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## BRING IT ON: PROFESSIONAL CHEERLEADERS RALLY AGAINST NFL'S EMPLOYMENT POLICIES

*"If you sell hotdogs at the game, you're going to make more than a cheerleader."*<sup>1</sup>

### I. INTRODUCTION

It's the job "a million girls would kill to have," but are they willing to work for free?<sup>2</sup> This question currently plagues the National Football League (NFL) and its teams, beset by lawsuits flooding in from their professional cheerleaders, who are turning their talents away from the end zone and into the courtroom in preparation for a legal showdown.<sup>3</sup>

Cheerleaders dominate American pop culture, from television tropes to the big screen.<sup>4</sup> Even Barbie has tried her hand at cheerleading, complete with a Dallas Cowboys cheerleading uniform.<sup>5</sup> Cheerleaders of all levels are expected to perform death-defying

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1. L.J. Jackson, *Cheerleaders File Labor and Employment Suits Against the NFL*, ABA JOURNAL (May 1, 2015, 6:15 PM), [http://www.abajournal.com/magazine/article/cheerleaders\\_file\\_labor\\_and\\_employment\\_suits\\_against\\_the\\_nfl](http://www.abajournal.com/magazine/article/cheerleaders_file_labor_and_employment_suits_against_the_nfl) (quoting lawyer for Raiderettes referring to scant wages cheerleaders make while on NFL teams).

2. See Tim Walker, *Oakland Raiderettes: Cheerleaders Celebrate New Laws That Mean They Will Be Treated as Employees*, INDEPENDENT (July 18, 2015), <http://www.independent.co.uk/news/world/americas/oakland-raiderettes-cheerleaders-celebrate-new-laws-that-mean-they-will-be-treated-as-employees-10399096.html> (discussing revered status of NFL cheerleaders among professional dancers and revealing how industry prestige has no bearing on low wages of cheerleaders).

3. See *id.* (detailing five lawsuits lodged against NFL teams by cheerleaders and California's legislative response to suits).

4. See, e.g., BRING IT ON (Universal Pictures 2000); *The Cheerleader*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/TheCheerleader> (last visited Apr. 5, 2016) (giving example of cheerleaders in popular culture). These sources document common cheerleader stereotypes. Particularly in movies and television shows about high school, the cheerleader is portrayed as physically attractive, but catty and unintelligent. The movie *Bring It On* openly mocks some of these labels while incorporating others (the main character is blonde, fit, and often unkind before undergoing a personality transformation at the movie's denouement). See BRING IT ON, *supra*.

5. See Press Release, Campaign For a Commercial-Free Childhood, Mattel's Barbie Dallas Cowboy Cheerleader Wins Worst Toy of the Year; CCFC Honors Doll with Inaugural TOADY Award (Feb. 12, 2009), *available at* <http://commercialfreechildhood.org/mattel%E2%80%99s-barbie-dallas-cowboy-cheerleader-wins-worst-toy-year-cfc-honors-doll-inaugural-toady-award> (awarding "worst toy of the year" label to children's doll that emphasizes sex appeal of cheerleaders).

stunts as part of the energetic support staff of sports teams.<sup>6</sup> The strength and skill involved in participation has stirred up recent controversy on whether the National Collegiate Athletic Association (NCAA) should consider cheerleading a sport.<sup>7</sup> The American Medical Association has classified cheerleading as a sport due to the “rigors and risks” inherent in participation.<sup>8</sup> Cheerleading has even drawn comparisons to football in terms of its difficulty and high injury rates, the highest for both high school and college-aged females.<sup>9</sup> Legally, courts have a different view.<sup>10</sup> The Second Cir-

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6. See Lisa Ling & Arash Ghadishah, *Most Dangerous ‘Sport’ of All May Be Cheerleading*, ABC NEWS (Jan. 4, 2010), <http://abcnews.go.com/Nightline/cheerleading-dangerous-sport-young-girls/story?id=9473938> (exploring extreme difficulty and danger of cheerleading stunts, often resulting in severe injury).

7. See *Cheerleading as a Sport*, AM. ASS’N OF CHEERLEADING COACHES & ADMINISTRATORS, <https://aacca.org/content.aspx?item=resources/Test.xml> (last visited Apr. 9, 2016) (addressing classification of cheerleading as sport and espousing view that classifying it as sport will help improve safety regulations and validate efforts of cheerleaders).

8. See Matt Bonesteel, *Is Cheerleading a Sport? The American Medical Association Thinks So*, WASH. POST (June 10, 2014), <http://www.washingtonpost.com/news/early-lead/wp/2014/06/10/is-cheerleading-a-sport-the-american-medical-association-thinks-so/> (detailing what constitutes “sport,” and whether cheerleading deserves title). Much of the medical community’s desire to have cheerleading recognized as a sport stems from the hope that doing so would result in increased safety regulations. See *id.* Cheerleading coaches would also be held to higher training standards. See *id.* The American Medical Association believes that these measures would drastically reduce the number of injuries high school and college cheerleaders suffer each year. See *id.*

9. See Lenny Bernstein, *Cheerleading Accounts for More Than Half of ‘Catastrophic’ Injuries to Girl Athletes*, WASH. POST (Sept. 10, 2013), [https://www.washingtonpost.com/lifestyle/wellness/cheerleading-accounts-for-more-than-half-of-catastrophic-injuries-to-girl-athletes/2013/09/10/52ecdcc8-16e8-11e3-a2ec-b47e45e6f8ef\\_story.html](https://www.washingtonpost.com/lifestyle/wellness/cheerleading-accounts-for-more-than-half-of-catastrophic-injuries-to-girl-athletes/2013/09/10/52ecdcc8-16e8-11e3-a2ec-b47e45e6f8ef_story.html) (summarizing report and policy statement from American Academy of Pediatrics). Cheerleading accounted for “65 percent of all direct catastrophic injuries to girl athletes at the high school level and 70.8 percent at the college level” from 1982 to 2009. See *id.* (quoting AAP report). While the number of injuries may seem low compared to the number of female participants (110 reported accidents causing brain injury, paralysis, or death, out of an estimated 3.6 million participants), doctors express concern over the disproportionate number of injuries connected to this particular activity. See *id.*

10. See *Biediger v. Quinnipiac University*, 691 F.3d 85, 102–05 (2d Cir. 2012) (holding that cheerleading is not sport for purposes of Title IX protections); see also *Court Upholds Cheerleading Decision*, ESPN (Aug. 7, 2012), [http://espn.go.com/college-sports/story/\\_/id/8245864/appeals-court-affirms-cheerleading-not-sport-title-ix](http://espn.go.com/college-sports/story/_/id/8245864/appeals-court-affirms-cheerleading-not-sport-title-ix) (detailing Second Circuit’s decision in controversial case stemming from elimination of women’s volleyball program and substitution with cheerleading program at Quinnipiac University).

cuit held that cheerleading was not a sport for the purposes of Title IX<sup>11</sup> in its controversial *Biediger v. Quinnipiac University* opinion.<sup>12</sup>

Sport or not, cheerleading is an integral part of the professional sporting event experience.<sup>13</sup> Presently, professional cheerleaders have a new cause to rally around: wage discrimination.<sup>14</sup> Beginning with a complaint filed by the cheerleaders for the Oakland Raiders, the Raiderettes, cheerleaders have begun to hit NFL teams with major class-action lawsuits.<sup>15</sup> The women name five teams as defendants in similar wage-theft claims: the Oakland Raiders, the Buffalo Bills, the Tampa Bay Buccaneers, the New York Jets, and the Cincinnati Bengals.<sup>16</sup> Cheerleaders for these teams are alleging their teams have not paid them for practices, charity appearances, and even games under the arbitrary rules of their respective squads.<sup>17</sup> Cheerleaders argue that their teams have violated the state minimum wage laws and the Fair Labor Standards Act (FLSA),<sup>18</sup> which sets minimum wage requirements that all employers must pay employees.<sup>19</sup> Some teams argue that the cheerleaders are not employees at all, or that the women fall under one of the exemptions of FLSA or state laws.<sup>20</sup>

This comment explores the recent group of lawsuits filed by professional NFL cheerleaders alleging wage theft.<sup>21</sup> Part II chroni-

11. 20 U.S.C. § 1681(a) (prohibiting discrimination on basis of sex under education programs that receive federal funding).

12. See *Biediger*, 691 F.3d at 102–05 (declining to grant “sport” status to cheerleading).

13. See Leah Messinger, *Lawmakers Call on NFL to Give Cheerleaders a Fair Wage*, THE GUARDIAN (Sept. 13, 2015, 8:00 AM), <http://www.theguardian.com/sustainable-business/2015/sep/13/nfl-roger-goodell-cheerleaders-minimum-wage> (stating 26 of 32 NFL teams currently have cheerleaders).

14. See *id.* (detailing five open lawsuits against NFL cheerleading teams and citing violation of existing wage laws).

15. See *id.* (naming open lawsuits against NFL teams that pay cheerleaders less than minimum wage).

16. See *id.* (reprinting claims from cheerleading lawsuits, including failure to pay cheerleaders for practices and outside appearances).

17. See Messinger, *supra* note 13 (stating cheerleaders are paid flat fee for games they are permitted to work).

18. Fair Labor Standards Act § 201-19, 29 U.S.C. § 201 (2012) (establishing federal employment standards).

19. See Rachel Homer, *An Explainer: NFL Cheerleader Lawsuits*, ON LABOR (Oct. 8, 2014), <http://onlabor.org/2014/10/08/an-explainer-nfl-cheerleader-lawsuits-part-1/> (explaining cheerleaders’ arguments that they are owed minimum wages under FLSA). Homer’s article breaks down the Fair Labor Standards Act and the claims of the respective teams, namely that cheerleaders are “independent contractors” not subject to the pay requirements of FLSA. See *id.*

20. See *id.* (listing six factors Department of Labor considers when evaluating whether worker is employee or independent contractor).

21. See *infra* notes 26–85 and accompanying text.

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cles a brief history of NFL cheerleading and the wage suits.<sup>22</sup> Part III addresses the cheerleading contracts, including how the teams may resolve these claims through arbitration and in the courts, and analyzes the merits of the complaints.<sup>23</sup> Part IV discusses the present settlements between the cheerleaders and teams.<sup>24</sup> Part V is forward-looking; it explores how these lawsuits have affected cheerleading in the NFL and how they may continue to do so. It also examines fledgling laws making their way through state legislatures; these laws seek to address and rectify the problems these suits have brought to light.<sup>25</sup>

## II. KICKOFF: CHEERLEADERS FILE SUIT

### A. A Brief Overview of NFL Cheerleading

NFL cheerleading began in 1954 with the formation of the Baltimore Colts cheerleading team.<sup>26</sup> At present, twenty-six out of thirty-two NFL teams have an accompanying cheerleading squad.<sup>27</sup> Cheerleaders attend all football games and numerous publicity events in order to raise a team's profile.<sup>28</sup> Forbes estimates that some squads bring in over a million dollars for their teams annually.<sup>29</sup> These profits stem from promotional appearances, calendar

22. See *infra* notes 87–193 and accompanying text.

23. See *infra* notes 195–206 and accompanying text.

24. See *infra* notes 208–36 and accompanying text.

25. See *infra* notes 208–36 and accompanying text.

26. See Joe Nawrozki, *Colts Cheerleaders' Spirit 'Got the Stadium Rocking'*, BALTIMORE SUN (Nov. 6, 2004), [http://articles.baltimoresun.com/2004-11-06/news/0411060331\\_1\\_colts-cheerleaders-baltimore-colts-memorial-stadium](http://articles.baltimoresun.com/2004-11-06/news/0411060331_1_colts-cheerleaders-baltimore-colts-memorial-stadium) (chronicling history of first cheerleading team, Baltimore Colts, presently known as Indianapolis Colts after team's move to Indianapolis).

