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BARE MINIMUM: STRIPPING PAY FOR INDEPENDENT CONTRACTORS IN THE SHARE ECONOMY

MICHAEL H. LEROY*

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.

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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.’”).

2. Rich McCormick, *Uber Settles Lawsuit to Keep Drivers as Independent Contractors in California and Massachusetts*, THE VERGE (Apr. 21, 2016, 11:57 PM), <http://theverge.com/2016/4/21/11485424/uber-suit-california-massachusetts-drivers-employee-contractor> [<https://perma.cc/6M68P99U>]; *Doe v. New Ritz, Inc.*, No. RDB-14-2367, 2016 U.S. Dist. LEXIS 54910, at *3 (D. Md. Apr. 25, 2016).

3. *See infra* notes 57–58.

4. U.S. DEP'T OF TREASURY, EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULINGS 2 (June 13, 2014), <https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf> (using figures for 2012, the Treasury Department said that when employers misclassify workers as independent contractors they save about \$3,710 per worker per year in employment taxes).

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/NEWS08/150909887> [<https://perma.cc/Y6RWPUT6>] (explaining that Uber paid \$77,925 to Alaska's workers compensation fund to settle a misclassification complaint over its drivers).

6. *E.g.*, *In re Enjoy the Show Mgmt., Inc.*, 731 N.Y.S.2d 287, 287 (N.Y. 2001) (club owed unemployment taxes); *Club Paradise, Inc. v. Okla. Emp't Sec. Comm.*, 213 P.3d 1157, 1159 (Okla. 2008).

7. National Labor Relations Act (NLRA), 29 U.S.C.S. § 152(3) (2012) (defining employee as “any employee, . . . unless the Act explicitly states otherwise” The same

for health benefits, either.⁸ 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,⁹ and state laws that protect against wage theft.¹⁰

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.¹¹ Whether work involves construction, ridesharing, healthcare, or other industries, companies give people a degree of control over the time they work.¹² But these jobs also inflate control-of-schedule into illusory forms of self-enterprise.¹³

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

section then excludes “any individual having the status of an independent contractor.”). *But see* *Jonbruni, Inc.*, 1999 WL 33454729 (N.L.R.B. Div. of Judges, Nov. 2, 1999) (concluding that exotic dancers are employees under the National Labor Relations Act). *Cf.* Margot Rutman, *Exotic Dancers’ Employment Law Regulations*, 8 TEMP. POL. & C.R.L. REV. 515, 553 (1991) (explaining that apart from legal impediments to unionizing, exotic dancers are stigmatized and shunned by labor organizations).

8. Antonia Crane, *Stop Stealing from Strippers*, N.Y. TIMES (Aug. 13, 2015), <http://www.nytimes.com/2015/08/13/opinion/stop-stealing-from-strippers.html> [<https://perma.cc/M5QS6V8D>] (dancers lack health insurance).

9. *See* Rutman, *supra* note 7, at 538–39.

10. *E.g.*, *Thornton v. Crazy Horse, Inc.*, No. 3:06-cv-00251-TMB, 2012 WL 2175753 (D. Ala. June 14, 2012) (awarding dancers damages for unpaid wages and overtime, in addition to liquidated damages, under the Alaska Wage and Hour Act and the Fair Labor Standards Act).

11. *See infra* notes 165–88.

12. *See* *Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951, 953 (Nev. 2014).

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

14. *Henderson v. 1400 Northside Drive, Inc.*, 110 F. Supp. 3d 1318, 1320 (N.D. Ga. 2015).

15. *See infra* Part II.A.

16. *See Herzfeld v. 1416 Chancellor, Inc.*, No. 14-4966, 2015 WL 4480829, at *2 (E.D. Pa. July 22, 2015).

17. *See infra* notes 73, 74.

18. *See infra* note 190.

19. *See infra* notes 53, 83.

20. *See infra* note 83.

21. *See* 303 West 42nd Street Enters., Inc. v. I.R.S., 916 F. Supp. 349, 352 (S.D.N.Y. 1996) (club misclassified dancers; employment tax deficiency was properly assessed); *Club Hubba v. United States*, 239 F. Supp. 324, 325 (D. Haw. 1965) (club treated dancers from Japan as independent contractors). *But see* *Cinema Art Theatre of Springfield, Inc. v. U.S.*, 46 F. Supp. 2d 812, 813 (C.D. Ill. 1999); *Taylor Boulevard Theatre, Inc. v. United States*, No. 3:97-CV-63-H, 1998 WL 375291, at *4 (W.D. Ky. May 13, 1998) (dancer had sufficient control of her pay to qualify as independent contractor); *Déjà vu Entm't Enters. of Minnesota, Inc. v. United States*, 1 F. Supp. 2d 964, 965 (D. Minn. 1998); *Marlar, Inc. v. United States*, 934 F. Supp. 1204, 1205 (W.D. Wash. 1996).

22. Sara Horowitz, *Freelancers in the U.S. Workforce*, BUREAU OF LABOR STATISTICS (Oct. 2015), <http://www.bls.gov/opub/mlr/2015/article/freelancers-in-the-us-workforce-1.htm> [https://perma.cc/E8B4KVG7].

23. Bureau of Labor Statistics, Tbl. A-9 Selected employment indicators, (Sept. 2, 2016), <http://www.bls.gov/news.release/empstat09.htm> [https://perma.cc/RT4WULXE].

