ENFORCEABILITY OF CHOICE-OF-LAW CLAUSES IN THE CONTEXT OF MISCLASSIFICATION LITIGATION: BRIDGING THE GAP BETWEEN WORKER AND EMPLOYER

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I. INTRODUCTION

It is one of the most-watched nights of television[1]—The Super Bowl. But the 2004 Super Bowl is memorable for more than the New England Patriots' close, three point win over the Carolina Panthers (thanks to a forty-one yard field goal with only four seconds remaining).[2] That was the night of the now-infamous "wardrobe malfunction." The Halftime Show featured pop idols Justin Timberlake and Janet Jackson, a duet that garnered multi-generational attention. Right before the conclusion of Timberlake's song, he grabbed Jackson's top, ripped it, and exposed her bare breast.[3] Despite CBS's attempt to shift the image to an aerial view of the stadium, the picture had been seen[4] by nearly ninety million viewers.[5] CBS received much scrutiny for broadcasting Jackson's exposed breast, and the Federal Communications Commission (FCC) subsequently imposed fines on the network.[6]

In response, CBS filed suit against the FCC, challenging the punitive sanction.[7] One of CBS's arguments was premised on a lack of liability.[8] They contended that they were not vicariously liable under respondeat superior,[9] despite the FCC's claims.[10]

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[1] *See* Bill Gorman, *Will 'Super Bowl XLVI' TV Viewership Set Another Record? (Poll+ Ratings History)*, TV BY THE NUMBERS (Feb. 4, 2012), http://tvbythenumbers.zap2it.com/2012/02/04/will-super-bowl-xlvi-tv-viewership-set-another-record-poll-ratings-history/118656/ (providing statistics showing that Super Bowl viewership is among the highest of any television programming).

[2] *Super Bowl XXXVIII*, NFL.COM (Feb. 2, 2004), http://www.nfl.com/superbowl/history/recap/sbxxxviii.

[3] CBS Corp. v. FCC, 663 F.3d 122, 125 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012).

[4] Gorman, *supra* note 1.

[5] CBS Corp. v. FCC, 535 F.3d 167, 171 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009), *remanded to* 663 F.3d 122 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012).

[6] *Id.* at 171–72.

[7] *Id.* at 171.

[8] *Id.* CBS also challenged the sanction on "whether the Commission acted arbitrarily and capriciously . . . in determining that CBS's broadcast of a fleeting image of nudity was actionably indecent." *Id.*

[9] *Id.* The doctrine of respondeat superior provides that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment." RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006). The doctrine's "scope is

Whether CBS would be vicariously liable however turned on whether Jackson and Timberlake were classified as independent contractors or employees of CBS.[11] This question, however, involved an additional level of analysis—what was the applicable law?[12]

Both Jackson and Timberlake's contracts with CBS included a choice-of-law provision stating that New York law governed the contract.[13] However, the court found that the choice-of-law provision did not govern the claims; thus, the provision was applicable to contract disputes but not applicable to the doctrine of respondeat superior.[14] The court further stated that even if the choice-of-law provision invoked all categories of New York law, it would still not apply here, as "[t]he regulation of broadcast indecency is the province of the federal government."[15] Federal law thus applied.[16] The court highlighted the implications of allowing CBS's choice-of-law provision to apply: "To hold otherwise would create opportunities for broadcasters to evade liability for broadcast indecency through artful drafting of contracts and would frustrate the federal government's intention of crafting uniform national rules restricting the transmission of indecent and obscene material over public airwaves."[17] The court ultimately held,

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limited to the employment relationship and to conduct falling within the scope of that relationship." *Id.* § 2.04 cmt. b.

[10] *See CBS Corp.*, 535 F.3d at 189 ("The FCC relies primarily on the traditional agency doctrine of *respondeat superior* to hold CBS vicariously liable for the actions of Janet Jackson and Justin Timberlake during the Halftime Show.").

[11] *See id.* at 190 (noting that CBS asserted, while the FCC denied, that Jackson and Timberlake were independent contractors and thus outside the scope of the doctrine of respondeat superior).

[12] *Id.*

[13] *Id.*

[14] *Id.* at 190–91 ("The plain text of these contract provisions select 'the laws of the State of New York applicable to contracts'—that is, New York contract law—in all disputes central or collateral to the contract. . . . But we read the contract as silent on applicable agency law . . . .").

