-fighters-associations-goals-include-experience-based-pensions-minimum-25k25k-purses-monthly-rehab-stipend>.

50. *See generally id.*

51. *FedEx Home Delivery, Inc.*, 361 N.L.R.B. at 1.

52. *Id.* at 3.

independent contractors and employees.⁵³ The board assessed and weighed all factors, with no one factor being decisive, and evaluated other relevant factors specific to each case.⁵⁴ Furthermore, all ten factors need not be met for employee status to be granted.⁵⁵ Utilizing these factors, the NLRB found the FedEx drivers were indeed employees of FedEx.⁵⁶ When analyzing and applying the board's reasoning for each of the following factors in the *FedEx* decision to the work environment experienced by UFC athletes, it is clear that they have a case for being classified as employees.

V. APPLICATION OF *FEDEX HOME DELIVERY* TO THE UFC

A. *The Extent of Control*

The first factor the NLRB considered was “[t]he extent of control which, by the agreement, the master may exercise over the details of the work.”⁵⁷ The NLRB ruled this factor in favor of employee status for FedEx drivers due to FedEx exercising “pervasive control over the essential details of drivers’ day-to-day work.”⁵⁸ FedEx dictated the working hours, the work location, and the packages to be delivered (job assignment).⁵⁹ Drivers had the freedom to select the order delivery and decided when to take their breaks, but this minimal control was insufficient to offset FedEx’s “fundamental control over their job performance.”⁶⁰

The current relationship between the UFC and its athletes would most likely not fall into the same category as the relationship between FedEx and its drivers, in terms of control. Athletes are free to train where and when they want, with the UFC only dictating the times and rules of matches between fighters.⁶¹ However, in the future, this may actually change. On January 18, 2017, UFC executives gave a media tour of the company’s new Corporate Campus and Performance Institute in Las Vegas, which opened in May

53. *Id.* at 2.

54. *Id.*

55. *Id.*

56. *Id.* at 1.

57. *Id.* at 2.

58. *Id.* at 12.

59. *Id.* at 13.

60. *Id.*

61. Brent Brookhouse & John Morgan, *UFC Breaks Ground on Corporate Campus with Eye Toward Future, Athlete Enhancement*, MMAJUNKIE (Dec. 1, 2015), <http://mmajunkie.com/2015/12/ufc-breaks-ground-on-new-corporate-campus-with-eye-toward-future-athlete-enhancement>.

2017]

MIXED MARTIAL ARTISTS

93

2017.⁶² According to statements by UFC President, Dana White, and UFC Chief Operating Officer, Lawrence Epstein, in 2015, when the center was first announced, it appears as though the idea behind the facility was to gain more control over their athletes' training and rehabilitation methods.⁶³ At the heart of the campus will be the performance institute for the UFC's fighters, where the athletes will have access to amenities such as a cryotherapy chamber, a hydroworx pool, compression and laser-therapy units, relaxation rooms, nutrition and rehabilitation centers, and training equipment, for example, a full-sized octagon equipped with high-definition overhead cameras to record and review sparring sessions.⁶⁴ The UFC is planning to schedule fighters for one to two-week visits to the Performance Institute, where they can learn efficient training methods that they can then take back to their home gyms.⁶⁵

In 2015, White compared the Institute to other professional sports facilities, claiming,

[i]f you get an injury and blow out your knee, now we're going to invite you to come to Las Vegas where you can live here and stay here and we can actually take care of you. No different than if you played for a professional sports team and you get injured. You have to show up at the rehabilitation facilities until you get cleared.⁶⁶

The difference, however, is that players on professional sports teams are employees of said team, not independent contractors. Epstein also plainly stated, "[t]hat was something, the training of athletes and the recovery [from injury] we had no control over at all. We decided if this is what is negatively affecting our business, things we had no control over, then the answer was to get more involved."⁶⁷ If the execution of the new UFC Corporate Campus and Performance Institute do in fact give the UFC more control over the day-to-day training and rehabilitation of its athletes, this factor could end up favoring employee status for fighters in the future.

