

TWO CLASSIFICATIONS ENTER, ONE CLASSIFICATION LEAVES: ARE UFC FIGHTERS EMPLOYEES OR INDEPENDENT CONTRACTORS?

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I. INTRODUCTION

The fighters who compete in the Ultimate Fighting Championship (“UFC”) are currently classified as independent contractors. However, this classification appears to contradict the level of control that the UFC exerts over its fighters. This independent contractor classification severely limits the fighters’ benefits, workplace protections, and ability to unionize. Furthermore, the friendship between UFC’s brash president Dana White and President Donald Trump—who is responsible for making appointments to the National Labor Relations Board (“NLRB”)—has added a new twist to this issue.¹ An attorney representing a former UFC fighter claimed this friendship resulted in a biased NLRB determination in their case.² This article provides a detailed examination of the relationship between the UFC and its fighters, the relevance of worker classifications, and the case law involving workers in related fields. Finally, it performs an analysis of the proper classification of UFC fighters using the Internal Revenue Service (“IRS”) Twenty-Factor Test.

II. UFC BACKGROUND

The UFC is the world’s leading mixed martial arts (“MMA”) promotion. MMA is a one-on-one combat sport that combines elements of different martial arts such as boxing, judo, wrestling, jiu-jitsu, and karate. UFC bouts always take place in the trademarked Octagon, which is an eight-sided cage.³ The first UFC event was held in 1993 and had limited rules and limited fighter protections as compared to the modern-day events.⁴ UFC 1⁵ was promoted as “deadly” and an event “where anything can happen and probably will.”⁶ The brutality of the early UFC events led to Senator John

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¹ *The Board*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/board> (last visited Dec. 1, 2019).

² Steven Marrocco, *NLRB Dismisses Leslie Smith’s Complaint Against UFC; Attorney Vows to Appeal*, USA TODAY: MMAJUNKIE (Sept. 26, 2018, 2:31 PM), <https://mmajunkie.com/2018/09/ufc-leslie-smith-labor-complaint-dismissed-by-nlr/>; see *infra* note 43 for a discussion of this case.

³ *The Octagon*, UFC (Oct. 31, 2018), <https://www.ufc.com/octagon>.

⁴ At UFC 1, there were no weight classes, rounds, or judges. The only two rules were no biting and no eye gouging. Groin strikes and hair pulling were allowed and gloves were optional. Alex Bysouth, *UFC 1: The Beginning: Playboy, Mortal Kombat And The Hunt For an Ultimate Fighter*, BBC SPORT (Nov. 9, 2018), <https://www.bbc.com/sport/mixed-martial-arts/46015665>.

⁵ UFC events are sequentially numbered. “UFC 1” was the first UFC event.

⁶ TheMontageKing MMA, *Remembering UFC 1*, YOUTUBE (Nov. 23, 2016), <https://www.youtube.com/watch?v=2jid5GNXZUk>.

McCain labeling it “human cockfighting” and urging state politicians to ban the events.⁷ Due in part to these successful efforts to convince states to ban the sport, the UFC was a fledgling company for many years. It was sold in 2001 for only \$2 million.⁸ Ironically, these censorship efforts led by Senator McCain were later cited by UFC executives as saving the sport.⁹ The pressure led to the UFC accepting regulations that allowed for the mainstream appeal the sport has today. It is interesting to note that the winner of UFC 1 received \$50,000, which is more than some UFC fighters receive for competing in an event in 2019, despite dramatic increases in the UFC’s profitability.¹⁰

As MMA grew in popularity, the UFC started acquiring competing promotions, thus expanding its market share. In 2017, the UFC sold for \$4 billion.¹¹ Today the UFC employs around 700 fighters, and a little more than one hundred of them are female.¹² The UFC is currently the largest pay-per-view event provider in the world, averaging almost one event per week, and is broadcast in over 156 countries and territories.¹³ The UFC accounts for nearly 90 percent of the total market share of MMA revenue.¹⁴

Over time, the UFC implemented more rules for not only the bouts but also fighters’ behavior outside the Octagon. Originally, UFC fighters were allowed to acquire their own sponsorships based in large part on wearing a sponsor’s logo on their fight gear and on their pre- and post-fight shirts. However, in 2015, the UFC signed a six-year deal to make Reebok the exclusive UFC clothing sponsor.¹⁵ That year the UFC also implemented a strict anti-doping program by outsourcing the process to the United States Anti-Doping Agency (“USADA”). This new drug-testing policy implements random, surprise testing and requires UFC fighters to inform the USADA of their location at all times.¹⁶

⁷ Jonathan Strickland, *How the Ultimate Fighting Championship Works*, HOW STUFF WORKS, <https://entertainment.howstuffworks.com/ufc4.htm> (last visited June 3, 2019).

⁸ Chris Isidore, *UFC Owners Turn \$2 Million Into \$4 Billion*, CNNMONEY SPORT (July 11, 2016, 1:57 PM), <https://money.cnn.com/2016/07/11/news/companies/ufc-sold/index.html>.

⁹ Elias Cepeda, *Sen. John McCain: ‘Absolutely’ Would Have Tried MMA as a Young Man*, YAHOO! SPORTS (Feb. 10, 2014, 10:08 AM), <https://sports.yahoo.com/blogs/mma-cagewriter/sen-john-mccain-absolutely-tried-mma-young-man-180848009--mma.html>.

¹⁰ However, UFC 1 was an eight-man tournament, so the tournament winner had to defeat three opponents. Fighters no longer have to compete in multiple bouts on the same night, as the UFC no longer does tournaments. *UFC 1: Royce Gracie Wins First Ultimate Fighting Event*, NEWSDAY (April 8, 2015, 10:29 AM), <https://www.newsday.com/sports/mixed-martial-arts/ufc-1-pictures-royce-gracie-wins-first-ufc-event-1.10221073>.

¹¹ ESPN.com News Services, *Dana White on \$4 Billion UFC Sale: ‘Sport is Going to the Next Level’*, ABC NEWS (July 11, 2016, 1:40 AM), <https://abcnews.go.com/Sports/dana-white-billion-ufc-sale-sport-level/story?id=40483372>.

¹² *See Athletes*, UFC, <https://www.ufc.com/athletes/all?filters%5B0%5D=status%3A23> (last visited Dec. 1, 2019).

¹³ WME | IMG, *WME | IMG to Acquire UFC*, PR NEWswire (July 11, 2016), <https://www.prnewswire.com/news-releases/wme--img-to-acquire-ufc-300296320.html>.

¹⁴ Kartikay Mehrotra & Eben Novy-Williams, *UFC’s \$4 Billion Sale Is Fodder for Fighters’ Antitrust Suit*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2016-07-12/ufc-s-4-billion-sale-is-new-fodder-for-fighters-antitrust-suit> (last updated July 12, 2016, 1:21 PM).

¹⁵ This Reebok deal cost some fighters hundreds of thousands of dollars in lost sponsorship deals per year. Jacob Debits, *The Obstacles to UFC Fighters’ Unionisation*, LAWINSPO (Aug. 26, 2017), <https://www.lawinsport.com/topics/sports/item/the-obstacles-to-ufc-fighters-unionisation>.

