EMPLOYEES VS. INDEPENDENT CONTRACTORS AND PROFESSIONAL WRESTLING: HOW THE WWE IS TAKING A FOLDING-CHAIR TO THE BASIC TENETS OF EMPLOYMENT LAW

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I. INTRODUCTION

World Wrestling Entertainment (WWE) markets its professional wrestling product as an escape from the stresses of everyday life. Every week, over twelve million people tune into the longest-running weekly, episodic U.S. television program to watch cartoonishly muscular men and voluptuous women duke it out in the squared-circle as part of storylines that range from the implausible to the impossible.[1] Only 26% of the viewing audience are children,[2] so the vast majority of adult viewers are in on professional wrestling's worst-kept secret: none of it is real.

With this knowledge in mind, perhaps wrestling fans have chosen to turn a blind eye to the very real consequences that professional wrestlers suffer as a result of their career choice. True, many punches are pulled and not every body slam is as painful as the man writhing in the ring would have you believe, but professional wrestlers suffer serious and chronic injuries just as all professional athletes and employees do. As former wrestler Scott "Raven" Levy commented, "'[injuries are] part of the job. . . . If you want to be a wrestler, you have to be a big guy, and you have to perform in pain. If you choose to do neither, pick another profession.'"[3]

Wrestlers' brutal travel schedules compound their injuries. The WWE not only has two weekly televised programs[4] and monthly pay-per-view events, but also typically puts on six other unaired, or "house" shows, that

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[1] *See Did You Know?*, WWE (Nov. 28, 2011), http://www.wwe.com/inside/standupforwwe/didyouknow.

[2] *See id.*

[3] Jon Swartz, *High Death Rate Lingers Behind Fun Facade of Pro Wrestling*, USA TODAY (Mar. 12, 2004), http://usatoday30.usatoday.com/sports/2004-03-12-pro-wrestling_x.htm.

[4] *Monday Night Raw* (USA Network television broadcast); *SmackDown* (Syfy television broadcast).

leave little time for injuries to fully heal. WWE Superstar Bryan Danielson, better known by his in-ring persona of "Daniel Bryan,"[5] recently summarized his hectic schedule:

> We're on the road 250 days a year. Last year I ended up doing 219 shows. We don't have an offseason, so week in and week out, we fly out on Friday, we'll do a show Friday night, Saturday night, Sunday night, all of which are untelevised unless we're doing a pay-per-view on a Sunday. Then we do a live *Raw* on Monday, we film *SmackDown* and *Main Event* on Tuesday, and then we fly home on Wednesday. So we have half of Wednesday and Thursday to get our stuff repacked, and then we fly back out on Friday. . . . It's pretty grueling. . . . The schedule can be taxing . . . [and] [s]ustaining your energy can be tough.[6]

The WWE pays for any surgeries and rehabilitation brought about by injuries suffered in the ring,[7] citing a need to maintain a pleasant workplace. WWE executive and broadcaster Jim Ross noted that the company "want[s] [its] guys to have a happy home life" because that "makes a better employee."[8] However, this seemingly generous company policy is offset by the pressure on wrestlers to be ironmen, ready to perform night in and night out, regardless of their physical condition. For many wrestlers, this "tough guy" mentality "is more than just a matter of outdated professional pride, it is a matter of financial security."[9] After all, there is little incentive for the company to promote a wrestler to "main-eventer" status if it cannot consistently rely on him to be available for action. An assistant to former WWE Champion Bret "The Hitman" Hart commented on the fear of reporting injuries: "[t]here is fear of repercussion, and that just doesn't happen in other sports like the NFL or Major League Baseball."[10]

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[5] Not all wrestling personas are all that creative.

[6] David Shoemaker, *Daniel Bryan: Q & A With a Reluctant Hero*, GRANTLAND (Dec. 27, 2013), http://grantland.com/features/masked-man-does-qa-wwe-superstar-daniel-bryan [hereinafter Shoemaker, *Reluctant Hero*].

[7] *See* Raymond Hernandez & Joshua Brustein, *A Senate Run Brings Wrestling Into Spotlight*, N.Y. TIMES (July 15, 2010), http://www.nytimes.com/2010/07/16/nyregion/16mcmahon.html?pagewanted=all&_r=4&.

[8] Lance Pugmire, *Ultimate Takedown*, L.A. TIMES (Mar. 29, 2003), http://articles.latimes.com/2003/mar/29/entertainment/et-pugmire29.

[9] Steven Sonneveld, *Why WWE, Pro Wrestlers Should Form a Professional Wrestling Union*, BLEACHER REPORT (Mar. 9, 2012), http://bleacherreport.com/articles/1110575-wwe-news-wrestlings-risks-warrant-a-labor-unions-rewards.

[10] Pugmire, *supra* note 8. In a similar vein, Jesse "The Body" Ventura, an outspoken former professional wrestler and former Minnesota governor, actually titled his autobiography I AIN'T GOT TIME TO BLEED: REWORKING THE BODY POLITIC FROM THE BOTTOM UP (2000).

Such repercussions are often drafted into the wrestlers' contracts, which stipulate that the company may dock a certain percent from the wrestler's annual compensation, or even terminate the contract entirely, should the wrestler be unable to perform for a specified period.[11] These contractual provisions permit termination for an injury-related absence for as short as six consecutive weeks, regardless of whether the injury occurred in the ring.[12]

With the constant pressure to "wrestle through" injuries, many wrestlers resort to shortcuts, including painkillers and steroids.[13] As former WWE Diva Dawn Marie expounded:

> The vicious cycle is this: they get injured, they don't heal, because we're on the road 275 days a year where we're working and active, and they go back and they work on injuries, over injuries, over injuries, and a lot of times that leads to taking pills. . . . That's where a lot of substance abuse occurs[.][14]

These instances are not isolated and often continue after retirement. Raven recounted that, even after his retirement, he would use over 200 pain pills a day.[15]

Abuse of anabolic steroids has been rampant throughout the WWE roster for years. Wrestlers abused these illegal muscle-building supplements not only to shorten recovery times and deal with chronic injuries, but also to attain the Herculean physiques necessary to earn top-billing and more lucrative contracts.[16] In 1991, WWE Hall of Famer Bruno Sammartino all but said that steroid-abuse was expected from the wrestlers: "'[t]here was a joke: If you did not test positive for steroids, you were fired.'"[17]

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[11] Sonneveld, *supra* note 9; *see also* World Wrestling Federation Entertainment, Inc. Booking Contract, Levy v. World Wrestling Entertainment, Inc., Civil Action No. 3:08–01289 (PCD), 2009 WL 455258 (D. Conn. Feb. 23, 2009), 2008 WL 7154752 [hereinafter Raven's Contract].

[12] Sonneveld, *supra* note 9; *see also* Raven's Contract, *supra* note 11, § 10.2(b).

[13] Pugmire, *supra* note 8.

[14] Sonneveld, *supra* note 9 (internal quotation marks omitted).

[15] Swartz, *supra* note 3.

[16] *Id.*

[17] *Id.* In interviews with *Grantland* wrestling correspondent David Shoemaker, wrestlers Daniel Bryan and Chris Hero hinted at the WWE's preference for size over actual wrestling ability, noting that "[i]n WWE, the size difference is so much greater, [and] the guys are so much bigger" than in the indie wrestling circuit that at least one WWE wrestler "looks like an action figure." Shoemaker, *Reluctant Hero*, *supra* note 6; *see also* David Shoemaker, *Can Indie Wrestling Survive in WWE?*, GRANTLAND (Dec. 3, 2013), http://grantland.com/features/can-indie-wrestling-survive-wwe/ [hereinafter Shoemaker, *Indie Wrestling*].

