

DEVELOPMENTS IN NLRA POLICY PROVIDE UFC ATHLETES NEW PATHWAYS TO REPRESENTATION

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I. INTRODUCTION

The Ultimate Fighting Championship (“UFC”) is the preeminent Mixed Martial Arts (“MMA”) organization in the world.¹ The UFC is distributed on FOX television² and Pay-Per-View,³ as well as on its own media platforms.⁴ The organization’s rise from its first event in 1993 pinnacled at its \$4 billion sale in 2016.⁵ Fighters signed to UFC contracts (“the Athletes”) have enjoyed increasing purses, but many argue the athletes are undercompensated and over-manipulated.

The Athletes are in the early stages of organizing, but barriers to National Labor Relations Act (“NLRA” or “the Act”) protections exist in the form of the Athletes’ independent contractor status. The National Labor Relations Board (“NLRB” or “the Board”), in response to recent internal guidance, generated a new inroad to enforcement of employee rights.

This paper examines the validity of potential Athlete claims and unionization attempts following the development of employee misclassification as a standalone Unfair Labor Practice (“ULP”) post-*Velox*⁶ and in accordance to jurisdictional concerns post-*Northwestern*.⁷

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¹ Human cockfighting to.... [link](#)

² Dave Meltzer, *UFC is facing its most important contract negotiation*, MMAfighting.com (Dec. 5, 2017),

<https://www.mmfighting.com/2017/12/5/16723236/ufc-is-facing-its-most-important-contract-negotiation>.

³ *Id.*

⁴ Jeff Beer, *How the UFC is Taking the World’s Oldest Sport into the Future of Media*, Fast Company, (July 7, 2016), <https://www.fastcompany.com/3061603/how-ufc-is-taking-the-worlds-oldest-sport-into-the-future-of-media>

⁵ Cindy Boren, *UFC sale is official at a reported \$4billion in one of the biggest sales in sports history*, The Washington Post (July 11, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/07/11/ufcs-dana-white-confirms-4-billion-sale-the-largest-in-sports-history/?utm_term=.b9a2e905590c

⁶ *Velox Express, Inc. and Jeannie Edge, an Individual*, 2017 WL 4278501 (N.L.R.B. Div. of Judges), at 9.

⁷ *Northwestern University*, 362 NLRB No. 167

II. BACKGROUND

A. Contractual developments in the UFC and Unionization response

As the UFC grows in popularity and value, support for commensurate athlete compensation and rights has picked up momentum. Some proclaim the UFC's contracts overly restrictive⁸, while some athletes plainly criticize the UFC's treatment of them.⁹ Despite the fact the UFC garnered over 3 million pay-per-view buys over 11 events in 2017,¹⁰ athletes can go unpaid if their opponent is unable to fight.¹¹ Recognizing the necessity for athlete justice, efforts to create and promote unions emerge.

Four organizations lead the charge: the Mixed Martial Arts Fighters Association ("MMAFA"),¹²; the Mixed Martial Arts Athletes Association ("MMAAA"),¹³; the Professional Fighters Association ("PFA");¹⁴ and, most recently, Project Spearhead,¹⁵ (collectively, "the Unions"). Project Spearhead focuses heavily on engaging the athletes to seek unionization and to sign union authorization cards.¹⁶ But that's only half the battle, as the Athletes must gain employee classification to receive Federal labor protections under the NLRA.

B. Governing body of law

The NLRB is an independent governmental agency whose task is to regulate matters relating to the NLRA.¹⁷ The NLRA offers protections to employees to organize and bargain collectively in order to remedy inequality of bargaining power between employees and employers.¹⁸ Such

⁸ Shaun Al-Shalli, *Georges St. Pierre's lawyer calls UFC contract 'something out of the 1940s,'*, MMAFighting.com (Oct. 19, 2016),

<https://www.mmafighting.com/2016/10/19/13333778/georges-st-pierres-lawyer-calls-ufc-contract-something-out-of-the>

⁹ Michael Blaustein, *The UFC and Georges St-Pierre are at war*, New York Post (Oct. 18, 2016), <https://nypost.com/2016/10/18/the-ufc-and-georges-st-pierre-are-at-war/>

¹⁰ *UFC Pay-per-view*, MMApayout.com, <http://mmapayout.com/blue-book/pay-per-view/>

¹¹ Belfort asks for pay after Hall Pulls Out. <http://mmapayout.com/2018/01/belfort-asks-for-pay-after-hall-pulls-out-of-ufc-st-louis/>

¹² *About MMAFA*, MMAFA.tv, <http://mmafa.tv/about-mmafa/>

¹³ *Mission Statement*, The MMA Athletes Association, <https://www.themaaa.com>

¹⁴ Professional Fighters Association *web site*, <http://profighters.org>

¹⁵ Project Spearhead *web site*, <http://projectspearhead.com>

¹⁶ *Id.*

¹⁷ 29 U.S.C. §151.