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,

The Bureau of Labor Statistics estimates that 5.3 million self-employed workers are incorporated, while 9.5 million are unincorporated. Freelancers Union & Elance-oDesk, *Freelancing in America: A National Study of the New Workforce* (Sept. 2014), https://fu-web-storage-prod.s3.amazonaws.com/content/filer_public/7c/45/7c457488-0740-4bc4-ae45-0aa60daac531/freelancinginamerica_report.pdf. See Lawrence Mishel, *Despite Freelancers Union / Upwork Claim, Freelancing is Not Becoming Americans’ Main Source of Income*, ECON. POLICY INST. (Dec. 9, 2015), <http://www.epi.org/publication/despite-freelancers-unionupwork-claim-freelancing-is-not-becoming-americans-main-source-of-income/> [<https://perma.cc/BV37FRL4>] (explaining the discrepancy in estimated number of independent contractors).

24. Françoise Carré, *(In)dependent Contractor Misclassification*, ECON. POLICY INST. (June 8, 2015), <http://www.epi.org/publication/independent-contractor-misclassification> [<https://perma.cc/9Y7DR5XM>].

25. Robert Reich, *Why the Sharing Economy Is Harming Workers—and What Must Be Done*, HUFFINGTON POST (Nov. 28, 2015, 12:02 PM), http://www.huffingtonpost.com/robert-reich/why-the-sharing-economy-i_1_b_8672120.html [<http://perma.cc/9BD6Y7BF>] (“The so-called ‘share economy’ includes independent contractors, temporary workers, the self-employed, part-timers, freelancers, and free agents.”).

26. *Id.*

27. MARTIN L. WEITZMAN, *THE SHARE ECONOMY: CONQUERING STAGFLATION* 1–5 (Harv. U. Press 1984).

28. *Id.* at 4–5 (share system should replace wage system). The author believes that a wage system discourages companies from hiring while flexible, contingent work contributes to full employment.

29. *Id.* at 8–9.

30. *Id.* at 4.

31. *Id.* at 9.

32. Lauren Horwitch, *Are Unions Still Necessary? A Conversation with Labor Specialist*

recent statistics show that corporations are adopting more contingent work arrangements.³³ This trend coincides, however, with more people who comprise the working poor.³⁴ Perhaps Weitzman would see validation that growing numbers of workers hold two or more jobs.³⁵ While his vision for a shared pool of just-in-time workers is taking root, more Americans have a declining living standard.³⁶ The growth of contingent workers who toil without job security and bargaining power resembles the Depression.³⁷ Weitzman did not focus on whether the wage system enables people to live above poverty.³⁸

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/PK6WV5H6>] (“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.

35. U.S. Bureau of Labor Statistics, *Economic News Release, Table A-16. Persons Not in the Labor Force and Multiple Jobholders by Sex, Not Seasonally Adjusted*, <http://www.bls.gov/news.release/empsit.t16.htm> [<https://perma.cc/5CRRG42W>]. This figure stood at 7,596,000 in November 2015. See also *The Devalued American Worker*, WASH. POST (Dec. 14, 2014) <http://www.washingtonpost.com/sf/business/2014/12/14/the-devalued-american-worker> [<https://perma.cc/C7GD9YN7>] (explaining that the economy has lost 5.5 million middle-skill jobs, resulting in more people seeking multiple jobs to offset falling income).

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.”).

38. Isabel V. Sawhill, *Rethinking Employment Policy*, in RETHINKING EMPLOYMENT POLICY 9, 29 (D. Lee Bawden & Felicity Skidmore eds., 1989).

contracts.³⁹ Collaborative consumption also drives the share economy.⁴⁰ People borrow or rent assets from others.⁴¹ Like a physical asset, labor is shared collaboratively.⁴² This technology-fueled model is popular, but it is also disruptive.⁴³

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.⁴⁴ By this definition, an estimated 600,000 people work with an online intermediary.⁴⁵ Dancers, in contrast, rarely use the Internet to improve their earnings.⁴⁶ Technology does not generate their income as it does for rideshare operators.⁴⁷ There are similarities, nonetheless, in how rideshare firms and strip clubs expropriate the value of labor by avoiding minimum wages and overtime.⁴⁸

39. *The Rise of the Sharing Economy*, ECONOMIST (March 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-share-economy> [https://perma.cc/S26RAKQV].

40. *Id.* (explaining that collaborative consumption, such as renting an empty bedroom on Airbnb, allows owners to make money from underused assets).

41. See INVESTOPEDIA, <http://www.investopedia.com/terms/s/sharing-economy.asp#ixzz3rCLHCHTV> [https://perma.cc/W4J696TN] (defining “sharing economy” as a peer-to-peer type of transacting business) Cf. *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 331 (Cal. App. 2007) (holding FedEx’s “Operating Agreement” specified that a delivery driver is as an “independent contractor, and not . . . an employee . . . for any purpose,” and said that the parties shared “mutual business objectives” (emphasis added)). FedEx required drivers to purchase or lease vans and regulated routes in great detail. Like clubs that offered dancers false control over their work, FedEx created “illusive” control with drivers. *Id.*; *Doe v. Cin-Lan, Inc.*, No. 08-cv-12719, 2010 WL 726710, at *5 (E.D. Mich. Feb. 24, 2010) (discussing a club’s “Dancer Performance Lease”).

42. Daniel Evans, *Startups and the Rise of The Sharing Economy*, YFS MAGAZINE (Nov. 3, 2015), <http://yfsmagazine.com/2015/11/03/startups-and-the-rise-of-the-sharing-economy%E2%80%A8> [https://perma.cc/J6NH8N85] (arguing that the share economy allows people to “share, lease, and exchange labor, skills, and commodities.”). See Stephen Ufford, *The Future of The Sharing Economy Depends on Trust*, FORBES (Feb. 10, 2015), <http://www.forbes.com/sites/theyec/2015/02/10/the-future-of-the-sharing-economy-depends-on-trust> [https://perma.cc/3NQVMNL4].