[15] *Id.* at 191.

[16] *Id.*

[17] *Id.*

however, that the performers were in fact independent contractors and thus outside the scope of respondeat superior.[18]

The classification of workers and the application of choice-of-law provisions, particularly in their interaction with one another, are extremely important. It is obvious that both Jackson and Timberlake were independent contractors, but what if they were not mega-stars hired for a one night only event? What if they were average laborers—salespeople or technicians—working for a company on a regular basis, especially for a small businesses? In such situations, the dichotomy between independent contractor and employee is less clear.[19]

Imagine a small, start-up company headquartered in Atlanta selling a unique, age-defense makeup line with the desire to sell its product across the nation.[20] Considering the economic climate and the risks associated with small businesses, particularly one selling a product in an already saturated market with successful brands, the company is currently unsure about its prospects for success and its future capital flow.

Given this uncertainty, the company is reluctant to commit to hiring full-time employees; instead, it turns to hiring independent contractors who act as sales agents across the nation. The company believes that independent contractors, given their

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[18] *Id.* at 198 ("On balance, the relevant factors here weigh heavily in favor of a determination that Jackson and Timberlake were independent contractors rather than employees of CBS."). The Supreme Court granted certiorari, vacated, and remanded the case to the Third Circuit in light of *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 502 (2009). FCC v. CBS Corp., 129 S. Ct. 2176, 2176 (2009). On remand, the Third Circuit found that "the FCC's ruling that the fleeting nude image was actionable indecency . . . was . . . arbitrary and capricious under the Administrative Procedure Act." CBS Corp. v. FCC, 663 F.3d 122, 125 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012).

[19] *See* Barry Schuster, *Avoiding the Misclassification of Workers in the Small Business*, JDSUPRA (Feb. 11, 2010), http://www.jdsupra.com/legalnews/avoiding-the-misclassification-of-worker-69368/ (discussing the advantages of using independent contractors in small businesses and providing a potential framework to aid businesses regarding the grey areas that exist when trying to define a worker).

[20] Although the facts of the hypothetical are quite different, this example was given life by the case *Woolf v. Mary Kay Inc.*, 176 F. Supp. 2d 642 (N.D. Tex. 2001), in which an independent contractor sued Mary Kay for wrongful termination. However, the plaintiff could not prevail unless she was an employee, rather than an independent contractor, of Mary Kay. *Id.* at 644.

flexibility, are the best choice in light of current capital flow. Independent contractors are paid on an as-needed rather than consistent basis.[21] Furthermore, the company believes that the use of independent contractors allows it to avoid paying the costly benefits that employees receive, including insurance and overtime.[22]

After posting an ad on a hiring website, the company is pleased to find interested sales agents in multiple states. After interviewing potential candidates and choosing its sales squad, the company begins drafting employment contracts with each sales agent. While drafting these contracts, the company realizes that, while headquartered in Georgia, its agents have citizenship in many other states, potentially exposing the company to liability in many jurisdictions.

Each state in which an agent works may have different laws regarding the classification of independent contractors. Absent a mechanism to limit the applicable law, the company potentially faces considerable exposure under diverse statutory schemes. This unpredictability in turn increases the cost of doing business. To cabin these costs, the company inserts a choice-of-law provision into its employment contracts with its sales agents, stating that "any disputes arising from the contract will be governed by Georgia law," Georgia being where the company is headquartered and where the contracts are created. Additionally, Georgia law is far more favorable to the company than that of many other states, including California.

After launching its new makeup line, sales quickly take off. In order to meet customer demand, the company increases production and calls on its sales agents to up their hours. The company celebrates its apparent success and discusses the possibility of creating another product line. But these plans are soon halted by a class action lawsuit filed by its independent contractors, seeking unpaid wages and benefits. The suit has been filed in California.

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[21] *Hire a Contractor or an Employee?*, SBA.GOV, http://www.sba.gov/content/hire-contractor-or-employee (last visited Jan. 1, 2013).

[22] *Id.*

The independent contractors claim they were misclassified. As employees, they would be entitled to benefits and past wages for overtime. Furthermore, they argue that California law governs the claim. The company is shocked. It contests the misclassification claim, asserting that California law cannot apply because the workers signed an employment contract that states Georgia law governs the agreement.