¹⁸ *Id.*

remedies are intended to cure industrial strife for the purpose of safeguarding and promoting the flow of commerce.¹⁹

While athletes in professional team sports are typically employees of the organizations they play for, individual-competition athletes are traditionally classified as independent contractors.²⁰ Tradition, however, is not determinative. Those engaged in an occupation regularly suggesting independent contractor status can be statutory employees under the act in some settings.²¹

C. Misclassification of statutory employees as NLRA Section 8(a)(1) violation

Because the NLRA only protects employees²², disputes as to whether an individual is an independent contractor or employee are common.²³ A new development, though, puts the importance of the question at issue, as recent NLRB actions frame the misclassification of statutory employees as a violation pursuant to Section 8(a)(1) of the act,²⁴ which protects against employer actions to curtail or frustrate unionization, collective bargaining and other concerted activities toward protection.²⁵

III. DISCUSSION

A. UFC exerts control over athletes such that the athletes are statutory employees

1. Applicable Standard

The Act's definition of employee states that "[t]he term 'employee' shall include any employee...but shall not include any individual...having the status of independent contractor".²⁶ As the plain language provides no

¹⁹ Id.

²⁰ Mark Conrad, *The Business of Sports: Off the Field, in the Office, on the News*, 2017, at 58.

²¹ *Pennsylvania Interscholastic Athletic Association, Inc.* 365 NLRB No. 107, at 8.

²² Id.

²³ *Velox Express, Inc. and Jeannie Edge, an Individual*, 2017 WL 4278501 (N.L.R.B. Div. of Judges), at 9.

²⁴ *Advice Memorandum, Pacific 9 Transportation, Inc.*, National Labor Relations Board Office of the General Counsel (Dec. 18, 2015), at 4.

²⁵ *Interfering with employee rights*, National Labor Relations Board, <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1>

²⁶ 29 USC §152 (3).

guidance in making the distinction, the Board adopted the Common Law Agency test as stated in the Restatement (Second) of Agency §220 as its tool for determining employee status under the NLRA²⁷.

The test's factors include: (1) the extent of control over the details, means, and manner of the work; (2) whether the putative contractor is engaged in a distinct occupation or business; (3) whether the work is done under the direction of the principal, or by a specialist without supervision; (4) the skill required; (5) who supplies the tools and place of work; (6) the length of time for which the person is employed/contracted; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an employment or contract relationship; and (10) whether the principal is in the same business²⁸. The Board also considers "the extent to which a putative independent contractor is, in fact, rendering services as part of an independent business with an actual (not merely theoretical) entrepreneurial opportunity."²⁹

The entirety of the circumstances will be considered when making a judgement, with no one factor being determinative.³⁰ Further, where the facts suggest a "close call", agencies should lean toward employee classification.³¹

Finally, the UFC would bear the burden of proof, as the party attempting to exclude individuals from NLRA protections on grounds that they are independent contractors has the burden of proving that status.³²

2. Analysis

The Board has noted the significance of the extent of control the putative employer demonstrates, the existence of an actual entrepreneurial opportunity, and whether the work is part of the putative employer's line of business in making determinations of employee status.³³

First, the question of the extent to which the UFC demonstrates control over the means and manner of the Athlete's work. The Board has found that

²⁷ *FedEx Home Delivery*. 361 NLRB No. 55, at 2.

²⁸ *Pennsylvania Interscholastic Athletic Association, Inc.* 365 NLRB No. 107, at 4.

²⁹ *Id.*

³⁰ *Pennsylvania Interscholastic Athletic Association, Inc.* 365 NLRB No. 107, at 4.]

³¹ *Velox Express, Inc. and Jeannie Edge, an Individual*, 2017 WL 4278501 (N.L.R.B. Div. of Judges), at 8.