43. Georgios Zervas et al., *A First Look at Online Reputation on AirBnB, Where Every Stay is Above Average* 1–2 (Jan. 28, 2015), <http://people.bu.edu/zg/publications/airbnb-reviews.pdf>.

44. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker,”* THE HAMILTON PROJECT 1, 6 (Dec. 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty-first_century_work_krueger_harris.pdf (explaining that workers “use an Internet-based app . . . that matches customers to workers.”).

45. *Id.* at 12.

46. *Morse v. Mer Corp.*, No. 1:08-cv-1389-WTL-JMS, 2010 WL 2346334, at *4 (S.D. Ind. June 4, 2010).

47. *Id.*

48. *Compare* Herzfeld v. 1416 Chancellor, Inc., No. 14-4966, 2015 WL 4480829, at *2 (E.D. Pa. July 22, 2015) with Harrison, *supra* note 5.

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

49. Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate through the Lens of Strippers' Rights*, 19 MICH. J. GENDER & L. 339, 347 (2013); Sarah Chun, *An Uncommon Alliance: Finding Empowerment for Exotic Dancers Through Labor Unions*, 10 HASTINGS WOMEN'S L. J. 231, 236 (1999); Andrew Gilden, *Sexual (Re)consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 95 GEO. L.J. 541, 546 (2007).

50. Doe v. New Ritz, Inc., No. WDQ-14-2367, 2015 WL 4389699, at *1 (D. Md. July 14, 2015).

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.”).

53. *New Ritz*, 2015 WL 4389699, at *1.

54. *Id.*

55. *Id.*

56. *Id.* *Accord* Thornton v. Crazy Horse, Inc., No. 3:06-cv-00251-TMB, 2012 WL 2175753, at *4 (D. Ala. June 14, 2012) (noting that dancers paid club \$10 for each hour they worked, or \$80 per regular shift); Nesselrodte v. Underground Casino & Lounge, LLC, No. 3:11-CV-92, 2012 WL 4378163, at *2 (N.D.W. Va. Sept. 2, 2012) (noting plaintiff's claim that defendant club fined dancer up to \$50 for leaving work early).

57. *New Ritz*, 2015 WL 4389699, at *1.

58. *E.g.*, Bosco v. Tampa Food & Beverage, LLC, No. 8:11-cv-1651-T-26AEP, 2013 WL 49477, at *1 (M.D. Fla. Jan 3, 2013).

59. *Id.*; Johnson v. VCG Holding Corp., 845 F. Supp. 2d 353, 354–55, 363, 365–66 (D. Me. 2012) (stating that male emcees sued for FLSA violations, claiming that their pay was based on tips from dancers).

60. *See, e.g.*, Collins v. Barney's Barn, Inc., No. 4:12CV000685 SWW, 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.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.⁶² A case involving emcees who were not paid significant wages, but depended on tips from dancers, shows the complexity of club ownership.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.⁶⁴ VCG's primary attraction was entertainers who leased space to dance for patrons.⁶⁵ The company treated dancers as independent contractors.⁶⁶ VCG was professionally staffed with 135 full-time managers.⁶⁷

The club's illusion of self-employment emerged in its defenses to this wage complaint.⁶⁸ The club argued that dancers were customers of emcees.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.⁷⁰

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

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. *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. *Id.*

62. *Kesley v. Entm't U.S.A., Inc.*, 67 F. Supp. 3d 1061, 1063 (D. Ariz. 2014).

63. *Johnson*, 845 F. Supp. 2d at 362, 367–68.

64. *Id.* at 355–56.

65. *Id.* at 361, 365.

66. *Id.* at 365.

67. *Id.* at 357–59 (noting that an area director handled day-to-day activities, including staffing decisions).

68. *Id.* at 365, 369.

69. *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.”).

70. *Id.* at 354, 369, 371 (ruling that the money a dancer pays to an emcee is a tip under the FLSA).

71. *See, e.g.*, *Clincy v. Glardi S. Enters., Inc.*, 808 F. Supp. 2d 1326, 1331–32 (N.D. Ga. 2011).

72. *E.g.*, *Morse v. Mer Corp.*, No. 1:08-cv-1389-WTL-JMS, 2010 WL 2346334 at *2 (S.D. Ind. June 4, 2010).

73. *E.g.*, *Clincy*, 808 F. Supp. 2d at 1330–31 (stating that new dancers received packet with forms, policies, and independent contractor agreement).

of an arm's length transaction.⁷⁴ Some dancers must sign leases to rent work space in the club.⁷⁵ Clubs also require dancers to arbitrate pay disputes.⁷⁶ Some clubs retaliate against dancers who challenge pay practices.⁷⁷

The empirical results show that dancers are exploited in a sophisticated share economy business model.⁷⁸ 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.⁷⁹

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).⁸⁰

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 1938⁸¹—because they believe they have been unlawfully classified as independent contractors by a putative employer for whom they work.⁸² Usually, they seek unpaid minimum wages and overtime.⁸³

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).

76. *E.g.*, *Robinson v. Taboo Gentlemen’s Club, LLC*, No. 3:14-CV-123, 2015 WL 3868531, at *4 (N.D.W. Va. June 23, 2015) (referencing the arbitration clause contained in the club’s licensing agreement).

77. *E.g.*, *Doe v. New Ritz, Inc.*, No. WDQ-14-2367, 2015 WL 4389699, at *1, *2 (D. Md. July 14, 2015) (considering possible retaliation when ruling on dancer’s plea to maintain anonymity in the lawsuit).