27. See Kyle Meinke, *Detroit Lions Proud to be Among Just 6 NFL Teams Without Cheerleaders*, MICHIGAN LIVE (Mar. 26, 2014, 12:34 PM), [http://www.mlive.com/lions/index.ssf/2014/03/detroit\\_lions\\_proud\\_to\\_be\\_1\\_of.html](http://www.mlive.com/lions/index.ssf/2014/03/detroit_lions_proud_to_be_1_of.html) (listing six NFL teams without cheerleaders). The Detroit Lions, Chicago Bears, New York Giants, Pittsburgh Steelers, Cleveland Browns, and Green Bay Packers do not have accompanying team cheerleading squads. See *id.* Meinke's article quotes the Lions' president, who says cheerleaders will not be added to the Lions family any time soon. See *id.* Given the present state of cheerleader-NFL team relations, the other five teams are also unlikely to add cheerleaders in the near future. See *id.* Some of the teams do permit local, unofficial dancers to perform at game day events, but these women are strictly volunteers and expressly unaffiliated with the brands of these six teams. See *id.*

28. See Emily Green, *Cheerleaders' Fair Wage Lawsuits Add to NFL's Problems*, NPR (Sept. 23, 2014, 4:24 PM), <http://www.npr.org/2014/09/23/350946942/cheerleaders-fair-wage-lawsuits-add-to-nfls-problems> (interviewing Caitlin Y., former Raiders cheerleader).

29. See Rob Wherry, *Pom-Poms and Profits*, FORBES (Sept. 15, 2003, 12:00 AM), <http://www.forbes.com/forbes/2003/0915/084.html> (comparing low cost of forming cheerleading team with profits stemming from such teams). Wherry's ar-

sales, and cheerleading camps run by the teams, where current cheerleaders instruct young cheerleading hopefuls on how to emulate their glamorous professional counterparts.<sup>30</sup> The NFL's official online store even peddles children's cheerleading costumes for pint-sized performers.<sup>31</sup> Cheerleading is so firmly entrenched in professional football culture that only one Super Bowl has not included cheerleading performances.<sup>32</sup>

However, cheerleading does not constitute full-time employment for the majority of squad members.<sup>33</sup> Nonetheless, with the expectation that cheerleaders will attend games, personal appearances, charity performances, and practices for up to fifteen hours per week, perhaps it should.<sup>34</sup>

Cheerleaders are often in college, graduate school, or holding down full-time jobs during their stints on teams.<sup>35</sup> The teams release their cheerleaders from their contracts at the end of each sea-

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article, written several years before the present lawsuits, gives an interesting perspective on why teams should incorporate cheerleaders into their brand. *See id.* Written with an eye toward encouraging the New York Giants to consider adding cheerleaders, the article demonstrates cheerleading teams can make their respective NFL franchises nearly a million dollars per season with minimal operating costs. *See id.* The cost comparison actually assumes cheerleaders are being paid minimum wage or better, and still remarks on the incredible opportunity for NFL teams to profit. *See id.*

30. *See* Nily Rozić & Lorena Gonzalez, *Cheerleaders, Until They See Their N.F.L. Paychecks*, N.Y. TIMES (Sept. 11, 2015), <http://www.nytimes.com/2015/09/12/opinion/cheerleaders-until-they-see-their-nfl-paychecks.html> (detailing various demands on cheerleaders' time as employment requirements).

31. *See, e.g.*, *Girls Infant Oakland Raiders Jumper Cheer Dress*, NFLSHOP.COM, [http://www.nflshop.com/Oakland\\_Raiders\\_Kids/Girls\\_Infant\\_Oakland\\_Raiders\\_Black\\_Jumper\\_Cheer\\_Dress](http://www.nflshop.com/Oakland_Raiders_Kids/Girls_Infant_Oakland_Raiders_Black_Jumper_Cheer_Dress) (last visited Apr. 5, 2016) (selling cheerleading costumes for young children).

32. *See* Bill Plaschke, *No Super Bowl Cheerleaders? He Says Rah!*, L.A. TIMES (Jan. 27, 2011), <http://articles.latimes.com/2011/jan/27/sports/la-sp-plaschke-20110128> (explaining lack of official cheerleading teams for Green Bay Packers and Pittsburgh Steelers meant no cheerleaders would appear at 2011 Super Bowl).

33. *See* Leah Goldman, *In Pictures: A Day In the Life of An NFL Cheerleader*, BUS. INSIDER (Sept. 8, 2011, 9:17 AM), <http://www.businessinsider.com/philadelphia-eagles-cheerleader-2011-9>; (describing day-to-day responsibilities of NFL cheerleaders); *see also* Atlanta Falcons, *Atlanta Falcons Cheerleaders Information Guide* (2013), *available at* <http://cdn.atlantafalcons.com/flagship/lib/2013/02/2013AFCInfoGuide.pdf> (listing rules for Atlanta Falcons cheerleader tryouts). The Atlanta Falcons explicitly require that cheerleaders "have a full-time job or be a full-time student because being an Atlanta Falcons Cheerleader is not a full-time paying job." *See id.*

34. *See, e.g.*, Complaint para. 1, *Brenneman v. Cincinnati Bengals, Inc.*, No. 1:14-CV-136, 2014 WL 554456 (S.D. Ohio filed Feb. 11, 2014) [hereinafter *Complaint, Brenneman*] (claiming Bengals required plaintiff to attend multiple weekly practices in addition to other mandatory appearances).

35. *See* Goldman, *supra* note 33 (interviewing additional cheerleaders who attest to similarly packed schedules with responsibilities from other jobs and schooling).

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son; cheerleaders must try out again before the next season if they wish to regain their spots on the team.<sup>36</sup> The teams give veteran members no preference in the tryout selection process in order to ensure that teams retain only top talent.<sup>37</sup> For many, these conditions add to the stress of being vastly underpaid.<sup>38</sup>

## B. Understanding the Suits

### 1. *Lacy Files Suit*

A former cheerleader for the Oakland Raiders, Lacy T., filed the first of the wage theft lawsuits.<sup>39</sup> In her complaint, Lacy alleges that the Raiders violated the California Labor Code by writing numerous illegal provisions into her contract.<sup>40</sup> The complaint states that the Raiders paid cheerleaders a flat fee of \$125 per game, which was typically an obligation extending over nine hours without breaks.<sup>41</sup> According to the contract's terms, coaches could "bench" cheerleaders for a game for a variety of infractions, ranging from missed practices to looking "too soft."<sup>42</sup> While the team still required benched cheerleaders to go to games and perform during the pregame and halftime, it did so without paying these women for their services.<sup>43</sup> The team also fined women for violations in place of or in addition to being benched.<sup>44</sup> Teams imposed fines for

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36. See Ira Boudway, *What are NFL Cheerleaders Worth? Inside Their Fight for Minimum Wage*, BLOOMBERG BUS. (Sept. 11, 2014, 2:18 PM), <http://www.bloomberg.com/bw/articles/2014-09-10/nfl-cheerleaders-battle-teams-for-minimum-wage> (interviewing Caitlin F., former Buffalo Bills cheerleader who declined trying out after one year on team). The automatic cut process means women have very little bargaining or staying power on the team. See *id.* Cheerleaders are expected to be loyal to the teams if they want to make the cheerleading team again, whereas teams have an opportunity to cut "problem" cheerleaders after a single season. See *id.*

37. See *id.* (interviewing Caitlin F., named plaintiff in class action wage suit against Buffalo Bills).

38. See *id.* (explaining incentive cheerleaders have to acquiesce to team demands, for fear of being cut from team).

39. See Complaint, *Lacy T. v. Oakland Raiders*, No. RG14710815, 2014 WL 231121 (Cal. Super. filed Jan. 22, 2014) [hereinafter Complaint, *Lacy T.*] (naming Oakland Raiders as defendant).

40. See *id.* paras. 83–107 (alleging Raiders' failure to pay minimum wage, in addition to refusal to give cheerleaders rest or meal breaks).

41. See *id.* para. 14 (stating team failed to pay cheerleaders for any events other than games).

42. See *id.* para. 28 (detailing factual allegations in support of cheerleaders' wage suit).

43. See *id.* para. 15 (alleging team forced women to stay for entirety of game day after being benched, but refused to pay benched cheerleaders any wages for that day).

44. See *id.* para. 22. (alleging team imposed various fines). For example, women could be fined for each missed practice, as well as benched for the game,

transgressions including forgetting a yoga mat for practice or wearing an incorrect item of clothing during practice or to a game.<sup>45</sup> The Raiderettes handbook warned cheerleaders that it was possible to “find yourself with no salary at all at the end of the season” after the team imposed these fines.<sup>46</sup>

The contract also required Raiderettes to perform in at least eleven so-called “charity” events throughout the season, which were often fundraisers for the Raiders team to stimulate ticket sales.<sup>47</sup> The team did not pay cheerleaders for any of the required charity events.<sup>48</sup> The team also failed to pay cheerleaders for practices, which involved a minimum of three three-hour sessions per week.<sup>49</sup> The coaches could also require specific Raiderettes to attend an additional number of paid appearances, but the selection process for these events was undisclosed and discretionary.<sup>50</sup> Teams also ordered cheerleaders to assume a number of uncompensated expenses, including expensive and mandatory hairstylist appointments before each game and equipment for uniforms and practices.<sup>51</sup>

Caitlin Y., another Raiderettes cheerleader, filed suit against the organization rather than joining Lacy's.<sup>52</sup> Caitlin's suit differs

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meaning they could actually net negative pay for the week, cutting into past earnings. *See id.*

45. *See id.* (listing generally examples of potential finable offenses).

46. *See* Amanda Hess, *Just Cheer, Baby*, ESPN (Apr. 2, 2014), [http://espn.go.com/espn/feature/story/\\_/id/10702976/just-cheer-baby-lacy-t-sues-oakland-raiders](http://espn.go.com/espn/feature/story/_/id/10702976/just-cheer-baby-lacy-t-sues-oakland-raiders) (featuring Lacy's story of her time on Raiderettes squad). The warning that cheerleaders may end up without any pay at the end of the season carries additional bite given that cheerleaders were paid in one lump sum at the end. *See id.* The Raiders held pay for the women until the end to make certain that fines were deducted, and to encourage consistent attendance and performance, under threat of not being paid at all. *See id.*

47. *See* Complaint, *Lacy T.*, *supra* note 39, para. 19 (alleging many compulsory “charity” events were to increase profit for Raiders organization, not to benefit any charity).

48. *See id.* para. 19 (alleging team required cheerleaders to complete minimum number of charity events to maintain continued employment).