62. Keefer, *supra* note 29.

63. Brookhouse & Morgan, *supra* note 61.

64. Keefer, *supra* note 29.

65. *Id.*

66. Brookhouse & Morgan, *supra* note 61.

67. Kevin Iole, *UFC Hoping New Las Vegas Facility will Lure Fighters in, Reduce Significant Injuries*, YAHOO! SPORTS (Dec. 1, 2015), <http://sports.yahoo.com/news/ufc-hoping-new-las-vegas-facility-will-lure-fighters-in--reduce-significant-injuries-003920591-mma.html>.

B. Whether the Employee Is Engaged in a Distinct Occupation or Business

The NLRB found that “[b]y virtue of their uniforms and logos and colors on their vehicles, [FedEx] drivers are, in effect, doing business in the name of FedEx rather than their own” and that “[a]bsent their affiliation with FedEx, drivers would lack the infrastructure and support to operate as separate entities.”⁶⁸

In 2014, the UFC signed an official uniform deal with Reebok worth a reported \$70 million over six years.⁶⁹ Under the terms of the outfitting deal, “[f]ighters [are] required to wear Reebok’s official outfitting kits during fights and fight week”⁷⁰ These “UFC” labeled uniforms, along with the gloves that are labeled “UFC,” suggest in the same manner as the FedEx drivers that the fighters are doing business in the name of the UFC rather than their own. Additionally, without the UFC, the athletes would lack an infrastructure to put together and monetize their fights at least not to the level the UFC is able to achieve. Thus, this factor weighs in favor of employee status for UFC athletes.

C. Whether Work Is Done Under Direction of Employer or Specialist Without Supervision

Under this factor, the NLRB found that “[d]rivers are required to adhere to a strict company protocol, with guidelines governing dress, appearance, safety Significantly, FedEx may also impose disciplinary measures.”⁷¹ Although the NLRB acknowledged that the FedEx drivers did most of their work without immediate supervision, this was insufficient to negate the conclusion that they were under general supervision.⁷²

UFC athletes must also adhere to strict company protocol. In addition to the aforementioned Reebok uniforms, athletes are also required to wear mouthpieces, groin protectors for males, and chest protectors for females, four to six-ounce gloves, and present a “clean and tidy” appearance.⁷³ Regarding the Reebok uniforms, the UFC states in its Athlete Outfitting Policy that “[i]f a fighter does not wear the merchandise, they will be subject to penalties

68. FedEx Home Delivery, Inc., 361 N.L.R.B. No. 55, 13 (2014).

69. *UFC/Reebok Uniform Deal Reportedly Worth \$70 Million Over Six Years*, *supra* note 27.

70. Thomas Gerbasi, *UFC Execs Outline Athlete Outfitting Policy*, UFC (May 6, 2015), <http://www.ufc.com/news/UFC-Execs-Outline-Athlete-Outfitting-Policy>.

71. FedEx Home Delivery, Inc., 361 N.L.R.B. at 13.

72. *Id.*

73. *Rules and Regulations*, *supra* note 16.

2017]

MIXED MARTIAL ARTISTS

95

ranging from monetary fines all the way to being removed from the fight.”⁷⁴ Although fighters are free to train without the direct oversight of the UFC, like the FedEx drivers, this is an insufficient basis for concluding they work predominately without supervision. For these reasons, this factor weighs in favor of employee status for UFC athletes.

D. Skill Required in the Occupation

The NLRB found that the FedEx driver’s lack of skill required for their occupation ruled in favor of employee status.⁷⁵ The same cannot be said of UFC’s roster, which is unquestionably made up of athletes with extremely high skill levels in MMA. However, the NLRB does not state what level of skill may preclude a worker from being considered an employee. The nature of the sports industry is such that no athlete could be an unskilled worker and an examination of the sports industry shows that highly skilled athletes are regularly unionized, as the players in the NFL, NBA, NHL, and MLB all are. The players in those leagues have always been considered employees by their teams, so they do differ from how UFC views its athletes. However, this difference is technical more than it is practical, especially in light of the fact that UFC athletes are not at liberty to work for other MMA organizations, as further discussed in subsection K of this article. Therefore, this factor should weigh in favor of UFC fighters being considered employees.