78. *See, e.g.*, *Thornton v. Crazy Horse, Inc.*, No. 3:06-cv-00251-TMB, 2012 WL 2175753, at *6, *7 (D. Ala. June 14, 2012).

79. Rutman, *supra* note 7, at 539–40.

80. *See infra* Part II.C.

81. Fair Labor Standards Act of 1938, 29 U.S.C.S. §§ 201–219 (2016).

82. *E.g.*, *Coronado v. D.N.W. Houston, Inc.*, No. H-13-2179, 2014 WL 2779548, at *1 (S.D. Tex. June 19, 2014).

83. *E.g.*, *Herzfeld v. 1416 Chancellor, Inc.*, No. 14-4966, 2015 WL 4480829, at *2 (E.D. Pa. July 22, 2015) (involving dancers who sought overtime as well as minimum wages).

Often, they have a pendent claim under a state wage-and-hour statute.⁸⁴ These laws have somewhat different legal tests for the employment relationship.⁸⁵ They also provide recovery against wage theft and unpaid reimbursements to employees.⁸⁶

My larger database—which is a work-in-progress—is derived from Westlaw’s internet service. My search began with basic keywords.⁸⁷ 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.⁸⁸ 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.⁸⁹ Courts did not treat dancer lawsuits differently from those cases.⁹⁰ I 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.⁹¹ This symmetry helped me

84. *E.g.*, *Bonton v. Centerfold Entm’t Club, Inc.*, No. 6:14-CV-6074, 2015 WL 2380300, at *1 (W.D. Ark. May 19, 2015) (seeking relief under the FLSA and the Arkansas Minimum Wage Act).

85. *Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951, 957–58 (Nev. 2014) (noting how several states utilize unique tests differing from the FLSA test for employment schemes).

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.

93. See, e.g., *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, 326 (5th Cir. 1993); *Mason v. Fantasy, LLC*, No. 13-cv-02020-RM-KLM, 2015 WL 4512327, at *11 (D. Colo. July 27, 2015); *McFeely v. Jackson St. Entm't, LLC*, 47 F. Supp. 3d 260, 273 (D. Md. 2014); *Verma v. 3001 Castor, Inc.*, No. 13-3034, 2014 WL 2957453, at *16 (E.D. Pa. June 30, 2014); *Stevenson v. Great Am. Dream, Inc.*, No. 1:12-CV-3359-TWT, 2013 WL 6880921, at *5 (N.D. Ga. Dec. 31, 2013); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 922 (S.D.N.Y. 2013); *Butler v. PP&G, Inc.*, No. WMN-13-430, 2013 WL 5964476, at *6 (D. Md. Nov. 7, 2013); *Watson v. W.W.D., Inc.*, No. 12-2590, 2013 WL 1947365, at *4 (W.D. La. Mar. 25, 2013); *Thornton v. Crazy Horse, Inc.*, No. 3:06-cv-00251-TMB, 2012 WL 2175753, at *6, *7-8 (D. Ala. June 14, 2012); *Ruffin v. Entm't of the E. Panhandle*, No. 3:11-CV-19, 2012 WL 761658, at *2 (N.D.W. Va. Mar. 7, 2012); *Cliney v. Galardi S. Enters., Inc.*, 808 F. Supp. 2d 1326, 1350 (N.D. Ga. 2011); *Thompson v. Linda & A., Inc.*, 779 F. Supp. 2d 139, 151 (D.D.C. 2011); *Morse v. Mer Corp.*, No. 1:08-cv-1389-WTL-JMS, 2010 WL 2346334, at *6 (S.D. Ind. June 4, 2010); *Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343, 1353-54 (M.D. Fla. 1997); *Reich v. Priba Corp.*, 890 F. Supp. 586, 595 (N.D. Tex. 1995); *Martin v. Circle C Invs., Inc.*, No. MO-91-CA-43, 1991 WL 338239, at *6 (W.D. Tex. Mar. 27, 1991); *Donovan v. Tavern Talent & Placements, Inc.*, No. 84-F-401, 1986 WL 32746, at *1, *3 (D. Colo. Jan. 8, 1986); *Jeffcoat v. Dep't of Labor*, 732 P.2d 1073, 1078 (Ala. 1987); *Moody v. Razooly*, No. A099065, 2003 WL 464076, at *1, *2 (Cal. Ct. App. Feb. 25, 2013) (reporting that a jury at the trial stage found that the dancers were employees); *Terry v. Sapphire Gentlemen's Club, LLC*, 336 P.3d 951, 963, 961 (Nev. 2014); *In re Enjoy the Show Mgmt., Inc.*, 731 N.Y.S.2d 287, 288 (N.Y. App. Div. 2001); *Club Paradise, Inc. v. Okla. Emp't Sec. Comm'n*, 213 P.3d 1157, 1161 (Okla. Civ. App. 2008); *Oregon ex rel. Roberts v. Bomareto Enters., Inc.*, 956 P.2d 254, 256 (Or. Ct. App. 1998); *Yard Bird, Inc. v. Va. Emp't Comm'n*, 503 S.E.2d 246, 252 (Va. Ct. App. 1998).

94. *Terry*, 336 P.3d at 960 (reporting that a lower court ruled that dancers were independent contractors); *Hilborn v. Prime Time Club, Inc.*, No. 411CV00197 BSM, 2012 WL 9187581, at *1 (E.D. Ark. July 12, 2012); *Matson v. 7455, Inc.*, No. CV 98-788-HA, 2000 WL 1132110, at *4 (D. Or. Jan. 14, 2000).