49. *See id.* para. 23 (alleging standard practice schedule totaled at least nine hours per week, not including games).

50. *See id.* para. 18 (detailing factual allegations in support of cheerleaders' wage suit).

51. *See id.* para. 31(b) (alleging women were required to visit certain salons, tanning booths, and other appearance-enhancing businesses).

52. *See* Lisa Fernandez, *Raiderettes File Class Action Suit vs. Raiders, NFL Claiming “Deplorable” Working Conditions*, NBC BAY AREA (June 4, 2014, 1:02 PM), <http://www.nbcbayarea.com/news/local/Raiderettes-File-Class-Action-Suit-vs-Raiders-NFL-Claiming-Deplorable-Working-Conditions—261874891.html> (voicing concerns that Lacy's suit failed to fully delve into “deplorable” working conditions Raiderettes faced).



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primarily in that she also named the NFL as a defendant in addition to the Raiders; otherwise, the claims mirror Lacy's.<sup>53</sup> Caitlin's lawyer says others have declined to name the NFL because of the vast resources the league commands—over \$9 billion in revenue in 2013 alone, and an army of lawyers to protect the league's spoils.<sup>54</sup>

## 2. *Ben-Gals Complaint*

In *Brenneman v. Cincinnati Bengals, Inc.*,<sup>55</sup> a former cheerleader for the Bengals echoed the claims of the Raiderettes.<sup>56</sup> Alexa Brenneman, a cheerleader for the “Ben-Gals” squad, alleged she was forced to work ten unpaid “charity” events before the team would even consider allowing her to perform in a paid event.<sup>57</sup> The Bengals also never paid Alexa for practices.<sup>58</sup> She alleges the most a Ben-Gal could make in a season without a special paid appearance was \$900 (disregarding fines), because games paid a mere \$90.<sup>59</sup>

53. *See id.* (arguing NFL is culpable for allowing working conditions and maintaining that low pay is league problem that must be resolved). Caitlin's suit, while unlikely to succeed based on the setup of the NFL, presents an interesting question of whether the league should be held responsible for sexist and unequal practices on teams. In other instances, such as the recent blowback over the rampant problem of domestic violence in the league, the NFL has been held morally, if not legally responsible. However, individual teams are run as separate business entities merely united under the NFL's flag, meaning that courts will not likely hold the NFL responsible for day-to-day payment of employees on individual teams. *See id.* While this Comment generally explores the legal claims against the individual teams, the issue of whether the NFL is morally culpable is explored in greater detail in parts III and IV. *See infra* notes 88–207 and accompanying text.

54. *See* Ellen Denham, *Only a Culture Overhaul Will End the NFL's Continuing Legal Woes and Win Back Female Fans*, Ms. JD (Oct. 1, 2014), <http://ms-jd.org/blog/article/only-a-culture-overhaul-will-end-the-nfls-continuing-legal-woes-and-pr-prob> (quoting lawyer for Caitlin Y., who claimed other cheerleaders are starting smaller with individual teams so as not to attract attention and resources of NFL's lawyers). While interesting, this theory seemingly fails to acknowledge the billions of dollars individual teams also have to fight wage claims. *See id.* A more likely theory as to why the other cheerleaders have not sued the NFL itself is that the NFL is structurally more insulated from the daily workings of individual teams, and therefore a less likely avenue for obtaining back pay. *See id.* However, a benefit to suing the NFL is the possibility that the league may decide to enact new policies binding on individual teams. *See id.* While this seems unlikely given the NFL's reaction so far, *see infra* notes 195–207, Caitlin's suit at least dragged the NFL into the picture and the public dialogue. *See* Denham, *supra*.

55. No. 1:14-CV-136, 2014 U.S. Dist. LEXIS 152031 (S.D. Oh. Oct. 24, 2014).

56. *See generally* Complaint, *Brenneman*, *supra* note 34 (alleging similar wage-theft claims as Lacy's suit). Brenneman was a cheerleader during the 2013-2014 season. *See id.*

57. *See id.* paras. 2, 33 (describing looseness of events deemed “charity”). Allegedly, many promotional appearances also fell under the umbrella term “charity.” *See id.*

58. *See id.* para. 31 (describing team's treatment of cheerleaders).

59. *See* Haisley, *Rules for Ben-Gals Cheerleaders: “No Panties,” “No Slouching Breasts,”* DEADSPIN (Feb. 13, 2014, 4:21 PM), <http://deadspin.com/rules-for-ben->

Her complaint against the Bengals states that she made less than \$2.85 per hour, working over 300 hours during the season but receiving only \$855 total.<sup>60</sup> The minimum wage in Ohio, the home state of the Bengals, was \$7.85 in 2013.<sup>61</sup>

Additionally, released excerpts from the Ben-Gals rulebook reveal strict conditions imposed to curb insubordination.<sup>62</sup> A choice excerpt with original emphasis and punctuation included: “ABSOLUTELY NO ARGUING OR QUESTIONING THE PERSON IN AUTHORITY!!!”<sup>63</sup> Additionally, coaches subjected Ben-Gals to repeated weigh-ins, with “leniency” afforded only to cheerleaders who managed not to fluctuate more than three pounds over their predetermined “ideal weight” throughout the entire season.<sup>64</sup> The Bengals filed a motion to dismiss Brenneman’s complaint. The court denied the motion, which questioned the ability of the Ohio state courts to grant the relief requested.<sup>65</sup>

### 3. *Buffalo Bills Take Bills to Court*

To some, Lacy and Alexa’s experiences with their cheerleading squads seem comparatively profitable.<sup>66</sup> Alyssa and Maria, two for-

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gals-cheerleaders-no-panties-no-slou-1522379579 (discussing Brenneman’s suit and incredibly low pay for Bengals cheerleaders).

60. See Complaint, *Brenneman*, *supra* note 34, para. 5 (describing team’s pay schedule for cheerleaders).

61. See *id.* para. 6 (noting discrepancy between cheerleader compensation and minimum wage laws).

62. See Haisley, *supra* note 59 (describing conditions for employment set by Bengals team, including provisions for makeup, hair color, and even discussion of daily rules—cheerleaders are not permitted to challenge any standards set by team). The rulebook demonstrates the absurdity of the rules, from micromanaging the women’s bodies to giving patronizing lessons on how cheerleaders should conduct themselves in public. See *id.*

63. *Id.* (punctuation and bolding included in manual and intended to emphasize importance of rule to “team unity”); see also Complaint, *Brenneman*, *supra* note 34, para. 47 (incorporating excerpt from manual).

64. See Haisley, *supra* note 59 (describing process for weight monitoring on team). Coaches assign cheerleaders their “goal” or “ideal” weights based on twice-weekly weigh-ins). Girls who fail to meet these weight goals (such as the girl mentioned in Hess’s article on the Raiderettes, Hess, *supra* note 46, who came in under her normal weight at the beginning of the season and gained it back) are benched. See *id.* Haisley, *supra* note 59.

65. See *Brenneman v. Cincinnati Bengals, Inc.*, No. 1:14-CV-136, 2014 U.S. Dist. LEXIS 152031 (S.D. Oh. Oct. 24, 2014) (ruling state courts have authority to determine validity of wage complaints).

66. See *HBO Real Sports with Bryant Gumbel: Episode 207* (HBO television broadcast June 24, 2014), available at <http://www.hbo.com/real-sports-with-bryant-gumbel/episodes/0/207-episode/index.html> (interviewing former Bills cheerleaders). The interview questions two former cheerleaders on what daily life as a Bills cheerleader entailed, and stacks lawsuits against one another as a basis for comparing claims and likely outcomes. See *id.*

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mer Buffalo Bills cheerleaders (called the Buffalo Jills), allege in their complaint against the team that the team not only refused to pay them for practices and events like the Raiders and Bengals cheerleaders, but that the Bills did not pay them for any games.<sup>67</sup> The only compensation they received stemmed from occasional tips and small appearance fees.<sup>68</sup> Neither woman made close to a dollar an hour.<sup>69</sup> Maria alleges she made just \$105 total for over 800 hours of work.<sup>70</sup> Additionally, every member of the Jills team must pay for her own uniform (a \$650 expense), as well as purchase specific, expensive hair treatments and cosmetics.<sup>71</sup>

The Jills' complaint also describes many other unsavory requirements for participation on the team.<sup>72</sup> Like the Ben-Gals, coaches repeatedly weigh women on the team, and cheerleaders who come in over their "goal" weight could be benched.<sup>73</sup> Even more insultingly, the team forces cheerleaders to perform "jiggle tests" in which the women wear revealing outfits and do jumping jacks as coaches watch and critique their physical fitness.<sup>74</sup>

#### 4. *Flight Crew Takes Off*

The Jets cheerleaders, referred to as the "Flight Crew," were next to file suit.<sup>75</sup> In her complaint, lead plaintiff Krystal C. raised

67. See generally Complaint, *Jaclyn S. v. Buffalo Bills, Inc.*, No. 804088–2014 (N.Y. Sup. Ct., Erie Cnty. filed Apr. 22, 2014) [hereinafter Complaint, *Jaclyn S.*], available at <https://assets.documentcloud.org/documents/1165317/buffalo-jills-lawsuit.pdf> (alleging Bills refused to pay cheerleaders); see also *Jaclyn S. v. Buffalo Bills, Inc.*, No. 804088–2014, 2014 WL 3700677 (N.Y. Sup. Ct., Erie Cnty. July 1, 2014) (denying Bills' motion to dismiss).

68. See Complaint, *Jaclyn S.*, *supra* note 67, para. 39 (describing minimal compensation paid to cheerleaders). Tips could come from events like the Golf Classic mentioned in the complaint, where women were encouraged to don bathing suits or cheer clothing and entertain attendees. See *id.* The complaint goes into more specifics about the nature of these events, which have disturbing sexual undertones, including instances where cheerleaders were forced to sit on the laps of attendees. See generally Complaint, *Jaclyn S.*, *supra* note 67.

69. See *id.* paras. 46–47 (detailing factual allegations in support of wage suit).

70. See *id.* para. 47 (detailing factual allegations in support of wage suit).

71. See *id.* para. 57(a) (detailing outside expenses for cheerleaders on Jills squad).

72. See Amanda Hess, *The Cheerleaders Rise Up*, SLATE (Apr. 23, 2014, 11:24 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/04/nfl\\_cheerleading\\_lawsuits\\_five\\_former\\_buffalo\\_jills\\_are\\_the\\_latest\\_in\\_a.html](http://www.slate.com/articles/double_x/doublex/2014/04/nfl_cheerleading_lawsuits_five_former_buffalo_jills_are_the_latest_in_a.html) (detailing allegations made in Jills suit).

73. See *id.* (describing claims made in Jills suit, including forced "jiggle tests" and sexual harassment while on job).

