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Sara A. Thurber

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# WE'VE GOT SPIRIT, BUT NOW WE WANT RIGHTS TOO!

SARA A. THURBER\*

## INTRODUCTION

Professional sports are a big business, with the National Football League (NFL) being the most profitable professional sports league in the United States.<sup>1</sup> The NFL in 2019 alone generated a revenue of more than 15 billion dollars.<sup>2</sup> With the financial success the NFL has experienced, it has incurred a number of labor disputes throughout its history, including the 1982 players' strike, the players' lockout in 2011, and most recently, the 2012 referee lockout.<sup>3</sup> With each of these disputes, new labor agreements were put into place that provided more favorable conditions for all parties involved, including the players and the referees.<sup>4</sup> Despite all this progress, there is still one group within the NFL that has yet to resolve its labor disputes with the individual teams or the league – the cheerleaders. NFL cheerleaders are subjected to long hours with minimal pay as well as hostile working conditions, while they bring in up to an additional one million dollars in revenue for their respective teams.<sup>5</sup>

This Comment analyzes the numerous legal claims NFL cheerleaders have brought based on their employment conditions against NFL teams as well as the

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\* Sara is a J.D. Candidate at Marquette University Law School, a candidate for the National Sports Law Institute's Sports Law Certificate, and the Executive Editor of the *Marquette Sports Law Review*. Sara would like to thank her partner Ray, her family, and her friends for their continued support, encouragement, and love throughout the years. Sara dedicates this Comment to her late mother, Teresa, who was a lifelong sports fan and a fierce advocate for women.

1. Christina Gough, *Total Revenue of All National Football League Teams from 2001-2020*, STATISTA (Sept. 8, 2020), <https://www.statista.com/statistics/193457/total-league-revenue-of-the-nfl-since-2005/>.

2. *Id.*

3. Claudia Harke, *Pom Poms, Pigskin & Jiggle Tests: Is It Time for the National Football League Cheerleaders to Unionize?*, 30 WIS. J.L. GENDER & SOC'Y 157, 157-58 (2015).

4. *Id.*

5. Nina Liss-Schultz & Julia Lurie, *Jiggle Tests, Dunk Tans, and Unpaid Labor*, MOTHER JONES (May 22, 2014), <https://www.motherjones.com/media/2014/05/nfl-cheerleader-lawsuits-sexism/>; Harke, *supra* note 3, at 159.

NFL and how these disputes could be resolved to provide more favorable conditions for all parties involved. NFL cheerleaders are employees, and it is high time the NFL and their franchise teams recognize them and treat them as such. Part II goes through a brief history of NFL cheerleaders and their employment status. Part III analyzes the multitude of lawsuits cheerleaders have brought against their respective NFL teams for wage and hours claims, as well as the resolutions of those suits. Part IV discusses the demeaning working conditions cheerleaders are subjected to, as well as the harassment and discrimination they endure while working for their respective NFL teams. Part V is a response to all these lawsuits and claims. It is forward-looking and explores the impact these lawsuits and claims have had on the NFL, whether it is the right move for NFL cheerleaders to unionize, and how state legislatures have begun to introduce legislation to rectify some of the issues these lawsuits have exposed.

## I. BACKGROUND

Cheerleading in the NFL began in 1954 with the formation of the Baltimore Colts cheerleading team.<sup>6</sup> Currently, twenty-six of the thirty-two NFL teams have a professional cheerleading squad affiliated with them.<sup>7</sup> The cheerleaders are a large part of the game-day experience. At the game, they provide entertainment for fans when the ball is not in play and help motivate the players on the field by engaging fans in cheers. They are also featured in NFL advertising and as part of the television coverage of the game.<sup>8</sup> Cheerleaders' work, however, is not limited to gameday. They also help raise the team's profile in the community by supporting charitable causes and attending publicity events for the team.<sup>9</sup> Further, NFL cheerleaders are expected to practice an average of six to eight hours per week from May to December and attend other "required" activities.<sup>10</sup>

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6. See Joe Nawrozki, *Colts Cheerleaders' Spirit "Got the Stadium Rocking"*, BALT. SUN (Nov. 6, 2004), [http://articles.baltimoresun.com/2004-11-06/news/0411060331\\_1\\_colts-cheerleaders-baltimore-colts-memorial-stadium](http://articles.baltimoresun.com/2004-11-06/news/0411060331_1_colts-cheerleaders-baltimore-colts-memorial-stadium).

7. Lee Igel, *Why It May Be Time to Retire NFL Cheerleader Squads*, FORBES (Apr. 17, 2018), <https://www.forbes.com/sites/leeigel/2018/04/17/why-it-may-be-time-to-retire-nfl-cheerleading-squads/#1b75cb4041b6> (listing the six NFL teams without cheerleaders). The NFL teams that do not have cheerleaders are the Buffalo Bills, Chicago Bears, Cleveland Browns, Green Bay Packers, the New York Giants, and the Pittsburgh Steelers. *Id.*

8. Harke, *supra* note 3, at 163.

9. See generally Jordan McGee, *Bring It On: Professional Cheerleaders Rally Against NFL's Employment Policies*, 23 JEFFREY S. MOORAD SPORTS L. J. 565, 568-69 (2016).

