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A CURTAIN-CALL FOR PERFORMING ARTS INDUSTRY CLAUSES: WHY NONUNIONIZED STAGE-PERFORMERS ARE "EMPLOYEES" NOT "INDEPENDENT CONTRACTORS"

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I. SETTING THE STAGE: INDUSTRY PRACTICES

"*The common curse of mankind, folly and ignorance, be thine in great revenue!*"[1]

In the entertainment industry, there exists a class of performers who, while paid, remain nonunionized. It is not uncommon for these performers to rely on nonunionized work to rise through the ranks. It is, in fact, via such fringe stage productions and student films that performers often earn their

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[1] WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 2, sc. 3.

union card.[2] However, this nonunion work forces these performers to face a Hobson's choice: either they must sign away valuable rights and risk sole liability while on the job, or they must altogether forego the opportunity and risk developing their career.[3] These nonunionized performers are typically informed via contract that they are not considered employees, but rather independent contractors.[4] Consequently, companies contractually demand that, as a hired independent contractor, these performers assume liability for any damage they personally cause to sets, props, and themselves while performing for the company.[5] Despite this attempt to contractually waive the employee status of a nonunionized performer, such status clearly exists regardless. Any performer, unionized or otherwise, should not be required to sign away their right to employee treatment when they are in fact being treated in all other relevant respects as an employee.[6] This Article will demonstrate that employee status for performing artists is supported by the fundamentals of employment law, state common-law, federal directives, and various state statutes.

When properly classified, employees benefit from numerous significant statutory protections, such as but not limited

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[2] Alex Ates, *What Nonunion Actors Should Know About Union Strikes*, BACKSTAGE (Jan. 11, 2019), https://www.backstage.com/magazine/article/nonunion-actors-sag-strike-66693/.

[3] *Id.*

[4] *See, e.g.*, *Contract For Grand Theatre Actors/Musicians*, SALT LAKE CMTY. COLL. (Sept. 18, 2018), https://www.slcc.edu/risk-management/docs/grandtheater.pdf; *Independent Contractor Agreement*, MALU PROD., https://static1.squarespace.com/static/550128aae4b0a33931074a11/t/5bf391b2562fa7bd25225da8/1542689207418/INDEPENDENT+CONTRACTOR+AGREEMENT+FORM.pdf (last visited April 20, 2020) (establishing call time, rehearsal, sound check, performance schedule and location, rights and responsibility to direct process of performer).

[5] SALT LAKE CMTY. COLL., *supra* note 4 (stating "Actor/Musician agrees to accept full financial responsibility for liability, property damage, theft, or personal injury sustained by Actor/Musician or caused by Actor's/Musician's negligence as a result of participation in this Contract.").

[6] *Cf.* W. Ports Transp., Inc. v. Emp't Sec., 41 P.3d 510, 516 (Wash. App. 2002) ("Contractual language, such as a provision describing drivers as independent contractors, is not dispositive; instead, the court considers all the facts related to the work situation.") (citation omitted).

to: (1) workers' compensation laws against liability from work-induced injuries; [7] (2) antidiscrimination laws; [8] (3) laws regulating working conditions;[9] (4) laws regulating wages;[10] (5) laws regulating hours worked;[11] (6) laws providing pregnancy and medical leave;[12] (7) Social Security benefits; (8) laws mandating unemployment insurance; [13] and (9) laws against sexual harassment.[14] In contrast, independent contractors do not have these guaranteed statutory protections.[15] Hence, being labeled as an independent contractor comes at a great cost to the performer. By intentionally misclassifying performers as independent contractors, employers attempt to pass labor costs onto both persons they hire and the government. [16] This practice is prohibited by law but it still permeates throughout the performing arts industry. [17] When performers are misclassified by their employers, they are left vulnerable and without the safeguards that both state and federal governments intended for an employees' protection.

Misclassification as an independent contractor subjects nonunionized performers to fewer statutory protections and less

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[7] 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, 54–55 (2015).

[8] *Id.*

[9] Fair Labor Standards Act of 1938, 29 U.S.C. § 201.

[10] Deknatel & Hoff-Downing, *supra* note 7, at 54–55.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

[15] Deknatel & Hoff-Downing, *supra* note 7, at 54–55.

[16] Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP'T L. PROJECT, https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/ (last visited April 20, 2020).

[17] *See* Shelley Attadgie, *Combating the Actor's Sacrifice: How to Amend Federal Labor Law to Influence the Labor Practices of Theaters and Incentivize Actors to Fight for Their Rights*, 40 CARDOZO L. REV. 1045, 1069–70 (2018).

than a living wage.[18] This is because when employers pay performing artists as independent contractors, those employers evade federal and state minimum wage laws.[19] How does one provide for him or herself in an industry where "the price for total and complete artistic freedom is that almost nobody makes a living wage, let alone a living, doing it[?]"[20] While nonunionized workers must fend for themselves in pursuit of such "complete artistic freedom," unionized workers have leverage in stark contrast. For example, The Actors' Equity Association ("AEA"), a union for stage performers and stage managers,[21] prohibits its members from working beyond sixteen performances in a single production without a contract containing very specific terms.[22] In order to perform beyond the limit, AEA members must be paid official Equity contract rates and a $3,000 payment must be paid upfront to AEA.[23] That upfront payment functions as "a bond in case a production is cancelled or postponed, so that actors are guaranteed [at least] a week's pay."[24]

It is well-established that unions support employees and guarantee representational access to statutory protections across all fields of work.[25] Moreover, the strength of performing arts unions is well documented. In 2019, for instance, Chicago Symphony Orchestra ("CSO") members ended a two-month strike after union negotiations took place between their union and the

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[18] Diep Tran, *Off-Off-Broadway: Freedom Isn't Free*, AM. THEATRE (Sept. 24, 2019), https://www.americantheatre.org/2019/09/24/off-off-broadway-freedom-isnt-free/.

[19] U.S. Dep't of Labor, *Consolidated Minimum Wage Table* (July 1, 2019), https://www.dol.gov/Whd/minwage/mw-consolidated.htm.

[20] Tran, *supra* note 18.

[21] Alex Ates, *Equity Continues to Grow Its Power With Announcement of Special Counsel*, BACKSTAGE (Mar. 27, 2019), https://www.backstage.com/magazine/article/equity-special-counsel-lynn-rhinehart-67639/

[22] Tran, *supra* note 18.

[23] *Id.*

[24] *Id.*

[25] Josh Bivens et al., *How today's unions help working people*, ECON. POLICY INST. (Aug. 24, 2017), https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/.

CSO administration.[26] In Hollywood, a noteworthy 2007 writers' union strike had the powerful effect of ending a major blockbuster already in production.[27] The strike successfully derailed a superhero film-adaptation of "Justice League: Mortal," which would have featured actors Armie Hammer as Batman and Adam Brody as the Flash.[28]

However, union strikes are rarely driven by the sole motivation of individual union members.[29] Rather, it is the direction and influence of the union as a whole that "gives an actor status, legitimacy, and protections, [and] the actor is expected to follow union protocols [acting] as a booster of the union's causes, including strikes."[30] If a performing arts union decides collectively to negotiate for an improved position, the union members will strike together.[31]

It is a myth that all performers are insulated from employer abuse and risks of work injury, especially when many performers do not have the protection and "badge of validation" offered by union membership.[32] In fact, it is often routine for performers in this industry to first gain experience in nonunionized work before attaining the ranks of higher-profile unionized work.[33] Such lower-profile localized work, however, suffers from more limited budgets than its Broadway

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[26] Kristen Thometz, *Emanuel: CSO, Union Have Reached an Agreement to End Strike*, WTTW (April 26, 2019), https://news.wttw.com/2019/04/26/emanuel-cso-union-have-reached-agreement-end-strike; *see also*, Howard Reich, *CSO musicians picket in front of Orchestra Hall after announcing strike*, CHI. TRIB. (Mar. 11, 2019), https://www.chicagotribune.com/entertainment/music/howard-reich/ct-ent-cso-musicians-union-0311-story.html.

[27] Brian Davids, *Adam Brody on 'Ready or Not' and His Lost 'Justice League' Movie*, HOLLYWOOD REP. (Aug. 26, 2019), https://www.hollywoodreporter.com/heat-vision/adam-brody-ready-not-his-lost-justice-league-movie-1234550.

[28] *Id.*

[29] Ates, *supra* note 2.

[30] Alex Ates, *What Union Actors Should Know About Union Strikes*, BACKSTAGE (Jan. 10, 2019), https://www.backstage.com/magazine/article/union-actors-sag-strikes-66695/.

[31] *Id.*

[32] *Id.*

[33] Ates, *supra* note 2.

counterparts.[34] For example, many nonunionized performers "appearing in fringe and storefront productions . . . make from $0 . . . to $200 a week" and must work subsequent jobs to pay the bills.[35] Rarely is this because the production company is "stingy . . . The money simply isn't there."[36] As a result, production companies and other performing arts employers "try to save money by classifying their workers as independent contractors rather than employees."[37]

Performing arts contracts typically attempt to dictate performer status as that of an independent contractor or as that of an employee.[38] Higher-profile performing arts work "is covered under collective bargaining agreements, with workers classified as payroll employees."[39] Nonunionized performers, on the other hand, must navigate and grapple with contacts written disadvantageously to their independent contractor status. However, if the industry wants to ensure a sustainable future for all theatre workers, then those with the power have a "legal, ethical, and moral obligation to abide by the law and to educate our colleagues about their responsibilities."[40]

Across the working class of nonunionized stage performers are actors, musical theater performers, ballet dancers,

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[34] Logan Culwell-Block, *How a Low-Budget Theatre Can Still Go High Tech*, PLAYBILL (Sept. 13, 2018), www.playbill.com/article/how-a-low-budget-theatre-can-still-go-high-tech.

[35] Nina Metz, *How Much Do Actors Get Paid?*, CHI. TRIB. (Jan. 28, 2007), https://www.chicagotribune.com/news/ct-xpm-2007-01-28-0701280271-story.html.

[36] *Id.*

[37] Michael Steinberg & Kathryn White, *Classifying Artists and Skilled Technicians as Employees or Independent Contractors under New York Law*, SHEARMAN & STERLING LLP 2 (Aug. 1, 2016), https://www.probonopartner.org/wp-content/uploads/2016/08/Classifying_Artists_as_Employees-Shearman-Sterling-LLP.pdf.

[38] Margot Roosevelt & Ryan Faughnder, *California has a new law for contract workers. But many businesses aren't ready for change*, L.A. TIMES (Sept. 29, 2019), https://www.latimes.com/business/story/2019-09-27/ab5-independent-contractors-how-businesses-are-responding.

[39] *Id.*

[40] Daniel B. Thompson, *Independent Contractors and the American Theatre*, HOWLROUND THEATRE COMMONS (Nov. 10, 2015), https://howlround.com/independent-contractors-and-american-theatre#block-comments.

opera singers, stage acrobats, orchestra players, instrumentalists, exotic dancers, and more.[41] This working class suffers massive misclassification in need of serious reform for the reasons provided herein.[42]

This Article will show that performing artists are employees and bear un-waivable statutory rights of employment. This Article is to serve as notice to performing arts employers who are under the mistaken impression that a performer can work in nonemployment status as an independent contractor. For those employers who willfully hire performers in spite of the law, it is a shot across the bow.

II. ANALYSIS: PULLING BACK THE CURTAIN OF EMPLOYMENT LAW

"*Not fair terms, and a villain's mind*."[43]

A. THE PLOT: LEGAL MISCLASSIFICATION

Misclassification, as it pertains to employment law, is an illegal practice in which an employer improperly declares an employee as an independent contractor.[44] In response to an apparent rise in employee misclassification, the Internal Revenue Service ("IRS") demonstrated a federal-level shift away from employer punishments and toward incentives for compliance.[45] In 2011, the IRS announced the Voluntary Classification Settlement Program that enabled a low-cost means for employers to rectify proper classification under federal tax laws.[46]

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[41] *See* Gary S. Eisenkraft, *Better Safe than Sorry Theater Groups and Independent Contractor Rules*, EISENKRAFT CPA & CONSULTING SERVICES, https://www.art-newyork.org/assets/member-documents/theater-groups-and-ic-rules.pdf (last visited April 20, 2020).

[42] *Id.*

[43] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3.

[44] *Employee Misclassification*, NAT'L CONF. OF ST. LEGISLATURES, www.ncsl.org/research/labor-and-employment/employee-misclassification-resources.aspx (last visited April 20, 2020).

[45] Deknatel & Hoff-Downing, *supra* note 7, at 62.

[46] I.R.S. News Release IR-2011-95 (Sept. 21, 2011).