74. See *id.* (arguing that "jiggle test" is just single concrete example of issues with sexism in NFL).

75. See Natalie O'Neill, *Jets Cheerleader Latest to Sue NFL Team Over Measly Pay*, NY Post (May 6, 2014, 7:02 PM), <http://nypost.com/2014/05/06/jets-cheerleader->

may of the same issues as other cheerleaders, stating that she made \$150 per game and \$100 per outside event (both of which were subject to withholding).<sup>76</sup> Including practices and other events that the team failed to compensate, Krystal asserted that this worked out to \$3.77 per hour.<sup>77</sup> Accounting for hair, makeup, transportation, and other expenses, the pay dipped below \$1.50 an hour.<sup>78</sup>

Krystal also alleged that payment was unequal for cheerleaders who were veterans versus those deemed “rookies.”<sup>79</sup> The team paid veterans for cheer camps and certain rehearsals.<sup>80</sup> Though veterans still made less than minimum wage, the Jets organization gave increased compensation to those with more experience.<sup>81</sup> This gave monetary incentive to women to remain loyal to the team, and perhaps gave others less reason to question the pay scale.<sup>82</sup>

Krystal’s contract, attached to her complaint, also has a “morals clause,” stating that the “[e]mployee agrees to behave in accordance with socially acceptable mores and conventions.”<sup>83</sup> The team can fire women under this provision for endorsing products ranging from adult beverages to nutritional supplements.<sup>84</sup> Any behavior which may have “a material adverse effect upon Employer’s . . . status or public perception” is grounds for dismissal from the team.<sup>85</sup>

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latest-to-sue-nfl-team-over-measly-pay/ (reporting Jets cheerleader sued Jets organization over pay amounting to less than minimum wage).

76. See Press Release, GPEFF Attorneys at Law, LLC, New York Jets Sued for Wage Theft by Member of the Flight Crew, *available at* <http://www.gpeff.com/new-york-jets-sued-for-wage-theft-by-member-of-the-flight-crew/> (last visited Apr. 5, 2016) (reporting Krystal’s claims against Jets).

77. See *id.* (quoting attorney representing Krystal C. in suit against Jets).

78. See *id.* (discussing subtraction of required cosmetics, products, and other expenses from net pay).

79. See Complaint at paras. 14(c), 14(e), *Krystal C. v. New York Jets LLC*, No. L-004282-14 (N.J. Super. Ct. Law Div., Bergen Cnty. filed May 6, 2014) [hereinafter Complaint, *Krystal C.*], *available at* <http://www.gpeff.com/wp-content/uploads/2014/07/GPEFF-Krystal-C-v-NY-Jets-Filed-Complaint.pdf> (detailing factual allegations in support of wage suit).

80. See *id.* para. 14 (alleging unequal pay even within cheerleading squad, based on experience of members).

81. See *id.* (noting slight increase in compensation for more experienced cheerleaders).

82. See generally Complaint, *Krystal C.*, *supra* note 79 (suggesting raised compensation for experienced cheerleaders masked unfair wage practices).

83. See *id.* at Exh. A, Para 9 (providing Plaintiff’s employment agreement with Jets). This appears to be a catch-all provision giving Jets grounds for firing cheerleaders who behave in a questionable manner. Of course, what constitutes questionable behavior is unspecified, and therefore left entirely up to coaches and Jets organization to define on a case-by-case basis. See *id.*

84. See *id.* (giving examples of causes for dismissal from squad).

85. See *id.* (demonstrating vagueness of grounds for dismissal from squad).

### III. A FAIR SHAKE: A CLOSER LOOK AT THE CHEERLEADING CONTRACTS

#### A. Internal Attitudes

Before analyzing the contracts themselves, the attitudes surrounding the lawsuits help to contextualize some of the issues the cheerleaders faced in coming forth with their claims.<sup>86</sup> Many fans feel that cheerleaders are causing an unnecessary stir by complaining over a competitive and coveted job.<sup>87</sup> Some feel the NFL does not need to pay them any wages for their time spent at the game, because the cheerleaders do not rely on their positions on the team for primary employment.<sup>88</sup> This attitude that cheerleaders are essentially glorified fans is shared by some of the cheerleaders themselves.<sup>89</sup> Many women also believe they joined the squads for a fun volunteer position with certain benefits, like opportunities to meet players and occasional free tickets.<sup>90</sup> Such beliefs have indeed muzzled some of the women who would otherwise have come forward sooner; many of the cheerleaders bringing the lawsuits have said that they were not aware of how much power they had to protest against their situation until Lacy came forward.<sup>91</sup>

#### 1. *Do Cheerleaders Deserve Payment?*

Many insist that the cheerleaders accepted these employment conditions when they willingly signed their contracts.<sup>92</sup> One devoted Raiders fan who volunteers at games voiced his frustration

86. See Lisa Fernandez, *Raiderettes to Get Paid \$9 an Hour, Earning Minimum Wage for the First Time*, NBC BAY AREA (June 30, 2014, 11:16 AM), <http://www.nbcbayarea.com/news/local/Oakland-Raiders-Cheerleaders-Raiderettes-to-Earn-9-Dollars-an-Hour-265230771.html> (describing public perception of cheerleaders as barrier to bringing claims).

87. See *id.* (recounting expressions of frustration from some fans over cheerleaders' claims of low pay).

88. See Jennifer Titus, *Cheerleader's Lawyer in Bucs' Lawsuit Speaks*, WTSP (May 21, 2014, 5:55 PM), <http://www.wtsp.com/story/news/local/2014/05/21/lawyer-cheerleader-bucs-speaks-out/9388599/> (quoting cheerleader who says women do not join team based on pay considerations).

89. See *id.* (suggesting cheerleaders' tendency to doubt athleticism of the sport).

90. See *id.* (describing incentives for cheerleading regardless of compensation).

91. See Hess, *supra* note 46 (quoting cheerleaders for other teams embroiled in cheerleader lawsuits). Cheerleaders in other suits said that they did not think to protest against their employment conditions until Lacy filed her lawsuit. See *id.*

92. See Fernandez, *supra* note 87.

with the suits: “This isn’t supposed to be a career . . . . They weren’t blindsided. They don’t have to work there.”<sup>93</sup>

Former and current cheerleaders share that sentiment.<sup>94</sup> “You don’t do this for the money, you go because you love your team, you love to perform.”<sup>95</sup> The former Buccaneers cheerleader also expressed that any wages were simply a bonus for what many view as a volunteer position with certain perks.<sup>96</sup> The cheerleader also emphasized that anyone cheering for the team understood the obligations and the pay scale well in advance of stepping onto the field.<sup>97</sup> Contrarily, lawyers representing the cheerleaders contend that acceptance of an illegal contract does not render it valid.<sup>98</sup>

Another question these suits raise is whether accolades constitute a form of payment.<sup>99</sup> Coaches routinely tell cheerleaders that it is a privilege to be part of the NFL brand in such a high-profile way.<sup>100</sup> Teams assert that becoming affiliated with the brand presents incredible potential for enterprising cheerleaders, ranging from other employment opportunities (as a dancer, choreographer, or even a model) to improved marriage markets.<sup>101</sup> As entic-

93. *Id.*

94. *See* Titus, *supra* note 88.

95. *See id.* (stating that cheerleaders who are dissatisfied should simply quit rather than level suits against organization and thereby “ruin” it for others).

96. *See id.* (stating that money isn’t primary reason for becoming cheerleader, and those who think so need to pursue different jobs).

97. *See id.* (arguing that cheerleaders knew well in advance of season’s beginning that position paid low wages).

98. *See* Jackson, *supra* note 1 (quoting Sharon Vinick, Lacy’s lawyer). Lacy’s lawyer states that illegal contracts are unconscionable, rendering them unenforceable even if cheerleaders willingly sign them. *See id.*

99. *See* Marina Adshade & David Berri, *Pay Cheerleaders What They’re Worth*, TIME (Mar. 25, 2015), <http://time.com/3752957/nfl-football-cheerleaders-minimum-wage/> (describing both sides of cheerleader lawsuits, including views from those who find current wages valid). This thought piece analyzes the competitive market argument that supporters of the low cheerleading wages raise, and compares the cheerleaders’ modern struggle to that of athletes who fought for fair wages in the early 20th century. *See id.*

100. *See* Michael Powell, *Buffalo Bills Cheerleaders’ Routine: No Wages and No Respect*, N.Y. TIMES (Dec. 10, 2014), [http://www.nytimes.com/2014/12/11/sports/football/buffalo-bills-cheerleaders-fight-for-wages-and-respect.html?\\_r=1](http://www.nytimes.com/2014/12/11/sports/football/buffalo-bills-cheerleaders-fight-for-wages-and-respect.html?_r=1) (interviewing two former Jills cheerleaders about employment conditions).

101. *See* Adshade & Berri, *supra* note 99 (discussing alternative theories of “pay” based on opportunities cheerleaders have to meet and date players). The “marriage market” argument here is wildly misleading given some of the rules that the cheerleading handbooks contain. While the Raiders claim they do not expressly forbid cheerleaders to date or befriend football players, they “STRONGLY prefer” that the cheerleaders do not date or frequently socialize with members of the team. *See* Hess, *supra* note 46. The handbook goes so far as to state “excessive and/or improper fraternization with club players or personnel will be grounds for dismissal.” *See id.* Cheerleaders must maintain a good reputation to keep their

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ing as these possibilities may be, the lawyer representing Lacy and the other Oakland Raiderettes cheerleaders characterizes the “privilege of opportunity” argument differently.<sup>102</sup> “Well, it’s an honor to be a quarterback, but they don’t do it for free.”<sup>103</sup>

Others focus arguments against a pay raise on whether the cheerleaders actually entice people to attend games, or if their presence is merely a bonus for those who already attend.<sup>104</sup> While it seems unlikely that most fans attend primarily for the cheerleaders, cheerleaders raise a team’s profile through philanthropic and promotional events that players are not similarly obligated to attend.<sup>105</sup> But are cheerleaders a necessary component of football?<sup>106</sup> Even some supporters of their efforts to raise wages say no.<sup>107</sup>

## 2. *Bringing Down the Sisterhood*

The cheerleaders filing suit fear more than the NFL and its influence.<sup>108</sup> Many say it has taken this long to come forward because of internal pressures from fellow cheerleaders and the

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employment, and the demeaning handbook reminds them that coaches and staff will hear about their off-field antics with players: “DO NOT BECOME THE TOPIC OF CONVERSATION IN THE LOCKER ROOM. . . WE EVENTUALLY HEAR EVERYTHING.” *See id.* As this possibility of meeting or befriending famous players is off the table, and pay is obviously not the draw, it grows harder to imagine exactly what “benefits” the women imagine they might garner through this employment.

102. *See* Jackson, *supra* note 1 (quoting Sharon Vinick, Lacy’s lawyer). Vinick, contends that coveted jobs should still net employees fair pay. *See id.* The replaceable nature of the cheerleaders’ positions should not mean cheerleaders deserve low or no pay. The absurdity of the argument becomes clear when applied to any other field, ranging from football players to investment bankers. Just because there are others who would like to have the job offered, the fact remains that these were the people best-qualified for the job, and who have trained extensively in order to retain it. *Cf. id.*

103. *Id.* (quoting Lacy T.’s attorney, Sharon Vinick).

104. *See* Olga Khazan, *The Shockingly Low Salaries of Professional Cheerleaders*, THE ATLANTIC (Jan. 24, 2014), <http://www.theatlantic.com/business/archive/2014/01/the-shockingly-low-salaries-of-professional-cheerleaders/283299/> (discussing whether cheerleaders draw in fans who would otherwise not attend). Even if cheerleaders do not draw the football crowd based on their own performances, they still enhance and improve the game day experience for many who go. *See id.*

105. *See id.* (discussing cheerleading’s positive impact on NFL’s philanthropic image).