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

95. *See, e.g.*, *Lee v. Plantation of La., LLC*, 454 Fed. App'x 358, 359 (5th Cir. 2011); *Carter v. Doll House II, Inc.*, 608 Fed. App'x 903, 903–04 (11th Cir. 2015); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 318 (7th Cir. 1995); *Eley v. Stadium Group, LLC*, No. 14-cv-1594 (KBJ), 2015 WL 5611331, at *1 (D.D.C. Sept. 22, 2015); *Leyva v. 35 Bar & Grill, LLC*, No. SA-15-CA-295-FB, 2015 WL 5751638, at *1, *9 (W.D. Tex. Sept. 22, 2015); *Herzfeld v. 1416 Chancellor, Inc.*, No. 14-4966, 2015 WL 4480829, at *1 (E.D. Pa. July 22, 2015); *Mays v. Grand Daddy's, LLC*, No. 14-cv-461-slc, 2015 WL 4373565, at *1 (W.D. Wis. July 15, 2015); *Doe v. New Ritz, Inc.*, No. WDQ-14-2367, 2015 WL 4389699, at *1, *2 (D. Md. July 14, 2015); *Robinson v. Taboo Gentlemen's Club, LLC*, No. 3:14-CV-123, 2015 WL 3868531, at *1, *11 (N.D.W. Va. June 23, 2015); *Pratts v. Ares on Fowler, LLC*, No. 2:15-cv-124-FtM-38CM, 2015 WL 3539608, at *1, *2 (M.D. Fla. June 3, 2015); *Bonton v. Centerfold Entm't Club, Inc.*, No. 6:14-CV-6074, 2015 WL 2380300, at *1 (W.D. Ark. May 19, 2015); *Wagoner v. N.Y.N.Y., Inc.*, No. 1:14-cv-480, 2015 WL 1468526, at *1, *7 (S.D. Ohio Mar. 30, 2015); *Mykytyak-Penning v. Private Eyes Gentlemen's Club*, No. 14 Civ. 5152(PAC), 2015 WL 1191282, at *1, *3 (S.D.N.Y. Mar. 16, 2015); *Jane Roes 1–2 v. SFBSC Mgmt., LLC*, 77 F. Supp. 3d 990, 995, 997 (N.D. Cal. 2015); *Kesley v. Entm't U.S.A., Inc.*, 67 F. Supp. 3d 1061, 1065–66, 1075 (D. Ariz. Dec. 17, 2014); *Dittus v. Keg, Inc.*, Nos. 3:14-cv-00300-JFA, 0:14-cv-03029-JFA, 2014 WL 6749183, at *1, *3 (D.S.C. Dec. 1, 2014); *Holden v. Raleigh Rest. Concepts, Inc.*, No. 5:14-CV-348-F, 2014 WL 6609774, at *1 (E.D.N.C. Nov. 20, 2014); *Jones v. JGC Dallas, LLC*, No. 3:11-CV-2743-O, 2014 WL 7332551, at *3, *9 (N.D. Tex. Nov. 12, 2014); *Hughes v. Burie*, No. 3:12-cv-332-RS-CJK, 2014 WL 5092263, at *1 (N.D. Fla. Oct. 9, 2014); *Cruthis v. Vision's*, No. 4:12-cv-00244-KGB, 2014 WL 4092325, at *1 (E.D. Ark. Aug. 19, 2014); *Carter v. Doll House II, Inc.*, 69 F. Supp. 3d 1351, 1358 (N.D. Ga. 2014); *Coronado v. D.N.W. Houston, Inc.*, No. H-13-2179, 2014 WL 2779548, at *1, *5 (S.D. Tex. June 19, 2014); *Collins v. Barney's Barn, Inc.*, No. 4:12CV00685 SWW, 2013 WL 1668984, at *1 (E.D. Ark. Apr. 17, 2013); *Brown v. Mustang Sally's Spirits & Grill, Inc.*, No. 12-CV-529S, 2013 WL 416303, at *1, *2 (W.D.N.Y. Jan. 31, 2013); *Trauth v. Spearmint Rhino Cos. Worldwide*, No. EDCV 09-01316-VAP (DTBx), 2012 WL 4755682, at *1, *10 (C.D. Cal. Oct. 5, 2012); *Blake v. Taboo Gentlemen's Club, LLC*, No. 3:12-cv-2, 2012 WL 4450966, at *1 (N.D.W. Va. Sept. 25, 2012); *Nesselrodte v. Underground Casino & Lounge, LLC*, No. 3:11-CV-92, 2012 WL 4378163, at *1 (N.D.W. Va. Sept. 25, 2012); *Brown v. Peaches & Pears Soc. Club, Inc.*, No. 4:11CV00224 SWW, 2011 WL 6153630, at *1, *3 (E.D. Ark. Dec. 12, 2011); *Rafeedie v. L.L.C., Inc.*, No. A-10-CA-743 LY, 2011 WL 5352826, at *1, *4 (W.D. Tex. Nov. 7, 2011); *D'Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 313–14, 344 (D. Conn. 2011); *Green v. Plantation of La., LLC*, No. 10-364, 2011 WL 1667170, at *1, *2 (W.D. La. Apr. 29, 2011); *Doe v. Cin-Lan, Inc.*, No. 08-cv-12719, 2010 WL 726710, at *1 (E.D. Mich. Feb. 24, 2010); *Does v. R&B of Muskegon, Inc.*, No. 1:09-cv-1018, 2009 WL 3756896, at *1, *2 (W.D. Mich. Nov. 6, 2009); *4 Exotic Dancers v. Spearmint Rhino*, No. CV 08-4038 ABC (SSx), 2009 WL 250054, at *1, *4 (C.D. Cal. Jan. 29, 2009); *Whiting v. W&R Corp.*, No. Civ.A. 2:03-0509, 2005 WL 1027467, at *1, *3 (S.D.W. Va. Apr. 19, 2005); *Reich v. ABC/York-Estes Corp.*, No. 91 C 6265, 1997 WL 264379, at *1, *2 (N.D. Ill. May 12, 1997); *Redmond v. Chains, Inc.*, 996 P.2d 759, 761, 763–64 (Colo. App. 2000).