E. Whether Employer or Individual Supplies Instrumentalities, Tools, and Place of Work

In *FedEx Home Delivery*, the NLRB acknowledged that the drivers provided their own vehicles and that this has been “found to be supportive of independent-contractor status.”⁷⁶ However, FedEx dictated vehicle specifications and provided drivers with information regarding dealers and a sales database, as well as had the drivers operate out of a central FedEx facility with FedEx package handlers.⁷⁷ These contrasting elements led the NLRB to conclude that this factor neither supported nor precluded employee status.⁷⁸

The UFC supplies each athlete with a pair of gloves every fight, which,

74. Luke Thomas, *UFC Athlete Outfitting Policy Pushes Boundaries of What it Means to be an Independent Contractor*, MMA FIGHTING (Jan. 15, 2015), http://www.mmafighting.com/2015/1/15/7552127/ufc-athlete-outfitting-policy-pushes-boundaries-of-what-it-means-to?_ga=1.67984408.829340813.1458158895.

75. *FedEx Home Delivery, Inc.*, 361 N.L.R.B. at 13.

76. *Id.*

77. *Id.* at 13–14.

78. *Id.* at 14.

other than the athlete's own body, is the essential tools in MMA.⁷⁹ Additionally, all UFC fights take place in the trademarked "Octagon."⁸⁰ Therefore, the UFC supplies the instrumentalities and place of work for its athletes, and the athletes do not have the option to conduct matches in other locations. Thus, this factor weighs in support of employee status for UFC athletes.

F. Length of Time for Which Individual Is Employed

The NLRB found that the FedEx drivers' "[a]greements are automatically renewed for successive 1-year periods after the expiration of their initial terms. In effect, drivers 'have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.'"⁸¹ Given the expense involved for the drivers to procure their vehicles, the NLRB concluded that there was an "expectation of a continuous working relationship rather than a short-term arrangement."⁸² The latter is indicative of independent contractor status, whereas the former is more akin to an employer-employee relationship. Thus, this factor weighed in favor of employee status for the drivers.⁸³

Similar provisions within the UFC's Standard Promotional and Ancillary Rights Agreement with athletes potentially create the same situation, such as the "Champion's Clause" and the "Retirement Clause," both of which favor the UFC heavily.⁸⁴ The Champion's Clause allows the UFC to extend any fighter's contract, should they be a champion at the end of their agreed upon term, for the longer of one year or three additional bouts, regardless of weight class or title.⁸⁵ This clause effectively prevents the most talented athletes from leaving the UFC, and some journalists have speculated that the wording of the clause "would allow the UFC to extend the contract indefinitely if the fighter holds a championship belt at the end of each subsequently extended term."⁸⁶ The Retirement Clause is another extension provision present in the UFC's

79. *Rules and Regulations*, *supra* note 16.

80. *The Octagon® - Get Inside*, UFC, <http://www.ufc.com/discover/sport/octagon> (last visited Dec. 14, 2017).

81. FedEx Home Delivery, Inc., 361 N.L.R.B. No. 55, 14 (2014).

82. *Id.*

83. *Id.*

84. Jeffery B. Same, Comment, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contracts in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1066.

85. *Contract*, *supra* note 19, at 6.

86. Same, *supra* note 84, at 1067–1068.

contracts.⁸⁷ This particular clause allows the UFC “to retain the rights to a retired fighter in perpetuity” by giving the promotion “the power to suspend the contract term for the entire period of the fighter’s retirement.”⁸⁸

These two clauses tie the athlete to the UFC for an extensive period of time, an indicator of an employment relationship. The existence of these two provisions within the UFC’s contracts should be enough to sway this factor in favor of employee status for the company’s athletes.