106. *See* Allison Davis, *Do We Even Need NFL Cheerleaders?*, N.Y. MAGAZINE (Apr. 29, 2014, 1:42 PM), <http://nymag.com/thecut/2014/04/we-even-need-nfl-cheerleaders.html> (questioning function and necessity of cheerleaders in general). Davis persuasively argues that cheerleaders are underappreciated and underutilized in their function as supporters of their team, and ultimately unnecessary. *See id.*

107. *See id.* (arguing that while NFL’s compensation of cheerleaders is unfair based on their talent and dedication, cheerleaders should consider leaving football entirely rather than attempting to revamp institution).

108. *See* Hess, *supra* note 46 (relaying concerns of Raiderettes alumni who believe suit is detrimental to survival of cheerleading team).

squad.<sup>109</sup> The cheerleaders report that their coaches constantly tell the girls they are replaceable.<sup>110</sup> Cheerleading coaches and directors express concerns that too much squabbling over cheerleaders' pay will lead to teams cutting their squads entirely.<sup>111</sup> In the words of one former Raiderette, “[these lawsuits] could be the demise of cheerleading.”<sup>112</sup>

Some criticism comes from sources more insidious than the managerial staff; not all cheerleaders are supportive of the efforts of those filing suit.<sup>113</sup> After Lacy filed her suit against the Raiderettes, she became the target of aggressive backlash from other team members.<sup>114</sup> Lacy says other women on the team stopped answering her phone calls and blocked her on social media after news of her complaint became public.<sup>115</sup> Other cheerleaders accused her of greed and attempting to subvert provisions she knew about from the beginning of her employment.<sup>116</sup>

This hostility is not limited to Lacy's case.<sup>117</sup> Manouchcar Pierre-Val, the cheerleader who filed the complaint against the Buc-

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109. *See id.* (sharing Lacy T's belief that Raiderettes "sisterhood" mentality prevented others like her from coming forward sooner).

110. *See id.* (quoting Lacy's personal experiences with Raiderettes coaches and staff).

111. *See id.* Chandra Roberts, an influential Raiderettes alum with deep connections to football (her father was an NFL player), believes the NFL's reluctance to get involved in cheerleading squad pay could lead to removal of cheerleading from the sport entirely. *See id.*

112. *Id.* (quoting former Raiderette, Chandra Roberts). Roberts' take on the lawsuits is shared by many others who feel the NFL will decide cheerleading is too much trouble for a league already faltering in the eyes of those who believe its attitude towards women is outdated and sexist. *See id.*

113. *See* Chris Polito, *Lawsuit Brought By Five Former Jills Derails the 2014 Cheerleading Season*, BUFFALO JILLS ALUMNI ASS'N, <https://web.archive.org/web/20150914071622/http://buffalo-jills-alumni.vpweb.com/> (last visited Sept. 13, 2015) (expressing inflammatory view on Jills cheerleaders who have "dismantled" squad by filing suit).

114. *See* Hess, *supra* note 46. Lacy originally notified many team members of her suit by posting it to a thread on change.org, under a then-circulating petition asking the NFL to pay cheerleaders a "living wage." *See id.* Though many of the cheerleaders shared the change.org petition on their own social media pages in support of the idea, few publicly supported Lacy's efforts – Sarah G. is the only other named plaintiff in Lacy's suit. *See id.* *See* Diane Todd, *NFL Teams: Pay Your Cheerleaders A Living Wage*, CHANGE.ORG, <https://www.change.org/p/roger-goodell-nfl-commissioner-petition-to-provide-nfl-cheerleaders-with-a-livable-salary> (last visited Apr. 5, 2016) (petitioning others to support efforts of NFL cheerleaders).

115. *See* Hess, *supra* note 46 (chronicling Lacy's experiences after filing suit).

116. *See id.* (expressing views of cheerleaders who are hostile to Lacy's efforts).

117. *See* Tony Marrero, *Bucs Settle Lawsuit Over Cheerleaders' Pay*, TAMPA BAY TIMES (Mar. 6, 2015, 10:21 PM), <http://www.tampabay.com/news/courts/civil/bucs-settle-lawsuit-over-cheerleaders-pay/2220433> (describing similar backlash against Buccaneers cheerleader who filed complaint against her team).



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careers, was also stunned by the negative reaction to her complaint “from the girls on the team and the community in general.”<sup>118</sup> The Jills’ website prominently features an article referring to the women bringing the claim against the Buffalo Bills as “five malcontents.”<sup>119</sup> The article goes on to speculate about the possibility that “sour grapes” fueled the lawsuit, after two of the suit’s claimants did not make the squad upon trying out for a second year.<sup>120</sup>

Many teammates who do support the cheerleaders do so in secret.<sup>121</sup> Sarah G., Lacy’s co-claimant in the Raiderettes suit, says “there are a ton of women who have contacted me who wish to remain anonymous. . . [because] [t]hey want to try out again or stay a part of this ‘sisterhood.’”<sup>122</sup> Caitlin Y. experienced similar negativity from within the Raider organization: “People outside that bubble have been really supportive.”<sup>123</sup>

#### B. Contracting Away Rights: Contractual Provisions in Cheerleading Contracts

Fueling much of the fight over fair pay is the uncertainty regarding whether a cheerleader is actually an employee. As previously stated, primary employment for a cheerleader typically lies outside of the stadium.<sup>124</sup> According to some teams, cheerleaders are not employees, but independent contractors.<sup>125</sup> In considering whether a cheerleader is an independent contractor, and therefore exempt from minimum wage requirements, the courts in these cases will examine their contracts for evidence of the NFL team’s control over the cheerleading squad in question.<sup>126</sup>

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118. *See id.* (quoting Manouchar Pierre-Val).

119. *See* Polito, *supra* note 108 (featuring article disparaging claims brought by Jills as unfounded and unrepresentative of true experience of Jills cheerleaders).

120. *See id.* (speculating lawsuit intended to derail Jills cheerleading organization as revenge for not being chosen again for team).

121. *See* Hess, *supra* note 46 (describing anonymous messages of support for suit coming from current Raiderettes cheerleaders afraid of damaging their position on squad).

122. *See id.* (blaming “sisterhood” mentality for cheerleaders’ resistance to fighting wage theft claims).

123. *See* Fernandez, *supra* note 87 (voicing Caitlin Y’s experience with others outside of Raiders circle who support her efforts to sue Raiders organization).

124. *See* Goldman, *supra* note 33 (discussing types of primary income for cheerleaders that does not include cheering).

125. *See* Powell, *supra* note 100 (describing Bills’ view regarding Jills’ role in organization).

126. *See* Homer, *supra* note 17 (describing method for Department of Labor’s evaluation of contracts, similar to what courts will be looking for in examining contracts).

### 1. *Fair Labor Standards Act*

The Fair Labor Standards Act sets the minimum wage, over-time hours, and other important labor guidelines for employers nationwide.<sup>127</sup> Under the Act, “employees” are defined as workers who are “economically dependent on the business of the employer.”<sup>128</sup> This category is distinct from “independent contractors,” who are “workers with economic independence who are in business for themselves.”<sup>129</sup> One can easily see how this distinction becomes blurred; a part-time worker may not be “economically dependent” on his employer, but also may not be defined as someone “in business” for himself.<sup>130</sup> Unfortunately, the Supreme Court has yet to articulate a test for determining whether a worker qualifies as an employee or an independent contractor.<sup>131</sup> NFL cheerleaders, who typically maintain full-time employment elsewhere, present another wrinkle in terms of classification.<sup>132</sup> While they typically hold full-time jobs in another employment sector entirely, the stringent standards they are held to for continued employment indicate that they are not “in business” for themselves.<sup>133</sup> The distinction is primarily centered on the amount of control the team has – the tighter the reins over what cheerleaders may do, the more likely it is that the relationship between the team and the cheerleaders is that of an employer-employee.<sup>134</sup>

### 2. *Team Contracts*

All of the disputed cheerleading contracts give their respective teams an incredible amount of control over their cheerleaders.<sup>135</sup>

127. See *Compliance Assistance – Wages and the Fair Labor Standards Act (FLSA)*, DEP’T OF LABOR (last visited Dec. 8, 2015)), <http://www.dol.gov/whd/flsa/> (explaining what Fair Labor Standards Act does).

128. See U.S. Wage and Hour Division, *Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S., DEP’T OF LABOR (2014), <http://www.dol.gov/whd/regs/compliance/whdfs13.pdf> (defining employee relationship).

129. See *id.* (defining independent contractor relationship).

130. See *id.* (applying definitions to part-time workers).

131. See *id.* (explaining that Supreme Court has not set particular guidelines for deciding which category worker may fall under).

132. See Homer, *supra* note 19 (describing challenges in assigning term “employee” to NFL cheerleaders).

133. For more information on the standards the teams and management companies impose on NFL cheerleaders, see *infra* notes 135–139 and accompanying text.

134. See *Fact Sheet #13*, *supra* note 128 (stating that employer’s amount of control over worker typically dictates classification).

135. See Matthew Fairburn, *Judge Says Buffalo Bills Set and Approved Contracts for Jills Cheerleaders, According to Report*, SYRACUSE.COM (Dec. 10, 2014), <http://www.syra>

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Provisions include requirements spanning from what color a cheerleader may dye her hair to what forms of outside employment she may accept.<sup>136</sup> Cheerleaders must obtain team approval before engaging in any modeling jobs or other appearances, under penalty of firing.<sup>137</sup> A particularly controversial aspect of some contracts dictates that employees may not discuss the compensation they receive from the team with other team members or anyone else.<sup>138</sup> As written, one analysis of a cheerleading team's rulebook describes the gig as "a scam exploiting the good looks and naiveté of young women—a Ponzi scheme in hot pants."<sup>139</sup> As Caitlin Y. of the Raiders put it, "I would have signed anything. I felt so lucky to be there."<sup>140</sup>

All NFL cheerleaders sign a contract that states that all disputes must be settled through arbitration.<sup>141</sup> This forced arbitration has many vocal critics, including the National Employment Lawyers Association (NELA).<sup>142</sup> When asked about Lacy's lawsuit, NELA's

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cuse.com/buffalo-bills/index.ssf/2014/12/judge\_says\_buffalo\_bills\_set\_and\_approved\_contracts\_for\_jills\_cheerleaders\_accor.html (giving example of contracts for Jills, compared to similar provisions in other contracts for cheerleading teams).

136. *See id.* (discussing regulation of women's appearances and outside activities in which cheerleaders may engage).

137. *See id.* (reprinting contractual provision forbidding cheerleaders from engaging in outside employment without prior approval). This provision also cuts off another source of potential funding for cheerleaders. Unlike other professional athletes, many of whom make most of their money from appearances and endorsements, cheerleaders are effectively prevented from supplementing their meager incomes with outside endorsements. The ease of replacing cheerleaders means they have few ways to appeal these rules without endangering their positions on the team. *See id.*

138. *See generally* Complaint, *Lacy T.*, *supra* note 39 (quoting contractual provision banning conversations about pay with members of team or any other person).