Notably, proper classification as an employee or as an independent contractor is not determined by contract.[47] Furthermore, misclassification cannot be surmounted by an express agreement between an employer and a worker.[48] A worker cannot waive employee status because employee status is statutory in nature and incapable of waiver.[49] The protections of employee status are structured in favor of the worker to insulate the worker from the treachery of unequal bargaining power that exists in nonunionized employer relationships.[50] Nonunionized performing arts industry's misclassification pervades the performing arts industry across the United States.[51]

It should be noted that misclassification is not unprecedented.[52] For instance, the construction,[53] salon,[54] and film[55] industries have struggled with the misclassification of their employees. Entertainment lawyer Gordon Firemark wrote that "[t]he IRS view[s] . . . that most crew members, actors, and others working on a film production should be classified as employees, not independent contractors," and that statutory rights, therefore, attach and "taxes should thus be withheld."[56] In any case, Firemark expressly cautioned that "merely declaring in a contract

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[47] *See* W. Ports Transp., Inc. v. Emp't Sec., 41 P.3d 510, 516 (Wash. App. 2002).

[48] *Id.*

[49] Verdugo v. Alliantgroup, L.P., 187 Cal. Rptr. 3d 613, 616 (Ct. App. 2015); *see also* Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1267–68 (9th Cir. 2017).

[50] Aditi Bagchi, *The Myth Of Equality In The Employment Relation*, 2009 MICH. ST. L. REV. 579, 584–85 (2009) (University of Pennsylvania Law School Assistant Professor Bagchi laments even in general unionized employment contexts there exists a "false image of unions as equal in strength to employers.").

[51] Thompson, *supra* note 40.

[52] Deknatel & Hoff-Downing, *supra* note 7, at 69.

[53] *Id.*

[54] Tina Alberino, *The 20 Factor IRS Test: Independent Contractors in the Salon*, THIS UGLY BEAUTY BUS. (May 10, 2014), https://www.thisuglybeautybusiness.com/2014/05/the-20-factor-irs-test-why-independent.html.

[55] Gordon Firemark, *Do You Hire An Independent Contractor Or Employee (For Your Film)*, FILMMAKING STUFF (Feb. 14, 2017), https://www.filmmakingstuff.com/independent-contractor-or-employee/.

[56] *Id.*

that the parties are independent contractors will do little to persuade the authorities that this is in fact the case."[57] Rather, courts will look to the statutory framework enumerating the criteria for employees and independent contractors to determine the status of work relationships.

In California, legislators signed Assembly Bill 5 into law with an effective date for January 2020.[58] Assembly Bill 5's purpose is to stop misclassification of employees,[59] "which erodes basic worker protections like the minimum wage, paid sick days, and health insurance benefits."[60] In anticipation of California's law, music industry representatives actively lobbied for an independent contracting exemption for musicians.[61] Nevertheless, legislators did not budge.[62] The *Los Angeles Times* reported that the Bill "does not include carve-outs for entertainment industry laborers including musicians and film crew workers."[63]

J. Ross Parelli, a California-based producer and non-profit director, lamented Assembly Bill 5, "[i]f I pay minimum wage, health insurance, paid sick days, overtime … I'm adding 30% to my labor costs."[64] A defense against proper worker classification centered on cost-market analysis unfortunately parallels archaic pro-slavery sentiments that the low labor cost of slavery fixed the production costs and controlled the market.[65] However, the fact that an economic model requires illegal practices to succeed is not an argument to support illegal practices; it is an argument against such an economic model. Parelli, as an employer, believes that she requires independent contractors for marketing, making music videos, and so on to do her job as

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[57] *Id.*

[58] Roosevelt & Faughnder, *supra* note 38.

[59] *Id.*

[60] John Myers, Johana Bhuiyan & Margot Roosevelt, *Newsom signs bill rewriting California employment law, limiting use of independent contractors*, L.A. TIMES (Sept. 18, 2019), https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees0independent-contractors-california.

[61] Roosevelt & Faughnder, *supra* note 38.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] FREDERICK L. OLMSTED, THE COTTON KINGDOM 111 (Sampson Low, Son & Co., 2d ed. 1962).

producer.[66] Parelli, also a 38-year-old award-winning, international touring professional singer and emcee, recognizes that "[o]ur whole millennial generation relies on being independent contractors," [67] but fails to recognize that they do not have to.

The national epidemic of performer misclassification puts artists at risk of injury, discrimination, and financial loss.[68] Misclassification deprives artists of indelible rights. It affects fellow employers who follow the law and properly classify employees in that state.[69] It divests millions from state and local governments in unpaid taxes, absorbed costs, and lost payments to insurance funds and workers compensation funds.[70]

Employment lawyers have noted that companies complying with classification statutes are concerned about the impact these tactics have had on their ability to compete in the marketplace against noncomplying companies.[71] Employers who do pay such taxes suffer unfair competition. [72] Across the proverbial aisle from the performing arts companies who misclassify are performing arts companies that have procured the necessary insurance policies and bear the responsibilities of union employment. Misclassification used as a cost-cutting measure is not only unethical but it leads to a saturated market of eligible performing arts companies all vying for the limited amount of federal grants and donations offered through underwriting.[73] The ramifications of misclassification thus extend beyond the individual worker.

Generally, the scholarship on the subject of misclassification is extensive.[74] The scholarship relating to performing artist misclassification, however, has not addressed

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[66] Roosevelt & Faughnder, *supra* note 38.

[67] *Id.*; *see also*, *Award-Winning Artist J Ross Parrelli Returns in Full-Force After Hiatus, Greatness Now Available*, ULSOUNDS, https://ulsounds.com/j-ross-parelli-greatness/ (last visited April 20, 2020).

[68] Deknatel & Hoff-Downing, *supra* note 7, at 55.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 82.

[72] *Id.* at 55.

[73] *Id.* at 82.

[74] Deknatel & Hoff-Downing, *supra* note 7.

possible solutions to this "gray area" of employment law. [75] In fact, some scholarship tacitly advocates for the legality of performing arts industry misclassification.[76]Alternatively, this Article argues that the performing arts industry is unique in its demands of its workers who deserve their rightful recognition as employees.

B. THE PLOT TWIST: FACTUAL DANGERS FOR MISCLASSIFIED PERFORMERS

Injury is to be expected in the performing arts industry.[77] It is a "part of a dancer's life, as it is for athletes."[78] However, unlike a professional athlete's life, a stage professional may not have guaranteed employment status, whereas "professional athletes are employees of either their team or their league (MLB, NFL, NBA, etc.)."[79] Moreover, an athlete's employment status is guaranteed regardless of endorsements and side ventures.[80] Stakes are similarly high for stage performers with major endorsements such as Under Armour's endorsement of ballet-dancer Misty Copeland, [81] and Rolex's endorsements of conductor Gustavo

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[75] Thompson, *supra* note 40.

[76] Sarah Howes, *Creative Equity: A Practical Approach To The Actor's Copyright*, 42 MITCHELL HAMLINE L. REV. 70, 86 (2016) (stating that "AEA actors enjoy sought-after, although short-lived, employee-status roles, whereas non-union actors operate as independent contractors.").

[77] Sarah L. Kaufman, *When rips, tears and falls kill a dancer's career (or don't)*, WASH. POST (June 29, 2018), https://www.washingtonpost.com/lifestyle/a-ballerina-just-suffered-a-terrible-injury-is-her-career-over/2018/06/29/86cb5740-68ff-11e8-bf8c-f9ed2e672adf_story.html.

[78] *Id.*

[79] Steven Chung, *3 Reasons Why It Is Difficult To Determine Whether A Worker Is An Employee Or An Independent Contractor*, ABOVE THE LAW (Oct. 9, 2019), https://abovethelaw.com/2019/10/3-reasons-why-it-is-difficult-to-determine-whether-a-worker-is-an-employee-or-an-independent-contractor/.

[80] *Id.*

[81] Julie Creswell, *Under Armour's Stock Tanks as Troubles Pile Up*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/business/under-armour-stock-investigation.html.

Dudamel, operatic tenor Plácido Domingo, and operatic soprano and cast-member of PBS' "Downton Abbey," Kiri Te Kanawa.[82]

Workplace injuries in the performing arts are often as severe—indeed, often identical—to those commonly incurred by professional athletes.[83] American Ballet Theatre corps member, Lauren Post, suffered a torn anterior cruciate ligament ("ACL") in her left knee after catching her foot in the hem of her costume while performing on stage at the Metropolitan Opera House.[84] The injury required her to stop dancing and undertake a procedure in which surgeons removed both muscle and tendon from her hamstring in order to repair her ACL.[85]

Other injuries are nationally well-documented. For instance, the Broadway production of "Spider-Man Turn Off the Dark," written by U2's Bono and the Edge, required performers to execute dangerous stunts in a notorious run that ended after multiple injured performers needed emergency hospitalization.[86] Most notably, in December 2010, an actor portraying Spider-Man, Christopher Tierney, fell from the Broadway stage during a performance.[87] Due to the fall, Tierney broke four ribs, his skull, a shoulder, an elbow, three vertebrae and bruised his lung.[88] That same month, an actress in the cast suffered a concussion.[89] Other injuries among various Spider-Man cast members had previously delayed the production's problematic opening-date.[90]

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[82] *Rolex and the Arts*, ROLEX, https://www.rolex.com/world-of-rolex/the-arts.html (last visited April 20, 2020).

[83] Kaufman, *supra* note 77.

[84] *Id.*

[85] Katherine Beard, *Here's How This ABT Dancer Recovered From an Injury that Could Have Ended Her Career*, DANCESPIRIT (Aug. 10, 2017), https://www.dancespirit.com/interview-with-abt-corps-dancer-reveals-how-she-recovered-from-a-career-ending-injury-2471416227.html.

[86] Julia Lull, *Another 'Spider-Man' actor injured on Broadway*, CNN (Aug. 16, 2013), https://www.cnn.com/2013/08/16/showbiz/spiderman-broadway-injury/index.html.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

Curiously, the Spider-Man production had been initially helmed by stage-director Julie Taymor,[91] who adapted Disney's animated blockbuster "The Lion King" into a Broadway production featuring complicated pain and injury-inducing wearable hybrids of costume and puppetry.[92] The costume designer was compelled to change garments to lighter, more durable fabrics in response to cast injury.[93] Such changes included shedding glass and stone beads from certain costumes lighten the load for the actors.[94] Nevertheless, the costume designer ultimately believed that "[b]ack and neck pain are part of the gig because of the headdresses and because some of the [unique] costume movements are not familiar even to dancers."[95] Most significantly, the production became one of the few to have onsite physical therapy.[96]

For stage performers, work-induced injury is not limited to the literal leaps and bounds of ballerinas and stage actors. Likewise, the risk of work injury is not limited to stage work involving sets and moving scenery. Opera singers,[97] violinists,[98]

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[91] Jeff Lunden, *Broadway's 'Spider-Man' Musical Turns Off The Lights At Last*, NPR (Jan. 3, 2014), https://www.npr.org/2014/01/03/256602469/broadways-spider-man-musical-turns-off-the-lights-at-last.

[92] Elysa Gardner, *Julie Taymor On The Lasting Legacy Of The Lion King*, BROADWAY DIRECT (Nov. 6, 2017), broadwaydirect.com/julie-taymor-lasting-legacy-lion-king/.

[93] Ron Dicker, *The Mane Event / It's a jungle in there -- behind the scenes at 'The Lion King'*, SFGATE (Jan. 25, 2004), https://www.sfgate.com/entertainment/article/The-Mane-Event-It-s-a-jungle-in-there-behind-2827511.php.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] American operatic bass and World War II veteran Giorgio Tozzi suffered a career-limiting injury at the Metropolitan Opera when scenery fell striking his head resulting in permanent hearing issues and pitch problems. *See* Giorgio Tozzi, *Backache, Barber and Bing*, JUSSI BJÖRLING SOC'Y (2017), https://www.bjorlingsocietyusa.org/articles/2017/3/10/backache-barber-and-bing; *see also* Margalit Fox, *Giorgio Tozzi, Esteemed Bass at the Met, Is Dead at 88*, N.Y. TIMES (June 2, 2011), https://www.nytimes.com/2011/06/02/arts/music/giorgio-tozzi-esteemed-bass-at-the-met-dies-at-88.html.

[98] Professor Dianna Kenny conducted a study of orchestral injury for the University of Sydney in 2013. Professor Kenny found that

oboists,[99] and even orchestral conductors[100] are susceptible to physical injury while performing, and "like a runner . . . on a sprained ankle . . . can get through [pain] and nobody's going to be the wiser."[101]

Ending misclassification in the performing arts industry can increase accountability of employers and promote procurement of adequate worker's compensation insurance.[102] Most importantly, it can induce cost-saving measures by situating such costs with the employer and not upon the performing arts employee's private insurance or, for uninsured artists, state resources.[103]

C. THE CAST: EMPLOYERS, EMPLOYEES, AND INDEPENDENT CONTRACTORS

An employer's legal status is derived from the master-servant relationship under agency law.[104] Per the Second Restatement of Agency, a master is one "who employs an agent to perform service in his affairs and who *controls* . . . the physical

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"84 percent of professional classical musicians have experienced pain severe enough to interfere with their performance." Dianna Kenny, *Musicians suffering for their art*, UNIV. OF SYDNEY (Oct. 2, 2013), https://www.sydney.edu.au/news/84.html?newsstoryid=12437. Moreover, half of Sydney's sampled 377 orchestral players "reported that they were currently experiencing pain" at the time of the survey. *Id.*

[99] Miami Symphonic Band Oboist, Janice Thomson, fell on the tile floor of the Maurice Gusman Concert Hall, fatally hitting her head "minutes before a season-opening concert." Jackie Salo, *Oboe player Janice Thomson dies in fall at concert hall before performance*, N.Y. POST (Nov. 13, 2019), https://nypost.com/2019/11/13/oboe-player-dies-in-fall-at-concert-hall-before-performance/.