10. See Complaint para. 2, *Brenneman v. Cincinnati Bengals, Inc.* No. 1:14-CV-136, 2014 WL 5448864 (S.D. Ohio filed Feb. 11, 2014) [hereinafter *Complaint, Brenneman*] (claiming Bengals required plaintiff to attend practice multiple times per week and attend to other mandatory appearances).

Prior to the 2014 lawsuits by the cheerleaders from five NFL teams, cheerleaders were paid on average about \$95 per game.<sup>11</sup> Historically, the majority of NFL cheerleaders are paid a flat fee per game, regardless of how many hours they actually worked on gameday.<sup>12</sup> Some NFL cheerleaders are not compensated for mandatory practices, photoshoots, cheer clinics, charity events, or participation in other “required” activities.<sup>13</sup> Further, cheerleaders may also be required to make appearances at charity events or other corporate functions.<sup>14</sup> Typically, if the cheerleaders are compensated for those appearances, the NFL team will charge a higher rate to have the cheerleaders appear at the function, and then they pay the cheerleaders.<sup>15</sup> On top of that, the cheerleaders are not usually reimbursed for the travel expenses they incur getting to and from these appearances.<sup>16</sup> Finally, some of the cheerleading squads only receive compensation from their NFL teams once or twice a season.<sup>17</sup>

## II. EMPLOYMENT LAWSUITS

All of these conditions have led to complaints being filed by cheerleaders from across the league against their respective NFL teams for unpaid wages and wage discrimination.<sup>18</sup> The first one of these types of complaints was a class-action lawsuit filed by the Oakland Raiders cheerleaders, the Raiderettes, alleging that they were paid less than minimum wage, did not receive overtime,

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11. Harke, *supra* note 3, at 163.

12. *See generally* Liss-Schultz & Lurie, *supra* note 5.

13. Benjamin A. Tulis, *Tampa Bay Buccaneers to Settle Cheerleaders' Wage-and-Hour Class Action*, NAT'L L. REV. (Mar. 12, 2015), <https://www.natlawreview.com/article/tampa-bay-buccaneers-to-settle-cheerleaders-wage-and-hour-class-action>.

Amended Class/Collective Action Complaint and Demand for Jury Trial at 1, *Pierre-Val v. Buccaneers Limited Partnership*, No. 8:14-cv-11182-T-33EAJ (M.D. Fla. June 3, 2014) [hereinafter *Pierre-Val Complaint*].

14. *See* Complaint para. 17, *Lacy T. et al. v. The Oakland Raiders* (Cal. Super. Ct. 2014) [hereinafter *Raiderette Complaint*]; Complaint para. 38, *Jaclyn S. et al. v. Buffalo Bills, Inc. et al.* (N.Y.S.2d 2014) [hereinafter *Jills Complaint*].

15. *Jills Complaint*, *supra* note 14, paras. 38-39; *see also* Harke, *supra* note 3, at 165.

16. *Raiderette Complaint*, *supra* note 14, para. 31.

17. *See* Robin Abcarian, *Cheerleaders' Wage-Theft Lawsuit to Cost Oakland Raiders \$1.25 Million*, L.A. TIMES, (Sept. 4, 2014), <http://www.latimes.com/local/abcarian/la-me-ra-raiders-settle-cheerleader-lawsuit-20140904-column.html>; Plaintiff's Motion for Class Action Complaint para. 46, *Brenneman v. Cincinnati Bengals, Inc.*, No. 1:14-cv-136 (S.D. Ohio Feb. 11, 2014).

18. Leah Messinger, *Lawmakers Call on NFL to Give Cheerleaders a Fair Wage*, GUARDIAN (Sept. 13, 2015), <http://www.theguardian.com/sustainable-business/2015/sep/13/nfl-roger-goodell-cheerleaders-minimum-wage>.

and were not paid as frequently as required by law.<sup>19</sup> After the Raiderettes lawsuit, four other teams filed lawsuits for similar claims in 2014, including the Ben-Gals (Cincinnati Bengals), Jills (Buffalo Bills), Flight Crew (New York Jets), and the cheerleaders for the Tampa Bay Buccaneers.<sup>20</sup> The primary argument made in all of these cases was that the cheerleaders are employees (not independent contractors or seasonal/temporary employees), and therefore are entitled to all of the rights employees have under the Fair Labor Standard Act (FLSA), specifically the federal minimum wage due to all employees.<sup>21</sup> The majority of these cases resulted in settlements and improved contracts for cheerleaders, while a few cases were dismissed by the court and one resulted in the NFL team dropping its cheerleaders altogether.<sup>22</sup>