Unfortunately, substance abuse is not limited to steroids and painkillers. Professional wrestlers tend to lead what some have described as a "rock god lifestyle," fraught with many sleepless nights full of alcohol and recreational drug use.[18] The "circuslike" lifestyle of the profession attracts testosterone-fueled young men who have few career options.[19] "Only a handful of stars have more than a high school education."[20] Former wrestler Larry "The Axe" Hennig, who lost his son and WWE Hall of Famer Curt "Mr. Perfect" Hennig at the age of forty-four to a cocaine-induced heart attack, remarked: "[t]here seems to be a pattern here. The pressures, this 'live hard, die young' mentality, is definitely out there."[21]

Wrestling's long-term health effects are undeniable. *USA Today* found that between 1997 and 2003, of the over one-thousand wrestlers who worked in various professional wrestling circuits worldwide, at least sixty-five died.[22] Twenty-five of those deaths were due to heart attacks or other coronary problems, creating a rate that medical experts said was "extraordinarily high . . . for people that young."[23] Autopsies have revealed that many of the wrestlers had enlarged hearts, a telltale symptom of steroid abuse.[24] In more than half of the deaths, use of painkillers, cocaine, and other drugs was evident.[25] Overall, the mortality rates of professional wrestlers are staggering:

> The costs are high. Wrestlers have death rates about seven times higher than the general U.S. population. . . . They are 12 times more likely to die from heart disease than other Americans 25 to 44. . . . And USA TODAY research shows that wrestlers are about 20 times more likely to die before 45 than are pro football players, another profession that's exceptionally hard on the body.[26]

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[18] Swartz, *supra* note 3.
[19] *Id.*
[20] *Id.*
[21] Pugmire, *supra* note 8.
[22] Swartz, *supra* note 3.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* Less scientific, personal accounts from wrestlers themselves are similarly disturbing. For example, in 2007, wrestler Andrew Martin remarked:

> "I just turned 32 years old and went to eight funerals. As bad as it may sound, it made me open my eyes and take my foot out [sic] the grave. I don't want to join that club. Either you clean up and straighten up, or lay down beside them."

As the body count increased, public awareness of wrestling's epidemic grew, and the WWE could no longer ignore the numbers. The WWE took action in 2006 by instituting the "wellness policy" following a string of high-profile deaths on its current and former roster.[27] The wellness policy required the wrestlers to submit to random drug and steroid testing throughout the year.[28] Within the next twelve months of the program's implementation, "40 percent of the WWE's wrestlers tested positive for steroids and other banned drugs."[29] Unfortunately for the WWE, the most infamous death in the WWE's history—Chris Benoit's double murder-suicide—occurred just fifteen months after the wellness policy began.[30]

Many industry analysts view the program as nothing more than a public relations stunt, arguing that the wellness policy's leniency rendered it ineffective.[31] For instance, the program allows violators to continue wrestling at "selected" shows with pay after positive tests solely for the purpose of wrapping up storylines.[32] As Wade Keller, editor of the *Pro Wrestling Torch*, put it, "'[o]ne of [the] biggest stars can test positive a week before WrestleMania and still make a million dollars.'"[33] Furthermore, aside from the random drug tests, from July 2007 to March 2008, only 3 of 505 wrestlers were tested on grounds of "reasonable suspicion,"[34] a laughably low number. After all, "[t]his is wrestling. Everyone is suspect."[35]

WWE CEO Vince McMahon, himself an admitted steroid user,[36] has long countered that the wellness policy, coupled with the WWE's paying for in-ring injuries and drug rehabilitation programs for past employees, proves that the company has its wrestlers' best interests at heart.[37] As to the notion that the WWE's culture all but encouraged drug use, McMahon responds: "'[t]hat's a cop-out . . . . These guys took steroids because they

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Shaun Assael, *WWE and Steroids: Still a Tough Target*, ESPN (Apr. 13, 2009), http://sports.espn.go.com/espn/e60/columns/story?columnist=assael_shaun&id=4055522. Sadly, less than a year later, Martin himself died of an Oxycodone overdose. *Id.*

[27] *See, e.g.*, Assael, *supra* note 26. One of the most notable deaths was that of Eddie Guerrero, a beloved superstar who was found dead at thirty-eight in his hotel room before a show. Guerrero was believed to be the sixtieth wrestler to die before the age of fifty that decade. *Id.*

[28] *Id.*

[29] *Id.*

[30] Sonneveld, *supra* note 9.

[31] Assael, *supra* note 26.

[32] Hernandez & Brustein, *supra* note 7.

[33] Assael, *supra* note 26.

[34] *Id.*

[35] *Id.* (emphasis omitted).

[36] John Milner, *Vince McMahon*, SLAM SPORTS, http://slam.canoe.ca/Slam/Wrestling/Bios/mcmahon-vince.html (last visited Feb. 18, 2014).

[37] *See* Hernandez & Brustein, *supra* note 7.

wanted to.'"[38] McMahon further contends that he and his company have been the target of a witch hunt due to the company's occasionally salacious, if not obscene, content, and McMahon's famously prickly personality.[39] As to media depictions of him as a cold and ruthless tyrant over an oppressive organization, McMahon responds: "I'm a human being and a businessman . . . . If people die, they can't perform for you. From the human being's perspective, how do you think I feel? Do you think I'm the . . . devil?"[40]

Regardless of McMahon's attitude towards his performers, a professional wrestling career is not conducive to a long, healthy life. Thus, it would seem, wrestlers are one of the classes most in need of benefits during and after their careers. Yet the WWE circumvents providing almost all benefits by ingeniously classifying their wrestlers as independent contractors rather than employees, despite the resemblance to a classic employer-employee arrangement.[41] As a result, the wrestlers are unable to bargain collectively through a union, and the company is absolved from providing health insurance, Social Security and Medicare contributions, and unemployment insurance.[42] The wrestlers are further burdened by a 15% self-employment tax.[43]

The WWE has long operated in this manner with little resistance from its wrestlers, who cite a fear of crossing the McMahons and a lack of other viable wrestling alternatives should they lose their jobs.[44] Consequently, few, if any, active wrestlers are willing to speak on the issue. In 1987, Jesse "The Body" Ventura tried to organize his fellow wrestlers into a union but found little support.[45] The blowback from his movement was substantial, and according to Ventura, almost cost him his career.[46] In a curious bit of

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[38] Swartz, *supra* note 3.

[39] *See id.* McMahon argues: "'Because we are the most visible organization, we get the black eye . . . . It is alarming whenever young people pass away from these insidious causes, but you can't help someone if they don't want to help themselves.'" *Id.*

[40] Pugmire, *supra* note 8.

[41] Sonneveld, *supra* note 9.

[42] Hernandez & Brustein, *supra* note 7.

[43] *See* Susan Schwochau, *Identifying an Independent Contractor for Tax Purposes: Can Clarity and Fairness Be Achieved?*, 84 IOWA L. REV. 163, 172 (1998).

[44] Hernandez & Brustein, *supra* note 7.

[45] Sonneveld, *supra* note 9.

[46] Brook Gladstone & David Shoemaker, *Real and Unreal in Professional Wrestling*, ON THE MEDIA (Oct. 14, 2011), http://www.onthemedia.org/story/164736-real-and-unreal-professional-wrestling/transcript/.

trivia, Ventura was apparently ratted out to Vince McMahon by Terry Bollea, better known as wrestling legend Hulk Hogan.[47]

Hogan's betrayal evidences a major obstacle to unionization: the wrestlers capable of spearheading a unionization movement are the ones with the least incentive to do so.[48] *Grantland* wrestling correspondent David Shoemaker characterized the Ventura-Hogan incident as follows: "[i]t's hard to imagine a more blatant example of a top star protecting his status by sabotaging collective action."[49] In essence, the only nonexpendable stars (from the WWE's perspective) are already so well compensated that they have little reason to alter the status quo.[50]

The WWE has some 140 to 150 wrestlers under contract at any given time.[51] While the marquee names of wrestling make millions, the pay grade is steep, and the vast majority do not share in such good fortune.[52] There is an urgency to protect this majority because, without a union, there could be a "race to the bottom" among wrestlers, whereby "workers [get] ahead by their willingness to expose themselves to ever greater risks for less pay."[53]

Clouding this issue is the natural inclination to demonize McMahon and his company. Painting McMahon as a modern-day robber baron fueled by unrestrained capitalistic greed and the WWE as a nefarious institution eager to chew up and spit out cheap labor is easy, especially given the trail of bodies the company has left in its wake during its decades-long ascendance. However, that emotional response to this issue does not accurately portray the WWE or its wrestlers' current situation. The fact is, as the WWE has grown, and its treatment of its wrestlers has moved further away from an employer-independent contractor relationship, so too have the bank

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[47] David Shoemaker, *On WWE and Organized Labor*, GRANTLAND (July 18, 2012), http://grantland.com/features/wwe-hell-cell-john-cena-history-wrestling-real-scripted-labor-movement/ [hereinafter Shoemaker, *Organized Labor*].

[48] *Id.*

[49] *Id.*

[50] Reminiscent of Hogan in 1987, in a recent roundtable discussion of the issue on *Larry King Live*, John Cena, currently one of the WWE's biggest and most well-compensated stars, unsurprisingly dodged the question of unionization and defended the WWE's stance on the grounds that wrestlers "know what they're getting into" and that "[n]obody is forcing them to get in the ring." *Larry King Live* (CNN television broadcast July 9, 2007), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0707/09/lkl.01.html (transcript).

