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Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy

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SUMMARY

My study explores a small but revealing corner of the share economy, where an individual’s private resources are bartered for limited use by others in exchange for compensation. Strip clubs create value for owners by commoditizing sexual labor. Clubs avoid employment in favor of independent contracting with dancers. They pay no wages or benefits; patrons pay dancers with fees and tips. But clubs extract entry fees from dancers who work; require them to rent dressing rooms and stage time; and compel them to share tips with DJs, emcees, house moms, bouncers, and bartenders. My research identified seventy-five federal and state court rulings on wage claims by exotic dancers. In thirty-eight cases, courts ruled that dancers were employees; only three courts ruled that dancers were independent contractors. Courts often awarded dancers minimum wages, overtime, and liquidated damages. My research relates more generally to labor in the share economy. Strip clubs epitomize a trend away from wage based employment in favor of independent contractor agreements for a transient and rootless workforce. The share economy model for work takes advantage of the poor bargaining power of individuals, while failing to pay workers minimum wages, overtime under federal and state law, employment taxes, and mandated employment benefits.

INTRODUCTION

A. Labor in the Share Economy
B. Research Overview

I. THE BUSINESS MODEL FOR STRIP CLUBS

A. What Is the Share Economy?
B. The Business Model for Strip Clubs

II. RESEARCH FINDINGS FOR DANCER LAWSUITS

A. Sample of Cases
B. Statistical Findings

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1. Degree of Control
2. Opportunity for Profit and Loss
3. Investment in Equipment or Materials
4. Degree of Skill
5. Permanence
6. Integral to the Business

III. IMPLICATIONS FOR THE SHARE ECONOMY

INTRODUCTION

A. Labor in the Share Economy

Uber and Ritz Cabaret—a strip club¹ in downtown Baltimore—have more in common than meets the eye. Neither company employs its primary workers.² Instead, each requires workers to sign independent contractor agreements.³ This allows the companies to avoid employment taxes, including Social Security and Medicare.⁴ They sidestep legal obligations for worker’s compensation, an insurance system that pays medical expenses and income support for employees who are injured on the job.⁵ They also shirk an employer’s duty to pay unemployment taxes.⁶ Because federal labor law does not apply to independent contractors, dancers are impeded from bargaining through a labor union.⁷ Uber and Ritz Cabaret do not pay

¹. E.g., Clincy v. Galardi S. Enters., Inc., 808 F. Supp. 2d 1326, 1329 (N.D.Ga. 2011) (“Plaintiffs refer to Onyx as a strip club, Defendants refer to it as a nightclub, regardless of this distinction in nomenclature, Onyx is a club in Atlanta, Georgia that features ‘nude, female exotic dancers.’”).


³. See infra notes 57–58.


⁵. See Sheena Harrison, Uber to Pay Workers Comp Fund for Drivers It Had Classified as Contractors, BUSINESS INSURANCE (Sept. 4, 2015, 10:35 AM) http://www.businessinsurance.com/article/20150904/NEWS08/1509098887 [https://perma.cc/Y6RWP1UT6] (explaining that Uber paid $77,925 to Alaska’s workers compensation fund to settle a misclassification complaint over its drivers).


for health benefits, either. My study focuses, however, on a more fundamental duty that these firms avoid in bypassing the employment relationship: federal requirements for minimum wages and overtime pay, and state laws that protect against wage theft.

B. Research Overview

This study is part of my ongoing research on jobs that are unlawfully structured as independent contractor relationships. My goal is to identify all federal and state cases from 2000–2015 in which workers were unlawfully denied wages and work-related reimbursements because they were misclassified as independent contractors. I measure (1) the types of jobs and industries for this work, (2) whether plaintiffs or defendants won rulings, (3) legal tests that courts applied and how these factors weighed for or against finding employment, and (4) court remedies.

At this early juncture, I find that many jobs are misclassified along lines that clubs use in this study. Whether work involves construction, ridesharing, healthcare, or other industries, companies give people a degree of control over the time they work. But these jobs also inflate control-of-schedule into illusory forms of self-enterprise.

This study explores a small but revealing corner of the share economy—the sexual labor market. I analyze and present data on seventy-five federal and state court cases involving dancers who

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section then excludes “any individual having the status of an independent contractor.”). 


13. E.g., Estrada v. FedEx Ground Package System, Inc., 64 Cal. Rptr. 3d 327 (Cal. Ct. App. 2007). Cf. Terry, 336 P.3d at 959 (“Sapphire’s supposed lack of control may actually reflect ‘a framework of false autonomy’ that give performers ‘a coercive “choice” between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity.’”).
sued their club for unpaid minimum wages and overtime, and unlawful pay deductions. Only one case had male dancers.14

Initially, I eliminated cases involving dancers from my study.15 But these cases continued to appear with conventional jobs in my research. I saw similarities in how plaintiffs—dancers and rideshare operators, for example—are deprived by contract of rights that inhere in the employment relationship.16 The commonalities in business models for strip clubs and rideshare companies are especially striking and unexpected. Firms leverage their power in contracts that create a false sense of worker control.17 Paradoxically, clubs and other companies use individual entrepreneurship to shift their business expenses to workers.18 They augment this strategy by avoiding payment of minimum wages,19 overtime,20 and employment taxes.21 The exploitation of dancers has revealing implications for many other workers in the emerging share economy.