¹⁶ *Id.*

Dana White has been the president of the UFC since 2001 and signed a new, seven-year contract in 2019.¹⁷ A former boxer, White is a polarizing president. He spoke at the 2016 Republican convention praising Donald Trump as “a fighter.”¹⁸ His own mother called him “egotistical, self-centered, arrogant, and cruel.”¹⁹ In response to fighters who want health insurance and better pay, White said, “We’re in this fucking society now where everybody should win a trophy. No, everyone doesn’t win a fucking trophy.”²⁰

Industry commentators have pointed out that the rapid increase in revenues for the UFC has not corresponded with a proportional increase in pay for its fighters.²¹ As a percent of team revenue, UFC fighters are paid significantly less than other athletes in unionized leagues. The highest-paid National Football League (“NFL”), Major League Baseball (“MLB”), National Basketball Association (“NBA”), and National Hockey League (“NHL”) athletes received 7.92 percent, 6.48 percent, 9.66 percent, and 7.56 percent of their team’s revenue in 2017, respectively.²² The highest paid UFC fighter in 2017, George St-Pierre, made only 0.36 percent of UFC revenue.²³ Even when compared to other individual sports athletes, UFC fighters appear underpaid. It is estimated that the UFC pays its fighters around 10 percent of total revenue from an event, while boxers generally make 70 percent.²⁴ These are only estimates; because the UFC is a privately held company, it can and does deny fighters and the public access to financial information.²⁵

¹⁷ Marc Raimondi, *Dana White Says He’s Extended His Contract with the UFC for Seven More Years*, MMA FIGHTING (Mar. 18, 2019, 6:30 PM), <https://www.mmafighting.com/2019/3/18/18271731/dana-white-says-hes-extended-his-contract-with-the-ufc-for-seven-more-years>.

¹⁸ Alex Shephard, *The UFC’s Dirtiest Move Yet: Union Bashing*, NEW REPUBLIC (Oct. 21, 2016), <https://newrepublic.com/article/137122/ufcs-dirtiest-move-yet-union-bashing>.

¹⁹ Joshua Molina, *Dana White’s Mom Calls Him a “Prick” and “Tyrant,” Who Turned His Back on His Family*, FULL CONTACT FIGHTER (July 19, 2011), <http://fcfighter.com/dana-white-%e2%80%99s-mom-calls-him-a-%e2%80%9cp-%e2%80%9d-and-%e2%80%9ctyrant-%e2%80%9d-who-turned-his-back-on-his-family/>.

²⁰ Shephard, *supra* note 18.

²¹ Z.G. Harris, *UFC Fighter Pay: What’s Wrong With It and How to Solve It*, BLEACHER REP. (July 31, 2013), <https://bleacherreport.com/articles/1722953-ufc-fighter-pay-whats-wrong-with-it-and-how-to-solve-it>. Even presidential candidate Andrew Yang stated his opinion that UFC fighters are underpaid. Walker Wolfson, *2020 Presidential Candidate Andrew Yang Gives His Take on UFC Fighter Pay*, FANSIDED (Mar. 2019), <https://fansided.com/2019/03/11/2020-presidential-candidate-andrew-yang-gives-take-ufc-fighter-pay/>.

²² Alfred Konuwa, *WWE Superstars Would Be Insane Not to Unionize Following \$2 Billion TV Deals*, FORBES (June 2, 2018, 8:00 AM), <https://www.forbes.com/sites/alfredkonuwa/2018/06/02/wwe-superstars-would-be-insane-not-to-unionize-following-2-billion-tv-deals/#390b7eb87088>.

²³ This is based on an estimated \$725 million in revenue and George St-Pierre’s reported \$2.58 million for 2017. However, admittedly, this is not a perfect comparison because the UFC does not have “teams” and UFC fighters rarely perform more than three times a year. *See generally* Kurt Badenhausen, *UFC 167: How Georges St-Pierre Makes \$12 Million a Year*, FORBES (Nov. 16, 2013, 4:33 PM), <https://www.forbes.com/sites/kurtbadenhausen/2013/11/16/how-georges-st-pierre-makes-12-million-a-year/#68c87dbf7ceb>.

²⁴ This is generally attributed to the UFC’s near monopoly in the MMA industry, its long-term contracts, and the lack of financial transparency. Daniel L. Maschi, Comment, *Million Dollar Babies Do Not Want to Share: An Analysis of Antitrust Issues Surrounding Boxing and Mixed Martial Arts and Ways to Improve Combat Sports*, 25 JEFFREY S. MOORAD SPORTS L.J. 409, 441–49 (2018).

²⁵ This was once a problem in boxing that was corrected by the passing of the Muhammad Ali Act; the UFC spent \$420,000 on lobbying efforts in 2016 to successfully oppose applying the act to the UFC. *Id.* at 443.

III. UFC UNIONIZATION EFFORTS AND CHALLENGES

These compensation issues, along with issues regarding undesirable working conditions and poor treatment by the UFC, have led fighters to attempt to unionize. As early as 1996 four fighters formed a “quasi-union.”²⁶ The first formal organization was the Mixed Martial Arts Fighters Association, formed in 2008.²⁷ Immediately after the UFC was sold for four billion dollars in 2016, another fighters’ association, the Professional Fighters Association (PFA) was created.²⁸ The PFA’s stated goals include dramatic increases in pay, revenue sharing, disability benefits, comprehensive health insurance for fighters and their families, a pension system, and a dispute resolution process.²⁹ Also in 2016, the Mixed Martial Arts Athletes Association (MMAAA) was formed. In addition to the goals of the PFA, the MMAAA is seeking additional compensation for former fighters.³⁰

To form a fighters’ union is an uphill battle. The issue of fighter classification is just one of many barriers (the NLRB only recognizes unions formed by “employees”).³¹ The UFC is a powerful organization that has a vested interest in barring unionization. Decisions on fighter bonuses, selection of opponents, and termination are almost entirely at the discretion of the UFC.³² This provides a strong reason for fighters to fear retaliation from the UFC if they support unionization.³³ In 2018, former UFC fighter Leslie Smith filed a complaint against the UFC for an allegedly retaliatory firing because of her support of unionization.³⁴ The case was dismissed by the NLRB.³⁵

²⁶ Debets, *supra* note 15.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Why do Baseball, Basketball, Football, and Hockey All Have Associations?*, PROF. FIGHTERS ASS’N, <http://profighters.org/#benefits> (last visited Dec. 1, 2019) (“Benefits” section on page).

³⁰ Debets, *supra* note 15.

³¹ Jeffrey B. Same, *Breaking the Chokehold: An Analysis of Potential Defenses Against Coercive Contracts in Mixed Martial Arts*, 2012 MICH. ST. L. REV. 1057, 1082 (2012) (“Inherent . . . is the requirement that those seeking to unionize are actual employees, as opposed to independent contractors.”).

³² *Id.* The highly subjective nature of these decisions has led to many seemingly contradictory actions by the UFC. When UFC fighter Quinton “Rampage” Jackson led the police on a freeway chase that ended in a wreck, UFC president Dana White flew his private jet to bail him out and provided him with legal representation. MMAmania.com, *Quinton Rampage Jackson Charged; Faces Three-Year Prison Sentence*, SBINATION: MMA MANIA (Aug. 25, 2008, 7:26 PM), <https://www.mmamania.com/2008/08/25/quinton-rampage-jackson-charged-faces-three-year-prison-sentence>. UFC fighter Jon Jones has failed three drug tests and was arrested for a hit and run accident and is still on the roster. Greg Beacham, *Jon Jones Defiant After Failed Drug Test Forces UFC 232 Move*, DENVER POST (Dec. 27, 2018, 10:55 PM), <https://www.denverpost.com/2018/12/27/jon-jones-failed-drug-test-ufc-232/>. Conversely, UFC fighter Leslie Smith was on a two-fight win streak when her next bout was cancelled due to her opponent failing to make weight. Marrocco, *supra* note 2. The UFC then ended Smith’s contract. Nick Baldwin, *Leslie Smith Says She Is No Longer a UFC Fighter After Cancelled Aspen Ladd Bout*, SBINATION: BLOODY ELBOW (Apr. 20, 2018, 4:00 PM), <https://www.bloodyelbow.com/2018/4/20/17263776/leslie-smith-no-longer-ufc-fighter-aspen-ladd-weight-miss-atlantic-city-mma-news-bantamweight>.