G. Method of Payment

The NLRB also found that FedEx controlled the rates charged to customers, as well as the rates of compensation to the drivers.⁸⁹ These rates were non-negotiable.⁹⁰ FedEx also guaranteed “a daily ‘vehicle availability payment’ to drivers simply for showing up on contractually-mandated days.”⁹¹ Additionally, FedEx controlled routes and limited the drivers’ ability to make money outside of their role as a driver.⁹² The NLRB concluded that, “[u]nlike the genuinely independent businessman, the drivers’ earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits.”⁹³ The NLRB also found that not providing fringe benefits, such as vacations or paid holidays, not withholding taxes, and not paying for accident insurance all weighed in favor of independent contractor status, but were not sufficient to supersede the conclusion that the drivers were employees.⁹⁴

Similarly to FedEx, the UFC pays its athletes per fight with a base amount for showing up to the fight, and generally, a bonus amount for winning the fight.⁹⁵ Payment by the job is admittedly characteristic of independent contractors.⁹⁶ While the UFC does not provide vacation or paid holidays, it

87. *Id.* at 1066.

88. *Id.* at 1066–1068.

89. FedEx Home Delivery, Inc., 361 N.L.R.B. No. 55, 14 (2014).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Contract, supra* note 19, at 7.

96. Mark A. Pihart & Megan M. Ruwe, *Understanding Independent Contractor Classifications*, WINTHROP & WEINSTINE, http://www.winthrop.com/news_events/winthrop_news/articletype/articleview/articleid/194/understanding_independent_contractor_classifications_-_mark_a_pihart_megan_m_ruwe.aspx (last visited Dec. 14, 2017).

does provide accident insurance to its athletes.⁹⁷ In 2011, the UFC began offering a customized accident insurance plan for all of its athletes referred to as “training insurance.”⁹⁸ Similarly, UFC athletes have ostensibly no say in the rates charged for UFC pay-per-views or ticket sales. Unfortunately, it is impossible to tell if the NLRB would find these facts to outweigh or neutralize those against employee status for UFC athletes within this factor.

H. Whether the Work Is Part of the Regular Business of the Employer

Under this factor, the NLRB ruled that “FedEx’s central mission is the delivery of packages to customers; the drivers’ job is to effectuate that purpose. Accordingly, drivers ‘perform functions that are not merely a “regular” or even an “essential” part of the Employer’s normal operations, but are the very core of its business.’”⁹⁹ In line with this, the UFC’s central mission is the promotion of MMA fights, and the athletes are not merely part of the normal operations of that mission, but are the very core of the UFC’s business, without whom the UFC’s product would not exist. This weighs heavily in favor of employee status.

I. Whether the Parties Believe They Are Creating an Independent Contractor Relationship

The NLRB stated that, “FedEx believes that it is creating an independent contractor relationship when it requires that drivers sign a contract acknowledging that characterization. But drivers do not have an opportunity to negotiate over that term The intent factor is therefore inconclusive.”¹⁰⁰

Under Article XX: Independent Contractor Status, in their Promotional and Ancillary Rights Agreement with fighters, the UFC also believes it is creating that relationship with its athletes.¹⁰¹ Due to the UFC’s market share, athletes typically have very little bargaining power with the company when it comes to their contracts and few other organizations that they may fight for.¹⁰² Although market share, and perhaps monopoly status, is not dispositive in determining an employment relationship, contracting athletes exclusively to the UFC and preventing them from working with other MMA match promoters does indicate that the athletes are not independent contractors in

97. *UFC Announces Accident Insurance Coverage for Athletes*, *supra* note 28.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Contract*, *supra* note 19, at 19.

102. Same, *supra* note 84, at 1065.

2017]

MIXED MARTIAL ARTISTS

99

practice. Therefore, the intent factor should favor employee status regardless of terminology used in the Promotional and Ancillary Rights Agreement.

J. Whether the Principal Is or Is not in the Business

The NLRB stated in their decision that “[b]ecause FedEx is engaged in the same business as the drivers, we find that this factor weighs in favor of employee status.”¹⁰³ Since both the UFC and its athletes are engaged in the business of commercializing mixed martial arts fights, this factor weighs in favor of employee status for the athletes as well.