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.¹⁰⁰ Nearly half of these rulings (47%) issued in 2014 or 2015, suggesting that this litigation is growing.¹⁰¹

Returning to misclassification rulings, courts ordered clubs to pay their dancers unpaid minimum wages and overtime.¹⁰² Some ordered clubs to pay liquidated damages under the FLSA,¹⁰³ and relatedly, found that clubs willfully violated this law.¹⁰⁴ In an exceptional case, a court dismissed a dancer's FLSA claims after finding that she had very high hourly pay.¹⁰⁵

C. Fair Labor Standards Act: How Courts Applied a Six Factor Test for Employment

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.¹⁰⁶ 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.¹⁰⁷

In FLSA cases, courts applied a six factor test.¹⁰⁸ The test originated with Supreme Court cases.¹⁰⁹ Eventually, federal courts refined

100. *E.g.*, *Brown*, 2013 WL 416303, at *2; *Trauth v. Spearment Rhino Co. Worldwide*, No. EDCV 009-01316-VAP (DTBx), 2012 WL 4755682, at *1–*2 (C.D. Cal. Oct. 5, 2012) (referencing an agreed upon settlement of \$12,970,000).

101. *See, e.g.*, *Mykytyak-Penning v. Private Eyes Gentlemen's Club*, No. 14 Civ. 5152 (PAC), 2015 WL 1191282 (S.D.N.Y. Mar. 16, 2015); *Kesley v. Entm't U.S.A., Inc.*, 67 F. Supp. 3d 1061 (D. Ariz. Dec. 17, 2014).

102. *E.g.*, *Martin v. Circle C. Inv., Inc.*, No. MO-91-CA-43, 1991 WL 338239, at *3, *8 (W.D. Tex. March 27, 1991) (ordering payment of \$369,852 to Crazy Horse dancers, and \$65,951 to Lipstick dancers).

103. *E.g.*, *Thompson v. Linda & A., Inc.*, 779 F. Supp. 2d 139, 153–54 (D.D.C. 2011).

104. *E.g.*, *Thornton v. Crazy Horse, Inc.*, No. 3:06-cv-00251-TMB, 2012 WL 2175753, 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).

106. *E.g.*, *Henderson v. 1400 Northside Drive, Inc.*, 110 F. Supp. 1318, 1321–22 (N.D. Ga. 2015).

107. *Terry v. Sapphire Gentlemen's Club, LC*, 336 P.3d 951, 953 (Nev. 2014); *Jeffcoat v. Dep't of Labor*, 732 P.2d 1073, 1074 (Ala. 1987); *Oregon ex. rel. Roberts v. Bomareto Ent., Inc.*, 956 P.2d 254, 254–55 (Or. Ct. App. 1998).

108. *E.g.*, *McFeeley v. Jackson St. Entm't, LLC*, 47 F. Supp. 3d 260, 267 (D. Md. 2014).

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.¹¹⁰ In addition, courts articulated an overarching factor—the “economic reality” between a worker and putative employer.¹¹¹ 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.”¹¹²

1. Degree of Control

When an individual’s work is subject to significant control, this is a factor for employment.¹¹³ 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.¹¹⁴ A club exerted control by regulating dancers’ body positioning, physical contact with customers, body coverage in costumes, and heel height.¹¹⁵

Club rules for on-stage dancing also indicated employer control.¹¹⁶ 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. Priba 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.”).

110. *See, e.g., Real*, 602 F.2d at 754–55, 754 n.14.

111. *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.”).

112. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

113. *Clincy v. Galardi S. Enters., Inc.*, 808 F. Supp. 2d 1326, 1344–45 (N.D. Ga. 2011) (finding that the control factor counted toward employment because club subjected dancers to rules for scheduling, conduct, dress and appearance, and pricing of dances). *See also Terry v. Sapphire Gentlemen’s Club*, 336 P.3d 951, 958–59 (Nev. 2014).

114. *Verma v. 3001 Castor, Inc.*, No. 13-3034, 2014 WL 2957453, at *2 (E.D. Pa. June 30, 2014); *see also Clincy*, 808 F. Supp. 2d at 1330 (reporting that applicants typically undergo a “body check” for stretch marks and tattoos).

115. *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 914–15 (S.D.N.Y. 2013) (stating that dancer’s footwear to have a minimum 4-inch stiletto heel, and must not wear transparent outfits).

116. *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.¹¹⁷ Regulation of prices for lap dances in a VIP room also indicated control.¹¹⁸ Clubs exercised control by threatening to fine dancers who break rules.¹¹⁹ Control occurred when clubs fined dancers for unexcused absences and tardiness, and required dancers to leave immediately after work.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.”¹²¹

2. *Opportunity for Profit and Loss*

Contractors have an opportunity for profit or loss in connection with their work.¹²² In most cases, however, courts rejected clubs’ arguments that dancers are able to profit from their work.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.¹²⁴ They also contended that if dancers were awarded wages, this would be unjust enrichment because dancers were already paid performance fees.¹²⁵

Courts rejected the argument that dancers can “hustle” to increase their profits.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.”¹²⁷ But the court also noted that a club attracts customers by determining its location, advertising, business hours, and atmosphere.¹²⁸ Similarly, a different ruling noted that when a club controls customer

117. *Id.* at 1332–33.

118. *Id.* at 1333.