³³ Milan Ordoñez, *Thomson: There Will Never Be a Union Because of Fighters Trying to ‘Get in the Good Graces of Dana White’*, SBINATION: BLOODY ELBOW (July 25, 2018, 8:00 AM), <https://www.bloodyelbow.com/2018/7/25/17610834/ufc-josh-thomson-never-union-fighters-good-graces-dana-white-mma-news>.

³⁴ Marrocco, *supra* note 2.

³⁵ *Id.*

The high rate of turnover among UFC fighters, with the average tenure being fewer than two years,³⁶ is another barrier to union formation. Additionally, the international nature of the UFC provides another impediment. The UFC employs fighters from forty-nine countries.³⁷ Persuading and obtaining signatures from fighters who live in other countries and speak different languages would be challenging. The international nature of the UFC could also limit the efficacy of a union once created. The NLRB case law is not clear regarding extraterritorial application issues.³⁸ This ambiguity might require foreign fighters to form unions in their home countries and then come together under a global federation, a process that would only complicate an already difficult endeavor.³⁹

One final challenge to unionization in the immediate future is that the NLRB board members are appointed by the president and serve five-year terms.⁴⁰ By President Trump's fifteenth month in office, he had already appointed three members to the board.⁴¹ Commentators have pointed out that the NLRB is not immune to partisan political influence.⁴² Given President Trump's reputation with unions and friendship with UFC president Dana White, this may provide an additional obstacle to UFC fighter unionization efforts.⁴³

IV. UFC FIGHTER CLASSIFICATION RELEVANCE

The distinction between independent contractor and employee is an important one. Under the doctrine of respondeat superior, an employer is generally liable for torts conducted by an employee if the act was within the scope of employment.⁴⁴ Workers legitimately categorized as independent contractors generally do not impose such liability on employers. Classifying wrestlers as independent contractors also means that the UFC does not have to pay unemployment insurance, Social Security, or Medicare.⁴⁵ Additionally, the Family Medical Leave Act of 1993 ("FMLA"), Title VII of the Civil Rights Act, the Occupational Safety and Health Act ("OSHA"), and

³⁶ The average length of a fighter's career in the UFC, WEC, and Strikeforce (the three main MMA promotions at the time) is 533 days. Paul Gift, *Does the Length of Fight Careers Matter in the UFC Antitrust Lawsuit?*, SBATION: BLOODY ELBOW (Dec. 30, 2014, 12:00 PM), <https://www.bloodyelbow.com/2014/12/30/7465287/mma-ufc-antitrust-lawsuit-fighter-career-length>.

³⁷ Michael Hutchinson, *How International is the UFC Roster?*, LAST WORD ON SPORTS (Feb. 7, 2015), <https://lastwordonsports.com/2015/02/07/international-ufc-roster/>.

³⁸ See *Int'l Longshoremen's Ass'n v. Ariadne Shipping Co.*, 397 U.S. 195, 198–99 (1970).

³⁹ Debets, *supra* note 15.

⁴⁰ See *The Board*, *supra* note 1 ("Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year.").

⁴¹ *Board Members Since 1935*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/board/board-members-1935> (last visited Dec. 1, 2019).

⁴² Debets, *supra* note 15.

⁴³ Leslie Smith is a former UFC fighter who filed a complaint with the NLRB against the UFC claiming a retaliatory firing in response to Smith's unionization efforts. Marrocco, *supra* note 2. The complaint also alleged that UFC fighters were improperly categorized as independent contractors. *Id.* Smith's attorney claimed that UFC president Dana White pulled "political strings" to get the case reassigned to the Washington D.C. division due to the UFC's "political stranglehold." *Id.* The attorney also pointed out that three days prior to the hearing which resulted in a dismissal, Dana White had a three-hour meeting with President Trump. *Id.*

⁴⁴ See, e.g., C. B. L., Annotation, *Nonliability of an Employer in Respect of Injuries Caused by the Torts of an Independent Contractor*, 18 A.L.R. 801 § 1 (1922).

⁴⁵ Susan Schwochau, *Identifying an Independent Contractor for Tax Purposes: Can Clarity and Fairness Be Achieved?*, 84 IOWA L. REV. 163, 166 (1998).

the Age Discrimination in Employment Act of 1967 (“ADEA”) do not apply to independent contractors.⁴⁶ Furthermore, a judicial determination that results in the reclassification of UFC fighters as employees could result in significant retroactive employer liabilities.⁴⁷

The employee/independent contractor distinction also impacts fighters’ ability to engage in collective bargaining. Independent contractors are unable to form a union under the National Labor Relations Act.⁴⁸ This lack of collective bargaining power affects more than just fighter pay. Fighters have complained about issues regarding health insurance, travel arrangements, consequences of sustaining injuries, the inability to participate in competing promotions, and the micromanagement of their behavior outside of the Octagon. Likely due to fighters’ lack of collective bargaining power, Northwestern University labor law professor Zev Eigen referred to a UFC contract as the worst he had ever seen in sports entertainment.⁴⁹

Classifying UFC fighters as employees would almost certainly result in a fighters’ union. Such a union would not only affect the UFC and its fighters but also alter the sport for consumers. It is unclear if it would result in a net improvement or decline in quality for the average consumer. Higher salaries might attract better, more entertaining athletes. Conversely, higher fighter salaries could cause consumers to view fighters as elitist, unrelatable, and greedy. Furthermore, higher salaries, along with retirement benefits, might cause fighters to retire earlier, depriving consumers of more of their bouts. The presence of a fighters’ union may result in strikes during which consumers would be deprived of UFC events for a long period of time, similar to what happened in the NHL (2004–2005), NBA (1998–1999), MLB (1994–1995), and NFL (1987).⁵⁰ Finally, the increased labor cost to the UFC would likely be passed on to the consumers, at least in part.

Beyond affecting just the UFC, its fighters, and its consumers, misclassification of employees as independent contractors costs the federal treasury an estimated \$4.7 billion annually in lost income tax revenue.⁵¹

V. TERMS OF UFC FIGHTER CONTRACTS

The contractual obligations of UFC fighters extend far beyond simply showing up and competing in their bouts, as illustrated by a twenty-four-

⁴⁶ *Id.* at 174–75.

⁴⁷ For example, in 2000, Microsoft settled a lawsuit for ninety-seven million dollars against a group of workers who were misclassified as independent contractors and therefore were improperly not allowed to participate in Microsoft’s retirement and stock purchase plans. *Settlement Agreement, Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997).

⁴⁸ One alternative option would be for fighters to form their own promotion, such as the Association of Tennis Professionals or the Professional Golfers’ Association (“PGA”). However, this would likely prove more difficult than seeking reclassification as employees. The UFC has almost a 90 percent market share in the MMA promotion industry and has many fighters on long-term contracts—two factors that would make forming a competing promotion more difficult. Same, *supra* note 31, at 1092.

⁴⁹ Jonathan Snowden, *The Business of Fighting: A Look Inside the UFC’s Top-Secret Fighter Contract*, BLEACHER REP. (May 14, 2013), <https://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract#slide0>.

⁵⁰ Esteban, *9 Most Significant Strikes and Lockouts in Pro Sports History*, TOTAL PRO SPORTS (Nov. 3, 2011), <https://www.totalprosports.com/2011/11/03/9-most-significant-strikes-and-lockouts-in-pro-sports-history/>.