### A. Raiderettes Lawsuits

The first lawsuit brought against the Oakland Raiders was by a former cheerleader, Lacy T.<sup>23</sup> In her complaint, Lacy alleged that a number of illegal provisions were written into her contract, ~~which is~~ in violation of the California Labor Code.<sup>24</sup> Some of the illegal provisions included working for over nine hours without any breaks, not being paid for practice or “charity” events, being paid well below California’s state minimum wage of \$8.00 per hour for games, and for the coaches “benching” cheerleaders for a game if the coaches determined a cheerleader was guilty of one of a variety of infractions (such as looking “too soft” or forgetting to bring a yoga mat to practice).<sup>25</sup> Further, the “benched” cheerleaders were still required to attend the game and perform during pregame and halftime, even though they would not be paid.<sup>26</sup> To add insult to injury, the cheerleaders were further fined for the infraction that led them to be benched.<sup>27</sup> This could result, as the handbook warned, in the cheerleader receiving no salary at all at the end of the season due to the fines.<sup>28</sup>

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19. *See id.*

20. Harke, *supra* note 3, at 167-68.

21. *Id.* at 168.

22. Brad Tuttle, *6 Things You Didn't Know About the Careers of NFL Cheerleaders*, MONEY (Feb. 1, 2018), <https://money.com/nfl-cheerleaders-career-pay-salary/>.

23. *See* Complaint, Lacy T. v. Oakland Raiders, No. RG14710815, 2014 WL 231121 (Cal. Super. Filed Jan. 22, 2014) [hereinafter Complaint, Lacy T.] (naming Oakland Raiders as defendant).

24. *See id.* paras. 83-107.

25. *See id.* paras. 14-28.

26. *See id.* para. 15.

27. *See id.* para. 22.

28. *See* Amanda Hess, *Just Cheer, Baby*, ESPN (Apr. 2, 2014), [http://www.espn.com/espn/feature/story/\\_/id/10702976/just-cheer-baby-lacy-t-sues-oakland-raiders](http://www.espn.com/espn/feature/story/_/id/10702976/just-cheer-baby-lacy-t-sues-oakland-raiders) (Lacy’s story about her time

Finally, Lacy alleged that the cheerleaders were required to take on a number of uncompensated expenses, such as equipment for uniforms and practices, and mandatory hairstylist appointments before each game.<sup>29</sup> Eventually, this lawsuit was settled. The Raiders agreed to pay Lacy and the other Raiderettes \$1.25 million and eliminate several unlawful practices, like the withholding of paychecks until the end of the season and fining cheerleaders for “minor” infractions.<sup>30</sup> On average, this would pay each of the 90 eligible Raiderettes \$6,000 for each season she worked between 2010-2012 and \$2,500 for the 2013-2014 season.<sup>31</sup>

Not all of the 90 Raiderettes that were eligible to recover under Lacy’s class action opted to do so. One particular Raiderette, Caitlin Y., instead filed a second lawsuit against the Oakland Raiders for similar claims.<sup>32</sup> The main difference in the suits was that Caitlin Y. also named the NFL as a defendant, as she felt the settlement from the Raiders did not “do enough to fix what she calls the misogynistic culture of the NFL” and by accepting the settlement, the NFL gets off the hook for something that is a league-wide issue.<sup>33</sup>

### *B. Other 2014 Lawsuits Inspired by Raiderettes’ Lawsuits*

Inspired by the Raiderettes’ lawsuit and settlement as well as their new contract with much improved working conditions, cheerleaders from four other NFL teams all decided to sue their respective NFL teams in the fall of 2014 as well. Alexa Brenneman, a cheerleader for the “Ben-Gals” squad, brought a class action suit against the Cincinnati Bengals for allegedly violating federal employment law.<sup>34</sup> She alleged that they did not receive minimum wage, working over 300 hours a season but only receiving \$855 total.<sup>35</sup> They also had

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with the Raiderettes). The handbooks warning that cheerleaders might wind up without any pay at the end of season was particularly harsh as the cheerleaders only received one lump sum at the end of the season. *See id.* para. 22. Lacy’s complaint alleged that the team would fine for missing practice and then bench the cheerleader for the same week resulting in negative pay and the Raiders held out paying until the end of the season to make sure that fines were deducted as well as to “encourage” consistent performance and attendance or else the cheerleader might receive no pay at the end of the season. *Id.*

29. *See* Complaint, Lacy T., *supra* note 23.

30. *See* Abcarian, *supra* note 17.

31. *See* Bay City News, *Oakland Raiders Settle Lawsuit Filed by Raiderette Cheerleaders*, NBC BAY AREA (Sept. 4, 2014), <https://www.nbcbayarea.com/news/sports/oakland-raiders-settle-lawsuit-filed-by-raiderette-cheerleaders/81002/>.

32. *See* Lisa Fernandez, “I’m Not in the Front Anymore”: Raiderette Opts Out of Class Action Wage Labor Settlement with Raiders, NBC BAY AREA (Nov. 17, 2014), <https://www.nbcbayarea.com/news/sports/raiderette-opts-out-of-class-action-wage-labor-settlement-with-raiders/108623/>.

33. *Id.*

34. *See* Complaint, Brenneman, *supra* note 10, para. 1.