I. THE BUSINESS MODEL FOR STRIP CLUBS

A. What Is the Share Economy?

The eroding employment relationship frames the backdrop for this study. The Bureau of Labor Statistics estimates that 53 million people engage in freelance work,22 including 14.3 to 21.1 million independent contractors.23 This estimate is imprecise because a range

15. See infra Part II.A.
17. See infra notes 73, 74.
18. See infra note 190.
19. See infra notes 53, 83.
20. See infra note 85.
of employers—ten percent to twenty percent—misclassify at least one worker as an independent contractor.24 Robert Reich, a labor expert, believes that all freelancers work as part of the share economy.25 However, his usage is overstated. He does not explain how this concept relates to all freelancers.26 In contrast, I use a more specific meaning for the share economy.

The idea of a share economy as it relates to labor markets originated in 1984 with Martin Weitzman.27 A share economy, he contended, would optimize the match between companies that need specific tasks to be performed and people who engage in short term work.28 Weitzman used this thought experiment: a mechanic who enters a car dealer’s salesroom is treated with indulgence and interest, but the same person is turned away if he seeks a job in the back of the dealership because the wage system is too inflexible to support an employment relationship.29 If labor markets were flexible, they would price work more affordably.30 The dealer would take more interest in this person’s skills.31

This concept applies to dancers and others in contingent work arrangements. Weitzman praises flexible sharing of workers by companies as a means to achieve full employment.32 To his credit,
recent statistics show that corporations are adopting more contingent work arrangements. This trend coincides, however, with more people who comprise the working poor. Perhaps Weitzman would see validation that growing numbers of workers hold two or more jobs. While his vision for a shared pool of just-in-time workers is taking root, more Americans have a declining living standard. The growth of contingent workers who toil without job security and bargaining power resembles the Depression. Weitzman did not focus on whether the wage system enables people to live above poverty.

Today, technology lubricates the share economy by lowering the cost of advertising, acquiring market information, and entering into

Richard Epstein, TheWrap (Feb. 16, 2009), http://www.thewrap.com/are-unions-still-necessary-conversation-labor-specialist-richard-epstein-1424 [https://perma.cc/PK6W-V5H6] (“Labor contracts are trying to create monopolies . . . . With any system like this small changes are difficult to adopt, and so what happens is that the only time there’s motion is when there’s a strike or a bankruptcy.”).

33. WEITZMAN, supra note 27, at 11–16 (discussing how very large companies with economies of scale can operate with inelastic cost-per-units of output, but other firms need a lower “markup coefficient”—the relationship of product revenue to the elasticity of demand for their products).

34. U.S. Bureau of Labor Statistics, A Profile of the Working Poor, 2013, BLS Report 1055, 1, 1 (2015). According to BLS data, 10.5 million people comprise the “working poor.” Id. at 1. The income for these people is below the poverty line (weekly earnings less than $342.87) even though they are in the labor force at least twenty-seven weeks per year. Id. at 15. There were 4.4 million full-time employees among the working poor. Id. at 5. The working poor rose sharply between 2007 and 2009, from 5.1% to 7.0% of the labor force. Id. at 1. It has stabilized since 2009 at about 7.2%. Id. at 2, 3.


36. Pew Research Center, The Lost Decade of the Middle Class (Aug. 22, 2012), http://www.pewsocialtrends.org/2012/08/22/the-lost-decade-of-the-middle-class [https://perma.cc/V7M997MW]. In 1971, 61% of American adults were classified as “middle income.” Id. By 2011, it was down to 51%. Id. In that time, the “middle” group’s share of national income fell from 62% to 45%. Id.

37. 78 Cong. Rec. 3678 (1934) (statement of Sen. Wagner), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 18–20 (1959) (“The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call.”).

Collaborative consumption also drives the share economy. People borrow or rent assets from others. Like a physical asset, labor is shared collaboratively. This technology-fueled model is popular, but it is also disruptive.

My study takes ideas from Weitzman and current developments in the share economy. I apply these concepts to an increasingly transient and rootless workforce. In one aspect of the share economy—recently called the gig economy—cell phone apps connect workers to users of their personal services. By this definition, an estimated 600,000 people work with an online intermediary. Dancers, in contrast, rarely use the Internet to improve their earnings. Technology does not generate their income as it does for rideshare operators.

There are similarities, nonetheless, in how rideshare firms and strip clubs expropriate the value of labor by avoiding minimum wages and overtime.