⁵¹ Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 62 (2015).

page fighter contract that was recently made public.⁵² Fighters are contractually obligated to cooperate and assist in the advertising, publicity, and promotion of (i) the Bouts, (ii) any and all rebroadcast of the Bouts in any media whatsoever, (iii) other UFC bouts, (iv) other UFC events and broadcasts, and (v) the sale of UFC merchandise, including making appearances at a reasonable number of press conferences, interviews and other sponsorship and promotional activities . . . at times and places reasonably designated by ZUFFA, without additional compensation therefore.⁵³

The UFC is contractually obligated to “arrange and pay for [a] Fighter’s reasonable travel, hotel and meal accommodations” for all promotional activities.⁵⁴ It is also obligated to provide the hotel, airfare, and meals for one of the fighter’s affiliates (i.e., coach, manager, training partner).⁵⁵ However, most UFC fighters travel with more than one affiliate. Additionally, fighters are contractually obligated to arrive at the hotel provided by the UFC up to eight days prior to the event.⁵⁶ Some UFC contracts last for a term of forty months with automatic extensions if the fighter is a champion at the end of the original term.⁵⁷

Furthermore, fighters are responsible for all costs associated with their medical examinations, which are required in order to be cleared by the athletic commission to fight.⁵⁸ Although fighters may receive bonuses for exemplary performances in their fights, these are selected arbitrarily, with no oversight, by the UFC.

While fighters are free to express who they want their opponent to be—and, conversely, who they do not want their opponent to be—the UFC always has the final say. Refusing to fight an opponent selected by the UFC results in the employment contract being “extended for six months or any period of time that Fighter is unable or unwilling to compete, whichever is greater.”⁵⁹ This is the same consequence for UFC fighters who cannot compete due to sickness, injury, government imposed travel restrictions, or incarceration.⁶⁰

The conduct clause in UFC contracts is expansive. The fighter’s conduct cannot “offend the public or any organized group therein . . .”⁶¹ Additionally, “Fighter will not commit any act or become involved in any situation or occurrence or make any statement which will reflect negatively upon . . . Fighter [or the UFC].”⁶² These conduct obligations even extend to

⁵² Promotional and Ancillary Rights Agreement at 14, *Bellator Sport Worldwide, LLC v. Alvarez*, No. 13-63 (JLL), 2013 U.S. Dist. LEXIS 202498, (D.N.J. Jan. 25, 2013).

⁵³ Zane Simon, *UFC Fighter Contract Details Revealed and Analyzed*, SBNATION: BLOODY ELBOW (May 14, 2013, 4:00 PM), <https://www.bloodyelbow.com/2013/5/14/4330572/ufc-fighter-contracts-revealed-dana-white-fertitta-mma-news> (ZUFFA, a sports promotion company specializing in MMA, is the former parent company of the UFC).

⁵⁴ *Id.*

⁵⁵ Snowden, *supra* note 49.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Damon Martin, *John Cholish Explains How Much It Costs To Be a UFC Fighter*, BLEACHER REP. (May 23, 2013), <https://bleacherreport.com/articles/1649483-john-cholish-explains-how-much-it-costs-to-be-a-ufc-fighter>.

⁵⁹ Snowden, *supra* note 49.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

the fighter's managers, trainers, and assistants, who are not allowed to "wear any clothing" that is "inappropriate as determined by [UFC] in its sole discretion"⁶³

When a bout agreement is in place (generally about eight weeks before the fight), fighters are not allowed to participate in certain dangerous activities, such as riding a motorcycle, snowboarding, wakeboarding, mountain climbing, or playing an exhibition basketball game.⁶⁴ On the other hand, if the UFC cancels an event in which a fighter is scheduled to compete, contracts stipulate that the cancellation is not considered non-performance by the UFC.⁶⁵ Since fighters are paid per fight, this means the UFC is not obligated to compensate them for their training expenses, including in the event of a cancellation by the UFC. Even worse, a fighter does not receive credit for preparing to compete in the cancelled bout, which would have counted toward the required number of completed fights in his or her contract. By contrast, if a fighter claims he or she cannot perform due to an injury, the UFC may elect to have the fighter examined by a doctor selected by the UFC.⁶⁶ In this case, a fighter has one day's notice to appear for such an examination.⁶⁷

The UFC has the absolute right of assignment to another promotion without the fighter's consent. However, this is an exceedingly rare occurrence; while it has happened in the past, it does not happen often presently because the UFC is the most prominent MMA promoter. Thus, it does not want to support any would-be competitors by providing them with fighters.⁶⁸

Lastly, the UFC may elect to terminate a contract due to a variety of reasons, including: the fighter loses bouts; the fighter is charged with a misdemeanor other than a minor traffic offense; and the fighter or an associate breaches any of the contract provisions, such as wearing clothing the UFC deems "inappropriate."⁶⁹ At their close, these contracts state: "Nothing contained in this Agreement shall be construed to make Fighter an employee of [the UFC]."⁷⁰

⁶³ *Id.*

⁶⁴ Brent Brookhouse, *UFC 'Dangerous Activities' Contract Clauses Limited To When Fighters Have a Fight Scheduled*, SBINATION: BLOODY ELBOW (Oct. 5, 2012, 3:33 PM), <https://www.bloodyelbow.com/2012/10/5/3461476/ufc-dangerous-activities-contract-clauses-fighters>.

⁶⁵ Snowden, *supra* note 49.

If a Bout is the undercard to a main event and the main event is canceled or postponed for any reason, the failure of such Bout to take place shall not be deemed non-performance by [the UFC] and [the UFC] shall not be liable for Fighter's Purse associated therewith (as defined herein). *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The most famous example of this was in 2003, when UFC fighter Chuck Liddell was sent to fight for the Pride FC promotion in Japan. At the time, Pride FC was an MMA promotion on par with the UFC. Since the UFC purchased Pride in 2007 (along with other rival MMA promotions around the same time), UFC has become, by far, the leading MMA promotion. Therefore, these types of cross-promotional activities are currently far less advantageous to the UFC. *See Same, supra* note 31, at 1090–93.

⁶⁹ Snowden, *supra* note 49.

⁷⁰ Jeffrey B. Aris, *The Fight as an Independent Contractor*, SHERDOG (June 29, 2013), <https://www.sherdog.com/news/articles/The-Fight-as-an-Independent-Contractor-53481#wRTkAfQxudADvwiB.99>.

VI. ANALYSES WITH COMPARABLE SPORT ATHLETES

Courts have not yet adjudicated the matter of whether UFC fighters are employees or independent contractors. In 2018, former UFC fighter Leslie Smith filed a complaint against the UFC that, in part, brought up the classification issue.⁷¹ However, the complaint was dismissed by the NLRB without addressing the issue.⁷² Despite this lack of directly relevant case law, an analysis of workers in other related fields can be used as a guide.

A. WWE WRESTLERS

Although technically not a sport, Worldwide Wrestling Entertainment (“WWE”, formerly Worldwide Wrestling Federation) wrestlers share commonalities with UFC fighters. Both WWE wrestlers and UFC fighters are currently classified as independent contractors, and both sign exclusive contracts that last for years and set strict limits on behavior inside and outside of the ring or Octagon. In addition, both the WWE and the UFC control almost 90 percent of the revenue from their respective industries.⁷³

Despite the similarities between WWE and UFC employment, the WWE exercises more control over its wrestlers than the UFC does over its fighters. WWE wrestlers routinely compete multiple times per week in different cities, while UFC fighters rarely perform more than three times per year. This more demanding traveling schedule results in the WWE having more control. For example, the WWE dictates what must occur in matches and promotional interviews. By contrast, while the UFC sets rules for its fighters’ interviews and bouts, and incentivizes more crowd-pleasing performances, it does not dictate or demand outcomes.

WWE wrestlers are not classified as employees despite the WWE exercising more control over its wrestlers than the UFC does over its fighters. However, this does not mean that UFC fighters are properly categorized as independent contractors. Many have argued that WWE wrestlers are improperly classified as independent contractors, and their continued classification as independent contractors is more a function of wrestlers being intimidated against pursuing legal action to change the classification.⁷⁴

B. BOXERS

Professional boxers also share a lot in common with UFC fighters. They both generally perform only two to three times per year in one-on-one competitions and are both classified as independent contractors.⁷⁵ However, boxers generally do not sign multi-fight deals with promotion like UFC fighters do. Rather, their managers negotiate one fight at a time.⁷⁶ Therefore,

⁷¹ Marrocco, *supra* note 2.