[100] Janelle Gelfand, *Is playing violin as dangerous as football?*, CIN. ENQUIRER (Mar. 17, 2017), https://www.cincinnati.com/story/entertainment/2017/03/13/champion-player-returns-injured-list/98860296/.

[101] An instrumentalist's work injuries can occur from repetitive action, such as the "repetitive strokes of a [violinist's] bow" or a percussionist's mallet. The potential for injury can strike *any* person on stage, even the conductor, as "even a maestro's baton can cause [repetitively induced] injuries such as nerve damage, joint, muscle or tendon problems." *Id.*

[102] Myers, Bhuiyan & Roosevelt, *supra* note 60.

[103] Deknatel and Hoff-Downing, *supra* note 7, at 74.

[104] RESTATEMENT (SECOND) OF AGENCY § 2(1).

conduct of the other in the performance of the service."[105] A servant is employed by a master to perform services for the master when the servant's physical conduct in the performance of the service is controlled or is subject to the right to control by the master.[106]

Under the Fair Labor Standards Act, an "employer" is any person acting directly or indirectly in the interest of an employer in relation to an employee.[107] Principles of employment law establish that "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work."[108] Moreover, a worker is an employee even if the work is performed gratuitously. A lack of payment "[will] not relieve a principal of liability."[109] At its very base, the operative inquiry of employment, as a legal concept, is the level of control exerted over the worker and not the amount or means of payment.[110] Nor is it affected by contractually designating a title.[111]

Returning to the Fair Labor Standards Act, it provides albeit somewhat circularly that an "employee" is "any individual employed by an employer."[112] Similarly, for one to be employed means "to suffer or [be] permit[ted] to work."[113] The Act also tacitly recognizes work in the performing arts as employment in its mandates regarding child labor.[114] Furthermore, the wage "paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are

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[105] *Id.* (emphasis in italics).

[106] RESTATEMENT (SECOND) OF AGENCY § 2(2).

[107] Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d).

[108] RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a).

[109] *Id.*

[110] RESTATEMENT (SECOND) OF AGENCY § 2(2).

[111] *Id.*

[112] Fair Labor Standards Act of 1938, 29 U.S.C. § 203©(1).

[113] *Id.* § 203(g).

[114] Fair Labor Standards Act of 1938, 29 U.S.C. § 213©(3) ("The provisions of section 212 of this title relating to child labor shall not apply to any child *employed as an actor or performer* in motion pictures or theatrical productions, or in radio or television productions.") (emphasis added).

customarily furnished by such employer to his employees."[115] Thus, providing housing and amenities to performing artists does not increase an independent status; rather, it more greatly secures their employee status.[116]

Alternatively, the Second Restatement defines an independent contractor as one "who contracts with another to do something for [that other] but who is not controlled" nor is subject to control by the other.[117] Rather, the independent contractor maintains self-control over "physical conduct in the performance" of the act that is performed for the other.[118] Merely reserving the right to control the servant without ever exercising that right is not sufficient to establish an independent contractor. When any control is established over the means or methods of performance, the independent contractor is no longer independent. Instead, the contractor is an employee.

A general rule to properly identifying independent contractors is that the right to control an independent contractor is limited the right to "control or direct only the *result* of the work."[119] By contrast, an employer renders an independent contractor an employee by controlling "what will be done and how it will be done."[120]

Federal tax forms indicate that if an employer files a payment with a 1099 form, then the worker is presumed to be an independent contractor instead of an employee.[121] The status of employee, as opposed to independent contractor, brings with it "a vast array of legal protections and benefits."[122] The 1099 form, however, is not dispositive as to the question of employment status.[123] Therefore, the issues over semantic titles of independent contractor or employee is not solved simply via a 1099 form. In

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[115] *Id.* §203(m)(1).

[116] *Id.*

[117] RESTATEMENT (SECOND) OF AGENCY § 2(3).

[118] *Id.*

[119] *Independent Contractor Defined*, IRS (Jan. 23, 2020), https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined.

[120] *Id.*

[121] Deknatel & Hoff-Downing, *supra* note 7, at 54.

[122] *Id.*

[123] *Id.* at 54–55.

addition to analyzing beyond mere forms, courts generally look beyond the text in an employment contract.[124]

On behalf of the *American Bar Association*, Attorney Robert W. Wood wrote that when one hires "an independent contractor, one is paying [solely] for a product or result" without the means to control how that product or result is accomplished.[125] Wood stated that when one contracts "[w]ith an employee, one is paying for . . . what is asked, whatever that might be," as "[w]ith employees, one controls not only the nature of the work, but the method, manner, and means by which" the employee does such work.[126] Proper employment classification is significant insofar as state statutory rights attach to employees and simply do not for the independent contractor.[127]

The benefits of employee status are not one-sided and most importantly do not solely benefit the employee. For example, in some states, employee status insulates an employer from greater exposure, such as civil tort liability.[128] The employee may be limited by the state itself to a fixed amount of compensable recovery.[129] An employee's case may be limited to review by an administrative body, as opposed to the filing of a civil suit before a trial court.[130]

Therefore, while there is much danger for the misclassified employee, the consequential legal risks for a

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[124] W. Ports Transp., Inc. v. Emp't Sec., 41 P.3d 510, 516 (Wash. App. 2002).

[125] Robert W. Wood, *Do's and Don'ts When Using Independent Contractors*, AM. BAR ASS'N. (June 30, 2011), https://www.americanbar.org/groups/business_law/publications/blt/2011/06/03_wood/.

[126] *Id.*

[127] Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case For Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239–40 (1997).

[128] Walton v. Ill. Bell Telephone Co., 818 N.E.2d 1242 (Ill. App. 2004). The Illinois Appellate Court affirmed the sole avenue of recovery for an employee is administered in its worker's compensation commission, and thus injured employees cannot utilize civil tort law in the state's circuit courts. *Id.*

[129] *Id.*

[130] *Id.*

misclassified employee ultimately falls upon the employer who controlled his employee.

D. A PLOT DOTH THICKENED: MISCLASSIFIED PERFORMING ARTISTS

"*This above all: to thine own self be true, And it must follow, as the night the day, Thou canst not then be false to any man*."[131]

1. *APPLICATION OF COMMON-LAW TO THE PERFORMING ARTS INDUSTRY*

In order for performing artists to be truly classified under common law as independent contractors, the initial point of inquiry becomes whether the employer truly controls the employer.[132] In order to be properly characterized as an independent contractor, the permissible control over a performer would be limited to only the completion of the performance and not any means leading up to that performance.[133]

The reality for performers is that an employer's control extends beyond the mere direct results.[134] Control is typically exerted via a rehearsal process dictating what the performance itself will be "and how it will be done."[135] Performances are not simply mounted and improvised all in one quick presentation. Rather, the process is one in which performers "spend hours in the practice room, followed by hours of rehearsal before the final performance."[136]

2. *REWRITING THE PLOT: EXOTIC DANCERS MIGHT BE THE KEY TO UNLOCKING EMPLOYMENT RIGHTS OF STATE PERFORMERS*

"*They say the owl was a baker's daughter. Lord, we know what we are, but know not what we may be. God be at your table*."[137]

The ever-growing body of common law relating to employment fails to directly address how it relates to the

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[131] WILLIAM SHAKESPEARE, HAMLET act 1, sc. 3.
[132] RESTATEMENT (SECOND) OF AGENCY § 2(3).
[133] *Id.*
[134] *Independent Contractor Defined*, *supra* note 119.
[135] *Id.*
[136] Gelfand, *supra* note 100.
[137] WILLIAM SHAKESPEARE, HAMLET act 4, sc. 5.

performing arts industry. In close proximity, however, is the existing case-law on exotic dancers, which may be instructive upon, relevant to, and indeed a part of the performing arts industry. Dancers' legal battles for employment rights are applicable across all working forms of stage performance.

Exotic dancers are among the class of paid stage performers who suffer well-documented misclassification.[138] They have made national headlines in their movement demanding labor reform to ensure status as employees.[139] An exotic dancer in Charlotte, North Carolina, sued "Club Onyx" in July 2019, alleging violations of state and federal labor laws for failure to pay overtime and the club's taking of her tips.[140] In New York, an exotic dancer "signed on to one lawsuit" in this wave of reform, but the club "paid out, and nothing changed."[141] While clubs typically do not pay the dancers a salary, they do tend to control the dancers' hours, outfits, performances, and chargeable amounts for private dances.[142]

In *Chaves v. King Arthur's Lounge, Inc.*, the plaintiff, Lucienne Chaves was an exotic dancer at King Arthur's Lounge ("King Arthur's").[143] King Arthur's classified Chaves and its dancers as independent contractors.[144] King Arthur's terminated Chaves after a dispute at work.[145] She subsequently sued to defend her rights under wage and hour laws.[146] The Superior Court of Massachusetts found that Chaves, as an exotic dancer, was indeed a misclassified employee.[147] The court noted, significantly, that it is the employer's right of control that is

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[138] *NC stripper sues exotic dance club over pay*, ASSOCIATED PRESS (July 20, 2019), https://www.cbs17.com/news/north-carolina-news/nc-stripper-sues-exotic-dance-club-over-pay/.

[139] Valeriya Safronova, *Strippers Are Doing It for Themselves*, N.Y. TIMES (July 24, 2019), https://www.nytimes.com/2019/07/24/style/strip-clubs.html.

[140] ASSOCIATED PRESS, *supra* note 138.

[141] Safronova, *supra* note 139, at 1.

[142] *Id.*

[143] Chaves v. King Arthur's Lounge, Inc., No. 07-2505, 2009 Mass. Super. LEXIS 298, at *1 (July 30, 2009).

[144] *Id.*

[145] *Id.*

[146] *Id.* at *3.

[147] *Id.* at *19–20.

paramount to employment analysis, rather than the exercise of it.[148] That employer's right "is legally determinative," and King Arthur's retained that right as Chaves' employer.[149]

King Arthur's argued that because its usual course of business was selling alcohol and not exotic dancing, King Arthur's was not Chaves' employer and Chaves was not King Arthur's employee.[150] Moreover, King Arthur's argued that its strip dancing services are merely a form of entertainment "akin to the televisions and pool tables in a sports bar."[151] The Superior Court disagreed: "[a] court would need to be blind to human instinct to decide that live nude entertainment was equivalent to the wallpaper of routinely- televised matches, games, tournaments and sports talk in such a place. The dancing is an integral part of King Arthur's business."[152]

The court analyzed the control exerted upon those dancers and the artistic characteristics of such work and held that King Arthur's did exert a measure of control over the dancers.[153] The court noted several forms of control unique to the employment of exotic dancers. For instance, King Arthur's trained its performers as to how they should dance.[154] King Arthur's "hired and fired dancers."[155] Also, the club made its dancers perform according to a set shift schedule that King Arthur's determined.[156] Despite initial appearances of the dancers' artistic autonomy, the *Chaves* court found sufficient employment control exerted over Chaves as an exotic dancer.[157]

The finding that exotic dancers are qualified employees and not independent contractors is affirmed in *Monteiro v. PJD Entertainment of Worcester, Inc.*[158] Here, again, an exotic dancer

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[148] *Id.* at *7 (citing Rainbow Dev., L.L.C. v. Dep't of Indus. Accidents, No. SUCV2005-00435, 2005 Mass. Super. LEXIS 586, at *7 (Nov. 14, 2005)).

[149] *Id.*

[150] *Id.* at *9.

[151] *Id.*

[152] *Id.* at *11.

[153] *Id.* at *7–8.

[154] *Id.* at *8–9.

[155] *Id.*

[156] *Id.*

[157] *Id.* at *7–8.

[158] Monteiro v. PJD Entm't of Worcester, Inc., No. 10-1930, 2011 Mass. Super. LEXIS 296 (Nov. 23, 2011).

brought a misclassification suit against her employer night club, Centerfolds.[159] She alleged that Centerfolds violated state wage laws, including those relating to minimum wage and overtime.[160] The central issue was whether exotic dancing was within the usual course of the club's business, and if so, then the exotic dancer would be deemed an employee.[161] The court determined that "[a]n establishment that serves alcohol and provides a venue for exotic dancers *is* in the business of providing adult entertainment."[162] Thus, as in *Chaves*, the exotic dancer was entitled to the hourly minimum wage as an employee.[163]

In the greater performing arts industry, the control that the *Chaves* and *Monteiro* courts recognized is applicable to performance schedules that are established independently of an individual performer's schedule.[164] A producer will establish a "clearly laid-out rehearsal schedule ahead of time" so that performers can "accommodate the production into their schedules."[165] That performing arts companies reserve the right to fire performers prior to the final performance is a level of control indicating employment.[166] The ultimate example of control among these various indicators of employment is the process of rehearsals that function to shape the artist's performance.[167]

For the reasons that follow, rehearsal processes in the performing arts industry are no different than various forms of employee training and control.[168] Stage performers are often subject to a form of rehearsal called "blocking," in which performers are directed to act from specific locations on the

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[159] *Id.* at *1.