40. Id. (explaining that collaborative consumption, such as renting an empty bedroom on Airbnb, allows owners to make money from underused assets).
45. Id. at 12.
47. Id.
B. The Business Model for Strip Clubs

Sexual dancing uses a business model that heavily exploits performers.49 The work experience of Gabrielle Doe, a Ritz Club dancer, demonstrates this business model.50 Doe worked under a pseudonym because the club’s atmosphere degraded women.51 Other clubs use dancer vulnerabilities and fear to discourage challenges to conditions of work.52 Doe worked about fifty-five hours each week, but was never paid minimum wage or overtime.53 However, Ritz Club charged Doe a fee to come to work, another fee for music, another fee for DJ services, another fee for backstage access, and another fee for VIP access.54 The club levied fines when Doe was late to work, and another fine when she appeared late on stage.55 In a typical night, Doe paid the club $75 or more in fees and fines.56 In her lawsuit for unpaid wages, she alleged that the club’s pay system sometimes resulted in negative wages.57

Clubs usually avoid paying most workers—and paradoxically, require dancers to pay their co-workers.58 To illustrate, a male DJ sued his club because he was not paid wages and relied on dancers to pay him tips.59 This practice is common.60

51. Id. (discussing plaintiff’s testimony that she was struck as she went to perform on stage, and managers constantly called her a slut, skank, whore, and bitch).
52. Jane Roes 1–2 v. SFBSC Mgmt., LLC, 77 F. Supp. 3d 990, 995 (N.D. Cal. 2015) (“[P]laintiffs express reasonable concerns that disclosing their identities would threaten them with both career and possibly physical harm.”).
54. Id.
55. Id.
60. See, e.g., Collins v. Barney’s Barn, Inc., No. 4:12CV000685SWW, 2013 WL 1668984, at *4 (E.D. Ark. Apr. 17, 2013) (stating that a dancer paid $25 to $50 to the house every night and was told to pay “tip-outs” to disc jockeys and bouncers).
Clubs often utilize intricate corporate structures.\textsuperscript{61} For example, a dancer sought class certification to challenge pay practices of clubs that were under common ownership by corporations in Arizona, Ohio, North Carolina, and Tennessee.\textsuperscript{62} A case involving emcees who were not paid significant wages, but depended on tips from dancers, shows the complexity of club ownership.\textsuperscript{63} The emcees and dancers worked for KenKevII, Inc., a Maine nightclub owned by VCG, a Colorado corporation that owned stock and partnership interests in eighteen adult entertainment businesses.\textsuperscript{64} VCG’s primary attraction was entertainers who leased space to dance for patrons.\textsuperscript{65} The company treated dancers as independent contractors.\textsuperscript{66} VCG was professionally staffed with 135 full-time managers.\textsuperscript{67}

The club’s illusion of self-employment emerged in its defenses to this wage complaint.\textsuperscript{68} The club argued that dancers were customers of emcees.\textsuperscript{69} In other words, VCG held itself out merely as an intermediary to bring fee-paying customers together with dancers who bore the cost of paying others who facilitated their sexual labor.\textsuperscript{70}

Strip clubs control dancers much more than emcees and DJs.\textsuperscript{71} Often, clubs encourage dancers to pay ten percent of their tips to the bar, and five percent to the DJ.\textsuperscript{72} They compel dancers to sign independent contractor agreements.\textsuperscript{73} These contracts give the illusion

\begin{itemize}
\item \textsuperscript{61} E.g., Reich v. Priba Corp., 890 F. Supp. 586, 589, 594 (N.D. Tex. 1995). The club was divided in two separate businesses at Cabaret Royale. A corporation named Prive held the liquor license and employed waitresses and other food service workers. Its gross sales in 1991 were $6,944,280. Priba held the license for the exotic dance business, and provided space and clients for topless entertainers. In 1990, Priba had more than $2 million in gross sales. Dancers worked as independent contractors under Priba’s rules and regulations. \textit{See also} Hart v. Rick’s Cabaret Intern., Inc., 967 F. Supp. 2d 901, 908–09 (S.D.N.Y. 2013), where Rick’s, a New York City club, was owned and operated by Peregrine. RCI New York owned Peregrine, and was itself owned by RCII, a Texas corporation. \textit{Id.}
\item Johnson, 845 F. Supp. 2d at 362, 367–68.
\item Id. at 355–56.
\item Id. at 361, 365.
\item Id. at 365.
\item Id. at 357–59 (noting that an area director handled day-to-day activities, including staffing decisions).
\item Id. at 365, 369.
\item Johnson, 845 F. Supp. 3d at 377 (“VCG sees it differently. It insists that the emcees receive their tips from customers, but that the customers are the entertainers.”).
\item Id. at 354, 369, 371 (ruling that the money a dancer pays to an emcee is a tip under the FLSA).
\item E.g., Morse v. Mer Corp., No. 1:08-cv-1389-WTL-JMS, 2010 WL 2346334 at *2 (S.D. Ind. June 4, 2010).
\item E.g., Clincy, 808 F. Supp. 2d at 1330–31 (stating that new dancers received packet with forms, policies, and independent contractor agreement).
\end{itemize}
of an arm’s length transaction. Some dancers must sign leases to rent work space in the club. Clubs also require dancers to arbitrate pay disputes. Some clubs retaliate against dancers who challenge pay practices.