⁷² *Id.*

⁷³ Mehrotra & Novy-Williams, *supra* note 14.

⁷⁴ David Cowley, Note, *Employees vs. Independent Contractors and Professional Wrestling: How the WWE Is Taking a Folding-Chair to the Basic Tenets of Employment Law*, 53 U. OF LOUISVILLE L. REV. 143, 148–49 (2014).

⁷⁵ Joel Calahan, *Boxing’s Labor Problem*, BOSTON REV. (May 1, 2015), <http://bostonreview.net/blog/joel-calahan-premier-boxing-champions-mayweather-pacquiao>.

⁷⁶ *Id.*

boxing promoters exercise less control over the boxers they contract with than the UFC does over its fighters.

C. EXOTIC DANCERS

The exotic dancer profession is somewhat analogous to that of a UFC fighter. They both have a great deal of creative freedom as long as their employer ultimately approves of the finished product. Overall, exotic dancers experience more freedom in their work than UFC fighters. They are generally free to perform concurrently at multiple clubs, do not have long-term contracts (and therefore have more freedom to terminate employment), have less demanding promotional requirements, and have more flexible schedules. In the comparison between UFC fighters and exotic dancers, the only aspect where the fighters appear to have more “employee” characteristics is that they are more integrated into the UFC than exotic dancers are integrated into their clubs. Clubs with exotic dancers could transition into a bar or club without exotic dancers more easily than the UFC could transition to a business that does not promote fights.

There have been numerous lawsuits where exotic dancers sued their clubs for failure to comply with the Fair Labor Standards Act and corresponding state wage and hour laws due to alleged misclassification as independent contractors.⁷⁷ In the majority of these cases, the dancers prevailed and were reclassified as employees.⁷⁸

D. GOLFERS

Professional Golfers Association (“PGA”) Tour golfers are classified as independent contractors despite the significant control exercised over them by the PGA.⁷⁹ There are a minimum number of tournaments they must play in every year.⁸⁰ They have to obtain PGA permission to play in conflicting events,⁸¹ and “they have to pay a rights fee to the tour when they appear on TV in a non-tour event.”⁸²

E. TEAM SPORT ATHLETES

The general rule is that participants in team sports are considered employees, while participants in individual sports are considered independent contractors. This is because in team sports “there [is] generally an owner, manager, trainer, coach, or captain who had the right to direct and control the details of the player’s activity.”⁸³ Conversely, “[i]n the case of individual type sports . . . the promoting organization normally provides no

⁷⁷ See Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23

WM. & MARY J. WOMEN & L. 249, 251–52 (2017).

⁷⁸ *Id.* at 260–61.

⁷⁹ *Does the PGA Tour Need a Players’ Union?*, ESPN (Mar. 4, 2008), <http://www.espn.com/golf/news/story?page=factfiction/080304>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Total and Partial Unemployment TPU 415.4: Professional Athlete*, CA.GOV: EMP. DEV. DEP’T OF CAL., https://www.edd.ca.gov/uibdg/Total_and_Partial_Unemployment_TPU_4154.htm (last visited Dec. 1, 2019).

training or coaching, and has no right to influence the outcome of any competition.”⁸⁴ Players in the NFL, NBA, MLB, and NHL are classified as employees.⁸⁵ However, there are exceptions where team sport athletes are classified as independent contractors, such as National Association of Stock Car Racing (“NASCAR”) drivers and in the Association of Volleyball Professionals.⁸⁶ (Olympic athletes, which include both individual and team athletes, are all independent contractors.⁸⁷) Although the UFC is more akin to an individual sport like boxing than to a team sport like football, some argue that UFC fighters are treated more like the athletes working for sports leagues, like the NFL, than those working for a promoter, as boxers do.⁸⁸

F. ACTORS AND ENTERTAINERS

The IRS applies a different standard to determine the proper classification of commercial video production workers.⁸⁹ The standard is a test derived from the IRS Twenty-Factor Test applied in this article.⁹⁰ If this altered version of the Twenty-Factor Test for commercial video production workers were applied to UFC fighters, they would almost certainly be classified as employees. This is because one of the “critical factors” that leads to an automatic determination of employee status if answered in the affirmative is whether the employer and worker have a continuing relationship.⁹¹ Since UFC fighters sign exclusive contracts that are commonly for a term of forty months, this critical factor is likely met.

VII. APPLYING THE IRS TWENTY-FACTOR TEST

Labor law defines “employee” in a circular fashion.⁹² Consequently, courts struggle with determining if a worker is properly classified as an employee or independent contractor. The judge in an NLRB case expressed

⁸⁴ *Id.*

⁸⁵ Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 100 (2008).

⁸⁶ Rod Hilpirt et al., *Show Me the Money! A Cross-Sport Comparative Study of Compensation for Independent Contractor Professional Athletes*, SPORT J. (Mar. 14, 2008), <http://thesportjournal.org/article/show-me-the-money-a-cross-sport-comparative-study-of-compensation-for-independent-contractor-professional-athletes/>.

⁸⁷ Megan Ormond, *#WeDemandChange: Amending International Olympic Committee Rule 40 for the Modern Olympic Games*, 5 CASE W. RES. J.L. TECH. & INTERNET 179, 188 (2014).

⁸⁸ “[B]y limiting endorsement opportunities and securing fighters to long-term contracts that include extension options, [the UFC] appear to be operating like a league instead of merely a fight promoter.” Josh Gross, *How the Ali Act Could Upset the Power Balance Between UFC and Its Stars*, GUARDIAN (May 2, 2016, 6:44 AM), <https://www.theguardian.com/sport/blog/2016/may/02/ufc-muhammad-ali-act-mma-conor-mcgregor-dispute>.

⁸⁹ Marilyn Barrett, *Independent Contractor/Employee Classification in the Entertainment Industry: The Old, the New and the Continuing Uncertainty*, 13 U. MIAMI ENT. & SPORTS L. REV. 91, 129 (1996).

⁹⁰ This standard involves first placing the worker into one of three categories, then applying three “critical factors,” then applying four “significant” factors, and finally, if a determination is still not clear, the unused factors from the IRS Twenty-Factor test are applied. *Id.* at 129–33.

⁹¹ *Id.*

⁹² *See, e.g.*, 42 U.S.C. § 2000e(b) (2012) (defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees” for purposes of Title VII); 42 U.S.C. § 12111(5)(A) (2012) (defining employer as same for purposes of the ADA); 29 U.S.C. § 2611(2)(A) (2012) (defining “eligible employee” for purposes of FMLA); 29 U.S.C. § 206(a) (2012) (requiring employers to “pay to each of his employees” minimum wages under the Fair Labor Standards Act); 29 U.S.C. § 157 (2012) (granting employees the right to self-organize under the National Labor Relations Act).

his frustration with the subjective nature of the determination by saying, “[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.”⁹³ To further complicate an already ambiguous determination, there are many different standards currently in use, including the traditional common law control test, the economic realities test, the ABC test, and the IRS Twenty-Factor Test.⁹⁴

The IRS Twenty-Factor Test was created in 1987 to help courts determine whether to classify a worker as an independent contractor or an employee.⁹⁵ While the test provides some objectivity and uniformity, it is applied in a somewhat arbitrary fashion. The weight of each factor is not uniform, and there is no quantifiable threshold for how much is needed to cross over from independent contractor to employee status. The IRS explicitly states that “[t]he degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed.”⁹⁶ However, the overall principle that guides the process is clear: the more right to control exercised by the employer, the more likely the worker is an employee and not an independent contractor.

The following are the twenty factors from the IRS test, including a brief analysis of how each factor applies to UFC fighters. Finally, a classification determination is made for each factor as to whether it supports employee classification, independent contractor classification, or is inconclusive.