The company's counsel and accountant inform it that if the plaintiffs' claim succeeds, the company would not only be liable for back wages and benefits to the employees but would also be liable to the federal government for back taxes, as companies have to pay taxes on their employees' wages. The accountant further informs the company that such liability would likely bankrupt the small company.

The question becomes: should the court find that the choice-of-law provision applies, given the company's intent to avoid this very situation (and not to misclassify its employees)? Alternatively, should California law govern, as the plaintiffs' claim could be classified as something other than a contract claim, perhaps being statutory, or sounding in tort, and given the plaintiffs' desire to be governed by the employment laws of their home state?

The remainder of this Note will discuss the enforceability of choice-of-law clauses in the context of misclassification litigation and will suggest a solution that allows for the enforceability of the choice-of-law clause without disrupting the expectations of the employer or the worker. Part II will discuss the history of the Fair Labor Standards Act and the concept of misclassification as well as the use of choice-of-law clauses in a business context and the implications of doing so. Part III will combine these concepts, illustrating courts' reasoning in declining to enforce choice-of-law clauses in the context of misclassification litigation, and the remainder of the Note will highlight the implication of these decisions and provide a possible solution.

II. BACKGROUND

A. FAIR LABOR STANDARDS ACT AND THE DICHOTOMY BETWEEN INDEPENDENT CONTRACTORS AND EMPLOYEES

1. History and Enactment. In 1912, Massachusetts became the first state to enact minimum wage legislation.[23] After the successful implementation of minimum wage rates for a limited number of employees in New Zealand, Australia, and Great Britain, Massachusetts decided to make the leap to address the poor working conditions of its residents.[24] The state was spurred to action by a study of the Federal Bureau of Labor, which included graphic examples of the poor working conditions experienced by women and children in the United States, as well as Massachusetts's own report detailing the "consequences of wage rates that were inadequate to sustain an acceptable standard of living" spurred the realization for a need for change.[25]

Despite only covering women and children and lacking compulsory compliance,[26] Massachusetts's minimum wage law was hailed as a major step forward, given the laissez faire philosophy underpinning the U.S. economic system.[27] Following Massachusetts's lead, in 1913 several other states enacted minimum wage statutes, including California, Wisconsin, Minnesota, Utah, Colorado, Nebraska, Oregon, and Washington, and by the end of the decade, fourteen other states took legislative action to establish minimum wage programs.[28]

Legal challenges followed the enactment of many of these state statutes. The first challenged the constitutionality of the Oregon

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[23] Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 716 (1988).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 717.

[28] *Id.*; *see also* 1 ABA SECTION OF LABOR & EMP'T LAW, THE FAIR LABOR STANDARDS ACT 1-9 & n.27 (Ellen C. Kearns et al. eds., 2d ed. 2010) (noting states that enacted minimum wage laws by 1913).

law, yet the Supreme Court upheld its constitutionality.[29] It was not until 1923, when the Supreme Court struck down the District of Columbia's minimum wage law as an unconstitutional infringement of employers and employees freedom of contract[30] that the minimum wage movement diminished.[31] Despite the Supreme Court's ruling, most states with programs in place in 1923 continued to maintain them, albeit passively.[32] The states did not enforce the statutes, nor did they abandon them. And yet, few employers pushed back against the laws.[33]

Following *Adkins*, some state supreme courts invalidated minimum wage statutes, citing the Supreme Court's finding of unconstitutionality,[34] while others upheld the statutes finding protection for women and children a necessity.[35] However, the Supreme Court's decision in *West Coast Hotel Co. v. Parrish* invalidated the reasoning of *Adkins* and upheld the constitutionality of Washington's minimum wage, hour, and working-condition requirements for women and children.[36] At the time of this decision, sixteen states had some sort of minimum wage statute on their books, and the public seemed receptive to a federally imposed, national wage standard.[37]

In fact, Franklin Roosevelt pushed wage-hour legislation during both his 1936 campaign and his presidency.[38] As Roosevelt

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[29] 1 ABA SECTION OF LABOR & EMP'T LAW, *supra* note 28, at 1-3 (citing Muller v. Oregon, 208 U.S. 412 (1908)).