The empirical results show that dancers are exploited in a sophisticated share economy business model. As I later explain in more detail, dancers are offered illusory control over their work when, in reality, clubs control their time, their bodies, and their self-expression through dancing.

II. RESEARCH FINDINGS FOR DANCER LAWSUITS

Part II presents empirical findings. Following this data presentation, I explore how courts apply a six factor test for employment under the Fair Labor Standards Act (FLSA).

A. Sample of Cases

Identifying FLSA Cases: The database with dancers is part of a comprehensive effort to track litigation outcomes in worker misclassification cases from 2000 through 2015. In misclassification actions, plaintiffs sue under the FLSA—a federal law enacted in 1938—because they believe they have been unlawfully classified as independent contractors by a putative employer for whom they work. Usually, they seek unpaid minimum wages and overtime.

74. E.g., Wagoner v. N.Y.N.Y., Inc., No. 1:14-cv-480, 2015 WL 1468526, at *1, *2 (S.D. Ohio Mar. 30, 2015) (noting that dancers signed an independent contractor agreement stated “the Entertainers . . . expressly disavow the existence, the intention and the desire to enter into an employment relationship, and expressly recognize that they will provide services directly to patrons in exchange for compensation by patrons.”).

75. E.g., D’Antuono v. Serv. Road Corp., 789 F. Supp. 2d 308, 314 (D. Conn. 2011) (stating that dancer signed “Entertainment Lease” when she began to work for the club).


79. Rutman, supra note 7, at 539–40.

80. See infra Part II.C.


Often, they have a pendent claim under a state wage-and-hour statute. These laws have somewhat different legal tests for the employment relationship. They also provide recovery against wage theft and unpaid reimbursements to employees.

My larger database—which is a work-in-progress—is derived from Westlaw’s internet service. My search began with basic keywords. I used federal and state databases.

I read cases to see if they met the inclusion criteria. This approach produced a sample of cases with many occupations. Each valid case was added to a roster. As the sample grew, I checked new entries to avoid duplication. For valid cases, I extended my search forward and back in time to add cases. Looking forward, all cases were keycited to find newer decisions with a misclassification issue. Looking back, within each case I checked precedents that met the inclusion criteria.

**Collecting Data for Dancer Cases:** Initially, I eliminated exotic dancer cases from consideration. My decision was more visceral than reasoned but included the idea that sexual labor differs from other work. However, new cases involving dancers cropped up with those involving cable installers, rideshare drivers, and others. Courts did not treat dancer lawsuits differently from those cases. Therefore reversed my decision to exclude dancer cases.

Over time, I decided to accelerate my study of dancer cases and complete that part of my database. The key moment occurred when I read rideshare operator cases side-by-side with dancer cases and noticed similarities in their business models—especially how these firms shifted business costs to these workers. This symmetry helped me

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86. *E.g.*, Smith v. Tyad, Inc., 209 P. 3d 228, 234 (Mont. 2009) (stating that club-imposed stage fee for dancer is subject to the reimbursement provisions under Montana’s wage laws, and carries a statutory penalty).

87. The search began with “Fair Labor Standards Act,” “independent contractor,” and “minimum wage.”

88. See infra notes 165–88. For this study, the sample includes cases decided before 2000.

89. See, e.g., Callahan v. City of Chicago, 78 F. Supp. 3d 791, 810 (N.D. Ill. 2015).

90. Id.

91. Compare O’Connor v. Uber Techs. 58 F. Supp. 3d 989, 993–94 (N.D. Cal. 2014) (referencing the fact that Uber calls their drivers independent contractors and retains part of the driver’s tip), with Jones v. JGC Dallas LLC, No. 3:11-CV-2743-O, 2014 WL 7332551, at *1, *2 (N.D. Tex. Nov. 12, 2014) (referencing the fact that clubs classified exotic dancers as independent contractors and kept part of the dancers’ tips).
realize that dancer cases have implications for many jobs in the share economy.92 I wondered whether dancer cases might foretell how courts rule on rideshare businesses and other putative employers who shift operating costs to workers in an independent contractor model.

I extracted relevant data and recorded this information on a survey form. Litigation variables included (1) statute or common law in a complaint, (2) remedy sought (e.g., minimum wage, overtime, make-whole for breach of contract, expenses reimbursement), (3) court (federal or state; trial or appellate), (4) winner of ruling (plaintiff or defendant), and (5) court’s reasoning.

B. Statistical Findings

My research identified seventy-five federal and state court rulings on wage and hour claims by dancers who work for strip clubs. In twenty-eight cases, some with separate rulings from a magistrate and a judge, thirty-eight rulings determined that dancers were employees.93 Only three courts ruled that dancers were independent contractors.94 In other words, dancers won 93% of these misclassification rulings. In thirty-four other cases, courts did not

92. See, e.g., Callahan, 78 F. Supp. 3d at 810.
decide the employment status of dancers but ruled on a procedural motion.95

Rulings involved class certification,96 anonymity,97 enforcement of arbitration agreements,98 motions for injunctions,99 and proposed


96. E.g., Carter, 69 F. Supp. 3d at 1355–56 ("Congress passed the FLSA to protect workers from overbearing practices of employers who had greatly unequal bargaining power over their workers. Congress has expressed a policy that FLSA plaintiffs should have the opportunity to proceed collectively.") (citation omitted).