³² *BKN, Inc.*, 333 NLRB 143, 144 (2001).

³³ *Lancaster Symphony Orchestra*. 357 NLRB No. 152, at 9; See *Pennsylvania Interscholastic* at 14

the presence of required drug testing³⁴, uniform policies³⁵ and codes of conduct³⁶ indicate employee classification.

In 2015 the UFC entered into a deal with the United States Anti-Doping Agency (“USADA”) outsourcing its drug testing. The USADA testing program requires the Athletes to inform USADA of their whereabouts on a strict basis via mobile app in order to facilitate random testing, subject to UFC punishment.³⁷ UFC Vice President of Athlete Health and Performance, Jeff Novitsky, went as far as saying he would “trail” repeat whereabouts offenders to ensure enforcement of the policy.³⁸ The UFC and USADA have even considered round-the-clock location tracking through cell phone applications to aid in enforcement.³⁹

In 2014, the UFC signed a six-year apparel deal with Reebok.⁴⁰ The Reebok deal requires an athlete wear only Reebok-branded apparel when acting in his or her capacity with the UFC.⁴¹

The Athletes are subject to a strict code of conduct for which they are subject to potentially immediate discipline.⁴² This code of conduct applies not only to an athlete’s actions in the course of a competition, but in any public capacity, so as not to reflect poorly on the UFC.⁴³ The athlete’s capacity to shed negative light on the UFC through his or her actions itself indicates some degree of ownership on behalf of the UFC.

In addition to these facts is UFC President Dana White’s response to one athlete’s complaints regarding matchmaking – “[t]here’s one guy around here who calls the shots, and as soon as you learn that, the better off you’ll be.”⁴⁴ The Board would likely find this factor to weigh in favor of employee status.

³⁴ See *Velox.*, at 9.

³⁵ See *Id.*; See *Lancaster Symphony* at 5.

³⁶ *Id.*

³⁷ *UFC fighters will have to inform*

<https://www.mmafighting.com/2015/8/24/9190741/ufc-fighters-will-have-to-inform-usada-of-whereabouts-three-months-in>

³⁸ *Id.*

³⁹ *USADA considers 24/7 tracking,*

<https://www.mmamania.com/2017/9/19/16337346/ufc-usada-consider-24-7-tracking-of-fighters-through-phones> [link](#)

⁴⁰ *Reebok, UFC announce landmark apparel deal*, UFC.com,

<http://www.ufc.com/news/reebok-ufc-announce-landmark-apparel-deal?id=>

⁴¹ *Reebok deal*, <https://www.bloodyelbow.com/2015/1/23/7595577/read-the-ufcs-athlete-outfitting-policy-2015>

⁴² *UFC Fighter Code of Conduct*,

<https://www.scribd.com/doc/294536958/Ufc-Code-of-Conduct>

⁴³ *Id.*

⁴⁴ *Dana White puts Tyron Woodley in his place*, CBS Sports,

<https://www.cbssports.com/mma/news/dana-white-puts-tyron-woodley-in-his-place-over-complaints-about-ufc-promotion/>

Considering next whether the Athletes' work is part of the UFC's regular business, the UFC is in the business of arranging, promoting and selling professional MMA fights, and the Athletes are MMA fighters. These facts are likely to suggest a finding in favor of employee status, as the Board in *Lancaster* made such a determination where an employer orchestra was in the live music business and employee musicians were in the business of playing music.⁴⁵ The inquiry looks to whether the employer could perform its business operations without the work of the putative independent contractor⁴⁶, and as no professional MMA fight can be held without professional MMA fighters, the Board is likely to find this factor favors employee status.

Next, the question of whether the Athlete is engaged in an independent business with actual entrepreneurial opportunity. The board has interpreted this factor as inquiring to whether the individual has a significant opportunity for gain or loss.⁴⁷ While the Athletes do have the ability to negotiate their fight purses, and can receive performance bonuses if they are awarded "Fight of the Night" or other superlatives⁴⁸ the nature of the UFC contract seems to put in doubt whether the individual is engaged in an "independent business". The Athletes often sign multi-year contracts, all with strict non-compete clauses that prevent the Athlete from competing in any other combat sports events.⁴⁹