A. INSTRUCTIONS

*A worker who is required to comply with other persons’ instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions.*⁹⁷

The UFC certainly dictates “when” and “where” its fighters must perform. It even dictates how many days in advance the fighter must arrive at the hotel.⁹⁸ How much control the UFC exercises over “how” fighters perform is debatable. The UFC implements a number of rules that restrict the types of attacks fighters are allowed to utilize, the number and duration of rounds, the gloves that must be worn, the behavior allowed at promotional events, the clothing allowed to be worn at promotional events, and more. Additionally, while fighters are given great latitude as to what strategy to implement in their bouts, the UFC has been known to give favorable treatment to fighters with aggressive, crowd-pleasing fighting styles and

⁹³ NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111, 121 (1944).

⁹⁴ Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 350 (2016).

⁹⁵ See Rev. Rul. 87-41, 1987-1 C.B. 296.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Snowden, *supra* note 49.

poor treatment to fighters who do not use such styles. Overall, this factor supports the classification of UFC fighters as employees.

B. TRAINING

Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner.⁹⁹

The UFC produces a reality television show called *The Ultimate Fighter*, in which fighters are trained by UFC-appointed coaches and compete for a UFC contract. However, to be selected for the show one must already be a trained, accomplished fighter. Furthermore, after winning the show and acquiring a UFC contract, the fighter goes back to training without UFC involvement. Before every UFC event there is a fighters' meeting where rules and behavioral expectations are discussed. But there is generally little training performed by the UFC. Fighters select their own coaches, who are not affiliated with the UFC. Together, the fighters and coaches make all training decisions without the control of the UFC. The UFC does provide instruction as to media appearances and the rules of its bouts; while this is technically "training," IRS materials explicitly disregard these types of "orientation or information sessions about the business's policies" for purposes of worker classification.¹⁰⁰ This factor supports the classification of UFC fighters as independent contractors.

C. INTEGRATION

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.¹⁰¹

The UFC could not continue without the fighters. On this factor the UFC might be tempted to claim that any one fighter is not integral to the UFC and, therefore, this integration factor strengthens the classification of fighters as independent contractors. But this would be an incorrect application of the integration factor. "The integration factor must be applied to the class of

⁹⁹ Rev. Rul. 87-41, 1987-1 C.B. 296.

¹⁰⁰ "However, not all training rises to this level. The following types of training, which might be provided to either independent contractors or employees, should be disregarded: orientation or information sessions about the business's policies, new product line, or applicable statutes or government regulations." INTERNAL REVENUE SERV., DEP'T OF TREASURY, INDEPENDENT CONTRACTOR OR EMPLOYEE? TRAINING MATERIALS (1996), <https://www.irs.gov/pub/irs-utl/emporind.pdf>.

¹⁰¹ Rev. Rul. 87-41, 1987-1 C.B. 296.

workers as an aggregate, not to any one worker in isolation.”¹⁰² This factor clearly supports the classification of UFC fighters as employees.

D. SERVICES RENDERED PERSONALLY

*“If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results.”*¹⁰³

While the UFC is allowed to assign the rights to fighters’ contracts to other promotions, the fighters are not allowed to delegate their duty to perform to another fighter and must render their services personally. This factor supports the classification of UFC fighters as employees.

E. HIRING, SUPERVISING, AND PAYING ASSISTANTS

*If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.*¹⁰⁴

UFC fighters are responsible for acquiring and compensating their own coaches, training partners, nutritionists, and “cutmen.”¹⁰⁵ This factor supports the classification of UFC fighters as independent contractors.

F. CONTINUING RELATIONSHIP

*“A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals.”*¹⁰⁶

¹⁰² Cowley, *supra* note 74, at 160.

¹⁰³ Rev. Rul. 87-41, 1987-1 C.B. 296.

¹⁰⁴ *Id.*

¹⁰⁵ A “cutman” (or “cutwoman”) treats fighters between rounds in an effort to reduce the severity of injuries that might cause the fight to end, such as lacerations and excessive swelling around the eyes that limit a fighter’s vision. Alex O’Meara, *How to Be a Cutman in Boxing*, LIVESTRONG.COM, <https://www.livestrong.com/article/427989-how-to-be-a-cutman-in-boxing/> (last visited Dec. 1, 2019).

¹⁰⁶ Cowley, *supra* note 74, at 160.

Very few fighters have fought in the UFC for over ten years.¹⁰⁷ The average time spent fighting in the UFC is between one and two years.¹⁰⁸ It is unclear exactly how long of a relationship is required to constitute a “continuing relationship.” In the recently overturned *FedEx Home Delivery, Inc.* case,¹⁰⁹ the NLRB determined that FedEx drivers’ one-year contracts that contained automatic renewals constituted “a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.”¹¹⁰ UFC contracts do contain a “Champions Clause” that allows the contract to automatically renew if it expires while the fighter is a reigning champion.¹¹¹ Of course, it is much easier for a FedEx driver to exhibit “satisfactory” performance than it is to become a UFC champion.

IRS training materials stipulate that workers engaged on a “seasonal, project, or ‘as needed’ basis” are considered to have a “temporary” relationship with their employer.¹¹² With this in mind, UFC fighters are not considered to be in a temporary relationship because even the average length in the UFC of just over one-and-a-half years is longer than “seasonal” or “as needed” work. Overall, this factor supports the classification of UFC fighters as employees.

G. SET HOURS OF WORK

“The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control.”¹¹³

UFC fighters have no control over fighting time limits nor the order in which fights are scheduled within a UFC event. The UFC not only schedules the hours fighters work but also can require fighters to arrive at the hotel up to eight days prior to the bout.¹¹⁴ This factor supports the classification of UFC fighters as employees.

H. FULL TIME REQUIRED

If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends

¹⁰⁷ Diego Sanchez fought in the UFC from 2005 through present. John Heinis, *Diego Sanchez: Recent Fights by Teammates Clay Guida And Carlos Condit ‘Sucked’*, BLEACHER REP. (Aug. 7, 2012), <https://bleacherreport.com/articles/1289015>. Frank Mir fought in the UFC from 2001 to 2016. Chad Dundas, *MMA Pioneer Frank Mir Looking to Get Back on Top in Bellator Tournament*, BLEACHER REP. (Apr. 27, 2018), <https://bleacherreport.com/articles/2772757-after-depressing-ban-ex-ufc-champ-frank-mir-fights-for-kids-bragging-rights>. Joe Lauzon fought in the UFC from 2006–2018. *Joe Lauzon*, UFC, <https://www.ufc.com/athlete/joe-lauzon>.

¹⁰⁸ Gift, *supra* note 36.

¹⁰⁹ *FedEx Home Delivery, Inc.*, 361 N.L.R.B. 610 (Sept. 30, 2014), *overruled by SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (Jan. 25, 2019).

¹¹⁰ *Id.* at 623.

¹¹¹ Genevieve F.E. Birren & Tyler J. Schmitt, *Mixed Martial Artists: Challenges to Unionization*, 28 MARQ. SPORTS L. REV. 85, 96 (2017).

¹¹² INTERNAL REVENUE SERV., *supra* note 100, at 2-28.

¹¹³ Rev. Rul. 87-41, 1987-1 C.B. 296.

¹¹⁴ Snowden, *supra* note 49.

*working and impliedly restrict the worker from doing other gainful work. An independent contractor, on the other hand, is free to work when and for whom he or she chooses.*¹¹⁵

UFC contracts are exclusive in that fighters cannot fight for any other combat sports promotion. However, excluding the two to three times per year when a fighter has a scheduled UFC bout, fighters are free to pursue other, non-fighting employment. Currently, UFC compensation is high enough that most fighters choose not to work outside the UFC. Previously, however, some fighters maintained jobs as attorneys (i.e., Christian Wellisch), firefighters (i.e., Chris Lytle), full-time engineers (i.e., Shane Carwin), or college football defensive line coaches (i.e., Jared Hamman).¹¹⁶ In the modern UFC, fighters must devote “substantially full time to the business.” Therefore, this factor supports the classification of UFC fighters as employees.