[51] Hernandez & Brustein, *supra* note 7.

[52] *Id.* ("While big stars in the W.W.E. can land contracts worth more than $1 million annually, others earn less, with base salaries starting at about $35,000 for wrestlers in the developmental program. 'Most of them are not wealthy and have relatively short careers,' [Editor of *Wrestling Observer Newsletter* Dave] Meltzer said. 'It's a hard profession.'").

[53] Sonneveld, *supra* note 9.

accounts of hundreds of its stars. In many respects, the WWE takes good, if not exceptional, care of its talent. After all, as WWE spokesman Robert Zimmerman eagerly reminds us, "'[t]he average WWE performer earns more than $550,000 annually while only wrestling less than three days per week . . . . [And the] WWE covers 100 percent of all costs associated with any in-ring related injuries and rehabilitation.'"[54] There is also an argument to be made that it is insincere to point to the well-documented plight of former WWE wrestlers as the impetus for change when those horror stories simply do not occur with the same frequency, if at all, in the WWE as it currently exists. By many accounts, gone are the days of all-night partying, drinking, and drug use.[55] Rather, the WWE wrestlers of today seem to have learned from the mistakes of their predecessors and have taken a much more restrained, disciplined approach to their craft.[56]

Regardless of whether the WWE is actually more benevolent than it is popularly perceived, the classification of a worker as either an employee or an independent contractor is a question of law.[57] After properly applying any number of accepted objective tests to make this determination, the WWE's classification of its wrestlers as independent contractors appears to be patently wrong.

The first step to unionization and, hence, collective bargaining, will be characterizing WWE wrestlers as employees in a court of law. Unsurprisingly, three former WWE wrestlers accused the WWE of employee misclassification in 2008, but their case was dismissed on procedural grounds.[58] This Note will argue that those wrestlers' claims were correct. First, I will discuss the development of the relevant laws for the employment classification determination of a worker. Next, I will apply the relevant rules to the case of WWE wrestlers using an accepted legal test

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[54] Brian Lockhart, *WWE: State Auditing Company for Misclassification of Employees*, CTPOST.COM (Sept. 14, 2010), http://www.ctpost.com/news/article/WWE-State-investigating-company-for-657735.php. It is likely that those dollar figures reflect the salaries of wrestlers on the WWE's active roster, and not under developmental contracts.

[55] *See* Swartz, *supra* note 3.

[56] *Id.* ("Major promoters say the industry has moved on from its 'Wild, Wild West' days of the late 1980s. Young wrestlers take better care of themselves. 'The new guys play PlayStation in their hotel rooms,' wrestler Sean Waltman, 31, says.").

[57] *See* Breaux & Daigle, Inc. v. United States, 900 F.2d 49, 51 (5th Cir. 1990) (noting that whether evidence supports the existence of a particular factor is a question of fact, but the conclusion drawn from the combination of factors—whether an employment relationship exists—is a question of law).

[58] Shoemaker, *Organized Labor*, *supra* note 47. The wrestlers sued for breach of contract and unjust enrichment. *See Raven Among Three Wrestlers Suing WWE Over Independent Contractor Classification*, PROWRESTLING.NET (Aug. 8, 2008), http://www.prowrestling.net/artman/publish/WWE/article1002388.shtml.

for the determination. Finally, I will argue that WWE wrestlers must be legally classified as employees and discuss the implications of this finding, namely, the realization that the WWE has been illegally depriving its wrestlers of millions in benefits for nearly fifty years.

II. HISTORY

The distinction between employees and independent contractors has long been crucial to determining the extent of an employer's liability to third parties for the torts of his workers through the doctrine of respondeat superior.[59] Under the doctrine, an employer is liable for the damages caused by a worker if the worker is an agent of the employer and acting within the scope of his employment at the time of the tortious conduct.[60] However, employers could traditionally avoid liability under respondeat superior if the worker was characterized as an independent contractor rather than an employee.[61]

This distinction became especially important in 1939 when Congress enacted the National Labor Relations Act (NLRA), which was designed to protect the rights of employees by preventing abusive management practices by granting collective bargaining rights to unions.[62] Besides the right to organize, the NLRA granted a number of new protections to employees, but it did not offer the same protections to independent contractors, making the incentive to classify workers as independent contractors even more alluring to employers.[63]

To distinguish between employees and independent contractors, courts have applied the so-called "right of control" test, which has been articulated as follows:

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

[60] BLACK'S LAW DICTIONARY 1426 (9th ed. 2009) ("The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency."). For our purposes, "agent" is synonymous with employee.

[61] *See* C. B. L., *supra* note 59, § 1.

[62] Andrew A. Lipsky, *Participatory Management Schemes, the Law, and Workers' Rights: A Proposed Framework of Analysis*, 39 AM. U. L. REV. 667, 667–68 (1990) ("In response to years of industrial strife and social unrest, Congress enacted the National Labor Relations Act (NLRA) in 1939. One of the NLRA's primary purposes was to facilitate and to protect labor's ability to organize and to take collective action. Specifically, the NLRA requires that labor be free to organize and to bargain collectively on equal terms with employers.").

[63] 29 C.F.R. § 104.201 (2012) (emphasis added) (denying NLRA protections to "agricultural laborers, supervisors, or *independent contractors*").

> "[T]he relationship of [employer and employee] exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks."[64]

Although it is difficult to establish the exact degree of control necessary to constitute an employer-employee relationship, "'the basic test is whether the employer has the right of control over the manner and means of the work being done.'"[65] In applying the right of control test to any employer-worker relationship, "each indicium of control must be viewed in relation to each other and the surrounding circumstances."[66]

The Restatement (Third) of Agency enumerates several factors to consider in determining the extent of control an employer exercises over a worker.[67] Weighing those factors will ultimately determine if an individual is an employee or an independent contractor.[68]

To supplement the Restatement's guidance for making the distinction between employees and independent contractors, the Internal Revenue Service (IRS) has promulgated its so-called "20-factor test."[69] While the IRS and courts generally apply the same test, factfinders may apply a given test differently based on how they weigh certain factors and on the occupation in question.[70] Additionally, there are some factors that appear in the 20-factor test that do not appear in either the Restatement's list or some

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[64] Mayfield v. Boy Scouts of Am., 643 N.E.2d 565, 569 (Ohio Ct. App. 1994) (quoting Hanson v. Kynast, 494 N.E.2d 1091, 1094 (Ohio 1986)).

[65] *Id.* (quoting Duke v. Sanymetal Prods. Co., 286 N.E.2d 324, 327 (Ohio Ct. App. 1972)).

[66] *Id.* (citing *Duke*, 286 N.E.2d at 327).

[67] The Restatement's non-exhaustive list of "factual indicia" relevant to the employer-independent contractor determination are as follows:

> The extent of control that the agent and the principal have agreed the principal may exercise over details of the work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal's direction or without supervision; the skill required in the agent's occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent's work is part of the principal's regular business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business.

RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (2006).

[68] *See id.*

[69] *See* Rev. Rul. 87-41, 1987-1 C.B. 296, 296–99 (setting forth twenty factors "identified as indicating whether sufficient control is present to establish an employer-employee relationship").

[70] *See* Schwochau, *supra* note 43, at 181–82.

court-produced lists of factors, and *vice versa*.[71] The 20-factor test does carry some precedential weight, as courts have cited each of the twenty factors in determining whether an employer-employee relationship exists.[72]

With respect to athletes, the distinction between employees and independent contractors is generally based on whether the athlete is a member of a team sport, with members of team sports regarded as employees,[73] though there are exceptions.[74] The following analysis will focus primarily on the application of the factors enumerated by the IRS to wrestling, though comparisons of a wrestler's craft with those of other types of athletes and performance artists are compelling.

III. ANALYSIS

As a foreword to my analysis, it is important to note that any analysis of professional wrestlers' relationship with the WWE will necessarily be complex and rife with uncertainty. The world of professional wrestling has aspects that are, in many ways, similar to various other occupations, and yet it is simultaneously an entirely unique industry. It is a basic tenet of the WWE that a wrestler is to obey orders, that is, follow the script. After all, wrestlers have to comply with instructions regarding how to wrestle and

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[71] *Id.* at 181 n.115 ("For example, whether training is provided by the hiring party, whether services must be personally rendered by the worker, whether the worker pays business or travel expenses, and whether the worker must present reports to the hiring party are factors that appear on the IRS list but do not appear in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), or *Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216 (Ct. Cl. 1965). There are also some factors in court-produced lists that do not appear in the Revenue Ruling. As the *Ware* court noted, the IRS list does not include 'the tax treatment of the hired party,' a factor listed in *Reid*.").