K. Other Relevant Factors

In the FedEx drivers’ case, the NLRB reviewed an additional relevant factor that is useful for the UFC athletes’ case as well.¹⁰⁴ The board judged “whether the evidence tends to show that the individual is, in fact, rendering services as an independent business.”¹⁰⁵ They found that the “drivers’ arrangement with FedEx effectively prevents them from working for other employers” and that they “do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor.”¹⁰⁶

Within the UFC’s Promotional and Ancillary Rights Agreement with fighters, an exclusivity provision states:

During the Term, ZUFFA shall have the exclusive right to promote all of Fighter’s bouts and Fighter shall not participate in or render his services as a professional fighter or in any other capacity to any other mixed martial art, martial art, boxing, professional wrestling, or any other fighting competition or exhibition, except as otherwise expressly permitted by this Agreement.¹⁰⁷

The UFC attempts to safeguard itself from this point by stating that, as long as the fighter is not a champion and subject to the company’s consent, they are allowed to fight for another promotion as long as, among other things,

103. FedEx Home Delivery, Inc., 361 N.L.R.B. No. 55, 15 (2014).

104. *Id.*

105. *Id.*

106. *Id.* at 15–16.

107. *Contract, supra* note 19, at 5.

“. . . such other bout is not televised by any domestic or international television network, station, cable system, satellite or other provider or via Internet or wireless exhibition . . .”¹⁰⁸ With every professional MMA organization in the world broadcasting its fights in some way and the UFC requiring their consent for the athletes to engage in these fights, these provisions effectively prevent UFC athletes from working for other employers. Thus, this additional relevant factor weighs in favor of finding employee status for UFC athletes.

VI. OTHER CHALLENGES

Even after being declared employees, mixed martial artists will still face several challenges to unionization, including the constantly changing UFC roster, whether unionization would provide any practical increase to their negotiating power, and the challenges that come with unionization of individual athletes.

A. Unionization Vote

In order to form a union, “a petition and associated documents must be filed, preferably electronically, with the nearest NLRB Regional Office showing support for the petition from at least thirty percent of employees.”¹⁰⁹ Once this is accomplished, NLRB agents will hold an election¹¹⁰ in which the employees can vote to certify the proposed union as their bargaining representative, entitled to be recognized by the employer.¹¹¹ For a union to be certified, it must capture a majority of the votes cast in the election.¹¹² Alternatively, a second path to union certification exists.¹¹³ Upon obtaining majority support via signed authorization cards or some other means, employees may “attempt to persuade [their] employer to voluntarily recognize a union.”¹¹⁴ An agreement of this nature is made outside of the NLRB process,¹¹⁵ but in the case of the UFC, it is highly unlikely to occur due to current management’s vehement opposition to fighter unionization.

108. *Id.*

109. *Conduct Elections*, N.L.R.B., <https://www.nlr.gov/what-we-do/conduct-elections> (last visited Dec. 14, 2017) [hereinafter *Conduct Elections*].

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

Unfortunately, while the unionization process is seemingly simple, the nature of the UFC's fighter roster could make it difficult to complete the first step of gaining the support of thirty percent of the athletes.¹¹⁶ With a roster of several hundred fighters spread throughout the world, it will undoubtedly be a long process for the fighters currently stepping up in support of a union to gather their colleagues, discuss the benefits of establishing a union, and collect the required amount of signatures to hold and win an election.¹¹⁷ Additionally, the UFC's standard fighter contract allows the promotion to cut an athlete if the "[f]ighter is not declared the winner of any mixed martial art bout . . . by the Athletic Commission or official authority having jurisdiction over the bout."¹¹⁸ If a fighter loses just one of their agreed upon amount of fights for the UFC, they can be cut. The promotion utilizes this clause heavily, often cutting fighters after two to three losses, which, along with signing new fighters just as frequently, results in an ever-changing roster.¹¹⁹ Without a consistent set number of fighters on the UFC's roster, it will be that much more of a challenge to acquire the required thirty percent support of the athletes needed to hold an election to certify an official fighters' union.¹²⁰