I. DOING WORK ON EMPLOYER’S PREMISES

*“If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere.”*¹¹⁷

The UFC requires their fighters to perform at leased venues that the UFC selects. Furthermore, all UFC bouts are conducted in the trademarked Octagon provided by the UFC.¹¹⁸ This factor supports the classification of UFC fighters as employees.

J. ORDER OR SEQUENCE SET

*If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker’s own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed.*¹¹⁹ Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.¹²⁰

The UFC requires its fighters to perform many functions in a sequential order, such as making certain media appearances, weighing in the night before the bout, performing their bout at a specified time, participating in the

¹¹⁵ Rev. Rul. 87-41, 1987-1 C.B. 296.

¹¹⁶ *MMA Fighters with Day Jobs*, SPORTS ILLUSTRATED (July 1, 2008), <https://www.si.com/more-sports/photos/2008/07/01mma-fighters-with-day-jobs#12>.

¹¹⁷ Rev. Rul. 87-41, 1987-1 C.B. 296.

¹¹⁸ See *The Octagon*, *supra* note 3.

¹¹⁹ Rev. Rul. 87-41, 1987-1 C.B. 296.

¹²⁰ *Id.*

post-fight press conference, and providing samples for the post-fight drug test. This factor supports the classification of UFC fighters as employees.

K. ORAL OR WRITTEN REPORTS

*“A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.”*¹²¹

The UFC does not require reports from its fighters and rarely checks in on their training camps. The UFC does, however, require its fighters to submit to the highly demanding USADA drug testing, the results of which are then sent to the UFC as a report. Part of the USADA drug testing requires the fighters to report their location at all times to better facilitate random testing.¹²² Because the nature of being employed as an MMA fighter does not lend itself to filing reports, it is unclear if this factor supports the classification of UFC fighters as employees or independent contractors.

L. PAYMENT BY HOUR, WEEK, MONTH

*Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor.*¹²³

UFC fighters do not receive a regular salary from the UFC. They are paid per fight, generally with a “show” amount that is doubled if they win their bout. Additionally, fighters may be given a bonus at the discretion of the UFC, and elite fighters receive a percentage of the pay-per-view buys. This notion of only being compensated for when one competes (and compensation based on how well one performs) is celebrated by the UFC as “eat what you kill.”¹²⁴ This factor supports the classification of UFC fighters as independent contractors.

M. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES

*“If the person or persons for whom the services are performed ordinarily pay the worker’s business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker’s business activities.”*¹²⁵

¹²¹ *Id.*

¹²² Debets, *supra* note 15.

¹²³ Rev. Rul. 87-41, 1987-1 C.B. 296.

¹²⁴ Jesse Holland, *Defiant Dana White Defends UFC Fighter Pay: ‘In This Sport, You Eat What You Kill’*, SBNATION: MMA MANIA (Sept. 29, 2016, 10:54 AM), <https://www.mmamania.com/2016/9/29/13105632/defiant-dana-white-defends-ufc-fighter-pay-in-this-sport-you-eat-what-you-kill-mma>.

¹²⁵ Rev. Rul. 87-41, 1987-1 C.B. 296.

The UFC pays for travel, hotel, and meal expenses for fights and promotional activities for the fighter and one additional associate.¹²⁶ This factor supports the classification of UFC fighters as employees.

N. FURNISHING OF TOOLS AND MATERIALS

“The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.”¹²⁷

The UFC provides the facilities, the Octagon, the in-ring clothing, and the gloves worn by the fighters. This factor supports the classification of UFC fighters as employees.

O. SIGNIFICANT INVESTMENT

If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship.¹²⁸

A UFC fighter could claim that the extra costs required to bring a second associate (i.e., coach or training partner) is an investment in his or her performance in a UFC bout. Beyond this, all of the investments are made by the UFC (with the exception of UFC fighters covering their own training costs). This factor supports the classification of UFC fighters as employees.

P. REALIZATION OF PROFIT OR LOSS

A worker who can realize a profit or suffer a loss as a result of the worker’s services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor¹²⁹

IRS training materials state, “[t]he ability to realize a profit or incur a loss is probably the strongest evidence that a worker controls the business

¹²⁶ Snowden, *supra* note 49.

¹²⁷ Rev. Rul. 87-41, 1987-1 C.B. 296.

¹²⁸ *Id.*

¹²⁹ *Id.*

aspects of services rendered.”¹³⁰ Unfortunately, this vital factor is difficult to apply in the present case. UFC fighters may receive bonuses for exemplary performances but are not at risk of losing their minimum compensation for a poor performance. However, for some entry-level fighters, it is possible to suffer a net loss on a bout. For example, in 2017 there were forty-seven fighters who earned only \$9,500 to \$12,500 for their one bout that year.¹³¹ Training camps, which the fighters pay for themselves, can cost eight to twelve thousand dollars.¹³² The UFC only pays travel expenses for the fighter and one associate, but fighters usually bring more than one associate. Fighters also pay for their own medicals to get licensed for their bout.¹³³ It is easy to see that entry-level fighters may suffer a net loss if they lose their bout.¹³⁴ To make matters worse, the UFC is free to cancel an event or a bout without any compensation to the fighter, in which case everything spent preparing for that fight would be a net loss.

However, the majority of UFC fighters make more than \$12,500 per fight and may receive additional compensation from endorsement deals. Additionally, if a UFC event were to result in a financial loss to the company, the fighters on that card would still receive their contractual compensation. While this factor is not definite, it seems to support the classification of UFC fighters as employees.

Q. WORKING FOR MORE THAN ONE FIRM AT A TIME

*If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.*¹³⁵

As previously discussed, UFC fighters are not allowed to compete in any other combat sports promotion. However, they are allowed to seek unrelated work as long as it does not interfere with their contractual obligations to the UFC. It is important to note that the IRS language does not refer to the mere ability or opportunity to work for other employers. Rather, it refers to the actual performance of this other work. Since the majority of modern-day UFC fighters do not maintain outside employment, this factor supports the classification of UFC fighters as employees.

¹³⁰ INTERNAL REVENUE SERV., *supra* note 100, at 2-21.

¹³¹ Jeff Fox, *2017 UFC Fighter Salaries – Complete List*, SPORTS DAILY (Jan. 6, 2018), <https://thesportsdaily.com/2018/01/06/2017-ufc-fighter-salaries-complete-list-fox11/>.

¹³² Martin, *supra* note 58.

¹³³ *Id.*

¹³⁴ Most fighters are compensated for their bouts on a scale where there is a “show” amount and a “win” amount. These amounts are usually the same, meaning that a fighter who loses his or her bout receives half as much as if he or she had won. Lee Whitehead, *If It’s Not Broke, Fix It Anyway: Can Bonuses Force Finishes in MMA?*, MMA WEEKLY (June 29, 2011), <https://www.mmaweekly.com/if-its-not-broke-fix-it-anyway-can-bonuses-force-finishes-in-mma>.

¹³⁵ Rev. Rul. 87-41, 1987-1 C.B. 296.

R. MAKING SERVICE AVAILABLE TO GENERAL PUBLIC

*“The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.”*¹³⁶

UFC fighters are allowed to make their services as a product spokesman available, but it is unlikely that this behavior occurs on a “consistent basis.” Furthermore, the fighter’s primary service of competing in a combat sport is not allowed to be made available to other combat sports promotions. This factor supports the classification of UFC fighters as employees.

S. RIGHT TO DISCHARGE

*The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer’s instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications.*¹³⁷

As previously discussed, the UFC is allowed to terminate the contract of any fighter for a number of reasons. This factor supports the classification of UFC fighters as employees.