35. *See id.* para. 5

to attend unpaid “charity” events and were subject to a rulebook that imposed strict conditions on the women, including fitness or weight requirements.<sup>36</sup> The Bengals settled with Alexa and agreed to pay the “Ben-gals” a total of \$255,000 in lost wages as well as pledged to pay cheerleaders more for the 2014 season.<sup>37</sup>

Jaclyn S., a former cheerleader for the Buffalo Jills, along with four other former cheerleaders, brought a class action suit against the Buffalo Bills.<sup>38</sup> In the Jills’ complaint, they alleged that the team did not pay them for practices or outside events similar to those of the Raiderettes and “Ben-gals”, but the Bills did not pay the Jills for games either.<sup>39</sup> Additionally, they were required to pay for their own uniforms (a \$650 expense) and similar hair and cosmetic treatments to the Raiderettes.<sup>40</sup> Beyond the lack of compensation, the Jills were also subject to demeaning requirements for participation on the team. Those requirements included being benched if they weighed in over their “goal” weight (a number that was determined by the team) or being benched if they failed the “jiggle tests” which consisted of wearing revealing outfits and having to do jumping jacks while the coaches watched and evaluated if the desirable parts of the cheerleader’s body jiggled and if the less desirable parts did not.<sup>41</sup> The Jills’ lawsuit still has not been resolved – it remains in mediation, but it did lead to the disbandment of the Jills just two days after it was filed.<sup>42</sup>

Krystal C., the lead plaintiff for the Jets cheerleaders, the “Flight Crew”, filed suit against the New York Jets for many of the same issues as the Raiderettes, “Ben-gals” and the Buffalo Jills.<sup>43</sup> Krystal C. alleged that she was paid a flat rate of \$150 per game and \$100 per outside event (though both were subject to withholding), but she was not compensated for practices or other required events, and she was required to pay for her own hair, makeup, transportation, and other expenses, which caused her hourly rate to be below

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36. See Billy Haisley, *Rules for Ben-Gals Cheerleaders: “No Panties,” “No Slouching Breasts”*, DEADSPIN (Feb. 13, 2014), <https://deadspin.com/rules-for-ben-gals-cheerleaders-no-panties-no-slou-1522379579>.

37. See Jake Elman, *Cincinnati Bengals Cheerleaders Won Big Once They Sued the Team for Low Wages*, SPORTSCASTING (June 1, 2020), <https://www.sportscasting.com/bengals-cheerleaders-won-big-once-they-sued-the-team-for-low-wages/>.

38. See generally Jills Complaint, *supra* note 14.

39. *Id.*

40. See *id.* para. 57(a).

41. See Amanda Hess, *The Cheerleaders Rise Up*, SLATE (Apr. 23, 2014), <https://slate.com/human-interest/2014/04/nfl-cheerleading-lawsuits-five-former-buffalo-jills-are-the-latest-in-a-string-of-cheerleaders-to-sue-their-teams.html>.

42. See Alan Pergament, *Jills’ Lawsuit gets National Attention on PBS’ ‘Independent Lens’*, BUFFALO NEWS, [https://buffalonews.com/entertainment/television/alan-pergament-jills-lawsuit-gets-national-attention-on-pbs-independent-lens/article\\_10878736-4aa5-11eb-8fe6-6f8013a0e42f.html](https://buffalonews.com/entertainment/television/alan-pergament-jills-lawsuit-gets-national-attention-on-pbs-independent-lens/article_10878736-4aa5-11eb-8fe6-6f8013a0e42f.html) (Jan. 8, 2021).

43. McGee, *supra* note 9, at 574-75.

\$1.50 an hour.<sup>44</sup> Additionally, the pay scale was tipped in favor of the veterans versus the “rookies”, which gave the cheerleaders incentive to not question the pay scale and remain loyal to the team.<sup>45</sup> Further, Krystal’s contract contains a “moral clause” and any behavior that the team deems to have “a material adverse effect upon Employer’s . . . status or public perception” can be grounds for dismissal.<sup>46</sup> This means that Krystal could have been let go for “endorsing any product ranging from adult beverages to nutritional supplements.”<sup>47</sup> After almost two years, in January of 2016, Krystal and the “Flight Crew” reached a settlement with the Jets.<sup>48</sup> The two sides agreed upon a \$325,000 settlement, which led to 52 of the team’s cheerleaders receiving \$2,500 for each season they worked between 2011-2013 and an additional \$400 for each photoshoot they participated in during those years.<sup>49</sup>

The final lawsuit filed by NFL cheerleaders in 2014 was by Manouchcar Pierre-Val, a former cheerleader with the Tampa Buccaneers.<sup>50</sup> Like the other suits, she alleged that the team violated minimum wage laws and that the cheerleaders were entitled to unpaid wages.<sup>51</sup> Pierre-Val alleged that the Buccaneers paid cheerleaders \$100 per game and require them to arrive four hours prior to kick-off.<sup>52</sup> Cheerleaders were not compensated for the up to fifteen hours of mandatory practice a week or the forty hours of public appearances they are required to complete each year.<sup>53</sup> About a year after filing the lawsuit, the Buccaneers and their cheerleaders reached a settlement of

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44. See Press Release, *New York Jets Sued for Wage Theft by Member of Flight Crew* (May 21, 2014), GPEFF ATTORNEY AT LAW, LLC, <https://www.gpfflaw.com/new-york-jets-sued-for-wage-theft-by-member-of-the-flight-crew/>.