B. Single Entity Status and Athlete Negotiating Power

Another challenge that faces UFC athletes, should they successfully unionize, is that unionization may not afford the athletes the negotiating power and protections they seek. The UFC is similar to Major League Soccer (MLS) in that it is a single entity sport organization.¹²¹ Being a single entity means that the UFC is not subject to Section 1 of the Sherman Act, although Section 2 restrictions on monopolization (as well as the related issue of monopolization) still apply.¹²² Thus, an examination of MLS and its relationship with the Major League Soccer Players Union (MLSPU) is pertinent.

MLS began in 1996.¹²³ The MLSPU formed in 2003 and the first collective bargaining agreement between the union and league was signed in

116. Nash, *supra* note 2.

117. *Id.*

118. *Contract*, *supra* note 19, at 14.

119. Nash, *supra* note 2.

120. *Id.*

121. Paul Gift, *Dissecting the Fighters' Antitrust Lawsuit Against the UFC, Part 2*, BLOODY ELBOW (Dec. 18, 2014), <http://www.bloodyelbow.com/2014/12/18/7414267/mma-ufc-fighter-antitrust-lawsuit-monopoly-monopsony-cung-le-nate-quarry-jon-fitch-part-2>.

122. *Fraser v. Major League Soccer*, 284 F.3d 47, 54–55 (1st Cir. 2002).

123. *MLS History*, MLS (Jan. 1, 2017), <https://www.mlssoccer.com/league/history>.

2004.¹²⁴ That agreement expired at the end of 2010 and a new four-year agreement was established.¹²⁵ The current collective bargaining agreement began in February of 2015 and will expire January 31, 2020.¹²⁶

Free agency has been at issue in every collective bargaining negotiation between MLS and the MLSPU, and something that has been proven elusive.¹²⁷ The 2004 and 2010 agreements did not result in any free agency for the players and the 2015 agreement resulted in limited free agency, however only a small percentage of MLS players have met the criteria.¹²⁸ MLS's single entity status has played a significant role in the players' mostly unsuccessful fight for free agency because it provides MLS with greater bargaining power than traditional sport leagues since

the threat of union decertification no longer exposes [MLS] to anti-trust liability, and the single-entity structure of the League allows it to unilaterally implement CBA terms without fear of antitrust violations. Employees are thus relegated to the backbone of labor warfare--striking--which yields minimal results when employers are permitted to permanently replace striking employees and players' careers hold short life-spans.¹²⁹

The same dynamic would likely occur between the UFC and any union the athletes formed. The UFC would be provided the same antitrust exemptions that MLS has due to its single entity status, and thus would maintain an advantageous bargaining position. If the UFC collective bargaining negotiations paralleled those between MLS and the MLSPU, the athletes would likely find themselves with little, if any, increased in freedom to fight for other promoters than they already have.

The athletes would likely see minimal gains related to player

124. *About the Union*, MAJOR LEAGUE SOCCER PLAYERS UNION, https://www.mlspu.org/about_mlspu.html (last visited Dec. 14, 2017).

125. *Id.*

126. *Id.*

127. Matthew J. Jakobsze, *Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer after American Needle and the 2010 Collective Bargaining Agreement*, 31 N. ILL. U. L. REV. 131, 132 (2010); Jeff Carlisle, *The Details on Major League Soccer's New Collective Bargaining Agreement*, ESPN FC (Mar. 4, 2015), <http://www.espnfc.us/major-league-soccer/19/blog/post/2332341/the-details-on-major-league-soccers-new-collective-bargaining-agreement>.