[160] *Id.*

[161] *See id.* at *1, *2, *3.

[162] *Id.* at *6 (emphasis added).

[163] *Id.*

[164] Kerry Hishon, *Creating a Rehearsal Schedule*, THEATREFOLK (Feb. 27, 2017), https://www.theatrefolk.com/blog/creating-rehearsal-schedule/.

[165] *Id.*

[166] Chaves v. King Arthur's Lounge, Inc., No. 07-2505, 2009 Mass. Super. LEXIS 298, at *8–9 (July 30, 2009).

[167] *Id.*

[168] MALU PROD., *supra* note 4 (establishing call time, rehearsals, sound check, performance schedule, performance locations, rights and responsibility to direct the process of performer).

stage.[169] Blocking also establishes the manner in which the performer should move, stand, sit, lay down, etc. on stage.[170] The performance term, "working," is a process in which performers rehearse the stage movements that occur after a performance has been "blocked."[171] The scene is "worked" by rehearsing it specifically for the purposes of fluidity and memorization.[172] The requirement of memorization is colloquially known as "performing off-book."[173] From there, rehearsal processes include "[r]unning and polishing," once performers are "off-book."[174] This process necessitates running the full performance to achieve the goal of a final, polished and presentable product: the performances.[175]

Next, "[t]ech-rehearsals" are a series of rehearsals specifically purposed to allow for perfecting the technical aspects of a show.[176] This period also allows performers a chance to become familiar with the set itself.[177] These aspects include sound effects, lighting, and the incorporation of equipment such as fog machines.[178] It is often a series of rehearsals commonly known as "tech-week."[179]

For productions involving sung music, there is the "sitzprobe," a German word that means "seated rehearsal."[180] This is a mandatory rehearsal that purposefully does not use the stage, props, or production elements.[181] Instead, the sitzprobe's purpose is to isolate the music and achieve cohesiveness by rehearsing only that element with the entire performing cast and orchestra.[182]

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[169] Tom Vander Well, *Preparing For A Role: Rehearsal Process*, WAYFARER (Feb. 3, 2013), https://tomvanderwell.com/2013/02/03/preparing-for-a-role-rehearsal-process/.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] Hishon, *supra* note 164.

[181] *Id.*

[182] *Id.*

Finally, "dress-rehearsals" are rehearsals simulated as full performances for the purpose of running the show as if it is the final product, allowing mistakes to occur without immediate correction.[183] As it were, whatever happens, happens. Performers receive what are known as "notes" from the director after rehearsals.[184] These notes indicate what the performer must change before the next rehearsal.[185] "[C]all-time," is the time at which a performer is required to arrive for the purposes of rehearsal or performance.[186]

For performing arts employers who may believe that some control is permissible over a contractor's work, some states are sensitive to slight exertions of control over a worker.[187] For instance, Illinois recognized that a "claimant was exposed to a greater risk than the general public because she was continually forced to use stairs [in order for her] to seek personal comfort during her workday."[188] Therefore, once again, any exertion of control over a performing artist factors into employment analysis.

Among subtle relevant examples of control includes orchestral duties such as the manner in which two string players share one music stand with one player designated as the "inside player," responsible for turning pages.[189] Other examples in performing arts agreements with purported "independent contractors" include contractual requirements for a performer to use only original music;[190] to perform "in a professional

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[183] Vander Well, *supra* note 169.

[184] *Id.*

[185] *Id.*

[186] *Glossary of Technical Theatre Terms – Beginners*, THEATERCRAFTS.COM http://www.theatrecrafts.com/pages/home/topics/beginners/glossary/ (last visited April 20, 2020).

[187] Ill. Consol. Tel. Co. v. Indus. Comm'n, 314 Ill. App. 3d 347, 350 (App. Ct. 2000).

[188] *Id.*

[189] RICHARD KING, RECORDING ORCHESTRA AND OTHER CLASSICAL MUSIC ENSEMBLES 51 (Routledge, 2017).

[190] *Performance Agreement*, DEEP ELLUM ARTS FESTIVAL, http://deepellumartsfestival.com/wp-content/uploads/2018/04/performance_agreement_2019.pdf (last visited April 20, 2020) (stating that any independent "[c]ontractor shall provide a performance of only original music composed, and whose rights are owned, by the artist contracted. Performance will be conducted in a professional manner.").

manner;"[191] prohibiting performers from "drinking of alcoholic beverages . . . while on the premises of the engagement, or during said hours of the performance(s);"[192] requiring that performers "do not eat, smoke, or drink beverages (other than water) while wearing your costume;"[193] requiring that a performer participate in "striking" a set after the show is complete;[194] reserving strict times for the performer's arrival, known as "call-times," [195] establishing a required procedure to contact a stage manager if the performer will be more than ten minutes late;[196] establishing performer guidelines or warning that a "violation of actor guidelines [could] result in immediate dismissal from the production;"[197] controlling when or where the performer's equipment may be set up;[198] contractual reservations of right to direct the performer's performance;[199] requiring that company "policies . . . should be followed as written," or else "[f]ailure to do so may result in a system of warnings or immediate dismissal from the production."[200] Each and every exertion of control in the performing arts defeats the proposition that the performer is an independent contractor.

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[191] *Id.*

[192] *Allan Hancock College Associated Students Agreement of Service*, ALLAN HANCOCK COLL., https://www.hancockcollege.edu/asbg/documents/Contract%20for%20Service.pdf (last visited April 20, 2020).

[193] *Lakewood Playhouse Actor Contract*, LAKEWOOD PLAYHOUSE, https://www.lakewoodplayhouse.org/uploads/8/1/1/6/81162538/0xx_blank_cast_adult.docx (last visited April 20, 2020).

[194] "Striking" is an industry term that means removal or deconstruction of a set after a production is completed. Ben Pesener, *Strike*, THEATRE DICTIONARY (Mar. 30, 2015), dictionary.tdf.org/strike/; *see, e.g.*, LAKEWOOD PLAYHOUSE, *supra* note 193, at 3 (stating "contractor will be compensated on CLOSING NIGHT of the Production after participating with Strike.").

[195] MALU PROD., *supra* note 4, at 1–2.

[196] LAKEWOOD PLAYHOUSE, *supra* note 193, at 2.

[197] *Id.*

[198] ALLAN HANCOCK COLL., *supra* note 192, at 1.

[199] MALU PROD., *supra* note 4, at 2.

[200] LAKEWOOD PLAYHOUSE, *supra* note 193, at 2.

3. *STICK TO THE SCRIPT: THE INTERNAL REVENUE SERVICE'S EMPLOYMENT DIRECTIVES APPLIED TO PERFORMING ARTS*

Under directives from the IRS,[201] employment status may be established pursuant to IRS Rev. Rul. 87-41, 1987-1 C.B. 296. According to the IRS, there exist twenty factors of employment.[202] The following analysis of ten of the factors supports the proposition that performing artists are indeed employees and not independent contractors.

a) *Instructions*

If the person for whom the services are performed has the right to require compliance with instructions, then that indicates employee status.[203] Performers are hired to perform a specific type of work as instructed by their production company. For instance, actors perform scripts, which are instructions on how to portray a character.[204] Musicians perform musical scores, which are instructions on how to play a composition.[205] Dancers perform notated choreography, which are instructions on how to move.[206] While there may be room for minor deviation and artistic expression, performers are primarily restricted to the style, format, and direction of their producer.

Performing arts contracts themselves contain examples of instructions requiring compliance. For example, a performing arts company in Washington states that even though the performer is hired as an independent contractor, that performer is subject to the

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[201] Federal directives operate both independent of and supreme to state common law tests. *See* IRS Rev. Rul. 87-41 (1987).

[202] *Id.*

[203] *Id.*

[204] GABRIEL A. RADVANSKY, HUMAN MEMORY: SECOND EDITION 144 (Routledge, 2nd ed. 2011).

[205] Satoshi Kawamura & Hitoaki Toshida, *KANSEI (Emotional) Information Classifications of Music Scores Using Self Organizing Map*, *in* TRENDS IN APPLIED KNOWLEDGE-BASED SYSTEMS AND DATA SCIENCE 574, 575 (Hamido Fujita et al., 2016).

[206] Jody Sperling, *How do you write down choreography?*, TIME LAPSE DANCE (Feb. 2, 2010), jodysperling.com/process/how-do-you-write-down-choreography/.

direction of the play house and certain behaviors would result in a reduced stipend.[207]

b) *Training*

Worker training indicates that the person for whom services are performed wants the services performed in a particular manner. [208] Orchestras, singers, soloists, and instrumentalists typically rehearse a work in order to synthesize a conductor's musical ideas. Stage performers are conditioned throughout the rehearsal process to the director's intentions.[209] Similarly, choreography is taught to dancing performers in ballets, stage musicals, and dance ensembles consistent with the choreographer's artistic vision and must remain the same throughout a run of performances.[210] Thus, any form of practice or rehearsal is training.

c) *Integration*

"Integration of the worker's services into the business operations" of the person for whom services are performed is an indication of employee status. [211] Performers whose work becomes a recurring part of artistic administrative choices become integrated. Administrative choices specifically taking the performer's capabilities in mind constitute integration. This is especially true of companies that mount a production as a "star-vehicle" to showcase specific aspects of cast members of a company.[212] Decisions by management to produce certain works that are within the wheelhouse of the performers supports a theory of employment.[213]

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[207] LAKEWOOD PLAYHOUSE, *supra* note 193, at 6.

[208] Rev. Rul. 87-41, 1987-1 C.B. 296.

[209] David Siegel, *Stage managers work long hours for rich rewards*, DC METRO (Nov. 8, 2019), https://dcmetrotheaterarts.com/2019/11/08/stage-managers-work-long-hours-for-rich-rewards/.

[210] *Id.*

[211] Rev. Rul. 87-41, 1987-1 C.B. 296.

[212] Nancy Churnin, *Stage/Nancy Churnin: Nostalgia Plays Well in San Diego*, L.A. TIMES (Sep. 3, 1992), https://www.latimes.com/archives/la-xpm-1992-09-03-ca-7032-story.html.

[213] Brittney Leemon, *Repertoire Programming Decisions Of Major West Coast Opera Companies In Washington, Oregon, And*

d) *Services Rendered Personally (Non-Delegable Services)*

If the services are required to be performed personally, then this indicates that the person for whom services are performed is interested in the methods used to the accomplish the work (which, in turn, indicates employee status).[214] Performing artists are typically hired for their unique capabilities and overall artistic production ideas. Nevertheless, the industry uses "understudies," performers who fill-in for a performer when that performer cannot meet the needs of the performance.[215] Nevertheless, the role of understudy is typically something for which a performer auditions.[216] This negates the ability for the primary performer to delegate her duties to another person, even if that other person is equally capable. When provided by a performing arts company, understudies are analogous to substitute teachers, who are employees trained and subject to rules in order to adequately substitute the primary employee.[217]

e) *Hiring, Supervising, and Paying Assistants*

If the person for whom services are performed hires, supervises, or pays assistants, this generally indicates employee status.[218] The performing arts personnel includes artistic directors, stage directors, assistant directors, conductors, assistant conductors, concertmasters, assistant concertmasters, section leaders, and other personnel throughout the respective

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California, UNIV. OF OR. 31 (June 6, 2017), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/22499/AAD_Leemon_Final Project_2017.pdf?sequence=4&isAllowed=y (stating that a "select few performers" may guide company choices in an industry).

[214] Rev. Rul. 87-41, 1987-1 C.B. 296.

[215] Erin McCarthy, *14 Behind-the-Scenes Secrets of Broadway Understudies*, MENTAL FLOSS (June 9, 2017), https://www.mentalfloss.com/article/501497/14-behind-scenes-secrets-broadway-understudies. ("Covers" is another industry term).

[216] *Id.*

[217] *See Substitute Teacher Training Manual*, GWINNETT CTY. PUB. SCH. 19–20, https://www.nctq.org/dmsView/16-2 (last visited April 20, 2020).