45. McGee, *supra* note 9, at 575.

46. *See id.*

47. *See id.*

48. See Jake Elman, *New York Jets Cheerleaders Danced with the Team in a \$325,000 Class Action Lawsuit*, SPORTSCASTING (June 3, 2020), <https://www.sportscasting.com/new-york-jets-cheerleaders-danced-with-the-team-in-a-325000-class-action-lawsuit/>.

49. *Id.*

50. *See* Tulis, *supra* note 13.

51. See Josh Sanchez, *Tampa Bay Buccaneers Become Latest Team to be Sued by Former Cheerleader*, SPORTS ILLUSTRATED (May 20, 2014), <https://www.si.com/nfl/2014/05/20/tampa-bay-buccaneers-cheerleader-lawsuit>.

52. *Id.*

53. *Id.*

\$825,000.<sup>54</sup> After attorney's fees, each of the more than 90 cheerleaders will receive about \$6,000.<sup>55</sup>

### C. Post 2014 Labor Lawsuits

Since 2014, a number of other cheerleading teams have filed similar claims against their teams. The Dallas Cowboy's cheerleaders brought suit in 2017 and settled with the team for an undisclosed amount in 2019.<sup>56</sup> Five former Houston Texans cheerleaders filed suit in June of 2018 and a month later agreed to dismiss the suit and instead submit their complaints to binding arbitration.<sup>57</sup> Similar to Caitlin Y., Kelsey K. and other members of the San Francisco 49ers' Gold Rush Girls brought a class-action suit against the NFL and its member teams in 2016.<sup>58</sup> They alleged that the NFL and its member teams conspired to suppress earnings for cheerleaders below fair market value by paying them a low, flat rate for each game and not paying them for practices or community appearances.<sup>59</sup> Her case was dismissed as she failed to provide actual evidence for her claims.<sup>60</sup> Despite a few exceptions, these lawsuits have overwhelmingly brought in more money and better conditions for the cheerleaders across the NFL, but is there a better alternative?

## III. WORKING CONDITIONS LAWSUITS

Unpaid wages and wage discrimination are not the only claims NFL cheerleaders have brought against their NFL teams. In 2002, the Philadelphia Eagles cheerleaders brought an invasion of privacy, emotional distress, negligence, and conspiracy suit against all of the NFL teams except the Eagles.<sup>61</sup>

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54. See Marissa Payne, *Tampa Bay Buccaneers Cheerleaders get \$825,000 in Wage Lawsuit Settlement*, WASH. POST (Mar. 7, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/03/07/tampa-bay-buccaneers-cheerleaders-get-825000-in-wage-lawsuit-settlement/>.

55. *Id.*

56. See Jason Whitely & Mark Smith, *Cowboys Settle Cheerleader Pay Dispute, Entire Squad Gets Pay Boost*, WFAA-TV (Sept. 10, 2019), <https://www.wfaa.com/article/sports/nfl/cowboys/cowboys-settle-cheerleader-pay-dispute-entire-squad-gets-pay-boost/287-7dc7f6a3-8d36-44bf-8a5c-466cff75c3de>.

57. See David Barron, *Ex-Texans Cheerleaders Drop Lawsuit, Opt for Arbitration*, CHRON., <https://www.chron.com/sports/texans/article/Ex-Texans-cheerleaders-dismiss-lawsuit-opt-for-13064625.php> (July 11, 2018).

58. *Kelsey K. v. NFL Enters.*, 254 F. Supp. 3d 1140, 1142 (N.D. Cal. 2017).

59. *Id.*

60. See Elizabeth Alt, *Former 49ers Cheerleader Appeals Loss in Wage Conspiracy Lawsuit Against NFL*, LEGAL NEWSLINE (Sept. 26, 2017), <https://legalnewsline.com/stories/511221847-former-49ers-cheerleader-appeals-loss-in-wage-conspiracy-lawsuit-against-nfl>.

61. Heylee Bernstein, *Cheerleaders in the NFL: Employment Conditions and Legal Claims*, 10 HARV. J. SPORTS & ENT. L. 239, 242 (2019).

This suit was brought against all the visiting NFL teams by the Eagles' cheerleaders because of the team's long-standing tradition of peering into the cheerleaders' locker room from the visiting locker room that was adjacent to the cheerleaders'.<sup>62</sup> The lawsuit was settled in November of 2005.<sup>63</sup> Other actions brought by NFL cheerleaders against their respective employers included claims of sexual harassment, sex-based discrimination, and for being subjected to a hostile work environment.<sup>64</sup> There have been additional allegations made against other NFL teams by cheerleaders for similar claims that have yet to end up in litigation. The most recent of these is from a former cheerleader with the Washington Football Team. She claims that the team's lead broadcaster and senior vice president possessed a 10-minute unofficial team video that was compiled from a cheerleaders calendar photoshoot at a beach that featured moments from when cheerleaders' nipples inadvertently were exposed as they adjusted positions or shifted props during the shoot.<sup>65</sup>