97. E.g., Jane Roes 1–2, 77 F. Supp. 3d, at 992, 996 ("Anonymity . . . does not in this case threaten the principle of open courts.").

98. E.g., Pratts, 210 WL 3539608, at *2.

99. E.g., R&B of Muskegon, Inc., 2009 WL 3756896, at *1 (dismissing dancers’ motion for an order to restrain a club from retaliating).
settlements. Nearly half of these rulings (47%) issued in 2014 or 2015, suggesting that this litigation is growing.

Returning to misclassification rulings, courts ordered clubs to pay their dancers unpaid minimum wages and overtime. Some ordered clubs to pay liquidated damages under the FLSA, and relatedly, found that clubs willfully violated this law. In an exceptional case, a court dismissed a dancer’s FLSA claims after finding that she had very high hourly pay.


Dancers usually alleged a misclassification issue under the FLSA. In a few cases, clubs countered that dancers performed as artistic professionals—a category of workers that is premised on the existence of an employment relationship, albeit one that is exempt from minimum wage and overtime requirements. In most cases, however, clubs contended that dancers were independent contractors. In related cases, dancers or state agencies sought wage recovery under state wage laws.

In FLSA cases, courts applied a six factor test. The test originated with Supreme Court cases. Eventually, federal courts refined


104. E.g., Thornton v. Crazy Horse, Inc., No. 3:06-cv-00251-TMB, 2012 WL 2175755, at *11 (D. Ala. June 14, 2012) (granting liquidated damages to dancers under federal and state law after concluding that their employer’s conduct was willful).

105. Matson v. 7455, Inc., No. CV 98-788-HA, 2000 WL 1132110, at *1, *6 (D. Or. Jan. 14, 2000) (reporting that a dancer worked 975 hours and earned $6,000 to $8,000 per month yielding an hourly wage between $73.85 and $98.46).


109. See Real v. Driscoll Strawberry Assocs., Inc., 602 F.2d 748, 754–55 (9th Cir. 1979) (citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (*The courts have identified a number of factors that may be useful in distinguishing employees from independent contractors for purposes of social legislation such as the FLSA. Some of those
this test to six factors. In addition, courts articulated an overarching factor—the “economic reality” between a worker and putative employer. One explanation for the high success rate of dancers in this study is reflected in a court’s observation that the FLSA defines employment with “striking breadth.”

1. Degree of Control

When an individual’s work is subject to significant control, this is a factor for employment. Club selection of dancers often indicates control; for example, when a club auditioned prospective dancers to see if they were “fluid” and possessed social skills, hygiene, and the ability to converse with patrons. A club exerted control by regulating dancers’ body positioning, physical contact with customers, body coverage in costumes, and heel height.

Club rules for on-stage dancing also indicated employer control. Similarly, clubs controlled dancers when they required them factors are: 1) the degree of the alleged employer’s right to control the manner in which the work is to be performed; 2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer’s business. The presence of any individual factor is not dispositive of whether an employee/employer relationship exists. Such a determination depends “upon the circumstances of the whole activity.”; Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311, 1311 nn.6–7 (5th Cir. 1976); Mednick v. Albert Enters., Inc., 508 F.2d 297, 300 (5th Cir. 1975); Reich v. Priha Corp., 890 F. Supp. 586, 592 (N.D. Tex. 1995) (citing United States v. Silk, 331 U.S. 704, 712–19 (1947)) (“The touchstone for determining whether an individual is an ‘employee’ under the FLSA is economic dependence. Accordingly, a court must consider several elements in evaluating economic dependence: degree of control; skill and initiative; opportunities for profit and loss as related to the activities of the alleged employer; investment in facilities; and permanency of relationship.”).

10. See, e.g., Real, 602 F.2d at 754–55, 754 n.14.
11. E.g., Harrell v. Diamond A Entm’t, Inc., 992 F. Supp. 1343, 1348 (M.D. Fla. 1997) (“Courts look not to the common law definition of employment, but rather to the ‘economic reality’ of whether the putative employee is economically dependent upon the alleged employer.”).
16. Clincy, 808 F. Supp. 2d at 1333 (noting that house dances were priced at $10, VIP room dances at $20).
to check in with house moms and make schedules, and when they required dancers to adhere to price lists for dances.\textsuperscript{117} Regulation of prices for lap dances in a VIP room also indicated control.\textsuperscript{118} Clubs exercised control by threatening to fine dancers who break rules.\textsuperscript{119} Control occurred when clubs fined dancers for unexcused absences and tardiness, and required dancers to leave immediately after work.\textsuperscript{120} One court concluded that “the Club’s Guidelines reflect the exercise of tight control, indeed, control fairly described as micro-management . . . over the dancers.”\textsuperscript{121}