[72] *See id.* at 181–82 (citing 303 W. 42nd St. Enters. v. IRS, 916 F. Supp. 349 (S.D.N.Y. 1996)) (analyzing each of the IRS's twenty factors).

[73] Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 100–01 (2008) ("In team sports, professional athletes generally are employees of their respective clubs who are paid an agreed salary, which is a multi-million dollar amount for most National Football League ('NFL'), Major League Baseball ('MLB'), National Basketball Association ('NBA'), and National Hockey League ('NHL') players. Professional athletes who participate in individual sports such as golf and tennis usually are independent contractors who must satisfy the event organizer's qualifying criteria in order to participate in organized competitions.").

[74] For example, members of the Association of Volleyball Professionals (AVP) are considered independent contractors, as are stock car racers in the National Association of Stock Car Racing (NASCAR), which some may argue is a "team sport" given the importance of a driver's pit crew. Rod Hilpirt et al., *Show Me the Money! A Cross-Sport Comparative Study of Compensation for Independent Contractor Professional Athletes*, THE SPORT J. (Mar. 14, 2008), http://thesportjournal.org/article/show-me-the-money-a-cross-sport-comparative-study-of-compensation-for-independent-contractor-professional-athletes/.

what to say in order to put on a good show or for storylines to make any sense.[75] Furthermore, every wrestler holds the life of his opponent in his hands every time he enters the ring, as even slight errors in coordination between wrestlers could lead to "botches" that result in serious injury or even death.[76] Conversely, there is a certain amount of freedom and creativity inherent in all forms of live entertainment, and this is certainly true in professional wrestling as well. The relationship between the WWE and its wrestlers defies straightforward analysis because the power dynamic that exists between them is hazy and fluid, and the WWE exercises its control over the wrestlers, at best, inconsistently.

Furthermore, because the aforementioned case was dismissed, the trial court made very few findings of fact. As a result, much of the evidence on which I must rely is gleaned from the contracts of the plaintiffs in the 2008 lawsuit and industry practices long believed to be true. To some extent, some of the inner workings of the WWE are still "cloak and dagger" in an effort to preserve "kayfabe,"[77] but because the company is now publicly traded, its transparency has improved through required filings with the SEC.[78]

As a general rule, "[c]ontracts establishing an independent contractor relationship are not determinative on their face [and courts will] always . . . look beyond the contract to the facts to determine the true nature of the relationship."[79] Thus, despite explicit language in the 2008 plaintiffs' contracts stating that "[n]othing contained in this agreement shall be construed to constitute wrestler as an employee,"[80] the determination still deserves a contextual analysis. To determine whether WWE wrestlers should be classified as employees or independent contractors, the following

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[75] Granted, even when they do follow the script, matches are often lousy and the storylines are often nonsensical.

[76] *See* Alberto Cortez, *The Most Gruesome Injuries in Wrestling History*, BLEACHER REPORT (Mar. 14, 2009), http://bleacherreport.com/articles/139156-the-most-gruesome-injuries-in-wrestling-history.

[77] Kayfabe is defined as "the portrayal of events within the industry as real . . . the portrayal of professional wrestling [and the accompanying storylines] as not staged or worked." *Kayfabe*, E-WRESTLING WIKIA, http://ewrestling.wikia.com/wiki/Kayfabe (last visited June 24, 2014).

[78] WWE Executive Paul Levesque ("Triple H") concedes that "[c]ontrary to popular belief, we're not really trying to hide anything. People know what we are, they know what we do. . . . The reality shows are what they are. It's creative reality." David Shoemaker, *'Getting Ready for a Car Crash': An Interview With Triple H*, GRANTLAND (Aug. 23, 2013), http://grantland.com/features/an-interview-wwe-superstar-corporate-officer-triple-h/ [hereinafter Shoemaker, *Triple H*].

[79] Michael F. Polk, Note, *Individuals as Independent Contractors or Employees in Nebraska: An Examination of* Larson v. Hometown Communications, Inc., 248 Neb. 942, 540 N.W.2d 339 (1995), 76 NEB. L. REV. 999, 1009–10 (1997).

[80] Raven's Contract, *supra* note 11, § 13.1.

discussion applies each of the IRS factors while heeding the broader considerations outlined by the Restatement.

A. Instructions

The first IRS factor holds that if the worker is required to comply with the other person's instructions "about when, where, and how" the job is to be performed, the worker is ordinarily an employee.[81] This factor is very similar to the Restatement's first factor, which considers "the extent of control that the agent and the principal have agreed the principal may exercise over details of the work."[82]

The WWE maintains substantial control over the particulars of its wrestlers' performance. In the complaint of the 2008 lawsuit filed by former WWE wrestlers Scott Levy (better known as "Raven"), Christopher Klucsarits (better known as "Chris Kanyon"), and Michael Sanders (who wrestled under his given name), the plaintiffs alleged that the WWE exercised "total control" over all aspects of the wrestlers' careers.[83] Specifically, the plaintiffs claimed that the WWE determined: their physical training and skill training regimens; the location of where they performed; the time they performed; who they competed with and against; the duration and outcome of each match; their costumes, props, and hairstyles; their stage personas; and the specific traits, mannerisms, and "signature moves" of those stage personas.[84] Additionally, the wrestlers claimed that they were obligated to adhere to certain storylines, including the specific dialogue of "the requisite pre- and post-match boasting and badmouthing of the wrestlers' opponent(s)."[85]

The WWE exercises substantial control over the details of its wrestlers' performances, but the plaintiffs' characterization is overstated. Outcomes and durations of WWE matches are predetermined, but often only the finishing sequence of a match is tightly scripted.[86] Up until the finishing sequence, wrestlers are often given improvisational leeway, gauging the

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[81] Rev. Rul. 87-41, 1987-1 C.B. 296, 298.

[82] RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (2006).

[83] Complaint at 2, Levy v. World Wrestling Entertainment, Inc., Civil Action No. 3:08–01289 (PCD), 2009 WL 455258 (D. Conn. Feb. 23, 2009), 2008 WL 5707884.

[84] *Id.*

[85] *Id.*

[86] *See* Ayuban Antonio Tomas, *Triple Threat Match: Independent Contractors v. Employees v. Pro Wrestling – Part One*, AVVO (2008), http://www.avvo.com/legal-guides/ugc/triple-threat-match--independant-contractors-v-employees-v-pro-wrestling---part-one-1 [hereinafter Tomas, *Part One*].

crowd's reaction themselves and reacting accordingly.[87] As former WWE wrestler Chris Hero put it, "[t]here are a lot of ways to put on a good match. Wrestling is art, and art is subjective . . . . Wrestling is a game with the crowd."[88] While some room for improvisation exists, the WWE has prohibited wrestlers from performing specific moves in the ring for safety[89] or other reasons.[90]

The extent of control the WWE exercises over its wrestlers' speech is similarly fluid. Though WWE writers sometimes dictate the dialogue a young wrestler must say during their onscreen "promos," veteran wrestlers are often just given bullet points that they must touch on and are free to improvise the rest.[91]

The WWE's exercise of control over its wrestlers' in-ring personas or "gimmicks" is significant. In many instances, the company has forced wrestlers to either accept the WWE's preferred character or be terminated. In a particularly distasteful example, Nick Dinsmore, a respected technical wrestler on the independent circuit, was forced to take on the persona of "Eugene," a bumbling fool whom broadcasters hinted had Down's Syndrome.[92] Similarly, there is a long history of the WWE assigning African-American wrestlers gimmicks as thugs or slaves, and depicting foreigners as savages, communists, or terrorists.[93]

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[87] *Id.*

[88] Shoemaker, *Indie Wrestling*, *supra* note 17. Hero continued: "[t]here are two forces—one wants to give the fans what they want and the other one wants to take it away. It's the heel cutting off the babyface. And then you give them what they want and if you do it right, it's better than they even imagined, and then it's over." *Id.*

[89] For example, the WWE prohibited the use of a "piledriver" in 2000. The move consists of one wrestler dropping the crown of his opponent's head onto the canvas. If performed incorrectly, the piledriver poses a serious risk of trauma to the head and compression to the spine. The move has left multiple WWE wrestlers with broken necks, most famously "Stone Cold" Steve Austin in 1997. Similarly, WWE no longer allows wrestlers to take unprotected "head-shots" from steel folding-chairs due to recent concerns about the long-term effects of concussions. *See Piledriver*, WIKIA, http://prowrestling.wikia.com/wiki/Piledriver (last visited Feb. 19, 2014).