128. Jakobsze, *supra* note 127, at 134–136; Carlisle, *supra* note 127.

129. Jakobsze, *supra* note 127, at 136.

compensation. Traditional leagues, such as the NFL, pay their athletes approximately fifty percent of league revenues, and in boxing that percentage can go much higher.¹³⁰ Estimates of MLS's 2015 revenues by team¹³¹ yields a total league revenue of \$602 million and salary figures released by the MLSPU for 2015 total \$166,967,980.¹³² Based on these numbers, MLS athlete salaries constitute twenty-eight percent of total revenues. The UFC made \$600 million in 2015, almost identical to MLS,¹³³ and all UFC athlete compensation currently constitutes between ten and twenty percent of all UFC revenues.¹³⁴ It took two decades and multiple collective bargaining agreements for MLS players to reach 28% and it is unlikely that UFC athletes would be able to do much better in the near future.

It is also likely that wage disparities currently seen between the top earners in the UFC and the rest of the athletes would continue, even with unionization and a collective bargaining agreement. In 2016 the top paid UFC athlete was Conor McGregor, who earned \$7.77 million in disclosed compensation, which was just slightly less than the next three highest earners combined, Rhonda Rousey, Brock Lesnar, and Nate Diaz, who totaled \$7.975 million between them.¹³⁵ The next six highest paid athletes totaled \$6.452 million combined, with tenth place earning \$872,500 in disclosed monies.¹³⁶ That is nearly a \$7 million difference between number one and number ten. There are over 500 athletes in the UFC and estimates are that the median payout was \$42,000 in 2016.¹³⁷ The exact total of athlete compensation from the UFC is unknown,

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

131. Chris Smith, *Major League Soccer's Most Valuable Teams 2016: New York, Orlando Thrive in First Seasons*, FORBES, Sept. 7, 2016, <https://www.forbes.com/sites/chris-smith/2016/09/07/major-league-soccers-most-valuable-teams-2016-new-york-orlando-thrive-in-first-seasons/#4bf914ff270d>.

132. Daniel Boniface, *MLS Player Salaries 2015 Released by Major League Soccer Players Union*, DENVER POST: THE TERRACE BLOG (Sept. 27, 2015, 6:00 AM), <http://blogs.denverpost.com/rapids/2015/09/27/mls-player-salaries-2015-released-by-major-league-soccer-players-union/27231/2/>.

133. Matt Connolly, *Report: UFC Profited \$157 Million in 2015, Over Double Its 2014 Total and 5-6 Times More Than WWE*, FORBES, June 3, 2016, <https://www.forbes.com/sites/mattconnolly/2016/06/03/report-ufc-profited-157-million-in-2015-over-double-its-2014-total-and-5-6-times-more-than-wwe/#48a8342b591a>.

134. Mehrotra & Novy-Williams, *supra* note 130.

135. Matt Connolly, *Estimating UFC's Highest-Paid Fighters of 2016: Conor McGregor, Ronda Rousey Lead Top Moneymakers*, FORBES, Jan. 12, 2017, <https://www.forbes.com/sites/mattconnolly/2017/01/12/estimating-ufcs-top-earners-of-2016-mcgregor-rousey-lesnar-diaz-lead-million-dollar-moneymakers/3/#608f5ee73c9c>.

136. *Id.*

137. Harris, *supra* note 3.

but it is clear that from the information available a few athletes are making amounts of money far beyond that majority of the other fighters.

This is similar to the situation in MLS. In 2016 data showed that the players in the top 10 for earnings constituted thirty-eight percent of all player salaries.¹³⁸ Given that there are twenty-eight first team players per each of the twenty-two teams, there are a total of 616 first team players in MLS. This means that over 600 players are sharing the remaining sixty-eight percent. The median salary among all players was \$117,000.¹³⁹ Although this median salary is over two and a half times the median earning of a UFC fighter in the same year, both organizations show a large disparity between the few top compensated athletes and all the rest. Although unionization would likely help the median UFC athlete's earnings increase, it is unlikely it would result in a dramatic increase and it is likely that the large disparity would remain.

The athletes would gain the power to strike through unionization and would likely have to resort to striking to have any chance of having the UFC meet their demands in a short time instead of over many years and negotiations.

C. Individual Athletes

In the event UFC athletes unionize, the reality is they will still be individual athletes competing against each other one-on-one, not as part of team, and this would likely present problems.