Apparel restrictions have also undercut the Athlete's entrepreneurial opportunity. Under the Reebok deal, athlete compliance is rewarded on a tier-based compensation system, featuring seven levels of pay ranging from \$2,500 for new athletes to \$40,000 for champions.⁵⁰ While the UFC stated that the deal would benefit the fighters,⁵¹ many claim to have lost earnings as a result as their more lucrative apparel and sponsorship deals were disallowed by the UFC.^{52 53}

⁴⁵ *Lancaster Symphony Orchestra and The Greater Lancaster Federation of Musicians*, 357 NLRB No. 152, at 9

⁴⁶ *Id*

⁴⁷ See *Velox Express, Inc.*, at 13

⁴⁸ *How the UFC turned its bonus system into a weapon*, <http://bleacherreport.com/articles/2664615-how-the-ufc-turned-its-bonus-system-into-a-weapon>

⁴⁹ *Le v Zuffa*, 108 F.Supp.3d 768.

⁵⁰ See *UFC alters Reebok*, MMAfighting.com,

⁵¹ *Reebok, UFC announce deal*, UFC.com, <http://www.ufc.com/news/reebok-ufc-announce-landmark-apparel-deal?id=>

⁵² *Ryan Bader details just how much he lost*, Bleacher Report, <http://bleacherreport.com/articles/2692766-ryan-bader-details-just-how-much-money-he-lost-per-fight-thanks-to-reebok-deal>

⁵³ *UFC fighters getting screwed out of so much money*, Deadspin, <http://deadspin.com/the-new-ufc-reebok-deal-is-screwing-fighters-out-of-so-1704258703>

Even more, while most major individual-competition sport leagues have primarily objective ranking systems,⁵⁴ the UFC itself controls the organization's matchmaking and ranking.⁵⁵

While these factors proved instrumental in justifying employee status in past Board decisions, the Board would likely find many factors squarely in favor of independent contractor status; the athletes are very skilled, they're primarily paid by the job, and do not get training from the UFC. The UFC would be likely be able to mount a strong argument for contractor status, but the board would appear more likely to assign employee classification.

B. NLRB may or may not exert jurisdiction

Even if the board does classify the Athletes as employees, the Board's recent decisions in the *Northwestern* cases⁵⁶ cast doubt as to whether the Board would assert its jurisdiction over the UFC.

After finding that Northwestern University College Football Players were employees under the meaning of Section 2(3) of the act,⁵⁷ the board upon review declined to assert its jurisdiction in *Northwestern* regarding the employee status of college football players in part because the case was too dissimilar from professional sports organizations, and likewise was not similar enough to non-sports issues they had tried in the past.⁵⁸

The Board notes that all of its past interventions into professional sports were with organizations featuring conglomeration of competing teams, rather than organizations featuring individual-competition athletes.⁵⁹ Even while the athletes may have a dissimilarity problem in the instant case, the board would appear less likely to garner the same decision in this matter. The UFC is an entity more like professional sports leagues with league-wide bargaining units than the single sports team within a league, as was the case in *Northwestern*.⁶⁰

Even in the face of these doubts, the Athletes can advocate for the jurisdictional viability of their matter via an amicus brief in response to the Board's invitation following its ruling in *Velox*.⁶¹

⁵⁴ *The Business of Sports*, at 60.

⁵⁵ *How Ali * (May 2, 2016), <https://www.bloodyelbow.com/2015/9/4/9253189/ufc-recommend-its-fighters-say-no-to-the-unions>

⁵⁶ 198 L.R.R.M. (BNA) 1837 (N.L.R.B.) (2014); 362 NLRB No. 167

⁵⁷ *Northwestern* (2014)

⁵⁸ *Northwestern University*, 362 NLRB No. 167 at 3-5.

⁵⁹ *Id* at 5.

⁶⁰ *Id.*

⁶¹ *Velox Express*, 2018 WL 992420 (N.L.R.B)

C. Misclassification of employees as a Section 8(a)(1) violation is appropriate

While the question of whether an individual is an employee or a contractor is an old one, the significance of the answer is currently at issue. The Office of the NLRB General Counsel issued an Advisory Memorandum suggesting employee misclassification can be an independent 8(a)(1) violation following the Board's decision in *Pacific 9 Transportation*, where a statutory employee was found to have her rights chilled by employer's actions discouraging unionization.⁶² There, an employer repeatedly told its statutory employees that unionization efforts would be futile, and insisted the employees actually did not have the right to unionize.