[90] The WWE has also prohibited any wrestler from performing a "knife-edge chop," a disrespectful, backhanded slap across an opponent's chest made famous by WWE legend Ric Flair, who was at the time working for a rival promotion. Some speculate that the move was banned in part because it was also a staple of the infamous Chris Benoit, who committed a double murder-suicide in 2007. *See* Tomas, *Part One*, *supra* note 86.

[91] *See id.*

[92] *Id.*

[93] David Shoemaker, *A (Very) Concise History of Racism in Wrestling, 1980-Present*, GRANTLAND (Nov. 6, 2013), http://grantland.com/features/excerpt-david-shoemaker-new-book-concise-history-racism-wrestling/.

While WWE writers often assign a wrestler his initial gimmick, wrestlers may have considerable discretion over how their characters progress.[94] In many instances, character development involves a collaborative dialogue between a wrestler and the WWE creative team rather than being "total[ly] control[led]" by the WWE, as the 2008 plaintiffs alleged.[95] In a 2013 interview, Triple H recalled that early in his career he and Vince McMahon would "bounce around some ideas" regarding his character's image and storyline, though McMahon always had the final say.[96] Former WWE wrestler "Stone Cold" Steve Austin has long maintained that the most successful wrestlers are the ones who draw on aspects of their real-life personalities and "crank[] [up] the volume . . . as far as it will go."[97] In that sense, the best wrestlers are not playing characters so much as they are depicting exaggerated versions of themselves.[98]

The WWE exercises total control over the details of when and where wrestlers perform. WWE's wrestlers must be at the specified venue several hours before a live broadcast.[99] Additionally, wrestlers are required to tape off-site interviews and vignettes and appear at other promotional events.[100]

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[94] *See* Paul Magno, *Pro Wrestling's Most Successful Bad Gimmicks of All Time*, YAHOO SPORTS (Feb. 12, 2014, 2:40 PM), http://sports.yahoo.com/news/pro-wrestling-39-most-successful-bad-gimmicks-time-144700619--spt.html.

[95] Shoemaker, *Triple H*, *supra* note 78.

[96] *Id.* Triple H recalled: "I'd give Vince my opinions. Sometimes he liked it, sometimes he didn't, but we kind of established that working relationship . . . ." *Id.* Later in the same interview, Triple H supported the notion that the substance of a gimmick comes from the wrestler himself by deferring all credit to wrestler Windham Rotunda for his recent success under a new gimmick as the cultish leader of a hillbilly family. He said: "If somebody asks me who created 'Bray Wyatt,' I tell them: Bray Wyatt did. We just helped set the table. That's the whole point. We give these guys every tool possible to succeed." *Id.*

[97] Nick Haynes, *When Gimmicks "Infringe" on a Wrestler's Talent*, BLEACHER REPORT (June 5, 2009), http://bleacherreport.com/articles/192810-when-gimmicks-infringe-on-a-wrestlers-talent (noting that "[e]ven Austin, after being given bad gimmick after bad gimmick, got proactive in the process and devised the Stone Cold gimmick from scratch").

[98] However, with the numerous wrestler-generated gimmick success stories comes no shortage of wrestlers who have been saddled with truly awful gimmicks. A quick rundown of a few exceptionally bad gimmicks: "The Spirit Squad" (a gang of evil male cheerleaders); "Eugene" (a bumbling fool whom broadcasters hinted had Down's Syndrome); "Kizarney" (an evil carnival worker); "Paul Burchill" (claimed to be related to Captain Blackbeard and dressed the part); "The Fat Chick Thrilla" (a bachelor obsessed with overweight women); "Max Moon" (a cyborg from the future); and last but not least, "The Gobbledy Gooker" (a giant chicken who made his debut by literally hatching from an enormous egg). TC Vreeland, *WWE: Ranking the 40 Worst Gimmicks in History*, BLEACHER REPORT (June 1, 2011), http://bleacherreport.com/articles/717264-wwe-ranking-the-40-worst-gimmicks-in-history.

[99] *See* Nathan Ryan, *We Take You Behind the Curtain of World Wrestling Entertainment with the World Heavyweight Champion*, FOX SPORTS (Apr. 16, 2013, 1:20 PM),

While wrestlers maintain some input, the WWE still exercises considerable control and always has the final say on the details of their performance. The extent of control that the WWE exercises over the details of its wrestlers' work appears to satisfy the level of an employer-employee relationship.

B. Training

The second IRS factor states that if the employer trains the worker for the job by "work[ing] with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods," the relationship tends to be classified as employer-employee.[101] Training indicates the employer wants the services "performed in a particular method or manner."[102] On the other hand, an independent contractor usually receives no training from the employer who is purchasing his or her services.[103]

The plaintiffs' allegation that the WWE had total control over their training regimens corresponds with other evidence, which suggests that the company trains its wrestlers identically to an employer-employee arrangement. Decades ago when the WWE (then the WWF) still had numerous, though clearly inferior, competitors in the form of various regional wrestling promotions, it could be selective in its hiring process due to the number of experienced wrestlers available.[104] These veterans received minimal "training," often just needing to be broken into a new gimmick (as discussed under the first factor).[105]

In 2001, after the WWE bought World Championship Wrestling (WCW)—its last legitimate competitor still in business[106]—the field of ring and camera-ready wrestlers from which the company could hire dwindled.[107] Recognizing the need to develop talent internally, the WWE

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http://www.foxsports.com.au/more-sports/weird-and-wacky/behind-the-curtain-and-beyond-the-ring-look-at-world-wrestling-entertainment/story-fn8boe91-1226599355445.

[100] Tomas, *Part One*, *supra* note 86.

[101] Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (citing Rev. Rul. 70-630, 1970-2 C.B. 229).

[102] *Id.* (citing Rev. Rul. 70-630, 1970-2 C.B. 229).

[103] *See id.*

[104] *See* Ayuban Antonio Tomas, *Triple Threat Match: Independent Contractors v. Employees v. Pro Wrestling – Part Two*, AVVO (2008), http://www.avvo.com/legal-guides/ugc/triple-threat-match--independant-contractors-v-employees-v-pro-wrestling---part-two [hereinafter Tomas, *Part Two*].

[105] *See id.*

[106] *See* Justin Watry, *WWE Buys WCW: A Look Back 11 Years Later on Wrestling History*, BLEACHER REPORT (Mar. 26, 2012), http://bleacherreport.com/articles/1119810-wwe-buys-wcw-a-look-back-11-years-later-on-wrestling-history.

[107] *See* Tomas, *Part Two*, *supra* note 104.

developed a "farm system."[108] Just as a Major League Baseball team will send a prospect who is not ready for the big leagues to independently-owned, affiliate clubs to hone his skills, the WWE sent its prospects to its independently-owned, affiliate developmental professional wrestling promotions.[109]

In 2012, the WWE acquired and consolidated all of its farm systems.[110] The WWE now develops all of its prospects internally in a conglomerate known as NXT Wrestling.[111] In 2013, the WWE opened the WWE Performance Center, a $2.5 million state-of-the-art training facility where more than seventy wrestlers work to improve all aspects of their craft, developing both their physical and theatrical skills.[112] The WWE currently trains all wrestlers internally, and its recent use of farm systems is analogous to the farm systems used in Major League Baseball, which recognizes its players as employees.[113] By the same token, the extent of training the WWE provides indicates an employer-employee relationship.

C. Integration

The third IRS factor states that "[w]hen the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business," indicating that they are employees.[114] In essence, the third factor turns on whether the employer can continue to run his business without the services provided by the worker in question.

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[108] *Id.*

[109] *Id.* From 2000 to 2008, Ohio Valley Wrestling (OVW) was this WWE-affiliated promotion, and from 2008 to 2012, it was Florida Championship Wrestling (FCW). *See Training School*, OVW WRESTLING, http://www.ovwrestling.com/training (last visited Feb. 19, 2014); *see also* Luis Campos, *WWE News: Florida Championship Wrestling Officially Becomes NXT Wrestling*, BLEACHER REPORT (Aug. 15, 2012), http://bleacherreport.com/articles/1298246-wwe-news-florida-championship-wrestling-officially-becomes-nxt-wrestling.

[110] *See* Campos, *supra* note 109.