#### IV. A WAY FORWARD

While not all of these claims have been resolved, it seems like the best course of action cheerleaders can take to receive better compensation and working conditions from their NFL teams is to continue to argue that they are employees and are therefore entitled to the same minimum wage that all other employees are due under the Fair Labor Standards Act (FLSA).<sup>66</sup> These lawsuits may not be winners if argued in court, but they have overwhelmingly led to NFL teams settling with their cheerleaders and providing improved contracts and working conditions for the cheerleaders.<sup>67</sup> However, bringing an FLSA case is not the only way NFL cheerleaders can be provided with more just compensation and improved working conditions, they can also bring a claim under the National Labor Relations Act (NLRA).<sup>68</sup> This would then allow the NFL cheerleaders to assert their rights to organize a union, which would allow them to collectively bargain for better wages and working conditions with either

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62. *Id.* at 240.

63. *See id.* at 242-43.

64. *See id.* 239-57.

65. Will Hobson, Beth Reinhard, Liz Clarke and Dalton Bennett, *Lewd Cheerleader Videos, Sexist Rules: Ex-Employees Decry Washington's NFL Team Workplace*, WASH. POST (Aug. 26, 2020), <https://www.washingtonpost.com/sports/2020/08/26/redskins-cheerleaders-video-daniel-snyder-washington/?arc404=true>.

66. *See Harke, supra* note 3, at 168.

67. *See Tuttle, supra* note 22.

68. *See Harke, supra* note 3, at 169.

at the team level or league-wide.<sup>69</sup> There is precedent for this in the NFL as a Regional Director of the National Labor Relations Board (NLRB) ruled that the Buffalo Jills were employees under the NLRA and were therefore eligible to vote in a representative election.<sup>70</sup> After that ruling the Buffalo Jills formed a union for the 1995-96 season, only to lose all their funding as their sponsor dropped them.<sup>71</sup> They were able to eventually find another sponsor, but that sponsor would only step in if the Jills dropped their union affiliation.<sup>72</sup> A final solution could be for the states to step in and pass laws that extend employee benefits and protections to cheerleaders for professional sports teams.<sup>73</sup>

#### *A. Fair Labor Standards Act (FLSA)*

To better understand how the FLSA can help cheerleaders receive better compensation and working conditions from their NFL teams, we need to look at what exactly the Act does and how ones qualify for the Acts protections. The FLSA sets important labor guidelines for employers nationwide, including requiring that an employee be paid at least the Federal minimum wage (currently set at \$7.25 per hour)<sup>74</sup> and in most cases receive time and one-half pay of the person's regular pay rate for all hours worked in excess of forty hours per week (overtime).<sup>75</sup> In order to qualify for the FLSA's minimum wage and overtime compensation provisions, the worker must be an "employee" of the organization.<sup>76</sup> The Act defines "employees" as "one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves."<sup>77</sup> This is distinct from a person who is "engaged in a business of his or her own", which the FLSA classifies as an "independent contractor."<sup>78</sup> It is easy to see how it can be hard to figure out how to classify part-time workers, like NFL Cheerleaders. On one hand they do not seem like "employees" because they are not usually "economically dependent"

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69. *Id.*

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

71. See Michelle Ruiz, *Sex on the Sidelines: How the N.F.L. Made a Game of Exploiting Cheerleaders*, VANITY FAIR (Oct. 4, 2018), <https://www.vanityfair.com/style/2018/10/nfl-cheerleaders-history-scandal>.

72. *Id.*

73. See Harke, *supra* note 3, at 169; N.J. Senate Bill S819, 217th Leg., 2016 Session (N.J. 2016).

74. 29 U.S.C. § 206(a)(1)(C).

75. 29 U.S.C. § 207(a)(2).

76. 29 U.S.C. § 203(e)(1).

77. See *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV. (July 2008), <https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/whdfs13.pdf>.

78. See *id.*

on the NFL team they cheer for as they usually maintain full-time employment elsewhere.<sup>79</sup> On the other hand, they also likely cannot be seen as “independent contractors” as they are not “engaged in a business of his or her own” as they are hired to be part of a squad that is connected with an NFL team.<sup>80</sup>

As it is difficult from the language of the FLSA to determine the line between who is an employee and who is an independent contractor, we look to the courts for clearer guidance. Unfortunately, the Supreme Court does not have clear guidance on that either. In a number of decisions, the Court held that there is not “one single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA.”<sup>81</sup> Instead, the Court has held it is about the amount of control the employer has over the worker’s employment situation.<sup>82</sup> The Court has considered the following seven factors when determining whether the worker is an employee or an independent contractor.<sup>83</sup> The factors are

- 1) The extent to which the services rendered are an integral part of the principal’s business.
- 2) The permanency of the relationship.
- 3) The amount of the alleged contractor’s investment in facilities and equipment.
- 4) The nature and degree of control by the principal.
- 5) The alleged contractor’s opportunities for profit and loss.
- 6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
- 7) The degree of independent business organization and operation.<sup>84</sup>

As they are factors, they do not all have to be proven to be in favor of one side or another but must be balanced.