\textbf{2. Opportunity for Profit and Loss}

Contractors have an opportunity for profit or loss in connection with their work.\textsuperscript{122} In most cases, however, courts rejected clubs’ arguments that dancers are able to profit from their work.\textsuperscript{123} Ironically, clubs argued that because dancers suffer a net loss on some nights as a result of required fees and tips, dancers are at risk for a loss and are therefore not employees.\textsuperscript{124} They also contended that if dancers were awarded wages, this would be unjust enrichment because dancers were already paid performance fees.\textsuperscript{125}

Courts rejected the argument that dancers can “hustle” to increase their profits.\textsuperscript{126} An appeals court agreed with clubs that “once customers arrive at [the club] . . . a dancer’s initiative, hustle, and costume significantly contribute to the amount of her tips.”\textsuperscript{127} But the court also noted that a club attracts customers by determining its location, advertising, business hours, and atmosphere.\textsuperscript{128} Similarly, a different ruling noted that when a club controls customer

\begin{itemize}
  \item \textsuperscript{117} Id. at 1332–33.
  \item \textsuperscript{118} Id. at 1333.
  \item \textsuperscript{119} Hart, 967 F. Supp. 2d at 908, 913, 915 (finding that the club imposed fines and dress codes).
  \item \textsuperscript{120} Harrell v. Diamond A Entm’t, Inc., 992 F. Supp. 1343, 1350 (M.D. Fla. 1997); Hart, 967 F. Supp. 2d at 915–17 (noting that rules and threats of discipline were found to control dancers even if rules were not enforced). See also Thompson v. Linda A., Inc., 779 F. Supp. 2d 139, 148 (D.D.C. 2011).
  \item \textsuperscript{121} Hart, 967 F. Supp. 2d at 916.
  \item \textsuperscript{122} Reich v. Priba Corp., 890 F. Supp. 586, 592 (N.D. Tex. 1995).
  \item \textsuperscript{123} Harrell, 992 F. Supp. at 1351 (“That a dancer may increase her earnings by increased ‘hustling’ matters little. As is the case with the zealous waiter at a fancy, four star restaurant, a dancer’s stake, her take and the control she exercises over each of these are limited by the bounds of good service; ultimately, it is the restaurant that takes the risks and reaps the returns.”).
  \item \textsuperscript{124} Clincy, 808 F. Supp. 2d at 1346.
  \item \textsuperscript{125} Hart, 967 F. Supp. 2d at 906.
  \item \textsuperscript{126} Priba, 890 F. Supp. at 593.
  \item \textsuperscript{127} Reich v. Circle C. Invs., Inc., 998 F.2d 324, 328 (5th Cir. 1993).
  \item \textsuperscript{128} Id.
\end{itemize}
access to its establishment, sets cover charges, and regulates a dancer's time in a semi-private room, these actions limit a dancer’s opportunity for profit.\textsuperscript{129} Another court concluded that “[a]ny profit to the entertainers is more analogous to earned wages than to a return for risk on capital investment.”\textsuperscript{130}

3. Investment in Equipment or Materials

A contractor invests in equipment or materials.\textsuperscript{131} However, clubs routinely lost rulings on this factor because they paid for buildings, water, electricity, liability insurance, advertising, and guards.\textsuperscript{132} One club spent $900,000 in a year for operating costs.\textsuperscript{133}

As a result, this factor weighed in favor of finding that dancers were employees.\textsuperscript{134} One court noted that clubs invest more in their business compared to dancers, whose investments are small.\textsuperscript{135} Along these lines, a club made the futile argument that dancers advertise on MySpace and Facebook.\textsuperscript{136} In sum, this factor usually weighed in favor of employee status because clubs provide investment and risk capital.\textsuperscript{137}

4. Degree of Skill

A worker’s skill is another factor in employment.\textsuperscript{138} Dancers did not need experience to be hired.\textsuperscript{139} Courts interpreted this to mean that the work of dancers requires little skill.\textsuperscript{140} Overall, courts found that “little specialized skill is required to be a nude dancer.”\textsuperscript{141}

\textsuperscript{129} Hart, 967 F. Supp. 2d at 919–20.
\textsuperscript{130} Priba, 890 F. Supp. at 593.
\textsuperscript{131} Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (finding that meat cutters who were paid piece-rate as independent contractors were employees because “[t]he premises and equipment of Kaiser were used for the work” (emphasis added)).
\textsuperscript{133} Clincy v. Giardi S. Enters., Inc., 808 F. Supp. 2d 1326, 1347 (N.D. Ga. 2011) (finding that the club’s annual business expenses of $900,000 outweighed dancers’ costs for costumes, shoes, and grooming).
\textsuperscript{134} Id.
\textsuperscript{138} Id. at 592–93 (indicating skill as a factor).
\textsuperscript{139} Id. at 592.
\textsuperscript{141} Id.
One court noted that these dancers “do not need long training or highly developed skills.” One court summed it up: “dancers do not exhibit the skill or initiative indicative of persons in business for themselves.”