[111] *See id.*

[112] Kyle Hightower, *New Training Center Cultivating WWE's Next Crop*, YAHOO! (Aug. 7, 2013), http://news.yahoo.com/training-center-cultivating-wwes-next-crop-080002154.html.

[113] Mitten & Davis, *supra* note 73, at 100.

[114] Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (citing United States v. Silk, 331 U.S. 704 (1947)).

The WWE engages in the business of professional wrestling (or as the company calls it, "Sports Entertainment").[115] Clearly, this business would collapse without wrestlers. Thus, the third factor weighs heavily in favor of the wrestlers being classified as employees.

The WWE may contend that because any one wrestler is replaceable and the business could continue in his absence, wrestlers are independent contractors. However, this is an improper application of the third IRS factor. The integration factor must be applied to the class of workers as an aggregate, not to any one worker in isolation.

D. Services Rendered Personally

The fourth IRS factor states that if "the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results," which further indicates a degree of control over the work that is consistent with the employer-employee relationship.[116] Once again, applying this factor to WWE wrestlers bolsters their standing as employees. Obviously, a wrestler cannot outsource or subcontract his work. The job requires personal appearances.

E. Hiring, Supervising, and Paying Assistants

The fifth IRS factor states that if "the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job," indicating an employer-employee relationship.[117] In contrast, an independent contractor is hired and left to subcontract any additional workers needed to complete the job.[118]

This factor does not apply neatly to the job of a professional wrestler, but it nevertheless weighs in favor of wrestlers being deemed employees. The WWE exercises supervision as it intently watches the matches and directs the outcomes. Also, wrestlers are not responsible for hiring or

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[115] *See* Vaughn Johnson, *WWE DVD Review: 'The History of WWE: 50 Years of Sports Entertainment,'* PHILLY.COM (Nov. 28, 2013), http://www.philly.com/philly/blogs/the-squared-circle/WWE-DVD-review-The-History-of-WWE-50-Years-of-Sports-Entertainment.html.

[116] Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (citing Rev. Rul. 55-695, 1955-2 C.B. 410).

[117] *Id.*

[118] *Id.*

paying individuals who assist in the creation of the WWE's desired product.[119]

F. Continuing Relationship

The sixth IRS factor states that a "continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists."[120] Independent contractors, on the other hand, complete a specified job, and when the job is done, so is the contract.[121]

The application of this factor to professional wrestlers' relationship with the WWE is a bit muddled. Every wrestler signs a "booking contract," and when it expires, the wrestler is released from the obligations therein. Such a scenario would indicate an employer-independent contractor relationship. However, the nature of booking contracts is often long-term,[122] and resembles employer-employee arrangements. Wrestlers' contracts give the WWE the option to terminate the contract at-will.[123] In most instances, a wrestler will continue to work for the WWE until he is fired or his contract runs its course.[124] Thus, the WWE's relationship with its wrestlers is comparable to that of an NFL team and its players,[125] who are considered employees by legal standards.[126] In both instances, an employer (the NFL team and the WWE) and the employee (the NFL player and a WWE wrestler) share the same goal of forming a long, mutually beneficial relationship whereby the employer will continually renew the

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[119] The desired product being a successful broadcast, and these assistants being any number of writers, camera operators, costume designers, make-up artists, etc.

[120] Rev. Rul. 87-41, 1987-1 C.B. 296, 298.

[121] *See id.*

[122] *See* Raven's Contract, *supra* note 11, § 6.1. Each of the three wrestlers in the 2008 lawsuit signed three-year contracts. *Id.*

[123] *Id.* § 11.

[124] Section 6.1 of the wrestlers' contracts refers to the agreement as a three-year term, which is automatically renewed each year, unless the WWE decides to release a wrestler at least ninety days prior to the end of each "contract year." *Id.* § 6.1.

[125] NFL players similarly work on long-term, nonguaranteed contracts that can be terminated at will. *See* Gary R. Roberts, *Interpreting the NFL Player Contract*, 3 MARQ. SPORTS L.J. 29, 32 (1992) ("[Certain provisions of a typical NFL contract] allow a club to terminate a player's contract in mid-term and owe him no further compensation. Major League Baseball and the NBA have roughly similar provisions, but in those sports virtually every player's contract has an addendum nullifying one or more of these terms, and to a significant extent, guaranteeing the player's salary for the entire term of the agreement unless there is a material breach of the contract by the player. Only a handful of players in the NFL have such an addendum on their contracts.").

[126] Mitten & Davis, *supra* note 73, at 100.

employee's contract based on his outstanding performance (be it on the gridiron or inside the squared-circle).

The IRS's test also notes that a "continuing relationship" indicative of an employer-employee relationship "may exist where work is performed at frequently recurring although irregular intervals."[127] This point is of particular relevance to WWE "legends contracts." These contracts are reserved for many established, veteran wrestlers and provide that, though a wrestler may not be on the WWE active roster at the time, he can be called in to work at the company's behest.[128] These veterans are not required to spend time training in the WWE's developmental promotions or at the Performance Center.[129]

The continuing relationship factor supports WWE wrestlers' contention that they are employees. Both parties have the goal of forming a long-lasting relationship that will often extend beyond the time period when a wrestler is on the WWE's active roster.

G. Set Hours of Work

The seventh IRS factor states that the "establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control," and thus indicates the worker is an employee.[130] This factor clearly weighs in favor of wrestlers being employees. Wrestlers must be at the specified venue several hours before any live broadcast.[131] The language of Raven's Contract is clear:

> [Promoter] shall schedule the Events and book [wrestler] for the Events. In doing so, [promoter] shall select the time and location of the Events at which [wrestler] is booked. . . . [Wrestler] shall appear at the designated location for any such Event no later than one hour before the designated time.[132]

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[127] Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (citing United States v. Silk, 331 U.S. 704 (1947)).

[128] *See* Marc Dykton, *The Return of Hulk Hogan and Last Hurrah for Hulkamania*, CHICAGONOW (Feb. 23, 2014, 11:15 AM), http://www.chicagonow.com/ringside-chicago/2014/02/the-return-of-hulk-hogan-and-hulkamanias-last-hurrah/.

[129] *See id.*

[130] Rev. Rul. 87-41, 1987-1 C.B. 296, 298 (citing Rev. Rul. 73-591, 1973-2 C.B. 337).

[131] *See supra* Part III.A.

[132] Raven's Contract, *supra* note 11, § 8.3.

Moreover, any failure to adhere to the WWE's schedule can result in a wrestler being fined, suspended, or terminated at the WWE's sole discretion.[133]

H. Full Time Required

The eighth factor states that if "the worker must devote substantially full time to the business of the person . . . for whom the services are performed, [that] person . . . [has] control over the amount of time the worker spends working," indicating that the worker is an employee.[134] The rationale behind this factor is that such a commitment to one employer "impliedly restrict[s] the worker from doing other gainful work," and it would be illogical to designate the worker an independent contractor given a nearly exclusive working relationship with one employer.[135] In contrast, an independent contractor "is free to work when and for whom he or she chooses."[136]

Again, this factor strongly supports the claim that wrestlers are employees. Being a professional wrestler is a fifty-two week-a-year job with no offseason, and the hectic travel schedule[137] certainly "impliedly restrict[s]" wrestlers from seeking work elsewhere.[138] Furthermore, the wrestlers are explicitly restricted from seeking other gainful work by the terms of their contracts, which include non-compete clauses and provisions that require a wrestler to obtain WWE approval before participating in other "permitted activities."[139]

I. Doing Work on Employer's Premises

The ninth IRS factor states that if "the work is performed on the premises of the person . . . for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere," and indicates that the worker is an employee.[140] The requisite degree of control for this factor "is indicated when the person . . . for whom

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[133] *See id.*

[134] Rev. Rul. 87-41, 1987-1 C.B. 296, 299.

[135] *Id.*

[136] *Id.* (citing Rev. Rul. 56-694, 1956-2 C.B. 694).

[137] "We're on the road 250 days a year," at least for Daniel Bryan. Shoemaker, *Reluctant Hero*, *supra* note 6.

[138] Rev. Rul. 87-41, 1987-1 C.B. 296, 299.

[139] Raven's Contract, *supra* note 11, §§ 12.2, 5.2; *see also infra* Part III.Q.