In balancing these seven factors in NFL Cheerleader employment cases, we find some weigh in favor of the NFL Cheerleaders being classified as employees while others do not. The cheerleaders would likely struggle to prove the first factor. There are six NFL teams that operate without cheerleaders, making it difficult to prove that the services cheerleaders render is an integral part of their

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79. See generally McGee, *supra* note 9, at 581.

80. See *id.*

81. See *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards*, *supra* note 77.

82. *Id.*

83. *Id.*

84. *Id.*

respective NFL teams.<sup>85</sup> Since cheerleaders' services are not being used by every team it makes them less integral to the running of football teams generally.<sup>86</sup> Though, the cheerleaders would likely have no issue proving the fourth factor as the cheerleaders are subject to extensive control from their respective NFL teams via their contracts and team rulebooks.<sup>87</sup> The conditions under which they perform, the uniform they wear, the hairstyle they can select, the color of tan they can have, the physical standards they must meet, are all mandated by their contracts or the rulebooks from their respective NFL team.<sup>88</sup>

A factor that both the cheerleaders and the teams could argue weighs in their favor is factor two. The NFL teams would argue that the cheerleaders are only employed for part of the year (the regular season) and are subject to annual release.<sup>89</sup> Alternatively, the cheerleaders would argue that they work at least nine months out of the year as they tryout in April, have constant practices throughout the summer, then the regular season which lasts until late December/early January, and then possibly into February if their team goes to the Superbowl.<sup>90</sup> Further, the cheerleaders would argue that the turnover rate of NFL cheerleaders is very low as over half of the incumbent cheerleaders are reselected for their teams the next season.<sup>91</sup> As these cases have generally all settled, the determination of whether NFL cheerleaders can be classified as "employees" under the FLSA is still unclear.<sup>92</sup>

#### *B. National Labor Relations Act (NLRA)*

The settlements in the NFL cheerleaders' FLSA cases though have helped demonstrate a shift in the legal consciousness regarding cheerleaders and their abilities to mobilize legally to have their rights in the workplace recognized.<sup>93</sup> This movement could lead to NFL cheerleaders, either at the individual NFL team level or on a league-wide level, to bring claims under the NLRA.<sup>94</sup> This classification would allow the cheerleaders to assert their rights to organize a

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85. See Messinger, *supra* note 18.

86. *Id.*

87. See generally Complaint, Lacy T., *supra* note 23; Complaint, Brennehan, *supra* note 10; Jills Complaint, *supra* note 14.

88. See Harke, *supra* note 3, at 177.

89. See McGee, *supra* note 9, at 585.

90. *Id.* at 586-87.

91. Buffalo Jills Cheerleaders, *supra* note 70.

92. See McGee, *supra* note 9, at 587.

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

94. See Harke, *supra* note 3, at 169.

union, which in turn would allow for them to collectively bargain for wage and more favorable working conditions.<sup>95</sup>

In order to bring a legal claim under the NLRA, the NFL cheerleaders have to satisfy four elements.<sup>96</sup> First, the cheerleaders need to fall under the jurisdiction of the NLRA.<sup>97</sup> Second, the cheerleaders need to establish an employee-employer relationship with their respective NFL teams.<sup>98</sup> Third, the cheerleaders need to establish that they are not temporary or seasonal employees.<sup>99</sup> Fourth, the cheerleaders must establish the individual NFL teams as their employers and whether they have joint employer claims as well with a third-party or the NFL.<sup>100</sup>

NFL cheerleaders likely satisfy the first element as the NFL has been found to be engaged in an industry that affects commerce, and therefore is subject to the NLRA jurisdiction.<sup>101</sup> Therefore, the NLRB would likely find that NFL franchises and their cheerleaders fall under the NLRA jurisdiction as well.<sup>102</sup> It should be noted that the NLRA and the FLSA use different tests to determine whether a worker is an employee, with the FLSA's test being more inclusive.<sup>103</sup>

In order to make the determination for the second element, the "Refined" Right to Control test would be used, which consists of weighing ten factors.<sup>104</sup> Here, the arguments that the cheerleaders and the NFL teams would make are similar to those under the FLSA; the NFL teams have control over almost every aspect of the cheerleaders' working lives, while the cheerleaders only work part of the year.<sup>105</sup> It is likely that the Board would find the amount of control each team has over every aspect of the cheerleaders' lives considerably outweighs the factors in favor of the teams, leading to the conclusion that NFL cheerleaders are employees of their respective NFL teams under the NLRA.<sup>106</sup>

Now that the cheerleaders likely have classification as employees, the third factor requires a determination of whether they are temporary or seasonal

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95. *Id.*

96. *See generally id.* at 172.

97. 29 U.S.C. § 160(a).

98. 29 U.S.C. § 157.

99. *See* 29 U.S.C. § 152(3).

100. 29 U.S.C. § 152(2).

101. *See generally* *Radovich v. Nat'l Football League*, 352 U.S. 333 (1957).