[218] Rev. Rul. 87-41, 1987-1 C.B. 296.

industries.[219] All of these roles indicate a chain of command and an element of supervision and control over the employee.

f) *Continuing Relationship*

A continuing relationship between the worker and the person for whom the services are performed indicates employee status.[220] The Literary Managers and Dramaturgs of the Americas contracts with performers "to make best efforts for [the artist] to be hired for revivals, transfers, co-productions, and tours of Theatre's production."[221] This type of recurring work establishes employment for performing arts environments in which the performer is paid for a performing arts season in multiple different productions.[222]

g) *Set Hours of Work*

"The establishment of set hours" for the worker indicates employee status.[223] Rehearsal processes are a "well organized" balance of stage rehearsals, wardrobe fittings, and other performer duties. These are "very carefully structured" schedules that can determine whether a performer works or continues to work in the production.[224] Performing arts "unions [establish] a fixed number [of] hours that can be worked by a performer without overtime."[225] However, simply put, nonunionized performers cannot dictate the time or length of rehearsals, performances,

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[219] *See* Lindsay Alissa King, *Hart Alumnae: Where Are They Now*, THEATERJONES (Nov. 8, 2019), www.theaterjones.com/ntx/features/20191108133357/2019-11-08/Hart-Alumnae-Where-Are-They-Now.

[220] Rev. Rul. 87-41, 1987-1 C.B. 296.

[221] *LMDA Sample Agreement (2018) – Development Dramaturgy Outside of a Festival Setting*, LITERARY MANAGERS AND DRAMATURGS OF THE AMERICAS, https://lmda.org/lmda-employment-guidelines-and-sample-contracts (last visited April 20, 2020).

[222] ROBERT BLUMENFELD, BLUMENFELD'S DICTIONARY OF ACTING AND SHOW BUSINESS 277 (Limelight, 2009) ("seasonal theaters" and "summer festival").

[223] Rev. Rul. 87-41, 1987-1 C.B. 296.

[224] DANIEL BOND, STAGE MANAGEMENT: A GENTLE ART 54 (Routledge, 2nd ed. 1998).

[225] *Id.*

costume fittings, production of promotional materials, the appropriate scheduling of breaks for meals, and rest.[226] Without union representation, those performers are at the performing arts company's sole discretion to determine their hours of work.

h) *Full-Time Required*

"If the worker must devote substantially full time to the business of the person . . . for whom services are performed," then this indicates employee status.[227] Although performing artists typically have full-time or part-time jobs elsewhere in order to supplement income, they spend substantial amounts of time rehearsing for a production.[228] Reportedly, only two percent of actors earn their sole income in that line of work.[229] Moreover, at any moment ninety percent of actors are out of work.[230] Therefore, supplemental income and side work is vital for stage performers.[231] Nevertheless, performers' work is time consuming. *DC Metro* reported that performing arts "stage manager[s] can work 60 to 75 hours per week during rehearsals, tech, and previews."[232] Even for individuals who moonlight in full-time jobs elsewhere, a tech week can mean twelve-hour rehearsal days.[233]

i) *Performing Work on Employer's Premises*

"If the work is performed on the premises of the person . . . for whom the services are performed," then this indicates

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[226] *Id.*

[227] Rev. Rul. 87-41, 1987-1 C.B. 296.

[228] PHILIP H. ENNIS & JOHN BONIN, UNDERSTANDING THE EMPLOYMENT OF ACTORS: A CONDENSATION OF A REPORT 13 (National Endowment for the Arts, 3rd report, 1977).

[229] Nicola Thorp, *Shaming actors for their day jobs is classism disguised as entertainment*, METRO (Oct. 25, 2019), https://metro.co.uk/2019/10/25/shaming-actors-day-jobs-classism-disguised-entertainment-10980997/.

[230] *Id.*

[231] *Id.*

[232] Siegel, *supra* note 209.

[233] Raven Snook, *A pain in the tech*, THEATRE DICTIONARY (June 28, 2016), dictionary.tdf.org/10-out-of-12/.

employee status, "especially if the work could be done elsewhere."[234] Some experts have argued that this is an "innocuous factor" in employment analysis.[235] This is because performing arts companies own property (concert halls, theaters, rehearsal rooms) specifically devoted to the company's production work.[236]

j) *Order or Sequence Test*

"If a worker must perform services in the order or sequence set by the person . . . for whom services are performed, that factor shows that the worker is not free to follow" his or her "own pattern of work," which indicates employee status.[237] For performing artists, the order of performance is often dictated by the script or material for which the performer is hired.[238] A performer cannot "rewrite a show, redirect it, redesign it . . . or otherwise change any other part of the complex puzzle that makes up a show."[239] Thus, a work chosen by an employer, with no room for the performer's deviation, determines the order or sequence. Furthermore, the rehearsal process and its sequence is determined by the performing arts company for reasons aforementioned. For instance, an orchestral conductor designs a schedule for the musicians to follow and that "rehearsal process must have a focus and direction that the conductor plans."[240] Therefore, both the performances and rehearsal process deprive the performer of control over the order or sequence of their work.

k) *Oral or Written Reports*

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[234] Rev. Rul. 87-41, 1987-1 C.B. 296.

[235] Deknatel & Hoff-Downing, *supra* note 7, at 101.

[236] *See* ROBERT COHEN, WORKING TOGETHER IN THEATRE: COLLABORATION AND LEADERSHIP 54 (Palgrave Macmillan, 2011) (stating that a performing arts company's "permanent assets . . . may include . . . a theatre building, scene and costume shops.").

[237] Rev. Rul. 87-41, 1987-1 C.B. 296.

[238] JOE DEER & ROCCO DAL VERA, ACTING IN MUSICAL THEATRE: A COMPREHENSIVE COURSE 224 (Routledge, 2nd ed. 2015).

[239] *Id.*

[240] JOHN F. COLSON, CONDUCTING AND REHEARSING THE INSTRUMENTAL MUSIC ENSEMBLE 135 (Scarecrow Press, 2012).

"A requirement that the worker submit regular or written reports" indicates employee status.[241] Performing artists receive "notes," a term used to describe the director's instructions to the performer for improvement.[242] Similarly, conductors communicate oral directions to performers,[243] and specific written notations are added to musical scores in order to dictate certain artistic preferences. For example, "bowings"[244] for string players and "breaths" for wind instruments[245] will impact the way the individuals in those groups perform.

l) *Payment by the Hour, Week, or Month*

"Payment by the hour, week, or month generally points to" employment status.[246] Employers attempt to sidestep employment classifications by labeling payments as stipends or flat-payments, as opposed to wages.[247] In the performing arts industry, flat-payments are sometimes deemed an honorarium.[248]

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[241] Rev. Rul. 87-41, 1987-1 C.B. 296.

[242] Simi Horwitz, *How Do You Give Notes?*, BACKSTAGE (Feb. 3, 2010), https://www.backstage.com/magazine/article/give-notes-60649/.

[243] COLSON, *supra* note 240.

[244] Bowings are a notated method for orchestras to achieve a tonal effect or articulation among a group of string players. It is accomplished by notating sheet music to reflect the desired effect to be performed by the ensemble. *See* Marvin Rabin & Priscilla Smith, *guide to orchestral bowings through musical styles*, UNIV. OF WIS., naspaa.hostcentric.com/sitebuildercontent/sitebuilderfiles/book.pdf (last visited April 20, 2020).

[245] Wind instruments often require a notated indication as to when the musician should breathe and temporarily pause the constant flow of sound. Breaths are indicated in sheet music in order for uniformity among an ensemble or orchestra. *See* Allison Baker, *Embouchure And Breathing Tips For Beginning Oboists*, BAND DIRECTOR, https://banddirector.com/woodwinds/double-reeds/embouchure-and-breathing-tips-for-beginning-oboists/ (last visited April 20, 2020).

[246] Rev. Rul. 87-41, 1987-1 C.B. 296.

[247]Deknatel & Hoff-Downing, *supra* note 7, at 94.

[248] Myron Silberstein, *Paying the Piper: A New Model for Employment in Storefront Theatre*, SCAPI MAGAZINE (Sept. 16, 2019), https://scapimag.com/2019/09/16/paying-the-piper-a-new-model-for-

The employer's semantic designation does not discharge the role and responsibility of an employer. Courts look to the payment itself, and not merely the employer's chosen terms.[249] In the performing arts industry, nonunionized performers are often paid a stipend for each performance (with no pay for rehearsals).[250] The *Chicago Tribune* reported that "[s]ome companies offer a one-time stipend for the entire run, ranging from $25 to $500."[251] Other companies pay stipends monthly for the performer's work across a larger period of time, such as an entire season or year of performances.[252] "Summer stock theater" is an example of this type of seasonal work.[253] Pay may even vary from theater to theatre company and may be based the union status of the performer.[254]

m) *Payment of Business (and Traveling Expenses)*

The payment of "business and/or traveling expenses" indicates employment status.[255] Some companies will pay for the performer's travel or housing.[256] For instance, some performing

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employment-in-storefront-theatre/?fbclid=IwAR2S_yrl_bqHNvuFq6x KQXYR6CBe61ZTBKq6XYKi8yhn2vyp9HpCAEQMY6E.

[249]Deknatel & Hoff-Downing, *supra* note 7, at 94.

[250] Nina Metz, *How Much Do Actors Get Paid?*, CHI. TRIB. (Jan. 28, 2007), https://www.chicagotribune.com/news/ct-xpm-2007-01-28-0701280271-story.html.

[251] *Id.*

[252] Casey Mink, *Everything Actors Need to Know About Summer Training*, BACKSTAGE (Mar. 11, 2019), https:// www.backstage.com/magazine/article/everything-actors-need-know-summer-training-1924/.

[253] *Id.* ("Summer-stock" theater, according to *Backstage*, "is shorthand for any theater [company] that puts on shows exclusively in the summer, frequently staging multiple shows with the same actors, costumes, sets, and props throughout the season.")

[254] *Id.*

[255] IRS Rev. Rul. 87-41, 1987-1 C.B. 296.

[256] Dan Kempson, *When People are the Product: Why Reliance on Young Artist Programs May Lead to Financial Ruin for Opera*, ART + MARKETING (Jan. 23, 2018), artplusmarketing.com/when-people-are-the-product-why-reliance-on-young-artists-may-lead-to-financial-ruin-for-opera-abbb27317cf9.

arts festivals reportedly include housing as part of the compensation for performers.[257]

n) *Furnishing Tools and Materials*

The provision of "significant tools and materials" to the worker indicates employee status.[258] Performing arts companies provide stage performers with costumes, sets, microphones, makeup, wigs, and props.[259] Additionally, companies provide musicians with music stands, sheet music, and chairs on which to sit.[260] Some companies will even reimburse specific materials needed for the performance when a performer procures such materials.[261]

o) *Significant Investment*

"If the worker invests in facilities used by the worker in performing services and are not typically maintained by employees," then that indicates independent contractor status.[262] Freelance performers almost never have an investment in the venue in which they perform. Performing arts companies often own facilities in which they house performances. It would be extremely rare that a nonunionized performer would own a significant interest of the facility in which they perform.

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 . . . is generally an independent contractor . . . ."[263] Nonunionized performers are typically paid a flat fee regardless of the success of the show.[264] This typically insulates them from experiencing losses from a less profitable

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[257] *Id.*
[258] Rev. Rul. 87-41, 1987-1 C.B. 296.
[259] DEER & DAL VERA, *supra* note 238, at 224.
[260] KING, *supra* note 189, at 51.
[261] *Id.*
[262] Rev. Rul. 87-41, 1987-1 C.B. 296.
[263] *Id.*
[264] Silberstein, *supra* note 248.

showing. It is generally up to the production company to provide costumes, props, etc. so performers themselves would not experience any profit loss by investing in such items.

q) *Working for More Than One Firm at a Time*

"If a worker performs more than de minimis services" for multiple firms at the same time, then that generally indicates independent contractor status.[265] Returning to *Chaves*, the court found that the exotic dancer was "'wearing the hat of an employee' of King Arthur's [rather] than 'the hat of [her] own enterprise,' even if she performed exotic dancing for more than one employer."[266] Independent contractors may not be contractually prevented from accepting other work, as that would constitute control.[267] Nevertheless, the conflict of fixed production schedules in a given time could establish a de facto monopolization of the performer's schedule, effectively precluding participation with multiple companies at a given time.

r) *Making Services Available to the General Public*

If "a worker makes his or her services available to the general public on a regular and consistent basis," then that indicates independent contractor status. [268] While stage performers sometimes freelance their services, it is not on a regular and consistent basis. Performers hired by one company are committed to that company for the duration of the show's season. Ultimately, whether performers make their services available to the general public depends on the level of control that the hiring party exercises over the worker's ability to work for other companies.

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[265] Rev. Rul. 87-41, 1987-1 C.B. 296.

[266] Chaves v. King Arthur's Lounge, Inc., No. 07-2505, 2009 Mass. Super. LEXIS 298, at *18 (July 30, 2009).

[267] A "covenant not to compete," also known as a noncompete clause, "is a term used in contract law under which one party (usually an employee) agrees to not pursue a similar profession or trade in competition against another party (usually the employer). Covenants not to compete are bound by traditional contract requirements, including the consideration doctrine." Jackson Hewitt Inc. v. Childress, No. 06-CV-0909, 2008 U.S. Dist. LEXIS 24460, at *15 (D.N.J. Mar. 21, 2008).