5. Permanence

Courts also consider a worker’s attachment to the putative employer. Numerous courts ruled that dancers are employees under the FLSA even though their relationship with a club lacks permanence. One court reasoned that because “dancers were free to work at other clubs or in other lines of work, and that they were not permanent employees, do [sic] not distinguish them from countless workers in other areas of endeavor who are undeniably employees under the FLSA—for example, waiters, ushers, and bartenders.” Even when a court found no permanence, this was given “modest weight in assessing employee status under the FLSA.”

6. Integral to the Business

Courts examine the degree to which a person’s work is integral to a business. Numerous courts recognized that dancers are essential to adult entertainment clubs. One opinion said, “[n]o reasonable jury could conclude that exotic dancers were not integral to the success of a club that marketed itself as a club for exotic dancers.” Another court concluded “[t]hat dancers play such an integral role is highly indicative of their economic dependence.” In another case, clubs served no alcohol or meals; they relied solely on dancers for entertainment. Dancers were therefore integral to the business. Dancers were economically dependent on the clubs rather than being in business for themselves.

142. Reich v. Circle C Invs., Inc., 998 F.2d 324, 328 (5th Cir. 1993).
143. Id.
144. Id.
145. Id. at 328–29 (finding that “most dancers have short-term relationships with Circle C.”).
149. E.g., id.
150. Id.
153. Id.
In sum, when courts applied the six factor test for employment under the FLSA, dancers won more than 90% of these cases. Apart from the classification issue, clubs also raised a defense under the FLSA that employers may take a tip credit for payments made by patrons to dancers. However, courts did not count club-mandated service charges paid by customers to dancers as tips that qualify for an employer credit under the FLSA. And, in a rare case where a club paid a wage, the club unlawfully required dancers to pay back part of their tips.

III. IMPLICATIONS FOR THE SHARE ECONOMY

The business model for strip clubs commoditizes sexual labor to create value for owners. Many clubs transmute employment into tenancy and contractor relationships. As a result, a dancer’s labor is monetized into assets that pay tips and fees to co-workers and club owners. The current transactional model not only enables clubs to exploit dancers, emcees, DJs, house moms, bartenders, and bouncers by avoiding payment of wages, it allows clubs to shirk financial responsibilities for employment taxes.

The contractor model used by clubs for their dancers has disquieting implications for millions of workers because it exploits a

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155. See supra Part II.B.
158. Donovan v. Tavern Talent & Placements, Inc., No. 84-F-401, 1986 WL 32746, at *5 (D. Colo. Jan. 8, 1986). The club entered into employment agreements (not independent contractor agreements) with dancers that paid $3.35 per hour, but also specified that the first $4.35 earned each hour by dancers belonged to the club. This meant that dancers paid the club $1 for each hour they worked, and the club counted the first $4.35 received each hour as an FLSA tip credit. Citing 1974 amendments to the FLSA, the court ruled that the club could not lawfully use employee tips to satisfy more than 50% of the Act minimum wage.
159. Terry v. Sapphire Gentlemen’s Club, 336 P.3d 951, 959 (Nev. 2014). Nevada’s supreme court recently said it “is mindful that Sapphire’s supposed lack of control may actually reflect a framework of false autonomy that gives performers a coercive ‘choice’ between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity.” Id.
161. E.g., id. at *4 (detailing dancers’ allegations that they were forced to pay tips (called a “tip out”) to co-workers—namely, house moms and house dads, disc jockeys, poker announcers, doormen, and bartenders.
162. Id. at *5.
vulnerable population that will forgo formal employment to make ends meet. The fact that dancers win 93% of their wage lawsuits means that clubs should abandon this exploitative model, and pay dancers wages in an employment relationship.

The larger point of my study is that a strip club’s ingenious methods for arranging work can be applied in varying degrees to mainstream companies in the share economy. My preliminary results show that many workers are misclassified. These jobs and their industries include telecommunications (cable and fiber optic installers); cleaning services (maids and janitors); protective services (security guards and police); construction (drywall installers, window and door installers, carpenters, painters, HVAC technicians, and welders); health care (nurses and ultrasound technicians); distribution (warehouse workers and package delivery workers);

163. Crane, supra note 8. See also Horowitz, supra note 22.

164. Strip Clubs Get Away With Exploiting Dancers Every Day, THINK PROGRESS (Nov. 4, 2015), https://thinkprogress.org/strip-clubs-get-away-with-exploiting-dancers-every-day-but-these-strippers-are-fighting-back-fb3a204bcb5a#gbtb6c6e [https://perma.cc/UY549WPB]. Dancers are drawn to the industry due to perceived scheduling flexibility; however, they discover that club rules make this work as restrictive as ordinary jobs by assigning performance times to dancers and enforcing the schedules with fines.


local transportation (school bus drivers\textsuperscript{181}, cabbies\textsuperscript{182}, and perhaps of most significance due to its rising popularity, rideshare drivers\textsuperscript{183}); and others (garment workers\textsuperscript{184} and grocery baggers\textsuperscript{185}).