139. *See* Billy Haisley, *NFL Cheerleading Is A Scam: A Former Ravens Cheerleader Tells All*, DEADSPIN (Jan. 28, 2014, 1:15 PM), <http://deadspin.com/nfl-cheerleading-is-a-scam-a-former-ravens-cheerleader-1509840273>. Haisley's article, which centers on an etiquette handbook and contract from the Ravens cheerleading team, takes issue with the common provision in NFL cheerleading contracts that requires cheerleaders to buy up to 100 copies of their team's cheerleading calendar using their own funds. *See id.* The women must then resell the copies of the calendar to others in order to recoup their money. *See id.*

140. *See* Lisa Fernandez, *Raiderettes to Get Paid \$9 an Hour, Earning Minimum Wage for the First Time*, NBC BAY AREA (June 30, 2014, 11:16 AM), <http://www.nbcbayarea.com/news/local/Oakland-Raiders-Cheerleaders-Raiderettes-to-Earn-9-Dollars-an-Hour-265230771.html> (quoting Caitlin Y.'s response as to why she signed contract).

141. *See* Complaint, *Lacy T.*, *supra* note 39, paras. 37, 93 (alleging Raiderettes require cheerleaders to agree to be limited to arbitration as sole means of settling disputes).

142. *See* Press Release, Nat'l Employment Lawyers Ass'n, Statement on the Oakland Raiders' Motion to Compel Arbitration in *Lacy T. v. The Oakland Raiders* – NELA Urges Congress to Enact the Arbitration Fairness Act (Mar. 19, 2014),

spokesperson stated that “[t]he Raiders are using their unequal power against these women to enforce a dubious forced arbitration provision that would strip them of their right to have their day in court.”<sup>143</sup> Lawyers for Lacy also expressed dissatisfaction with this method of dispute resolution.<sup>144</sup> They stated that they strategically chose to file the suit in state court because California has struck down contractual provisions that unequally distribute bargaining power to the defendants in similar suits.<sup>145</sup> Many point out that the NFL Commissioner’s role in arbitration is unfairly skewed towards team owners, who pay the commissioner’s \$44 million salary.<sup>146</sup> Asks one critic, “[Commissioner] Roger Goodell, how do you discipline one of your bosses?”<sup>147</sup>

The growing mountain of lawsuits exposes what appears to be a widespread problem among NFL teams.<sup>148</sup> For every team like the Seattle Seahawks, cited in Alexa’s complaint as one that pays minimum wage to cheerleader employees, there is a corresponding team like the Raiders that does not.<sup>149</sup>

For an organization under a lot of pressure due to what many feel is already a sexist and outdated attitude toward women, the NFL is feeling the pressure.<sup>150</sup> For its part, the NFL insists that monitoring contracts between independent contractors and teams is not its responsibility.<sup>151</sup> Roger Goodell submitted an affidavit de-

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*available at* <https://www.nela.org/index.cfm?pg=20140319OaklandRaiders> (stating NFL’s requirement that cheerleaders settle claims through arbitration unconscionable).

143. *Id.* (quoting NELA’s response to Lacy’s lawsuit).

144. See Robin Abcarian, *Oakland Raiders Break All Kinds of Labor Laws, Cheerleader Suit Says*, LA Times (Jan. 24, 2014, 3:53 PM) <http://www.latimes.com/local/abcarian/la-me-ra-20140124-story.html>

145. See *id.* (describing California’s labor laws, which lawyers say are significantly more favorable to plaintiffs than federal law).

146. See Nat’l Employment Lawyers Ass’n, *supra* note 142 (explaining payment for Goodell).

147. *Id.*

148. See Nichi Hodgson, *Cheerleaders Make the NFL’s Billions. They Deserve to be Paid Minimum Wage*, THE GUARDIAN (Mar. 30, 2014, 7:30 AM), <http://www.theguardian.com/commentisfree/2014/mar/30/cheerleaders-make-minimum-wage-nfl-labor-rights> (arguing cheerleaders deserve at least minimum wage given revenue they rake in for NFL teams).

149. See Complaint, *Brenneman*, *supra* note 34, para. 7 (observing not all franchises are equal in way they compensate cheerleaders).

150. See Powell, *supra* note 100 (interviewing two former Jills cheerleaders about employment conditions).

151. See *NFL Seeks Dismissal of Lawsuit by Former Buffalo Jills Cheerleaders Over Wages*, THE BUFFALO NEWS (Mar. 10, 2015), <http://bills.buffalonews.com/2015/03/10/nfl-seeks-dismissal-of-lawsuit-by-former-buffalo-jills-cheerleaders-over-wages/> (describing NFL’s argument that it does not oversee team contracts).

nying any knowledge of the Jills' employment conditions.<sup>152</sup> The individual teams also deny responsibility for the deplorable employment circumstances.<sup>153</sup> Some cheerleading teams are subcontracted to independent choreography groups, which are not run directly through the league or even the teams.<sup>154</sup> This gives the NFL and individual teams an additional layer of insulation from liability.<sup>155</sup>

### C. The Feds (Kick) Step In

How can teams get away with denying their cheerleaders minimum wage?<sup>156</sup> The Fair Labor Standards Act expressly dictates that employers must pay a minimum wage of \$7.25 per hour to all employees.<sup>157</sup> States may set their own minimum wage higher, and many have.<sup>158</sup> However, the minimum wage does not apply to workers classified as "independent contractors" rather than employees.<sup>159</sup> This is what the Department of Labor (DOL) calls "misclassification," which occurs when "employers deliberately misclassify employees [as independent contractors] in an attempt to cut costs."<sup>160</sup> The DOL considers six factors in determining if a worker is legitimately an independent contractor:<sup>161</sup>

- 1) The extent to which the work performed is an integral part of the employer's business;
- 2) Whether the worker's managerial skills affect his or her opportunity for profit

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152. See Powell, *supra* note 100 (interviewing two former Jills cheerleaders about employment conditions).

153. See *id.* (describing attempts to foist responsibility on third-party production companies).

154. See *id.* (detailing intricacies of employment structure).

155. See *id.* (describing goal of NFL and teams to insulate themselves from liability by subcontracting services of cheerleaders, concessions, parking, et cetera).

156. See Adshade & Berri, *supra* note 99 (questioning practices that allow teams to escape from individual liability).

157. See Wage and Hour Division, *Minimum Wage Overview*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/minimumwage.htm> (last visited Feb. 22, 2016) (listing required federal minimum wage).

158. See *id.* (stating states are permitted to set minimum wage laws at higher rates).

159. See Wage and Hour Division, *Misclassification of Employees*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/workers/misclassification/> (last visited Apr. 5, 2016) (stating exemptions from minimum wage requirement for certain types of workers).

160. See *id.* (detailing ways in which companies try to "get around" wage laws by paying workers less).

161. See Homer, *supra* note 19 (analyzing federal standards for independent contractors).

and loss; 3) The relative investments in facilities and equipment by the worker and the employer; 4) The worker's skill and initiative; 5) The permanency of the worker's relationship with the employer; 6) The nature and degree of control by the employer.<sup>162</sup>

Arguably, cheerleaders confront challenges in proving even the first factor.<sup>163</sup> As six NFL teams operate without cheerleaders, the plaintiffs face difficulty in proving that their skills are integral to their respective teams.<sup>164</sup> Team owners would also argue that the relationship lacks permanency under the fifth factor because cheerleaders are subject to annual release.<sup>165</sup> However, examination of their contracts and rulebooks indicate that some of the other factors more persuasively demonstrate employee status.<sup>166</sup> As to their "managerial skills," the workers uniformly allege in their complaints that the system for selecting cheerleaders for paid performances is unpredictable, with such appearances being rare even after the cheerleaders have complied with the requisite number of "charity" appearances.<sup>167</sup> In terms of skill and initiative, cheerleaders must demonstrate incredible proficiency in their work, imbuing their performances with examples of talent they have honed for years.<sup>168</sup>

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162. *Id.* (listing considerations DOL uses when determining whether worker is employee or independent contractor).

163. *See* Messinger, *supra* note 13 (stating difficulties of proving cheerleaders are employers). The difficulty of categorizing cheerleaders increases when services they provide are not utilized by every team, arguably making them less integral to running of football teams generally.

164. *See id.* (naming six NFL teams without cheerleaders).

165. *See* Khazan, *supra* note 103 (stating that all cheerleaders are subject to release after season contract expires, meaning veterans risk being cut as well as rookies). In addition to helping teams retain only women at the top of their field, this annual release also helps to prevent the relationship between the teams and the cheerleaders develop any sense of permanency. Whether this policy is intended to have that effect, it does help the NFL teams' cases in the wake of these suits. *Cf. id.*

166. *See* Sudhin Thanawala, *Pom-Pom Pay: California Bill Gives Cheerleaders Minimum Wage*, AP NEWS (July 1, 2014, 4:06 PM), <http://bigstory.ap.org/article/b0e814edefed4d06b2b152f0c31f2583/california-legislation-responds-cheerleader-lawsuits> (arguing cheerleaders deserve employee status). The Thanawala article quotes Reuel Schiller, a labor law professor at University of California Hastings College of Law, who says cheerleaders are not independent contractors based on the level of control the teams have over their performances. *See id.* Schiller believes an independent contractor in this situation would be a dance studio supply-performers for a single game. *See id.*

167. *See generally* Complaint, *Brenneman*, *supra* note 34 (complaining she was selected for only one paid appearance despite completing requisite number of "charity" appearances).

168. *See id.* (detailing professional dance experience required for job performance).

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Depending on the team, cheerleaders are either provided with equipment, or must buy it from the team.<sup>169</sup> The Jills required cheerleaders to purchase uniforms, whereas organizations like the Raiders provide them, though replacements of anything can be extremely expensive.<sup>170</sup>

The DOL seemingly sidestepped this question when evaluating the Raiderettes' claim of misclassification.<sup>171</sup> The DOL determined that the Raiderettes were seasonal workers and therefore not subject to minimum-wage requirements under the law.<sup>172</sup> Seasonal workers are employees of an "amusement or recreational" business that operates for no more than seven months in a calendar year.<sup>173</sup> The Fair Labor Standards Act exempts seasonal businesses from the minimum wage and overtime requirements that the act promulgates, so employers operating under this classification are not required to pay their employees in accordance with the FLSA.<sup>174</sup>

DOL officials made the pronouncement that the Raiderettes were seasonal workers after considering the scheduled football season, which runs from August through December.<sup>175</sup> However, lawyers for the Raiderettes expressed disappointment with the ruling, saying that the DOL ignored the realities of cheerleading.<sup>176</sup> For example, cheerleaders try out for teams in April, and have constant practices throughout the summer months leading into the football season to rehearse complicated routines.<sup>177</sup> If a cheerleader's foot-

169. See Hess, *supra* note 46 (describing equipment policies for cheerleading teams).

170. See *id.* (discussing incident in which cheerleader accidentally stained shirt with pen during calendar signing and was forced to buy new uniform).

171. See Bob Egelko, *Feds End Raiderette Wage Probe With No Action*, SF GATE (Mar. 20, 2014, 7:10 AM), <http://www.sfgate.com/raiders/article/Feds-end-Raiderette-wage-probe-with-no-action-5332287.php> (describing end of federal inquiry about Raiderette minimum wage claims).