[268] Rev. Rul. 87-41, 1987-1 C.B. 296.

s) *Right to Discharge*

"The right to discharge a worker" indicates "that the worker is an employee and the person possessing the right is an employer."[269] Performing arts companies often reserve the right to replace a performer who is incapable of performing to a company's desired level.[270] This may be done by invoking an understudy in the event that sickness, injury, or termination occurs; however, "the cost and time needed to train understudies" causes many companies go without them.[271] Understudy or not, production companies retain the right to discharge.

t) *Right to Terminate*

If a worker has the right to terminate the "relationship with the person for whom services are performed at any time he or she wishes without incurring liability," then that indicates employee status.[272] Performing arts companies do not typically allow for the risk of a performer terminating the relationship at any time because this may financially impact a company. Rather, the companies typically contractually require that the performer follow through with their duties or risk liability for a premature termination.[273]

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[269] *Id.*

[270] Edith Weiss, *Newsletter: Working with Teen Actors*, PIONEER DRAMA SERVICE (Sept. 17, 2019), https://www.pioneerdrama.com/Newsletter/Articles/The_Contract_That_Could_Save_Your_Sanity3.asp.

[271] Matthew J. Palm, *Most Central Florida theaters forgo understudies — until (like last weekend) they're desperately needed*, ORLANDO SENTINEL (Oct. 24, 2019), https://www.orlandosentinel.com/entertainment/arts-and-theater/os-et-sweeney-todd-deathtrap-understudies-20191024-dthpo7jilngadbj73oyzcfrqne-story.html.

[272] Rev. Rul. 87-41, 1987-1 C.B. 296.

[273] *Chicago Theatre Standards*, #NOTINOURHOUSE 29 (Dec. 2017), https://www.notinourhouse.org/wp-content/uploads/Chicago-Theatre-Standards-12-11-17.pdf (stating that "Actor's failure to comply with the responsibilities herein stated may result in termination of the Actor and removal from the Production at the discretion of the Theatre, without notice or compensation."); *see also* SALT LAKE CMTY. COLL.,

III. APPLICATION: DETERMINING LIABILITY OF PERFORMERS, THEIR EMPLOYERS, AND THIRD-PARTIES

A. EMPLOYER LIABILITY GENERALLY

Employment law varies from state to state based on court precedent and respective legislatures. Nevertheless, generally, "[a]n employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control."[274] By contrast, "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."

Generally, work injuries are overseen at the state level. Each state may extend jurisdiction, for instance, to "[e]very person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State" and "where the contract of hire is made within the State."[275] From there, the state may extend recovery to "persons whose employment results in . . . non-fatal injuries within the State" regardless of if "the contract of hire is made outside of the State."[276] The state may also afford coverage to "persons whose employment is *principally localized* within the

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supra note 4 (stating "TERMINATION: Unless otherwise stated, this contract may be terminated with cause by either party, in advance of the specified termination date, upon written notice being given by the other party. The party in violation will be given ten (10) working days after notification to correct and cease the violation(s), after which this contract may be terminated for cause. This contract may be terminated without cause, in advance of the specified expiration date, by either party, upon sixty (60) days prior written notice being given to the other party. On termination of this contract, all accounts and payments will be processed according to the financial arrangements set forth herein for approved services rendered to date of termination. In no event shall SLCC be liable to the Contractor for compensation for any good neither requested nor accepted by SLCC. In no event shall SLCC's exercise of its right to terminate this contract relieve the Contractor of any liability to SLCC for any damages or claims arising under this contract.").

[274] § 7.07(2) Employee Acting Within Scope of Employment, Restatement of the Law, Agency 3d, (The American Law Institute 2003).

[275] 820 ILCS 305/1(b)(2).

[276] *Id*.

State . . . regardless of the place of the accident or the place where the contract of hire was made."[277]

For employers, risks of employee injury are to be expected.[278] In Illinois, its Workers' Compensation Act provides that in order for a worker "[t]o obtain compensation . . . [that] employee bears the burden of showing, by a preponderance of the evidence," proof that the worker "sustained accidental injuries arising out of and in the course of the employment."[279] From there, the tribunal may assess whether the worker is an employee, if the employer disputes employee status or the scope of employment.[280] Injuries that are covered may either be caused or even aggravated by work.[281] For instance, the Illinois Supreme Court stated that "[w]hen an employee with a preexisting condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability."[282] In Illinois, an administrative tribunal known as the Workers Compensation Commission, decides factual questions under a two-step inquiry.[283] First, "whether there was an accidental injury which arose out of the employment."[284] Second, "whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury."[285]

A state will typically look to the chain of events in order to see if there exists sufficient control and direction over the employee to meet the scope of work injuries "arising out of and in the course of the employment."[286] Such "[a] causal connection between an accident and a claimant's condition may be established by a chain of events.[287] This chain considers the

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[277] *Id*.

[278] *Id.*

[279] 820 ILCS 305/1.

[280] *See generally* Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193 (2003).

[281] Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 215 (2003).

[282] *Id*.

[283] *Id*.

[284] *Id*.

[285] *Id*.

[286] 820 ILL. COMP. STAT. 305 (2012).

[287] Pulliam Masonry v. Indus. Comm'n, 77 Ill. 2d 469 (1979); *see also*, Darling v. Indus. Comm'n of Illinois, 176 Ill. App. 3d 186, 193 (1988).

employee's "ability to perform . . . before an accident," as compared to "a decreased ability to so perform immediately after an accident."[288] States may extend coverage to preexisting discrete injuries aggravated by work.[289] A causal connection may be found to exist between work performance and the injury, when performance contributed to that injury.[290] Once the employee demonstrates "causal connection between the work activity and the injury . . . no 'limitation' or 'exception' to compensation can be imposed to defeat [that employee's] right to recovery."[291]

B. THIRD-PARTY LIABILITY

In the performing arts industry, third-party liability would extend liability beyond the producers to parties, such as, but not limited to, the owner of a performing arts venue and companies who rent performance equipment to the performing arts company. This would include rental companies providing sets, costumes, props, hydraulics, scaffolding, etc. For example, in Illinois, where the work injury creates a legal liability for "*some person other than his employer* to pay damages, then legal proceedings *may be taken against such other person* to recover damages notwithstanding such employer's payment."[292] Under a theory of "subrogation," exposure and liability therefore extend beyond the contracting employer.[293]

If an employer directly or indirectly engages any contractor who lacks proper worker's compensation insurance, then that employer "is liable to pay compensation to the [subsidiary] employees of any . . . contractor or sub-contractor."[294] Without appropriate insurance in place, an injured party may sue up the chain to the party most financially capable of incurring liability. Consequently, any party involved with a performing arts

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[288] *Pulliam Masonry*, 77 Ill. 2d at 471; *see also Darling*, 176 Ill. App. at 193.

[289] Edward Hines Lumber Co. v. Indus. Comm'n, 215 Ill. App. 3d 659, 663 (1990).

[290] Twice Over Clean, Inc. v. Indus. Comm'n, 214 Ill. 2d 403, 413 (2005).

[291] *Id.* at 413.

[292] 820 ILL. COMP. STAT.ILCS 305/5(b) (2019) (emphasis added).

[293] *Id.* (emphasis added).

[294] 820 ILL. COMP. STAT.ILCS 305/1 (2012).

company should ensure the proper employee classification of performing artists and further ascertain whether appropriate workers' compensation is in place.

Those who instruct performing arts companies to contract with employees as an independent contractor will themselves incur a risk of legal liability. For example, a Massachusetts federal court held that "a non-party to an employment relationship can be held liable . . . for aiding and abetting the wrongdoing of a party to an employment relationship."[295] This risk of liability exists "regardless of whether the party to the employment relationship can itself be held liable."[296] Therefore, risks of misclassification extend beyond hiring companies to the parties advising upon the contracts.

C. THE VENUES: STATE-TO-STATE ILLUSTRATIONS OF EMPLOYMENT

States have individualized approaches to determining employment status. While "many work-related injuries and diseases are never compensated within the [respective] workers' compensation systems," states nevertheless have procedures for overseeing the adjudication of work injuries.[297] Like that of other respective states overseeing a vast body of employment law, the Illinois Supreme Court provided the test for which injuries constitute work injuries.[298] Work injuries must arise out of and in the course of employment.[299] More specifically, a work injury occurs in the course of employment if that injury "occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto."[300]

Employment analysis is generally centered on the concept of control. However, the determination of whether performing

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[295] Green v. Parts Distribution Xpress, Inc., Civil Action No. 10-11959-DJC, 2011 U.S. Dist. LEXIS 136616, at *15 (D. Mass. Nov. 29, 2011).

[296] *Id.*

[297] Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS L. REV. 891, 895 (2018).

[298] Saunders v. Indus. Comm'n, 189 Ill. 2d 623, 627–28 (2000).

[299] *Id.*

[300] *Id.*

artists are employees varies depending on state law. This Article is not intended to provide a canon of all tests. Rather, certain notable cases, statutes, and common law tests have been selected to illustrate principles of employment law.

1. *CALIFORNIA: THE EMPLOYER'S RIGHT TO CONTROL TEST*

In *Alexander v. FedEx Ground Package System,* the United States Court of Appeals for the Ninth Circuit reviewed the disputed status of approximately 2,300 of FedEx's full-time delivery drivers under California law.[301] FedEx Ground Package System, Inc. contracted with over two thousand full-time drivers to deliver packages to customers.[302] As per the operating agreement, FedEx required its drivers to wear FedEx uniforms, drive FedEx vehicles, and had company standards of grooming with which drivers had to comport.[303] Furthermore, FedEx directed its drivers what packages to deliver, where to deliver these packages, and the dates and times in which drivers may make such deliveries.[304] Nevertheless, FedEx insisted these drivers were independent because the operating agreement that FedEx had with its drivers designated them as independent contractors.[305] FedEx also recommended to its drivers that they craft ways to "'reduce travel time' and 'minimize expenses and maximize earnings and service.'"[306] The court was not convinced that this was evidence of independent contractor status.[307] The test under which the Ninth Circuit reviewed their status is called the "right-to-control test."[308]

California's right-to-control test requires the weighting of several factors to determine "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."[309]

Other factors that California courts must consider include: (a) whether the one performing services is engaged in a distinct

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[301] Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 984 (9th Cir. 2014).

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.* at 985.

[307] *Id.* at 988.

[308] *Id.*

[309] *Id.* (citations omitted).

occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; (h) whether or not the parties believe they are creating the relationship of employer-employee; and (i) the employer's right to terminate the worker at will and without cause.[310]

The Ninth Circuit noted that under California law these factors "generally … cannot be applied mechanically as separate tests."[311] Instead, "they are intertwined and their weight depends often on particular combinations."[312] Notably, the test does not in fact require absolute control.[313]

2. *ILLINOIS' CRACKDOWN ON EMPLOYEE MISCLASSIFICATION*

In 2008, the Illinois Legislature passed the Employee Classification Act ("Act") to address the practice of misclassifying employees as independent contractors.[314] Under the Act, by default, employees are anyone other than an individual who meets the following conditions. First, where the worker is "free from control or direction over the performance of the service for the contractor," with such freedom under both the terms of "contract of service and in fact."[315] Second, where the worker's provided service "is outside the usual course of services performed by the [worker]."[316] Third, where the worker must be either "engaged in an independently established trade, occupation,

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[310] *Id.* at 989.
[311] *Id.*
[312] *Id.*
[313] *Id.* at 990.
[314] 820 ILL. COMP. STAT. 185/3 (West 2008).
[315] *Id.* at 185/10(b)(1).
[316] *Id.* at 185/10(b)(2).

profession or business."[317] Fourth, where the worker "is deemed a legitimate sole proprietor or partnership."[318]

Under the fourth condition, the Act provides that under the test of independence, the person "performing services for a contractor as a subcontractor" may be deemed a sole proprietor if the following twelve conditions are met:

> (1) the sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result; (2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor; (3) the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle; (4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership; (5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis; (6) the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession; (7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name; (8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name; (9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service; (10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal

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[317] *Id.* at 185/10(b)(3).
[318] *Id.* at 185/10(b)(4).

> Revenue Service; (11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and (12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses.[319]

3. *MASSACHUSETTS, NEW MEXICO, OREGON, AND PENNSYLVANIA: THE ABCS OF EMPLOYER CONTROL*

Massachusetts established a notable test that codified its common law "right to control" analysis under a statutory three-prong test.[320] This test is known colloquially as the "ABC test" for employment.[321] (A) requires that "the individual is free from direction and control . . . [both] under his contract for the performance of service and in fact."[322] (B) requires that "the service is performed outside the [employer's] usual course of business."[323] Finally, (C) requires that the worker "is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."[324] This ABC test is part of a wave of reform across several states.[325] Some states, such as Pennsylvania, New Mexico, and Oregon, have replaced (B)'s usual course of business with a hybrid test that analyzes whether the work is of a type that is "customarily engaging in an independently established trade."[326]

As applied to performers, the test establishes employment. First, performers are directed and not "free from direction and control." This is true both under contract and when rehearsing and performing.[327] Second, performances are within a

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[319] *Id.* at 185/10(c).
[320] Deknatel & Hoff-Downing, *supra* note 7, at 65.
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.*

performing arts company's "usual course of business."[328] Finally, performers do not act in an established trade that exist independently from the performing arts company.[329] Rather, performers often become an integral part of the company's production.[330] Thus, no prong is met under the ABC test.