The General Counsel drew on Board decisions which held that employer's actions to curtail future Section 7 activity constituted an 8(a)(1) violation,⁶³ and stated that misclassification alone "suppresses future [union] activity by imparting to its employees they do not possess [unionization] rights in the first place."⁶⁴ This amounted to an interference and restraint of the drivers' rights egregious enough to be a ULP.⁶⁵

In *Velox*, the Board made precedent of the General Counsel's instruction, issuing a decision stating that a courier service violated section 8(a)(1) by misclassifying an employee driver as an independent contractor according to that guidance.⁶⁶ The board, however, is currently inviting briefs addressing whether and when such violations are appropriate.⁶⁷

Here, the UFC has urged the Athletes not to sign union cards,⁶⁸ disparaged unionization efforts as "shameful and pathetic" in a letter to the Athletes,⁶⁹ and told the Athletes unionization would make them lose control of contract negotiations.⁷⁰ These facts would suggest NLRA violations if the Athletes were classified as employees, and are likely to lend themselves

⁶² See *Advice Memorandum*, at 11-12.

⁶³ *Id* at 8-12.

⁶⁴ *Id* at 11.

⁶⁵ *Id* at 4.

⁶⁶ *Velox Express*, 2017 WL 4278501 (N.L.R.B. Div. of Judges)

⁶⁷ *Velox Express*, , 2018 WL 992420 (N.L.R.B)

⁶⁸ *UFC recommends fighters 'say No to the*

<https://www.bloodyelbow.com/2015/9/4/9253189/ufc-recommend-its-fighters-say-no-to-the-unions>

⁶⁹ *Teamster: Even the top guys in UFC are underpaid*, (Aug. 10, 2015), <https://www.bloodyelbow.com/2015/8/10/9122479/ufc-responds-mma-union-culinary-workers-teamsters-interview>

⁷⁰ *The UFC's Dirtiest Move Yet*<https://newrepublic.com/article/137122/ufcs-dirtiest-move-yet-union-bashing>

to a strong case for the appropriateness of employee misclassification as a standalone UPL.

IV. POTENTIAL SOLUTIONS

A. Athletes and Unions can take action via Section 8(a)(1)

The emergence of the Section 8(a)(1) claim for misclassification of employees gives the Athletes a unique opportunity to stake their claim for representation. Even if the Board would currently decline to assert its jurisdiction over the UFC, the Athletes are invited to write an amicus brief in support of misclassification of statutory employees in the context of UFC athletes as a standalone ULP.

B. UFC can take affirmative action

While the issues examined in this paper may pose a perilous road ahead for the UFC, it finds itself in a position of great opportunity. The UFC's contract with FOX Television expires at the end of 2018, and the organization is reportedly bargaining aggressively for a more valuable deal.⁷¹ The UFC is encouraged by the media landscape⁷² and would be well served to make a marketing play regardless of any pressure of impending NLRA change.

If the organization does find itself on the wrong end of a Board decision, it will likely have stoked the animosity and distrust feared in collective bargaining situations. As such, if a negative board decision does loom, an affirmative and mutually beneficial action may be the organization's best strategy.

One such action would be to accept that employee classifications will occur but to mitigate the negative consequences by instituting two athlete-classes. Fighters who have effectively been integrated into the UFC's identity could make up the "employee class" while fighters in their first stretch with the UFC are part of the "contract class".

⁷¹ <https://www.mmafighting.com/2017/12/5/16723236/ufc-is-facing-its-most-important-contract-negotiation>.

⁷² <https://www.mmafighting.com/2018/1/9/16867194/morning-report-dana-white-maintains-ufc-is-living-up-to-financial-expectations-after-wme-img-sale>

Proposals for minor league systems to compliment the UFC have been made in the past,⁷³ and the UFC's parent company is planning a foray into Boxing.⁷⁴

V. CONCLUSION

As these changes in NLRA enforcement are tested and measured, the Athletes and the UFC are presented with an opportunity to take affirmative measures to even the scales of power and to grow their organization, respectively.

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⁷³ Mark Stricherz, *Alliance MMA plans \$17.4 million IPO*, CQ Roll Call Washington Capital Markets Briefing (Aug. 17, 2016)

⁷⁴ Dana White to discuss Zuffa Boxing with industry heads
<https://www.bloodyelbow.com/2017/11/30/16718838/dana-white-to-discuss-zuffa-boxing-with-industry-heads-interested-in-anthony-joshua-ufc>