102. *See* Harke, *supra* note 3, at 173.

103. *Id.* at 172.

104. *Id.* at 176.

105. *See id.* at 177-78.

106. *Id.* at 178.

employees.<sup>107</sup> Temporary or seasonal employees are generally not eligible to vote in a representation election under the NLRA, however, there is an exception to this if the employees have an expectation of future employment.<sup>108</sup> As there is a high likelihood of future employment for NFL cheerleaders the next season due to annual turnover being low and over half of the incumbent cheerleaders being selected to the squad again the next season, they likely would be eligible to vote in a representation election under the NLRA.<sup>109</sup>

As it is usually the individual NFL teams that offer the employment contracts to the cheerleaders, there is not much that needs to be done to establish their individual NFL teams as their employers. The challenging part of the fourth element to establish is that the NFL is the joint employer of the cheerleaders. The current standard of the NLRB is that a company that traditionally was considered to be a separate entity and not a joint employer is liable for its employees.<sup>110</sup> Here, the cheerleaders would be able to argue that because the NFL exerts control over its franchise teams, it also has control over all of the workers the clubs choose to employ, which would include the team's cheerleaders.<sup>111</sup> Thus, the NFL could likely be a joint employer of NFL cheerleaders and therefore would be liable for the same NLRA claims the cheerleaders bring against the individual teams.<sup>112</sup> If the NFL cheerleaders can successfully argue these factors in front of the NLRB, then they likely would be able to form a union and collectively bargain for wages and better working conditions.<sup>113</sup>

### *C. States Stepping In*

Despite the success of the lawsuits ending in settlements that generally bring about better compensation and working conditions for NFL cheerleaders, states could also step in and pass laws that extend employee benefits and protections to cheerleaders for professional sports teams. The Governor of California in 2015, in response to the lawsuit brought by the Raiderettes, signed a law into effect that requires professional sports teams to treat their cheerleaders like

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107. See 29 U.S.C. § 152(3) (2020).

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

109. See Harke, *supra* note 3, at 179.

110. *Id.* at 182.

111. *Id.* at 183.

112. *Id.*

113. *Id.* at 169.

employees for the purpose of FLSA within the state of California.<sup>114</sup> In 2016, a New Jersey state senator introduced a bill that proposed extending employment benefits and protections to cheerleaders for professional sports teams in response to the Flight Crew's lawsuit against the Jets.<sup>115</sup> This bill died in committee.<sup>116</sup> States enacting legislation that classifies NFL cheerleaders as employees provides cheerleaders with better benefits and protections, and allows them to start working towards unionization.

#### CONCLUSION

If the NFL wants to continue being the most profitable league in North America, they will need to do so by retaining and expanding their female fan base, as women represent the portion of the population that would provide the NFL with its largest opportunity for growth.<sup>117</sup> Women will likely only continue to invest their time and spending power in the NFL if they believe the league's values align with their own.<sup>118</sup> With all the wage and hours lawsuits as well as the harassment and discrimination lawsuits, the least the NFL could do to show that it values women is to classify all NFL cheerleaders as employees, entitling them FLSA protections and giving them the ability to unionize and collectively bargain for better conditions on their own.

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114. Maxwell Strachan, *California Cheerleaders Win the 'Right' to Be Treated Like Normal Workers*, HUFFPOST (July 15, 2015), [https://www.huffpost.com/entry/california-cheerleaders-minimum-wage\\_n\\_55a6d5cee4b04740a3deec34?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guc\\_e\\_referrer\\_sig=AQAAAAQ\\_PvNmMMiaO4FFBsGKZPgfmShE\\_ca255ZUChqi2w94VH5SiIAYKOe13f0Q2N0FNg-X2Xm4fp\\_5zHL27L4qOM7wV1k33Ddk94Wq8-ObgSWQ9JadizTfhB3cZc\\_ANy8z3PamoJJM9508u5fqfyWF-ujDQxn25v\\_S5x9CdK2YZab](https://www.huffpost.com/entry/california-cheerleaders-minimum-wage_n_55a6d5cee4b04740a3deec34?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guc_e_referrer_sig=AQAAAAQ_PvNmMMiaO4FFBsGKZPgfmShE_ca255ZUChqi2w94VH5SiIAYKOe13f0Q2N0FNg-X2Xm4fp_5zHL27L4qOM7wV1k33Ddk94Wq8-ObgSWQ9JadizTfhB3cZc_ANy8z3PamoJJM9508u5fqfyWF-ujDQxn25v_S5x9CdK2YZab).

115. See S819, 217<sup>th</sup> Leg., 2016 Sess. (N.J. 2016).

116. See *id.*

117. See 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](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).

118. Mina Kimes, *Dear NFL, Women Matter. . .*, ESPN (July 25, 2014), [https://www.espn.com/espnw/news-commentary/story/\\_id/11262500/espnw-why-ray-rice-light-punishment-bad-business-nfl](https://www.espn.com/espnw/news-commentary/story/_id/11262500/espnw-why-ray-rice-light-punishment-bad-business-nfl).