4. *NEBRASKA: DEFERENCE TO CONTRACTUAL LANGUAGE*

Nebraska emphasizes the provisions of a worker's contract itself and looks to the context in which the worker agreed to perform.[331] However, this practice suffers criticism from some because its focus on contractual language "may provide employers with an opening to contractually designate a worker as an independent contractor, while in reality preserving employee-like control."[332] Contracting with nonunionized performers as independent contractors is a tactical practice in the performing arts industry, although, as this Article explains, it is an illegal practice.[333] Nevertheless, Nebraska's contractual deference is unique among states.

5. *NEW YORK: AN EMPLOYEE FOCUSED APPROACH*

New York, known for its vibrant theatre community both "on and off Broadway," specifically addressed employee

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[328] *Id.*

[329] *Id.*

[330] *Actor Agreement*, #NOTINOURHOUSE 1, https://www.notinourhouse.org/wp-content/uploads/Actor-Agreement.pdf (last visited April 20, 2020) (stating that "[a]ctor's name will appear on [company's] primary publicity tools including but not limited to postcards and bookmarkers, and may appear in posters, lobby displays, and print advertisements. Company agrees that Actor's biography will appear in the program. Actor agrees to provide Company with an electronic headshot and a (FILL IN NUMBER OF WORDS) word or less biography as requested and in compliance with Company standards for such.").

[331] Deknatel & Hoff-Downing, *supra* note 7, at 68.

[332] *Id.* at 69.

[333] *See* Gary S. Eisenkraft, *Better Safe than Sorry Theater Groups and Independent Contractor Rules*, EISENKRAFT CPA & CONSULTING SERVICES, https://www.art-newyork.org/assets/member-documents/theater-groups-and-ic-rules.pdf (last visited April 20, 2020).

classification of performing artists.[334] Joshua Beck, a workers' compensation attorney, stated that "[b]efore 1986 . . . in New York, performers were [generally] considered to be independent contractors and there was a serious legislative push, a lobbying effort that was successful in '86[,] and the New York legislature finally passed an amendment to their workers compensation law."[335]

The New York Department of Labor provides the following criteria as indicators establishing that performers are independent contractors: (1) Performers share in the fee received from the establishment for the performance;[336] (2) The performer provides the venue with the performer's personal equipment for sound, lighting, or stage design;[337] (3) The performer has an investment in such equipment utilized in the performance;[338] (4) The performer operates in the legal form of a corporation or joint venture;[339] (5) The performer retains the right to exercise artistic *control* over the elements of the performance;[340] (6) The performer sets or negotiates the offered rate of pay received from the establishment;[341] (7) The performer retains ultimate authority in establishing the type of music for the performance;[342] (8) The performer dictates to the establishment the conditions of the engagement, for example, the stage layout, security arrangements, transportation requirements, or food and beverage provisions;[343] (9) The featured performer provides services as a single engagement; [344] and (10) The performer establishes when

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[334] Justin Beck & Alan Pierce, *Workers' Compensation for Performing Artists*, LEGAL TALK NETWORK (Sept. 29, 2017), https://legaltalknetwork.com/podcasts/workers-comp-matters/2017/09/workers-compensation-for-performing-artists/.

[335] *Id.*

[336] *Guidelines for Determining Worker Status Performing Artists*, N.Y. DEP'T OF LABOR (Nov. 5, 2017), https://www.labor.ny.gov/formsdocs/ui/IA318.17.pdf.

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *Id.*

[344] *Id.*

performance breaks will occur, or establishes the duration of such breaks.[345] If the aforementioned factors are not met, then the relationship between the performer and the performing arts company is an employee relationship.[346]

By contrast, the New York Department of Labor also provided that the following alternative criteria establishes a relationship of employment: (1) The performer is paid at a rate determined solely by the establishment;[347] (2) The establishment makes standard withholding deductions from the performer's fee, e.g. income tax, social security, etc.;[348] (3) The performer is covered under the establishment's Workers' Compensation Policy;[349] (4) A performer is also considered an employee if the establishment provides substitutes or replacements when the performer cannot participate in a scheduled performance.[350]

6. *WASHINGTON: WHY CONTRACTUAL LANGUAGE WON'T SIMPLY SOLVE THE EMPLOYER'S WOES*

The Washington Court of Appeals stated in *Western Ports Transportation, Inc. v. Employment Security Department* that "[c]ontractual language, such as a provision describing [workers] as independent contractors, is not dispositive; instead, the court considers all the facts related to the work situation."[351] As some experts have put it, "courts have chosen to look beyond mere labels."[352] And in *Affordable Cabs, Inc. v. Employment Security*, the Court of Appeals established that another means by which a worker's independent contractor status can be met is if the worker "held himself out to the community as being in a separate business or . . . established himself as a separate business."[353]

The reasoning in *Affordable Cabs* is not a viable framework for solving the issue of performing artists'

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[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] *Id.*

[350] *Id.*

[351] W. Ports Transp., Inc. v. Emp't Sec., 41 P.3d 510, 516 (Wash. App. 2002).

[352] Deknatel & Hoff-Downing, *supra* note 7, at 98.

[353] Affordable Cabs, Inc. v. Emp't Sec., 101 P.3d 440, 445 (Wash. App. 2004).

employment status. Treating performing artists as a separate business from the performing arts company is nonapplicable to the employment status of performers because performing artists are not an entity that is separate from the performing arts company. Cast-members are often literally defined as "company members."[354] Thus, when performing with a company, however brief, such artists become a temporary inextricable part of the performing arts company.

IV. PROPOSAL: THE PROPER CLASSIFICATION FOR PERFORMING ARTISTS

A. MEANS AND METHOD

As a general premise, insurance spreads risk.[355] In the employment context, workers' compensation insurance serves to limit the financial exposure that an employer faces if and when any of its workforce suffers injury in the course of performance.[356] For instance the "rule of workers' compensation exclusivity" shields an employer who pays "compensation insurance premiums from further liability to its employees."[357]

However, punitive procedures exist for employers who do not procure workers' compensation insurance. States, such as Illinois and Delaware, require business cooperation with several agencies when businesses are suspected of misclassification.[358] Parenthetically, Delaware's employment laws are significant for the reason that many corporations incorporate in the state, due to

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[354] *See* Dan Meyer, *The Lightning Thief Cast Members Join Rob Rokicki's Monstersongs Concert*, PLAYBILL (Oct. 24, 2019), www.playbill.com/article/the-lightning-thief-cast-members-join-rob-rokickis-monstersongs-concert; *see also* Gwendolyn Rice, *The week of the puppet*, ISTHMUS (Oct. 31, 2019), https://isthmus.com/arts/stage/patchwork-puppets-parading-on-mercury/.

[355] *Cf.* Christian Ketter, *A Second Amendment in Jeopardy of Article V Repeal, and "AMFIT," A Legislative Proposal Ensuring the 2nd Amendment Into the 22nd Century: Affordable Mandatory Firearms Insurance and Tax (AMFIT), A Solution to Maintaining the Right to Bear Arms and Promoting the General Welfare*, 64 WAYNE L. REV. 431, 446 (2019).

[356] *Id.*

[357] *Id.*

[358] 820 ILL. COMP. STAT. 185/75 (LexisNexis 2019); *see also*, DEL. CODE ANN. tit. 19 § 3507.

its favorable corporate legal climate.[359] States like Illinois grant standing for misclassification allegations to "[a]ny interested party," who consequently "may file a complaint with the Department against an entity or employer . . . if there is a reasonable belief that the entity or employer" misclassifies employees.[360] Some states afford additional private rights of civil action to workers who have suffered as a result of misclassification.[361]

Many states already have mechanisms in place for regulating employee classification. In the context of performing-arts employers, incentive for compliance can be accomplished by restricting funding of the National Endowment for the Arts, which is a goal of the Trump administration.[362] It can also be accomplished under IRC § 501, by regulating performing arts companies and denying § 501(c)(3) status to charitable companies that do not classify consistently with the aforementioned IRS Rev. Rul. 87-41, 1987-1 C.B. 296.[363] Specifically, IRC § 503 may be

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[359] Alyssa Gregory, *Best States to Incorporate a Business*, BALANCE SMALL BUS. (Mar. 29, 2019), https://www.thebalance smb.com/best-states-to-incorporate-a-business-4178799.

[360] 820 ILL. COMP. STAT. 185/25 (LexisNexis 2019).

[361] Deknatel & Hoff-Downing, *supra* note 7, at 78 (For instance, Delaware, Illinois, Massachusetts, Maryland, New Jersey, and Washington).

[362] Peter Nicholas, *Trump Is MAGA-fying the National Medal of Arts*, THE ATLANTIC (Nov. 11, 2019), https://www.theatlantic.com/politics/archive/2019/11/trumps-first-medal-arts-winners-include-jon-voight/601672/.

[363] 26 U.S.C. § 501(c)(3) states that the following organizations, unless exemption is denied, shall be exempt from Federal income taxes: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which insures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

amended to include misclassification as grounds for denial, which already denies tax-exempt status for corporate acts resulting in "less than an adequate consideration in money."[364]

B. PURPORTED OBSTACLES

1. *PERFORMING ARTS COMPANIES ARE MERELY IN THE "PRIMARY BUSINESS" OF MARKETING PRODUCTIONS AND THEREFORE PERFORMERS ARE INDEPENDENT CONTRACTORS IN THE SECONDARY BUSINESS OF PERFORMING*.

Some tests, such as California's aforementioned right-to-control test, may look to "a part of the regular business of the principal."[365] In fact, theater companies could be said to have two different lines of day to day work.[366] The first line of work is the marketing and administration of a performing arts company.[367] The second line of work is producing of the performing arts media.[368] The business is dual and therefore it cannot be claimed that somehow one line of business negates the other.

2. *WHEN DIRECT PATRONAGE IS PAID TO PERFORMING ARTISTS IN LIEU OF PAYMENT FROM THE EMPLOYER, THEN THERE CANNOT BE AN EMPLOYEE RELATIONSHIP IF THERE IS NO PAPER TRAIL*.

As a misclassification tactic, employers will instruct customers to pay an employee directly in order to avoid a paper trail.[369] That consequential lack of recorded payment from employer to employee makes it more difficult for a public agency to track. Nevertheless, courts analyze the employer's *control*

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[364] 26 U.S.C. § 503(b)(5).

[365] Alexander v. FedEx Ground Package Sys., 765 F.3d 981, 989 (9th Cir. 2014).

[366] Allison Considine, *Why Wait? The Rise of Undergrad Arts Admin Programs*, AM. THEATRE (Jan. 2, 2019), https://www.americantheatre.org/2019/01/02/why-wait-the-rise-of-undergrad-arts-admin-programs/; *see also MA, Performing Arts Administration*, NYU STEINHARD, https://steinhardt.nyu.edu/degree/ma-performing-arts-administration (last visited April 20, 2020).

[367] Considine, *supra* note 366.

[368] *Id.*

[369] Deknatel & Hoff-Downing, *supra* note 7, at 94.

regardless of the means of remuneration.[370] In the performing arts industry, patrons often directly support a performer on behalf of the charitable performing arts company.[371] However, direct patronage is not a viable solution to employment misclassification for any performing arts company, as *control* is paramount to employee analysis.[372]

3. *ADDITIONAL PERFORMING DUTIES, FROM "DINNER THEATER" TO TOURING MAKE JOB DUTIES TOO PLENTIFUL FOR CHARACTERIZATION AS EMPLOYEES.*

Performers are often tasked with additional duties beyond the performance itself. For instance, a Chicago-based theater company has its performers work additionally as a waitstaff to "serve drinks and food up until a few minutes before the show."[373] The Tracy Jong law firm, a New York firm specializing in liquor license law, cautioned its readership that when a "restaurant/bar environment" classifies workers "as independent contractors, the employer [exposes itself] to more responsibility and liability than it [avoids]."[374] Moreover, misclassification does not "eliminate [the employer's] obligation to pay payroll taxes, unemployment and maintain Worker's Compensation and disability insurance."[375] Stage performance, by itself, is certainly not the work of an independent contractor. Stage performance *with added duties*, such as waiting tables, is surely nothing other than employment.

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[370] *Independent Contractor Defined*, *supra* note 119.

[371] Jennifer Miller, *Suffering for Your Art? Maybe You Need a Patron*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/fashion/what-is-a-patron.html.

[372] *Independent Contractor Defined*, *supra* note 119.

[373] Hedy Weiss, *Theo Ubique Inaugurates New Home With 'The Full Monty'*, WTTW NEWS (Dec. 11, 2018), https://news.wttw.com/2018/12/11/theo-ubique-inaugurates-new-home-full-monty.