T. RIGHT TO TERMINATE

*“If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.”*¹³⁸

UFC fighters are not free to terminate their contract. This factor supports the classification of UFC fighters as independent contractors.

U. OVERALL ASSESSMENT OF IRS TWENTY-FACTOR TEST

As previously mentioned, each of the twenty factors not only contains a certain amount of subjectivity but also possess no quantitative thresholds to the test overall. In other words, if eleven factors point to a worker being an independent contractor and only nine factors point to the worker being an employee, applying the test to that worker will not necessarily result in a determination of independent contractor classification. Regardless, the results of the IRS Twenty-Factor Test as applied to UFC fighters produce a clear result: UFC fighters should be classified as employees. Of the twenty factors, fifteen support an employee classification, one is inconclusive, and

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

only four support an independent contractor classification. The conclusion that UFC fighters should be classified as employees is consistent with the conclusion of the vast majority of commentators who have covered the issue.¹³⁹

Because of the subjective nature of the test, this determination does not rule out the possibility that the four factors in favor of independent contractor status may be disproportionately weighted to overcome the fifteen factors in favor of employee status; therefore, UFC fighters could ultimately remain being held as independent contractors. However, the findings of a 2008 study make that possibility very unlikely. The study applied logistic regression analysis to 149 worker classification decisions to determine which factors are most important.¹⁴⁰ The results identified the following eight factors as most important: instructions; integration; hiring, supervising, and paying assistants; continuing relationship; payment by hour, week, month; furnishing of tools and materials; working for more than one firm at a time; and right to discharge.¹⁴¹ Looking only at these eight factors, we see that this abbreviated analysis yields an equally strong case that UFC fighters should be classified as employees. Six factors support employee classification, and two factors support independent contractor classification.

Interestingly, the three common law factors conspicuously absent from the IRS Twenty-Factor Test all point to UFC fighters being classified as independent contractors rather than employees. These three factors are: skill required; intent of the parties; and custom in the industry.¹⁴² First, UFC fighters are certainly highly skilled. Second, the intent of the parties as stated in the contract is that of independent contractor classification (a factor that the IRS Twenty-Factor Test explicitly ignores).¹⁴³ Third, the UFC has labeled its fighters as independent contractors since its founding in 1993.¹⁴⁴

VIII. TRAINING ISSUE

Some of the factors analyzed in the IRS Twenty-Factor Test are dependent on whether a fighter's training is considered work done for the UFC. This author is unaware of any current UFC fighters that do not train extensively for their UFC bouts. However, training is not a contractual

¹³⁹ This author was unable to find a single commentator who argued in favor of independent contractor being the proper classification for UFC fighters. "[I]t is likely that, if a complaint were ever to be brought to the board, the athletes would be found to, in fact, be employees of the UFC . . ." Birren & Schmitt, *supra* note 111, at 90. "Based on the totality of the contractual relationship, it seems that a court could consider fighters to be employees rather than independent contractors." Same, *supra* note 31, at 1093. "[T]he totality of the circumstances overwhelmingly support the notion that [UFC] fighters are employees." Brandon Weber, *The Muhammad Ali Expansion Act: The Rise of Mixed Martial Arts and the Fight that Lies Ahead*, 14 DEPAUL J. SPORTS L. 106, 127 (2018).

¹⁴⁰ Teresa J. Webb et al., *An Empirical Assist in Resolving the Classification Dilemma of Workers as Either Employees or Independent Contractors*, 24 J. APPLIED BUS. RES. 45, 51 (2008).

¹⁴¹ *Id.*

¹⁴² Barrett, *supra* note 89, at 98.

¹⁴³ "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial." Rev. Rul. 87-41, 1987-1 C.B. 296.

¹⁴⁴ To strengthen the argument that independent contractor status is custom in the industry, the author was unable to identify an MMA promotion which did not classify its fighters as independent contractors. This includes World Extreme Cagefighting, Invicta, International Fight League, Strikeforce, Affliction, Cage Rage, and Elite XC.

requirement the UFC imposes on its fighters. Thus, while training certainly increases the odds of a fighter's success in his or her bouts, it is technically not required.

In presenting a case for independent contractor classification, the UFC could argue that the two or three times per year a fighter performs are just one aspect of the work done by fighters. The fighter contracts also encompass the year-round training required to perform in UFC bouts. Since the UFC exerts little control over fighter training, including it as an aspect of work done for the UFC would drastically reduce the overall amount of control the UFC has over the fighters' work. Therefore, this interpretation would strengthen the UFC's claim that its fighters are independent contractors.

However, this potential UFC interpretation that all training should be considered for classification purposes is unlikely to succeed. In the IRS training materials, under the common law standard of worker classification (which the Twenty-Factor Test is based on), reference is only made to training as what is "provided by the business."¹⁴⁵ This is also the standard application in scholarly treatment of the subject.¹⁴⁶

Additionally, unsupervised training would likely not be included when considering worker classification because it would further complicate an already difficult determination. Even within a category of worker seeking a classification determination, there is significant variance as to training. Some workers may have conducted extensive training in their earlier careers but now only participate in limited training. Some may go to great lengths, including traveling, to seek out the best training. Some may participate in additional, experimental training methods, such as meditation, massage, acupuncture, and sessions with a sports psychologist.

Even if a UFC fighter's training were considered as part of the work contracted for, this would likely not change the end result of fighters being classified as employees. Doing so would allow the UFC to lessen its perceived overall control over fighters by claiming that the majority of fighters' work is beyond the UFC's control, but this would also lead to the consideration of a new requirement imposed on fighters by the UFC. Considering training as part of the work the UFC contracts for would strengthen the UFC's claim of independent contractor status as to the instructions factor because the UFC would provide no instruction on how to conduct the training. However, considering training as part of the work would weaken the independent contractor claim as to factors of training, full time required, oral and written reports,¹⁴⁷ and realization of profit and loss. At best, this would change the overall composition of the Twenty-Factor Test from 15-4-1 in favor of employee classification to 14-5-1 in favor of employee classification.

¹⁴⁵ INTERNAL REVENUE SERV., *supra* note 100, at 2-8.

¹⁴⁶ See Webb et al., *supra* note 140, at 61 (where the second factor of training was described as "employer provided" training).

¹⁴⁷ Because, if training is considered a requirement, the UFC would need to keep track of this requirement. See *id.*

IX. THE FUTURE

The UFC has great financial, liability, and anti-union incentives to keep its fighters classified as independent contractors. It is unlikely to proactively change its fighters' status to employees. Therefore, a court must adjudicate UFC fighters as employees to change their status. Although beyond the scope of this article, there are significant impediments fighters pursuing this course of action face. The fighters who would be most influential in pursuing legal action are the elite-level fighters who have the most to lose. Conversely, the fighters who would benefit most from unionization—the entry-level fighters—are in the least influential position. The treatment a UFC fighter receives (including bonuses, favorable matchups, being cut from the organization, and treatment in promotional materials) is almost entirely at the discretion of the UFC. Therefore, fighters need to stay in the good graces of the UFC.¹⁴⁸ To further strengthen this incentive, the window of opportunity to compete in MMA is narrow, and there are currently no equivalent alternative promoters in MMA. Facing a setback of several years in the MMA industry can be devastating to a fighter's career.

X. CONCLUSION

The misclassification of UFC fighters as independent contractors and not employees is significant for the fighters, UFC, and consumers. Looking at case law for the classification of similar workers provides mixed results but overall suggests that UFC fighters are in fact employees. While the standards for determination under the IRS Twenty-Factor Test used in this article often produce ambiguous results, applying the test to UFC fighters results in a clear determination that they are improperly classified as independent contractors. But judicial determination will be required to overcome incentives within the UFC to maintain the status quo and effectuate any change on this issue.

¹⁴⁸ Ordoñez, *supra* note 33.