119. *Hart*, 967 F. Supp. 2d at 908, 913, 915 (finding that the club imposed fines and dress codes).

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).

121. *Hart*, 967 F. Supp. 2d at 916.

122. *Reich v. Priba Corp.*, 890 F. Supp. 586, 592 (N.D. Tex. 1995).

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.”).

124. *Clincy*, 808 F. Supp. 2d at 1346.

125. *Hart*, 967 F. Supp. 2d at 908.

126. *Priba*, 890 F. Supp. at 593.

127. *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993).

128. *Id.*

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.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."¹³⁰

3. *Investment in Equipment or Materials*

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

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

4. *Degree of Skill*

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

129. *Hart*, 967 F. Supp. 2d at 919–20.

130. *Priba*, 890 F. Supp. at 593.

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)).

132. *McFeeley v. Jackson St. Entm't, LLC*, 47 F. Supp. 3d 260, 271 (D. Md. 2014).

133. *Clinicy v. Glardi 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).

134. *Id.*

135. *Stevenson v. Great Am. Dream, Inc.*, No. 1:12-CV-3359-TWT, 2013 WL 6880921, at *4–5 (N.D. Ga. Dec 31, 2013) (holding that the club "invested far more than the Plaintiffs on necessary personnel and equipment.>").

136. *Morse v. Mer Corp.*, No. 1:08-cv-1389-WTL-JMS, 2010 WL 2346334, at *4 (S.D. Ind. June 4, 2010).

137. *Reich v. Priba Corp.*, 890 F. Supp. 586, 593 (N.D. Tex. 1995).

138. *Id.* at 592–93 (indicating skill as a factor).

139. *Id.* at 592.

140. *Verma v. 3001 Castor, Inc.*, No. 13-3034, 2014 WL 2957453, at *9 (E.D. Pa. June 30, 2014).

141. *Id.*

One court noted that these dancers “do not need long training or highly developed skills.”¹⁴² One court summed it up: “dancers do not exhibit the skill or initiative indicative of persons in business for themselves.”¹⁴³

5. *Permanence*

Courts also consider a worker’s attachment to the putative employer.¹⁴⁴ Numerous courts ruled that dancers are employees under the FLSA even though their relationship with a club lacks permanence.¹⁴⁵ 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.”¹⁴⁶ Even when a court found no permanence, this was given “modest weight in assessing employee status under the FLSA.”¹⁴⁷

6. *Integral to the Business*

Courts examine the degree to which a person’s work is integral to a business.¹⁴⁸ Numerous courts recognized that dancers are essential to adult entertainment clubs.¹⁴⁹ 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.”¹⁵⁰ Another court concluded “[t]hat dancers play such an integral role is highly indicative of their economic dependence.”¹⁵¹ In another case, clubs served no alcohol or meals; they relied solely on dancers for entertainment.¹⁵² Dancers were therefore integral to the business.¹⁵³ Dancers were economically dependent on the clubs rather than being in business for themselves.¹⁵⁴

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.”).

146. *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 921 (S.D.N.Y. 2013).

147. *Butler v. PP&G, Inc.*, No. WMN-13-430, 2013 WL 5964476, at *5 (D. Md. Nov. 7, 2013).

148. *Hart*, 967 F. Supp. 2d at 921.

149. *E.g., id.*

150. *Id.*

151. *Harrell v. Diamond A Entm’t, Inc.*, 992 F. Supp. 1343, 1352 (M.D. Fla. 1997).

152. *McFeeley v. Jackson St. Entm’t, LLC*, 47 F. Supp. 3d 260, 273 (D. Md. 2014).

153. *Id.*

154. *Butler v. PP&G, Inc.*, No. WMN-13-430, 2012 WL 5964476, at *4 (D. Md. Nov. 7,

In sum, when courts applied the six factor test for employment under the FLSA, dancers won more than 90% of these cases.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ And, in a rare case where a club paid a wage, the club unlawfully required dancers to pay back part of their tips.¹⁵⁸

III. IMPLICATIONS FOR THE SHARE ECONOMY

The business model for strip clubs commoditizes sexual labor to create value for owners.¹⁵⁹ Many clubs transmute employment into tenancy and contractor relationships.¹⁶⁰ As a result, a dancer's labor is monetized into assets that pay tips and fees to co-workers and club owners.¹⁶¹ 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.¹⁶²

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

2013) (finding that dancers were “entirely dependent on the [club] to provide [them] with customers.”).

155. *See supra* Part II.B.

156. *Reich v. ABC/York-Estes Corp.*, No. 91C6265, 1997 WL 264379, at *4 (N.D. Ill. May 12, 1997).

157. *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 934 (S.D.N.Y. 2013) (providing a detailed explanation of the tip credit provisions under the FLSA).

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.*

160. *Thornton v. Crazy Horse, Inc.*, No. 3:06-cv-002510-TMB, 2012 WL 2175753, at *6 (D. Ala. June 14, 2012).

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.¹⁶³ The fact that dancers win 93% of their wage lawsuits means that clubs should abandon this exploitative model,¹⁶⁴ 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 (cable¹⁶⁵ and fiber optic installers¹⁶⁶); cleaning services (maids¹⁶⁷ and janitors¹⁶⁸); protective services (security guards¹⁶⁹ and police¹⁷⁰); construction (drywall installers,¹⁷¹ window and door installers,¹⁷² carpenters,¹⁷³ painters,¹⁷⁴ HVAC technicians,¹⁷⁵ and welders¹⁷⁶); health care (nurses¹⁷⁷ and ultrasound technicians¹⁷⁸); distribution (warehouse workers¹⁷⁹ and package delivery workers¹⁸⁰);

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-fb3a204bcc5a#.g9tgb6ew> [<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.