[374] *Can My Servers and Bartenders be Independent Contractors?*, TRACY JONG L. FIRM (Mar. 13, 2013), https://www.tracyjonglawfirm.com/blog/can-my-servers-and-bartenders-be-independent-contractors/.

[375] *Id.*

Some performing artists are required to travel in the course of a touring series of performances in multiple locations.[376] Some states recognize that travel as a part of employment expands rather than disrupts the relationship of the employee to the employer.[377] Traveling employees are defined generally as "employees whose duties require them to travel away from their employer's premises."[378] As such, the duties of a worker to travel or tour do not diminish the relationship of employment.

In classical music industry, one of the steppingstones of a career early on is the "Young Artist Program" ("YAP").[379] Dan Kempson, a Grammy-nominated opera singer, has written that "YAPs were created initially as training programs, but increasingly have been relied upon as cheap labor . . . . It doesn't work the same way if you're hiring a marketing associate."[380] Among other duties of performers in YAPs is fundraising work and community outreach.[381] In addition to a general season of stage performances, many YAPs have charity performance concerts to fundraise among benefactors.[382] These duties beyond the stage performances are not paid independently; instead, the performing arts general stipend purports to compensate for all labor.[383]

The Illinois Supreme Court once held that recreational activity during the after-hours of employment could nevertheless

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[376] *See Music, Theatre and Dance News,* OAKLAND U. NEWS (Jul. 30, 2019), https://oakland.edu/oumagazine/news/smtd/music-theatre-and-dance-news-may-2019.

[377] Wright v. Indus. Comm'n, 338 N.E.2d 379, 381 (Ill. 1975).

[378] *Id.*

[379] Kempson, *supra* note 256.

[380] *Id.*

[381] *Young Artist Program, 2020 Program Information,* OPERA SARATOGA, http://www.operasaratoga.org/young-artist-program-application (last visited April 20, 2019) (indicating duties such as performing in festival concerts, public concerts, and community outreach events).

[382] Cara Lippitt, *Learning how to shine out loud, the journey of an opera singer with cochlear implants*, COCHLEAR (Sep. 5, 2019), https://hearandnow.cochlearamericas.com/hearing-solutions/cochlear-implants/opera-singer-with-cochlear-implants/.

[383] Kempson, *supra* note 256.

arise out of and in the course of employment.[384] The Court found that a company baseball team in which the employee participated *after hours*, was a work environment in which the employee suffered an injury was "under the circumstances . . . an incident of his employment."[385] As such, "the injuries [the worker] sustained while playing in the particular game could properly be found to arise out of and in the course of his employment."[386] As a result of that case, Illinois abrogated the case-law in part but maintained scope extension when an employee is ordered or assigned by the employer to do any act.[387] It states that recreational work events generally "do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof," however, that "exclusion *shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program*."[388]

Therefore, if a performer's employment *could* terminate because the performer does not participate in an act, that act is within the performer's scope of employment.

4. *PERFORMING ARTISTS OFTEN HAVE MULTIPLE GIGS, AND THEIR FULL, VARIED SCHEDULES RENDER THEM THE DE FACTO STATUS OF BEING AN INDEPENDENT CONTRACTOR*.

Some performers simultaneously work for multiple performing arts companies at any given time.[389] Nevertheless, employment law accounts for when a claimant is concurrently working for multiple employers but not "in the [literal] employ of both employers at the time of the accident."[390] The employer is liable for loss of all employment, if that employer knows of the performer's concurrent employment.[391] When that "part-time employer [is] aware of the [employee's] main line of work, " then

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[384] Jewel Tea Co. v. Indus. Comm'n, 128 N.E.2d 699, 706 (Ill. 1955).

[385] *Id.*

[386] *Id.*

[387] 820 ILL. COMP. STAT. ANN.§ 305/11 (2019).

[388] *Id.* (emphasis added).

[389] Richard Jordan, *Richard Jordan: It's time to show understudies respect – they might be tomorrow's stars*, THE STAGE (June 21, 2018), https://www.thestage.co.uk/opinion/2018/richard-jordan-its-time-to-show-understudies-respect-they-might-be-tomorrows-stars/.

[390] Flynn v. Indus. Comm'n, 813 N.E.2d 119, 126 (Ill. 2004).

[391] *Id.*

the employee "may be considered" to be "employed 'concurrently' by two or more employers."[392] Liability for *all* employment then attaches.[393]

5. *FOR PERFORMERS, THERE EXISTS SUCH A GREAT AMOUNT OF ROOM FOR IMPROVISATION AND INTERPRETATION THAT ESTABLISHES THE INDEPENDENCE OF WORKERS IN THE PERFORMING ARTS*.

Performing arts employers may claim that a performer's interpretation or improvisation in a given performance somehow generously manifests independence for the performing artist.[394] From this perspective, such performance liberties somehow overcome employer control, and thus defeat employment analysis. However, improvisation and unique artistic expression would be most akin to what is known as "the personal comfort doctrine."[395] Under that doctrine, the scope of employment extends beyond the employer's directives to employee injuries resulting from the unique behavior of an employee.[396] This doctrine covers "an employee, while engaged in the work of his employer," who does any act "necessary to his health and comfort, even though they are personal to himself, and such acts will be considered incidental to

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[392] *Id.*

[393] *Id.*

[394] Here are four examples of improvised performing arts forms: (1) Comedy improv: Natalie Fedor, *Improv comedy teaches openness, risk-taking*, THE EXPONENT (Oct. 28, 2019), https://www.purdueexponent.org/campus/article_bf6f9c06-727a-5600-8b11-6c476ff4a216.html. (2) Freestyle rap: Allison Considine, *Can Freestyle Love Supreme Be Taught?*, AM. THEATRE (Nov. 1, 2019), https://www.americantheatre.org/2019/11/01/can-freestyle-love-supreme-be-taught/. (3) Improvised dance: Amanda Stanger-Read, *What is Improvisation and Why Do We Do It?*, ARTS IN MOTION (May 4, 2019), https://artsinmotion.net/2017/11/04/what-is-improvisation-and-why-do-we-do-it/. (4) Jazz: Georgia State University, *Making It Up as You Go: How Jazz Improvisation Affects the Brain*, NEUROSCIENCE NEWS & RESEARCH (Oct. 26, 2019), https://www.technologynetworks.com/neuroscience/news/making-it-up-as-you-go-how-jazz-improvisation-affects-the-brain-326436.

[395] Hunter Packing Co. v. Indus. Comm'n, 115 N.E.2d 236, 239 (Ill. 1953).

[396] *Id.*

the employment."[397] Therefore, even if a performer improvises or interprets in a manner unique to her, she would still perform within her scope of employment.

6. *EMPLOYERS CAN DISCLAIM EMPLOYEE LIABILITY BY CONTRACTUALLY WARNING THE PERFORMING ARTIST OF RISKS INCIDENTAL TO SUCH WORK*.

It is well-settled that workers' "compensation system[s] cannot be avoided by direct contract, and subterfuges designed to avoid the workers' compensation laws are not countenanced."[398] Performing arts companies expressly cannot disclaim liability via contractually warning an employee of risks and demanding careful work as a term of that contract.[399] Nevertheless, companies demand the performer's assumption of liability.[400] However, when one works within "the reasonable sphere of his employment," there remains for the employer a duty to adequately protect an employee.[401] Some courts affirm that sufficient employee protection cannot be supplanted by contractual agreements to waive liability and workplace rules to promote safety.[402]

The Supreme Court of Illinois stated, "[i]t is true an employee may violate a rule of his employer without necessarily leaving the sphere of his employment."[403] An employee may even very well "be guilty of contributory negligence in violating the rule," but, the employee's negligence "would constitute no bar to a recovery of compensation, for contributory negligence is no defense to a claim for [employee] compensation."[404] However, this common law logic does not dissuade the general counsel of

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[397] *Id.*

[398] Truesdale v. Workers' Comp. App. Bd., 235 Cal. Rptr. 754, 757 (App. 1987).

[399] Lumaghi Coal Co. v. Indus. Comm'n, 149 N.E. 11, 13 (Ill. 1925) (citations omitted).

[400] SALT LAKE CMTY. COLL., *supra* note 5 (stating "Actor/Musician agrees to accept full financial responsibility for liability, property damage, theft, or personal injury sustained by Actor/Musician or caused by Actor's/Musician's negligence as a result of participation in this Contract.").

[401] *Lumaghi Coal Co.*, 149 N.E. at 13.

[402] *Id.*

[403] *Id.*

[404] *Id.*

performing arts companies from drafting contractual language. For instance, the Salt Lake Community College's Office of the General Counsel & Risk Management declared in its performing arts contract: "Insurance, does not apply to this Contract. Actor/Musician agrees to accept full financial responsibility for liability, property damage, theft, or personal injury sustained by Actor/Musician or caused by Actor's/Musician's negligence as a result of participation in this Contract."[405]

Under common law principle, acts which are "considered incidental to the employment" are still "considered to be in the course of the employment."[406] The incidental character of an employee's act is terminated under rare circumstances, "only if done [by the employee] in an unusual, unreasonable or unexpected manner."[407] However, "the fact that [a] claimant was not performing her actual job duties at the time of the accident does not foreclose her right to compensation."[408] Thus, the scope of employment broadly favors employees.

CONCLUSION: BRINGING THE CURTAIN TO A CLOSE

"*Uneasy lies the head that wears the crown*."[409]

Performing arts employers are statutorily required to extend employment protections to those working under their control.[410] When these employers misclassify, they illegally shirk those duties.[411]

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[405] SALT LAKE CMTY. COLL., *supra* note 5 (stating "Actor/Musician agrees to accept full financial responsibility for liability, property damage, theft, or personal injury sustained by Actor/Musician or caused by Actor's/Musician's negligence as a result of participation in this Contract.").

[406] Segler v. Indus. Comm'n, 406 N.E.2d 542, 543 (Ill. 1980).

[407] Union Starch, Div. of Miles Labs., Inc. v. Indus. Comm'n, 307 N.E.2d 118, 121 (Ill. 1974).

[408] Ill. Consol. Tel. Co. v. Indus. Comm'n, 732 N.E.2d 49, 52 (Ill. App. Ct. 2000).

[409] WILLIAM SHAKESPEARE, HENRY IV, PART 2 act 3, sc. 1.

[410] Deknatel & Hoff-Downing, *supra* note 7, at 55.

[411] *Id.*

Within this decade, twenty states pursued stricter regulation for independent contractor status.[412] That mission *must* incorporate regulation and oversight for the performing arts industry. Chicago-based pianist and recording artist Myron Silberstein wrote in *Scapi Magazine* that performing artists should "not be so blinded by the joy of our craft that we forget that our craft, though it is truly a joy, is also a job."[413] Silberstein rallied that performing "[a]rtists should not be asked to provide a sliding scale to theatre companies that do not have the [adequate] budget to pay for artists' services."[414] Dan Kempson warned that "[t]hree well-known [professional] summer festivals currently pay less than $400/week, which equates to less than minimum wage for the state in which [these festivals] reside."[415] Kempson advocated that the performing arts industry needs to follow some corporate models on improving practices by paying its employees more and treating them better.[416]

It is the duty of employers in the performing arts industry to accept the proper role of a performing arts company and, with it, the full gamut of accompanying responsibilities. It is also the duty of performing artists to assert their rights and avail themselves of the protections to which employees are entitled as a matter of law. State legislatures have a duty to understand the work of performing artists. While there is a complicated nature of that work, it is not so different from the greater American workforce so as to remove it from the general realm of employment and its governing laws. Executive agencies must adequately investigate employment sectors, such as the performing arts, in which performers are actively misclassified. And it is the duty of workers' rights organizations to educate themselves on the work of performing artists.

Performing arts work is not an independent practice. Rather, as this Article demonstrates, it is controlled to a great extent by industry employers who are trying to keep their

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[412] *Id.*

[413] Myron Silberstein, *Paying the Piper: A New Model for Employment in Storefront Theatre*, SCAPI MAGAZINE (Sept. 16, 2019), https://scapimag.com/2019/09/16/paying-the-piper-a-new-model-for-employment-in-storefront-theatre/?fbclid=IwAR2S_yrl_bqHNvuFq6xKQXYR6CBe61ZTBKq6XYKi8yhn2vyp9HpCAEQMY6E.

[414] *Id.*

[415] Kempson, *supra* note 256.

[416] *Id.*

production costs low. Recognizing performing artists as employees may indeed cost more for employers, but a cost increase does not justify misclassification. If the show must go on, it cannot be to the detriment of performing artists. Abraham Lincoln allegedly once riddled: "If you call a tail a leg . . . how many legs has a dog? The answer: four, 'because calling a tail a leg doesn't make it a leg.'"[417]

Indeed, calling performing artists "independent contractors" does not change the laws that establish employee status. Nor should it. Performing artists are employees.

[417] William Safire, *Essay; Calling a Tail a Leg*, N.Y. TIMES (Feb. 22, 1993), https://www.nytimes.com/1993/02/22/opinion/essay-calling-a-tail-a-leg.html.