[140] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 56-660, 1956-2 C.B. 693).

the services are performed [has] the right to compel the worker to travel a designated route . . . or to work at specific places as required."[141]

This factor undoubtedly bolsters the assertion that wrestlers are employees. Wrestlers do their work in WWE-leased venues, and, per the terms of the contracts, they must appear at these places.[142]

J. Order or Sequence Set

The tenth IRS factor states that if "a worker must perform services in the order or sequence set by the person . . . for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person . . . for whom the services are performed," indicating that he is an employee.[143] Again, this factor clearly indicates that wrestlers are employees. While there is a limited amount of improvisation in the ring, wrestlers must adhere to the set routine of the WWE to avoid termination. If a wrestler were allowed to work at his own pace by taking the proper amount of time off to recover from injuries, there would be no need to resort to steroids and painkillers to endure the grind of a WWE career.[144]

K. Oral or Written Reports

The eleventh IRS factor indicates that if the worker is required to "submit regular or written reports to the person . . . for whom the services are performed," it "indicates a degree of control," and thus employee status.[145] This factor is not directly applicable to the case of professional wrestlers because the WWE monitors their progress by observation rather than through written reports. WWE wrestlers are required to submit to random drug tests under the wellness policy. Even if these tests were viewed as analogous to submitting reports, it is not necessarily indicative of wrestlers' employment status, as athletes of both distinctions are often

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[141] *Id.* (citing Rev. Rul. 56-694, 1956-2 C.B. 694).

[142] *See* Raven's Contract, *supra* note 11, § 8.3.

[143] Rev. Rul. 87-41, 1987-1 C.B. 296, 299.

[144] *See* Ayuban Antonio Tomas, *Triple Threat Match: Independent Contractors v. Employees v. Pro Wrestling – Part Ten*, AVVO (2008), http://www.avvo.com/legal-guides/ugc/triple-threat-match--independant-contractors-v-employees-v-pro-wrestling---part-ten-1.

[145] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 70-309, 1970-1 C.B. 199; Rev. Rul. 68-248, 1968-1 C.B. 431).

subject to drug tests.[146] Thus, this factor bears little weight in the determination.

L. Payment by Hour, Week, Month

The twelfth IRS factor states that "[p]ayment by the hour, week, or month generally points to an employer-employee relationship," whereas "[p]ayment made by the job or on a straight commission generally indicates that the worker is an independent contractor."[147] However, payment through regular installments should not indicate an employee-employer relationship if that method is "just a convenient way of paying a lump sum agreed upon as the cost of a job."[148]

This factor is difficult to apply given the variance in how wrestlers are compensated. The three wrestlers in the 2008 case each received a weekly paycheck in proportion to their negotiated contractual minimums,[149] but they also had incentives that would pay them a percentage of ticket sales for appearances at events,[150] as well as a fixed percentage of sales of videos and merchandise featuring their likenesses.[151] These incentives are paid in a lump sum at the end of each contract year.[152] At least in regard to the three wrestlers of the 2008 lawsuit, WWE wrestlers are paid in a manner characteristic of both employees and independent contractors. However, some wrestlers may be paid only in weekly installments, and some may only receive a lump sum based on appearances.

To deal with this uncertainty, only about half of the some 140 to 150 wrestlers under contract with the WWE at any given time are actually on the active roster,[153] that is, making regular appearances.[154] Consequently, the majority of the wrestlers will earn no lump sum payment at all, equating

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[146] For instance, both the World Tennis Association (WTA), whose players are considered independent contractors, and the NFL, whose players are considered employees, are subject to drug tests. *See* INT'L TENNIS FED'N, TENNIS ANTI-DOPING PROGRAMME (2014), http://www.itftennis.com/media/163109/163109.pdf; NAT'L FOOTBALL LEAGUE, NATIONAL FOOTBALL LEAGUE POLICY AND PROGRAM FOR SUBSTANCES OF ABUSE (2010), http://images.nflplayers.com/mediaResources/files/PDFs/PlayerDevelopment/2010%20Drug%20Policy.pdf.

[147] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 74-389, 1974-2 C.B. 330).

[148] *Id.*

[149] *See* Raven's Contract, *supra* note 11, § 7.1(a).

[150] *Id.* § 7.2 This percentage is determined at the WWE's "sole discretion." *Id.*

[151] *Id.* § 7.3–7.5.

[152] *Id.* § 7.1(b).

[153] Hernandez & Brustein, *supra* note 7.

[154] *See WWE Roster*, ONLINE WORLD OF WRESTLING, http://www.onlineworldofwrestling.com/bios/wwe-roster/ (last visited Feb. 20, 2014) (listing sixty wrestlers on WWE's active roster).

their compensation to that of an employee. Thus, this factor leans towards wrestlers' employee classification.

M. Payment of Business and/or Traveling Expenses

The thirteenth IRS factor states that if "the person . . . for whom the services are performed ordinarily pay[s] the worker's business and/or traveling expenses, the worker is ordinarily an employee," as this would generally give the employer "the right to regulate and direct the worker's business activities."[155] This factor is a toss-up. Currently, the WWE pays the wrestlers' airfare from their home cities to the first event of the week and from the last event of the week back home. The costs of all flights, hotels, and other expenses in-between come out of the wrestler's pocket.[156] Due to the volume of shows, both the wrestler and the WWE incur hefty travel expenses. How much each side spends is uncertain, so for the purposes of this analysis I conclude that this factor is indeterminable.

N. Furnishing of Tools and Materials

The fourteenth IRS factor states that the "fact that the person . . . for whom the services are performed furnish[es] significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship."[157] Despite contractual terms saying the wrestlers have the obligation to provide "all costumes, wardrobe, props, and make-up" necessary for their performance,[158] it is common knowledge that the WWE provides the majority of a wrestler's "tools." On the WWE reality television show *Total Divas*, wrestlers are regularly shown consulting with the WWE wardrobe and make-up team.[159] Many wrestlers have expensive props that routinely get destroyed by rivals, and it is likely that the WWE replaces these items free of cost.[160]

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[155] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 55-144, 1955-1 C.B. 483).

[156] *See* Ayuban Antonio Tomas, *Triple Threat Match: Independent Contractors v. Employees v. Pro Wrestling – Part Thirteen*, AVVO (2008), http://www.avvo.com/legal-guides/ugc/triple-threat-match--independant-contractors-v-employees-v-pro-wrestling---part-thirteen; *see also* Raven's Contract, *supra* note 11, § 9.3.

[157] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 71-524, 1971-2 C.B. 346).

[158] *See* Raven's Contract, *supra* note 11, § 9.3.

[159] *Total Divas* (E! television series).

[160] For example, Paul Calloway, better known as "The Undertaker," used to drive an expensive motorcycle to the ring. On numerous occasions, rivals destroyed this motorcycle, which was always replaced a week or two later. Similarly, Roy Wayne Farris, better known as "The Honky Tonk Man,"

O. Significant Investment

The fifteenth IRS factor states that if "the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees . . . that factor tends to indicate that the worker is an independent contractor."[161] On the other hand, a worker's "lack of investment in facilities indicates dependence on the person . . . for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship."[162] This factor indicates that if an employer invests significant time and money to train a worker, that worker is most likely an employee.[163]

This factor strongly supports the claim that wrestlers are employees. As previously mentioned, the WWE has made significant investments in developmental promotions and training centers to help their wrestlers perfect their craft.[164] The booking contracts of the 2008 plaintiffs is silent regarding significant investments.[165]

P. Realization of Profit or Loss

The sixteenth IRS factor states that a "worker who can realize a profit or suffer a loss as a result of the worker's services . . . is generally an independent contractor, but the worker who cannot is an employee."[166] The IRS gives the example of a worker who should be classified as an independent contractor because he faces the real risk of economic loss based on his "significant investments or a bona fide liability for expenses."[167]

As previously mentioned, wrestlers do not make significant investments that would subject them to a risk of economic loss.[168] A wrestler certainly can affect his income through his performance, which may lead to more or less appearances, which ultimately may determine his lump sum payment.[169] However, the personal choices of a wrestler's performance are

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used to smash a guitar over his opponents head after his victories. It is fair to say that the wrestlers were not paying for these tools out of pocket. *See* Ayuban Antonio Tomas, *Triple Threat Match: Independent Contractors v. Employees v. Pro Wrestling – Part Fourteen*, AVVO (2008), http://www.avvo.com/legal-guides/ugc/triple-threat-match--independant-contractors-v-employees-v-pro-wrestling---part-fourteen.

[161] Rev. Rul. 87-41, 1987-1 C.B. 296, 299.

[162] *Id.* (citing Rev. Rul. 71-524, 1971-2 C.B. 346).

[163] *See id.*

[164] *See supra* Part III.B.