Unionization often results in the low and middle earners in the union having larger wage increases than the top earners.¹⁴⁰ In team sports, this is beneficial even to the top athletes because the success of the team depends on multiple players working in concert. If lower paid players do not get paid sufficiently, this may make them less inclined to play at an optimal level, or even unable to if they need to supplement their player wages. Thus, the top earners have an interest in the financial well-being of their teammates in order to create a well-rounded and successful team overall. Even individual bonuses for team sport athletes are often dependent on the performance of their teammates. A quarterback cannot earn a bonus for total passing yards if his receivers do not catch the passes he throws, nor can the receiver earn a bonus

138. Luke Kerr-Dineen, *2 Charts that Prove How Wildly Unequal Pay Is in MLS*, USA TODAY, May 19, 2016, <http://ftw.usatoday.com/2016/05/mls-player-salary-charts-data-unequal-pay>.

139. Jeff Carlisle, *Average MLS Salary Goes Up, with Surprising Value Available Leaguewide*, ESPN FC (May 19, 2016), <http://www.espnfc.us/major-league-soccer/19/blog/post/2876311/average-mls-salary-goes-up-with-surprising-value-available-league-wide>.

140. Matthew Walters & Lawrence Mishel, *How Unions Help All Workers*, ECON. POL. INST., Aug. 26, 2003, http://www.epi.org/publication/briefingpapers_bp143/.

2017]

MIXED MARTIAL ARTISTS

105

for total receiving yards if the quarterback is not accurate in his throwing. Both athletes benefit from the other's performance.

This is not a factor among individual athletes, such as MMA athletes. A top fighter's success depends on their performance against another individual and if that individual does not perform optimally, that is of benefit to the other fighter. Thus, individual athletes have less incentive to fight for an increase in the wages of the lower paid athletes.

In some cases, the top athletes may have a personal financial incentive to oppose unionization. In 1987 Jesse Ventura attempted to unionize wrestlers in the World Wrestling Federation, now known as the World Wrestling Entertainment (WWE).¹⁴¹ His attempt was thwarted by none other than Hulk Hogan, who reported Ventura's attempt at unionization to WWE owner Vince McMahon.¹⁴² The day after Ventura spoke to the other wrestlers in the locker room about forming a union, he received a call from McMahon, who essentially told him that he would fire him if he brought up unionization again and Ventura agreed to drop the subject.¹⁴³ Fortunately for the lower earning fighters, the current attempts at unionization among UFC athletes appears to have better support among top athletes than Ventura had among WWE wrestlers thirty years ago.

VII. CONCLUSION

The majority of the factors laid out in the NLRB's decision in *FedEx Home Delivery* on employee status for FedEx drivers should weigh in favor of employee status for the UFC's athletes. If the athletes were to bring a suit against the UFC to the NLRB, it is reasonable to expect that they would be declared employees, and thus subject not only to the additional benefits enjoyed by employees, but also the opportunity to form a labor union. Forming a union would be a challenge in and of itself, but it currently looks to be the only way for UFC athletes to begin to even the playing field in terms of negotiating their compensation. While the discussion on labor organization within the UFC remains theoretical, one thing is for certain: rumblings over fighter pay are not going away any time soon, and the fight for fair

141. David Cowley, *Employees vs. Independent Contractors and Professional Wrestling: How the WWE Is Taking a Folding-Chair to the Basic Tenets of Employment Law*, 53 U. Louisville L. Rev. 143, 148 (2014).

142. *Id.* at 148–149.

143. William Windsor, *Jesse Ventura Disputes Pro Wrestlers Being Independent Contractors, Talks Hulk Hogan Selling Him Out*, WRESTLING INC (Nov. 13, 2016), <http://www.wrestlinginc.com/wi/news/2016/1113/619292/jesse-ventura-disputes-pro-wrestlers-being-independent/>.

106 *MARQUETTE SPORTS LAW REVIEW* [Vol. 28:1

representation in mixed martial arts may end up being the toughest fight of all.