Further study is needed to determine how many putative employers misclassify workers \textit{and} require these individuals to pay for the firm’s operations. But initial indications show that the strip club model is not isolated. FedEx relies on delivery drivers whom they require to buy or lease vehicles that are solely dedicated to the company’s use.\textsuperscript{186} Some cable companies require installers to rent the company’s tools and vans, and deduct this money from their pay.\textsuperscript{187} Other companies fine technicians in “chargebacks” for being late to jobs.\textsuperscript{188}

The corporate practice of forcing workers to pay for the enterprise’s operating costs is expanding.\textsuperscript{189} Rideshare companies and strip clubs shift their infrastructure costs to their workers.\textsuperscript{190} Uber is the short name for Uber Technologies, Inc.,\textsuperscript{191} but incongruously, its licensing agreement requires drivers to bear the cost of maintaining cellular accessibility to the company’s dispatching system.\textsuperscript{192} Drivers are not reimbursed for sharing their telecomm assets and data plans so that Uber can transact business with customers.\textsuperscript{193} In that sense, Uber gets a free ride on every driver’s self-funded cell phone plan. This mimics the club strategy of charging dancers rent

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\textsuperscript{182.} Callahan v. City of Chicago, 78 F. Supp. 3d 791, 830 (N.D. Ill. 2015).

\textsuperscript{183.} O’Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 1005, n.8 (N.D. Cal. 2015).

\textsuperscript{184.} Zheng v. Liberty Apparel Co., 355 F.3d 61, 79 (2d Cir. 2003).

\textsuperscript{185.} Dubois v. Sec’y of Defense, 161 F.3d 2, 3 (4th Cir. 1998).

\textsuperscript{186.} Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 331 (Cal. Ct. App. 2007).

\textsuperscript{187.} E.g., Swinney v. AMcomm Telecomms., Inc., 30 F. Supp. 3d 629, 637 (E.D. Mich. 2014) (noting that the “rental scheme undercut a strong finding that this factor favors an independent contractor holding.”).


\textsuperscript{189.} E.g., Swinney, 30 F. Supp. 3d at 637; Estrada, 64 Cal. Rptr. 3d at 331; O’Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 994 (N.D. Cal. 2014).

\textsuperscript{190.} See O’Connor, 58 F. Supp. 3d at 994. See also Harrell v. Diamond A Entm’t, Inc., 992 F. Supp. 1343, 1350 (M.D. Fla. 1997).

\textsuperscript{191.} O’Connor, 58 F. Supp. 3d at 993.

\textsuperscript{192.} \textit{Terms and Conditions}, UBER (Jan. 2, 2016) https://www.uber.com/legal/term/us [https://perma.cc/Q5HEHYU3] (“You are responsible for obtaining the data network access necessary to use the Services. Your mobile network’s data and messaging rates and fees may apply if you access or use the Services from a wireless-enabled device. You are responsible for acquiring and updating compatible hardware or devices necessary to access and use the Services and Applications and any updates thereto.”).

\textsuperscript{193.} Id.
for dressing rooms and stage time.\textsuperscript{194} Businesses who use an independent contractor model fail to pay for mandated social safety nets.\textsuperscript{195} And while rideshare firms and strip clubs play up the angle that workers can enhance their freedom, the reality is that many individuals enter into work arrangements that exploit their personal hardships.\textsuperscript{196} After experiencing this faux freedom, people realize they have been duped into accepting sham working agreements.\textsuperscript{197} The litigation trends that favor exotic dancers brings to life Margaret Meade’s precept: “[e]very time we liberate a woman, we liberate a man.”\textsuperscript{198}

\textsuperscript{194} See Smith v. TYAD, Inc., 209 P.3d. 228, 231 (Mont. 2009).
\textsuperscript{195} See Mason v. Fantasy, LLC, No. 13-cv-02020-RM-KLM, 2015 WL 4512327, at *4, *11 (D. Colo. July 27, 2015) (finding that dancer’s request for a W-2 form was denied because the club avoided paying employment taxes and kept no tax records for its dancers). See also Chris Opfer, Limited Data Show Gig Workers May Be Moonlighters, BLOOMBERG BNA (Dec. 18, 2015) (statement of Sen. Mark Warner) http://www.bna.com/limited-data-show-n57982065390/ [https://perma.cc/ZXS8ATFY] (“If we suddenly turn a blind eye and tomorrow we have 60, 70, 80 percent of the workforce as a contingent workforce with no social insurance at all, the irony for folks who say they’re conservative is that what you’re going to end up doing is putting more and more pressure on a feeble public entitlement system that is underfunded.’ . . . ‘So you might wind up growing government rather than decreasing government because you will have no shared responsibility for eating the broccoli that is social insurance.’”).
\textsuperscript{196} Crane, supra note 8.
\textsuperscript{198} Quotations by and about women, RELIGIOUS TOLERANCE.ORG, http://www.religioustolerance.org/femquote.htm [http://perma.cc/9HZCPFVE].