[165] *See* Raven's Contract, *supra* note 11, § 9.

[166] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 70-309, 1970-1 C.B. 199).

[167] *Id.*

[168] *See supra* Part III.O.

[169] Triple H suggests that it is the wrestlers themselves, not the WWE, who determines who rises to

more akin to the choices an NFL player makes during a game which determine whether his team will retain his services, rather than the type of investments and expenses to which the IRS refers. Those choices include a worker's decisions as to whom to subcontract work, what materials to buy, and so forth. A wrestler's personal decisions will have no effect on his minimum annual compensation, which for the majority of WWE wrestlers comprises the entirety of their compensation. Thus, this factor favors the wrestlers being employees.

Q. Working for More Than One Firm at a Time

The seventeenth IRS factor states that if "a worker performs . . . services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor."[170] In contrast, an employee is not permitted to work for other employers.[171] The presence of non-compete clauses in most WWE contracts makes it clear that this factor supports employee classification.[172] Non-compete clauses with varying terms are present in almost all WWE contracts.[173]

R. Making Service Available to General Public

The eighteenth IRS factor states that the "fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship."[174] A WWE wrestler cannot make his wrestling services available to anyone other than the WWE per the non-compete clause. Furthermore, a wrestler cannot profit from his character's celebrity without the WWE's approval, as he contractually

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the level of stardom when he discussed the ascendance of WWE legend Stone Cold Steve Austin: "We don't tell the fans who's going to be over. We put somebody on the table, fans react, and then we decide where to go with them. What people forget is we have a focus group every single night, 10,000 people somewhere. We didn't get Austin over. Austin got over with the fans." Shoemaker, *Triple H*, *supra* note 78.

[170] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 70-572, 1970-2 C.B. 221).

[171] *See id.*

[172] *See* Raven's Contract, *supra* note 11, § 12.2.

[173] *See id.* The non-compete clauses in the three wrestlers' contracts of the 2008 lawsuit are for one year after termination of the contract, though some are for as few as ninety days. *Id.* When WWE wrestler Brock Lesnar left the WWE in 2003 to pursue a career in the NFL, and then the Ultimate Fighting Championship (UFC), the WWE forced him to sign a ten-year non-compete clause. Lesnar has since returned to WWE. *See* Ayuban Antonio Tomas, *Triple Threat Match: Independent Contractors v. Employees v. Pro Wrestling – Part Seventeen*, AVVO (2008), http://www.avvo.com/legal-guides/ugc/triple-threat-match--independant-contractors-v-employees-v-pro-wrestling---part-seventeen.

[174] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 56-660, 1956-2 C.B. 693).

forfeits any rights to his character's likeness.[175] This factor clearly indicates that the wrestlers are employees.

S. Right to Discharge

The nineteenth IRS factor states that the "right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer" because, through this right, the "employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions."[176] On the other hand, an independent contractor "cannot be fired so long as [he] produces a result that meets the contract specifications."[177] This factor clearly indicates that the wrestlers are employees, as the WWE retains the right to end the agreement "for any reason whatsoever" provided it gives the wrestler ninety days notice.[178]

T. Right to Terminate

The twentieth and final IRS factor states that if "the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship."[179] This factor indicates that the wrestlers are independent contractors, as there is no similar right for a wrestler to prematurely end the agreement. In fact, any such breach would potentially subject a wrestler to a suit in equity,[180] and would waive any right to future payments.[181] However, when considering factors nineteen and twenty together, it is clear that the WWE has the best of both worlds: it can fire any wrestler with impunity, and it can sue for damages should a wrestler decide to walk away from his contract.[182]

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[175] *See* Raven's Contract, *supra* note 11, §§ 3.1, 3.2, 5.2.

[176] Rev. Rul. 87-41, 1987-1 C.B. 296, 299.

[177] *Id.* (citing Rev. Rul. 75-41, 1975-1 C.B. 323).

[178] Raven's Contract, *supra* note 11, § 11.

[179] Rev. Rul. 87-41, 1987-1 C.B. 296, 299 (citing Rev. Rul. 70-309, 1970-1 C.B. 199).

[180] *See* Raven's Contract, *supra* note 11, § 12.3. The contract provides that such relief may entail more than just monetary damages due to the "special, unique, and extraordinary nature" of the wrestler's and WWE's obligations to one another. *Id.*

[181] *See id.* § 12.2.

[182] Again, this aspect of WWE contracts is very similar to the nonguaranteed contract of an NFL player, who may be fired without cause and yet retains no right to freely break off the agreement from his end. *See* Roberts, *supra* note 125, at 32.

IV. RESOLUTION

The final tally of the IRS 20-factor test reveals that sixteen of the twenty factors clearly indicate that wrestlers are employees. One factor ("Right to Terminate") weighs towards wrestlers being independent contractors, one factor ("Oral or Written Reports") does not apply, and two factors ("Payment by Hour, Week, Month" and "Payment of Business and/or Traveling Expenses") do not weigh heavily towards one determination or the other. Given that the essence of the right of control test is the degree to which an employer controls the particulars of a worker's performance, it is clear that the WWE's classification of its wrestlers as independent contractors rather than employees is incorrect as a matter of law. This analysis focused exclusively on the IRS's 20-factor test, though there are other methods of analysis that were not explored in this Note.[183]

The implications of the WWE's misclassification are substantial. Employees are protected by a number of federal laws that offer no such protection to independent contractors, including the National Labor Relations Act (NLRA), the Social Security Act of 1935, the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act, the Age Discrimination in Employment Act of 1967 (ADEA), the Occupational Safety and Health Act (OSHA), the Employee Retirement Income Security Act of 1974 (ERISA), the Americans with Disabilities Act of 1990 (ADA), and the Family and Medical Leave Act of 1993 (FMLA).[184] The range of protections and benefits afforded by these laws are countless, and include employer contributions to employees' family health insurance plans, Social Security and Medicare contributions, unemployment insurance, workers' compensation benefits, protection from discrimination, and protection from wages below the statutory minimum.[185] Additionally, a correct classification would also relieve wrestlers from having to pay a 15% self-employment tax under the Self-Employment Contributions Act (SECA).[186]

The WWE's misclassification also contributes to the substantial amount of revenue that the federal government loses due to lost Social Security,

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[183] One possible analysis might have focused exclusively on WWE wrestlers' similarities and differences with other athletes who are or are not considered employees. A second method might have compared wrestlers to actors or stuntmen who are represented by collective bargaining bodies as well (the Screen Actors Guild and the American Federation of Television & Radio Artists, respectively).

[184] *See* Schwochau, *supra* note 43, at 174–75.

[185] *Id.* at 166.

[186] *Id.* at 172.

unemployment, and income tax collections.[187] The current extent of such losses is unknown, although the most recent estimates number in the billions of dollars.[188]

To resolve the WWE's misclassification, a court must find that the WWE's wrestlers are employees. There are significant impediments and deterrents for current WWE wrestlers to pursue a claim.[189] However, should a former wrestler bring a claim such as the one brought in 2008 and have the case decided on its merits, it will lead to a fundamental shift in the way that the WWE conducts business. With a court finding that professional wrestlers are employees, wrestlers will be able to unionize, bargain collectively, and eventually receive the benefits and protections to which all employees are entitled.

V. CONCLUSION

A career as a WWE wrestler is fraught with many dangers that make wrestlers susceptible to long-term injury and hardship. However, due to the WWE's classification of its wrestlers as independent contractors rather than employees, the wrestlers are denied countless benefits to which they would otherwise be entitled. Analysis of the relationship between the WWE and its wrestlers using the IRS's 20-factor test clearly demonstrates that the WWE exercises substantial control over its wrestlers. Thus, wrestlers are, in fact, employees, and they are entitled to the protections that label entails.

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[187] *Id.* at 167.

[188] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 10 (2009), *available at* http://www.gao.gov/assets/300/293679.pdf. In its last comprehensive estimate of misclassification, for tax year 1984, the IRS estimated that nationally about 15% of employers misclassified a total of 3.4 million employees as independent contractors, resulting in an estimated revenue loss of $1.6 billion (in 1984 dollars). *Id.* Nearly 60% of the revenue loss was attributable to the misclassified individuals failing to report and pay income taxes on compensation they received as misclassified independent contractors. *Id.* The remaining revenue loss stemmed from the failure of (1) employers and misclassified independent contractors to pay taxes for Social Security and Medicare, and of (2) employers to pay federal unemployment taxes. *Id.*

[189] *See supra* text accompanying notes 48–53.