172. See *id.* (stating Raiderettes are seasonal employees exempt from federal minimum wage laws).

173. See Wage and Hour Division, *Fact Sheet #18: Section 13(a)(3) Exemption for Seasonal Amusement or Recreational Establishments Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR (2008), <http://www.dol.gov/whd/regs/compliance/whdfs18.htm> (explaining provisions of FLSA and effect on seasonal workers).

174. See *id.* (detailing how and why seasonal employers are exempt from FLSA requirements).

175. See Egelko, *supra* note 171 (describing how DOL came to conclusion that Raiderettes were not employees).

176. See Heather Johnson, *Raiderettes are Seasonal, Labor Agency Says*, COURTHOUSE NEWS SERVICE (Mar. 20, 2014, 6:33 AM), <http://www.courthousenews.com/2014/03/20/66347.htm> (lawyers for Raiderettes disputing federal determination that Raiderettes are seasonal employees based on football schedule).

177. See *id.* (observing that cheerleaders try out in April, and do not receive paychecks until January).

ball team makes the playoffs or the Super Bowl, cheerleading practices can extend all the way to February; of course, this does not include other special events that require additional time commitments.<sup>178</sup> Realistically, even if the season runs only from the April tryout until the official season's end in December, cheerleaders are employed for nine months, pushing them over the seasonal worker requirements.<sup>179</sup>

#### D. What's in a Name? Determining if Cheerleaders Are Really "Employees"

Were the lawsuits to proceed to trial, the likely outcome is unclear. Given the DOL's ruling that cheerleaders are only seasonal workers, it seems as though the teams would be exempt from FLSA.<sup>180</sup> However, some of the teams clearly characterize their cheerleaders as employees.<sup>181</sup> This classification harms the NFL teams' claims that they are not obligated to pay minimum wage, especially in state court.<sup>182</sup> The Jets personally run the cheerleading team through their organization, not a third-party vendor, and specifically refer to the cheerleaders as "employees" in their contracts.<sup>183</sup> If the Jets decide not to settle and instead proceed to court, the Flight Crew cheerleaders have a sturdy claim under New York state law based on the intense control the Jets exercise over their physical appearances, hours, and job performances.<sup>184</sup>

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178. *See id.* (describing possibilities for additional extension of cheerleading season).

179. *See Cheer FAQ*, BALTIMORE RAVENS, <http://www.baltimoreravens.com/ravenstown/cheerleaders/cheer-faq.html> (last visited Oct. 8, 2015) (giving example of cheerleading requirements for Ravens). The Baltimore Ravens explicitly state on their home website that cheerleading practices run from April through January.

180. *See Egelko*, *supra* note 171 (stating difficulties of proving cheerleaders are employers when services they provide are not utilized by every team, making them less integral to running of football team). Based on this disappointing determination, cheerleaders are classified as seasonal workers, meaning they fall under one of the exemptions for minimum wage requirements. *See id.*

181. *See GPEFF Attorneys at Law*, *supra* note 76 (quoting New York Jets, who specifically call cheerleaders employees).

182. *See id.* (describing difficulties this presents for Jets in claiming cheerleaders are not actually supervised by team).

183. *See id.* (describing difficulties this presents for Jets in claiming cheerleaders are not actually supervised by team).

184. *See Independent Contractors*, N.Y. DEP'T OF LABOR, <https://labor.ny.gov/ui/dande/ic.shtm> (last visited Apr. 5, 2016) (listing methods for evaluating whether worker is independent contractor, which includes more criteria than federal DOL standards). New York's laws do not mention an exemption for seasonal workers, strengthening the cheerleaders' claims of employee status. *See id.*



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The Bills, who subcontract their cheerleading services to the production company Stejon Productions, insist the Jills are an “ancillary service provided by third-party vendors.”<sup>185</sup> The team avoids all attempts to tie it directly to the employment and management of the cheerleaders.<sup>186</sup> The production company disputes these claims, contending that the team has final say over every aspect of the cheerleading brand.<sup>187</sup> After the Bills filed a motion to dismiss, stating that they did not employ the Jills, a state judge determined that the Bills had more supervision over the cheerleading team than the organization admitted.<sup>188</sup> The judge concluded that the Jills were employed by the production company in name only, with the Bills retaining primary control over the cheerleaders.<sup>189</sup> The court consequently denied the Bills’ motion.<sup>190</sup> The Bills set the terms and approved all contracts for the Jills.<sup>191</sup> Though the Bills subcontracted their squad’s management, their close relationship with Stejon Productions and retention of certain supervisory rights may make the Bills obligated to pay under New York state law.<sup>192</sup> At the time the Jills were employed as cheerleaders, they should have been paid a minimum hourly wage of \$8.00.<sup>193</sup> The New York Department of Labor noted the importance of “[r]emember[ing] that the real distinction between the employer-employee relationship and the independent contractor relationship depends primarily on the level of supervision, direction and control exercised by the [entity] engaging the services. It is *not* defined by what the relationship is called by the participants.”<sup>194</sup>

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185. See Powell, *supra* note 100 (internal quotation marks omitted) (quoting Bills’ response to questions from New York Times writer).

186. See *id.* (noting team’s assertion that it is not responsible for actions of Stejon Productions).

187. See *id.* (quoting manager from production company, who says Bills exercised firm control over cheerleading rules and requirements).

188. See *id.* (describing court’s response to Bills’ motion to dismiss).

189. Robin Abcarian, *NFL Cheerleader Lawsuit Update: Buffalo Jills Win One Against Bills*, L.A. TIMES (July 2, 2014), <http://www.latimes.com/local/abcarian/la-me-ra-jills-cheerleaders-wage-theft-20140702-column.html>.

190. See *id.* (describing court’s ruling that Bills exercised extensive control over cheerleaders).

191. See *id.*

192. See N.Y. Dep’t of Labor, *supra* note 184 (declaring supervisory rights are key to determining if worker is employee).

193. See *id.* (showing graduated levels of minimum wage increasing each year).

194. *Id.* (stating definition of relationship in contract as “independent contractor” irrelevant to determination of employer-employee status).

#### IV. SETTLING DOWN: NFL SETTLEMENTS LOOK A LOT LIKE CROWD CONTROL

The NFL's teams have begun to back down in the face of growing revolt. Despite the uncertain success of the cheerleaders' legal argument, several of the teams have wisely chosen to settle.<sup>195</sup> While cheerleaders have fairly convincing claims under state law, the NFL teams have the benefit of comparatively unlimited resources to fight or quash claims, as well as the ability to buy off or simply fire dissenters.<sup>196</sup> As previously mentioned, the teams also have the advantage of a tightly controlled majority of cheerleaders, many of whom are too afraid of losing their positions on the squads to fight back against a system they know to be unfair.<sup>197</sup> However, the NFL teams likely settled only to mitigate the damage the suits were causing to their image in the court of public opinion.

Notwithstanding the low level of support, all cheerleaders employed during the same time as the lead plaintiffs in the lawsuits stand to benefit from a settlement or judgment against the team.<sup>198</sup> Four of the five teams sued by their cheerleaders chose to settle, agreeing to compensate cheerleaders for back pay.<sup>199</sup> The Raiders settled with Lacy and the other Raiderettes for \$1.25 million.<sup>200</sup> The settlement gave back pay to Raiderettes who cheered for the

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195. See John Breech, *Cheerleaders Reach \$1.25 Million Settlement in Lawsuit Against Raiders*, CBS SPORTS (Sept. 4, 2014, 7:00 PM), <http://www.cbssports.com/nfl/eye-on-football/24694782/cheerleaders-reach-125-million-settlement-in-lawsuit-against-raiders> (detailing settlement in Raiderettes case).

196. See generally Complaint, *Krystal C.*, *supra* note 79 (asserting that under catch-all provisions inserted into contracts, NFL teams have wide latitude to expel dissenters from organization).

197. See Hess, *supra* note 46 (explaining cheerleaders who want to stay with team have largely chosen not to protest low wages).

198. See Breech, *supra* note 195 (writing that all cheerleaders who do not expressly opt out will receive back pay under settlement).

199. See Benjamin Horney, *Bengals Settle Cheerleader Wage Class Action for \$255K*, LAW360 (Aug. 26, 2015, 7:22 PM), <http://www.law360.com/articles/695843/bengals-settle-cheerleader-wage-class-action-for-255k> (reporting Bengals settled with Ben-Gals cheerleaders for \$255,000); Michael Powell, *N.F.L. Cheerleaders' Wage Fight Gains Momentum*, NY TIMES (Sept. 8, 2015), [http://www.nytimes.com/2015/09/09/sports/a-wage-fight-gains-momentum.html?\\_r=0](http://www.nytimes.com/2015/09/09/sports/a-wage-fight-gains-momentum.html?_r=0) (writing status update regarding NFL cheerleading lawsuits and stating Raiders and Buccaneers among those who have chosen to settle); Claire Zillman, *Yet Another NFL Team Settles a Cheerleader Lawsuit Over Poor Pay*, FORTUNE (Jan. 27, 2016, 5:33 PM), <http://fortune.com/2016/01/27/nfl-cheerleader-pay/> (reporting Jets as latest team to settle cheerleading lawsuit).

200. See Powell, *supra* note 199 (describing end of lawsuit against Raiders resulting in \$1.25 million payout for cheerleaders).

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team from the 2010 season onward, totaling \$6,400 per season.<sup>201</sup> The two lead plaintiffs, Lacy T. and Sarah G., will receive \$10,000 each.<sup>202</sup> As Lacy put it, her suit “changed the way the Raiders do business.”<sup>203</sup>

The Buccaneers also chose to settle rather than proceed through a protracted legal battle, although their lawyers made certain to deny that the team owed the cheerleaders any wages.<sup>204</sup> As for Pierre-Val, she told reporters: “I’m glad that I stuck to my guns and now the girls including myself will be compensated for at least some of the time given to the Bucs organization.”<sup>205</sup> Pierre-Val’s lawyer expressed similar feelings of victory: “We hope this is part of a movement for all teams who pay their cheerleaders this way to pay them a livable wage for the hours they have worked.”<sup>206</sup> Up to ninety-three other cheerleaders will be able to claim at least \$3,445 per season for up to five seasons total.<sup>207</sup>

#### V. CHEERLEADING’S BRIGHTER FUTURE

Despite the Bills’ suspension of the Jills squad, the future for most other squads looks considerably brighter than in previous years.<sup>208</sup> Many of the teams have opted to settle with cheerleaders and retain their services rather than engage in protracted legal battles.<sup>209</sup> This indicates that the teams understand the economic benefits they reap from the cheerleaders, even after paying them minimum wage.<sup>210</sup> Aside from signaling a newfound understanding that cheerleaders deserve higher pay, these settlements indicate

201. *See id.* Lacy has stated she is happy with the result of the suit against the Raiders, but states she is still “shocked” that the NFL has yet to publicly address the suit or the systematic payment problem afflicting NFL cheerleading teams. *See id.*

202. *See* Robin Abcarian, *Cheerleaders’ Wage-Theft Lawsuit to Cost Oakland Raiders \$1.25 Million*, L.A. TIMES (Sept. 4, 2014, 3:12 PM), <http://www.latimes.com/local/abcarian/la-me-ra-raiders-settle-cheerleader-lawsuit-20140904-column.html> (describing benefit Lacy and Sarah will receive as leaders of class).