165. *Bennett v. Unitek Global Servs., LLC*, No. 10C4968, 2013 WL 4804841, at *11 (N.D. Ill. Sept. 9, 2013).

166. *Deras v. Verizon Maryland, Inc.*, No. DKC 09-0791, 2010 WL 3038812, at *1, *8 (D. Md. July 30, 2010).

167. *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013 WL 3506149, at *9 (N.D. Ill. July 11, 2013).

168. *Quinteros v. Sparkle Cleaning, Inc.*, No. AW-07-0628, 2010 WL 3000865, at *3 (D. Md. July 26, 2010).

169. *Grenawalt v. AT&T Mobility, LLC*, 937 F. Supp. 2d 438, 454 (S.D.N.Y. 2013).

170. *Perez v. Off-Duty Police Servs., Inc.*, No. 3:13-cv-000935-DJH, 2015 WL 4068392, at *7 (W.D. Ky. July 2, 2015).

171. *Mendoza v. Essential Quality Constr., Inc.*, 691 F. Supp. 2d 680, 687 (E.D. La. 2010).

172. *Calle v. Chul Sun Kang Or.*, No. DKC 11-0716, 2012 WL 163235 (D. Md. Jan. 18, 2012).

173. *Luna-Reyes v. RFI Constr., LLC*, 109 F. Supp. 3d 744, 752 (M.D.N.C. 2015).

174. *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 582 (D. Md. 2008).

175. *Cherichetti v. PJ Endicott Co.*, 906 F. Supp. 2d 312, 318 (D. Del. 2012).

176. *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1443 (10th Cir. 1998).

177. *Barfield v. New York City Health & Hospitals Corp.*, 537 F.3d 132, 150 (2d Cir. 2008).

178. *Werner v. Bell Family Med. Ctr., Inc.*, No. 3:09 C 0701, 2012 WL 3284789, at *5 (M.D. Tenn. Aug. 10, 2012).

179. *Carrillo v. Schneider Logistics Trans-Loading and Distrib., Inc.*, No. 2:11-cv-8557-CAS, 2014 WL 183956, at *16 (C.D. Cal. Jan. 14, 2014).

180. *Collinge v. Intelliquick Delivery, Inc.*, No. 2:12-cv-00824 JWS, 2015 WL 1299369, at *7 (D. Az. Mar. 23, 2015).

local transportation (school bus drivers,¹⁸¹ cabbies,¹⁸² and perhaps of most significance due to its rising popularity, rideshare drivers¹⁸³); and others (garment workers¹⁸⁴ and grocery baggers¹⁸⁵).

Further study is needed to determine how many putative employers misclassify workers *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.¹⁸⁶ Some cable companies require installers to rent the company's tools and vans, and deduct this money from their pay.¹⁸⁷ Other companies fine technicians in "chargebacks" for being late to jobs.¹⁸⁸

The corporate practice of forcing workers to pay for the enterprise's operating costs is expanding.¹⁸⁹ Rideshare companies and strip clubs shift their infrastructure costs to their workers.¹⁹⁰ Uber is the short name for Uber Technologies, Inc.,¹⁹¹ but incongruously, its licensing agreement requires drivers to bear the cost of maintaining cellular accessibility to the company's dispatching system.¹⁹² Drivers are not reimbursed for sharing their telecomm assets and data plans so that Uber can transact business with customers.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

181. *Solis v. Kansas City Transp. Group*, No. 10-0887-CV-W-REL, 2012 WL 3753736, at *10 (W.D. Mo. Aug. 28, 2012).

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

183. *O'Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1005, n.8 (N.D. Cal. 2015).

184. *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 79 (2d Cir. 2003).

185. *Dubois v. Sec'y of Defense*, 161 F.3d 2, 3 (4th Cir. 1998).

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

187. *E.g.*, *Swinney v. AMcomm Telecomms., Inc.*, 30 F. Supp. 3d 629, 637 (E.D. Mich. 2014) (noting that the "rental scheme undercuts a strong finding that this factor favors an independent contractor holding.").

188. *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1314 (11th Cir. 2013). *See also* *Collinge v. Intelliquick Delivery, Inc.*, No. 2:12-cv-00824 JWS, 2015 WL 1299369, at *7 (D. Az. Mar. 23, 2015) (finding that company assessed "chargebacks" from driver pay).

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).

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).

191. *O'Connor*, 58 F. Supp. 3d at 993.

192. *Terms and Conditions*, UBER (Jan. 2, 2016) <https://www.uber.com/legal/terms/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.").

193. *Id.*

for dressing rooms and stage time.¹⁹⁴ Businesses who use an independent contractor model fail to pay for mandated social safety nets.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.¹⁹⁶ After experiencing this faux freedom, people realize they have been duped into accepting sham working agreements.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."¹⁹⁸

194. See *Smith v. TYAD, Inc.*, 209 P.3d. 228, 231 (Mont. 2009).

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.'").

196. Crane, *supra* note 8.

197. Compare Robert Wilonsky, *Uber Dallas Strike Continues as Some Luxury Sedan Drivers Protest Lower Fares*, DALLAS MORNING NEWS (Sept. 20, 2015, 9:33 AM) <http://transportationblog.dallasnews.com/2015/09/uber-strike-continues-as-some-luxury-sedan-drivers-protest-lower-fares.html> [<http://perma.cc/P5BLPFX5>] ,with Crane, *supra* note 8.

198. *Quotations by and about women*, RELIGIOUSTOLERANCE.ORG, <http://www.religioustolerance.org/femquote.htm> [<http://perma.cc/9HZCPFVE>].