203. *See* Breech, *supra* note 195.

204. *See* Marrero, *supra* note 117 (Buccaneers lawyers denying comment except in court documents stating team chose to settle after “many rounds of negotiations,” not because it owes cheerleaders back pay).

205. *See id.* (quoting lead plaintiff’s reaction to settlement).

206. *See id.*

207. *See id.* (explaining terms of suit and payment for all cheerleaders except those who expressly opt out).

208. *See* Powell, *supra* note 199 (chronicling new movement towards fair pay throughout NFL cheerleading teams).

209. *See id.*

210. *See id.* (performing cost-benefit analysis of cheerleading lawsuits against NFL).

that the NFL may be working to repair its image with female fans.<sup>211</sup> Teams wisely decided it was worth paying higher wages to quell negative media attention these suits brought to disenfranchised women working within the NFL.<sup>212</sup>

Notably, teams have opted to increase cheerleader wages following the lawsuits, including some teams who were not sued by their cheerleading squads.<sup>213</sup> The Ravens quietly increased pay to minimum wage for their cheerleaders.<sup>214</sup> Despite the team's reluctance to admit wrongdoing, the Buccaneers also changed their pay scale following the suit. The team will now compensate cheerleaders with minimum wage for all practices and special events outside of games.<sup>215</sup> The Raiderettes settlement also increases pay for current cheerleaders to \$9 per hour for all games, practices, and appearances.<sup>216</sup>

Lacy noted that "it's really shocking that [the NFL teams] expect such a high-quality product but aren't willing to pay."<sup>217</sup> Apparently, lawmakers are shocked by this as well, as the notoriety of the suits attracted high-profile assistance.<sup>218</sup> California state lawmakers took up the cheerleaders' cause first, passing a law to

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211. See Natalie Kitroeff, *N.F.L. Hones Message for Its Female Fans*, N.Y. TIMES (Jan. 5, 2013), [http://www.nytimes.com/2013/01/06/sports/football/nfl-hones-message-for-its-female-fans.html?\\_r=1](http://www.nytimes.com/2013/01/06/sports/football/nfl-hones-message-for-its-female-fans.html?_r=1) (describing NFL's efforts to connect with and solidify female fan base).

212. See Powell, *supra* note 199 (theorizing that NFL decided to settle rather than suffer additional backlash from those who feel its attitudes toward women are already deplorable).

213. See Baltimore Ravens, *supra* note 179 (stating all Ravens cheerleaders make minimum wage for every game, practice, and appearance).

214. See *id.*; see also Haisley, *supra* note 139 (discussing sexist practices on Ravens cheerleading team).

215. See Marrero, *supra* note 117 (commenting on Buccaneers' changed pay scales, which now compensate cheerleaders minimum wage for every practice and event).

216. See Howard Bloom, *NFL Cheerleaders Bring in Money, But Barely Paid Any*, SPORTING NEWS (Sept. 11, 2014), <http://www.sportingnews.com/nfl-news/4608901-nfl-cheerleaders-treatment-pay-salary-lawsuits-jills-raiderettes-minimum-wage-women> (describing pay bump for Raiders cheerleaders following lawsuit).

217. See Christopher Zara, *Super Bowl 2015: NFL Cheerleader Pay, Surprisingly Low, Fuels Ongoing Wage Debate*, I.B. TIMES (Jan. 30, 2015), <http://www.ibtimes.com/super-bowl-2015-nfl-cheerleader-pay-surprisingly-low-fuels-ongoing-wage-debate-1800684> (quoting Lacy's reaction to ongoing failure of NFL to apologize or demand teams pay cheerleaders minimum wage).

218. See Chris Nichols, *CA Lawmaker Pitches Cheerleader Rights Bill*, SAN DIEGO UNION-TRIBUNE (Jan. 29, 2015, 10:03 AM), <http://www.sandiegouniontribune.com/news/2015/jan/29/lorena-gonzalez-cheerleader-nfl-employee-rights/> (detailing efforts of Lorena Gonzalez, California state lawmaker, to pass bill deeming cheerleaders "employees" of their organization and demanding they be paid minimum wage).

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improve working conditions for the women.<sup>219</sup> The new law affirms their status as employees rather than independent contractors, and requires teams to pay them at least minimum wage.<sup>220</sup> Cheerleaders will also get breaks and sick leave under the new law.<sup>221</sup> Though this only affects three NFL teams (the Raiders, the 49ers, and the Chargers), it is a step in the right direction, and one that has gained traction in other states.<sup>222</sup> New York has since introduced similar legislation, following the suits against the Jets and the Bills.<sup>223</sup> As the Bills still have not settled with their cheerleaders, this legislation could prompt settlement as well as require change going forward. The authors of the New York and California cheerleader minimum wage legislation, along with several other state senators and representatives, sent a letter to Commissioner Goodell requesting that he take action to correct the compensation issues.<sup>224</sup> The letter notes the “highly visible and lucrative” nature of the industry and encourages the NFL to use this opportunity to address and rectify the “economic injustice.”<sup>225</sup> The NFL’s spokesperson responded to the letter saying that “[t]eams are advised to follow state and federal employment laws.”<sup>226</sup> While that seems to be a less than proactive stance, some believe the NFL is quietly pulling the strings to ensure teams settle the cases.<sup>227</sup>

The relative success of the NFL cheerleaders has encouraged other similarly situated men and women to take action as well.<sup>228</sup> Minor league baseball players have filed suit against the Minor League Baseball (MiLB) organization, stating that their pay fails to compensate them for their skills and exploits their dreams of mak-

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219. *See id.*

220. *See* Melanie Mason, *Gov. Jerry Brown Signs Bill Giving Labor Protections to Pro Sports Cheerleaders*, L.A. TIMES (July 15, 2015, 7:06 PM), <http://www.latimes.com/local/political/la-me-pc-cheerleader-employee-protections-20150715-story.html> (stating Governor Jerry Brown of California signed bill ensuring minimum wage for professional cheerleaders in state).

221. *See id.* (listing benefits cheerleaders will now have under new law).

222. *See id.* (discussing implications of bill and support for similar bills).

223. *See id.* (stating lawmakers in New York are contemplating similar bill after bill’s success in California).

224. *See* Liz Sumon, *The NFL Cheerleader Wage Theft War*, Payscale (Sept. 17, 2015), <http://www.payscale.com/career-news/2015/09/the-nfl-cheerleader-wage-theft-war>.

225. *See id.* (reprinting letter sent by legislators to NFL, imploring league to correct pay problems).

226. *See id.* (quoting NFL spokesman’s response to letter).

227. *See* Zara, *supra* note 217 (quoting lawyer espousing belief that NFL is encouraging teams to settle).

228. *See id.*

ing it into the major leagues.<sup>229</sup> However, their suit seems unlikely to succeed, despite some of their employment conditions eclipsing even the deplorable treatment of the cheerleaders.<sup>230</sup> It is possible that some of the more outrageously sexist elements of the cheerleading contracts are saving the cheerleaders from a similar fade-out, by making them more newsworthy and bringing increased attention to their plight.<sup>231</sup>

A former NBA dancer for the Milwaukee Bucks filed suit in Wisconsin, stating the flat fees she made for games, practices, and appearances failed to amount to minimum wage.<sup>232</sup> Even the NBA dancers who do make minimum wage have expressed discontent and begun to set their sights on greater goals. “You get this prestigious job dancing for the Warriors and you go home, and think: Hey, I’m making \$10 an hour! It’s like working at Wendy’s,” said a former NBA dancer for the Golden State Warriors team, voicing her frustrations with the low pay.<sup>233</sup>

While minimum wage is a solid starting point for the cheerleaders, it seems clear that truly fair pay would take into account

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229. See Mary Pilon, *Are Minor Leaguers Paid Legal Wages?*, THE NEW YORKER (Aug. 20, 2015), <http://www.newyorker.com/news/sporting-scene/are-minor-leaguers-paid-legal-wages> (describing claims of minor league baseball players, who believe league is exploiting them based on shockingly low pay). See also Mark Stanton, Comment, *“Juuuusst a Bit Outside”: A Look at Whether MLB Owners Can Justify Paying Minor Leaguers Below Minimum Wage Without Violating the Fair Labor Standards Act*, 23 Moorad Sports L.J. 727 (2015).

230. See *id.* (describing conditions for minor league players, who often cannot afford single-family housing on their meager salaries, and are forced to share rooms with other players or couch-surf all season). Minor leaguers suffer from their lack of a union, which would likely help them fight for better pay. See *id.* However, like the cheerleaders, many players are too afraid to act in a manner that might be construed as rebellious or dissenting, and thereby dash their chances of making it to the major leagues. See *id.*

231. See *id.*

232. See Mattie Kahn, *NBA Cheerleaders Paid Less Than Minimum Wage Demand a Raise*, ELLE (Oct. 26, 2015), <http://www.elle.com/culture/career-politics/news/a31461/nba-cheerleaders-demand-raise/>.

233. See Powell, *supra* note 199 (quoting former NBA dancer disgruntled with job’s low pay). The fast-food employer comparison is particularly timely in the wake of a movement for higher pay in that industry. New York lawmakers recently approved a controversial bill increasing pay for fast-food workers in New York City to \$15 an hour. See *id.* The governor hopes to lead the charge to significantly raise minimum wages in all industries around the country to reflect living wages. Cheerleaders, whose jobs require incredibly specific training and dedication, seem deserving of at least such an increase. See *id.*; see also Jeanne Sahadi, *New York Seals Deal on \$15 Minimum Fast Food Wage*, CNN MONEY (Sept. 11, 2015, 11:54 AM), <http://money.cnn.com/2015/09/10/pf/new-york-minimum-wage/> (describing controversy in industry over whether employers should pay fast food workers higher wages).

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their years of experience and dedication.<sup>234</sup> After all, the lowest-paid player in the NFL makes over \$400,000 a year.<sup>235</sup> For now, cheerleaders are still working to buck decades' worth of sexist practices and pay discrepancies promulgated by an incredibly powerful and lucrative industry. Even the modest advances the cheerleaders have made so far have taken an extraordinary amount of mettle; now that their respective state governments have begun to back them, the women are finally seeing their hard work pay off. Lacy's efforts have done much to change the way industry insiders and outsiders alike view the work of cheerleaders.

In the words of one famed fictional cheerleader: "This is not a democracy; it's a cheerocracy!"<sup>236</sup>

*Jordan McGee\**

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234. See Powell, *supra* note 199.

235. See Kurt Badenhausen, *Average MLB Player Salary Nearly Double NFL's, But Still Trails NBA's*, FORBES (Jan. 23, 2015), <http://www.forbes.com/sites/kurtbadenhausen/2015/01/23/average-mlb-salary-nearly-double-nfls-but-trails-nba-players/#237434e269e9> (reporting minimum salary of \$420,000 in 2014 for NFL players).

236. BRING IT ON, *supra* note 4.

\* J.D. Candidate, May 2016, Villanova University Charles Widger School of Law; B.A., Political Science and English Literature, University of Delaware. I would like to dedicate this article to all of my cheerleaders—thank you for your support!