[30] Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 545, 562 (1923), *overruled in part by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (stating "[t]hat the right to contract about one's affairs is a part of the liberty of the individual protected by [the due process clause of the Fifth Amendment]" and that "[w]ithin this liberty are contracts of employment of labor" and ruling that the statute violated this right).

[31] Nordlund, *supra* note 23, at 718.

[32] *Id.*

[33] *Id.*

[34] *See id.* (noting that Arizona, Arkansas, and Kansas struck down their respective minimum wage statutes based on *Adkins*'s reasoning).

[35] 1 ABA SECTION OF LABOR & EMP'T LAW, *supra* note 28, at 1-10.

[36] 300 U.S. 379, 389–90 (1937). The Court upheld the Washington Supreme Court's reasoning that the minimum wage statute was a reasonable exercise of the state's police power under the Fourteenth Amendment. *Id.*

[37] Nordlund, *supra* note 23, at 718. Twenty-two states had minimum wage laws by the end of 1937. *Id.*

[38] MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 381 (4th ed. 2010).

explained, "All but the hopelessly reactionary will agree that to conserve our primary resources of manpower, Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor,"[39] thus rejecting the laissez faire ideology of capitalism. On June 25, 1938, after a year of hearings, amendments, and revisions, President Roosevelt signed the Federal Fair Labor Standards Act (FLSA).[40]

2. Major Provisions and Coverage. "The FLSA contains four major requirements: a minimum wage, an overtime standard, restrictions on child labor, and equal pay."[41] However, these requirements apply only to "covered employees"; the Act exempts some employees from coverage.[42] Coverage under the FLSA includes individual employee coverage, enterprise coverage, and coverage of public employees.[43] However, public employee coverage will not be discussed in this Note, as misclassification issues do not arise with government workers.

Under traditional individual employee coverage, workers are covered by the FLSA if they are "engaged in commerce"[44] or involved "in the production of goods for commerce,"[45] meaning that their work involves the movement of goods or communications across state lines.[46] The scope for this coverage is rather broad, as

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[39] 1 ABA SECTION OF LAB. & EMP'T LAW, *supra* note 28, at 1-11 (citing H.R. REP. NO. 101-260, at 8 (1989), *reprinted in* 1989 U.S.C.C.A.N. 696, 697).

[40] Nordlund, *supra* note 23, at 720, 721; *see also* The Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.).

[41] ROTHSTEIN ET AL., *supra* note 38, at 383.

[42] *Id.*

[43] *Id.*

[44] 29 U.S.C. § 206(a) (2006). "The term includes, for example, employees in communications industries, those who load, unload, or otherwise handle goods received directly from outside the state, those who regularly use channels of commerce such as telephones and the mail, and those who maintain, repair, or improve instruments of commerce." ROTHSTEIN ET AL., *supra* note 38, at 383.

[45] 29 U.S.C. § 206(a). "Employees are engaged in the 'production of goods for commerce' if they manufacture, mine, produce, handle, or otherwise work on goods that cross state lines." ROTHSTEIN ET AL., *supra* note 38, at 383.

[46] *See* 29 U.S.C. § 203(b) (2006) (" 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.").

it includes employers who have reason to believe that the goods with which they are involved will cross state lines.[47]

Enterprise coverage, like traditional coverage, employs a commerce test to determine coverage.[48] But for purpose of enterprise coverage, the focus is on the nature of the employer's business instead of the duties of the employee.[49] To qualify for enterprise coverage, an employer's business must meet the statutory definition of "enterprise."[50] To do so, the activities performed must be for a "common business purpose," considering all of the employer's activities, whether in multiple organizational units, establishments, or departments.[51] The business must also meet the "commerce test,"[52] meaning the business must have two or more "employees engaged in commerce or in the production of goods for commerce, or . . . handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce."[53] Lastly, the business must satisfy the third prong of enterprise coverage—the "dollar volume test,"[54] meaning that the business must have a minimum of $500,000 in gross annual sales

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[47] ROTHSTEIN ET AL., *supra* note 38, at 383.

[48] *Id.*

[49] 1 ABA SECTION OF LABOR & EMP'T LAW, *supra* note 28, at 3-88.

[50] ROTHSTEIN ET AL., *supra* note 38, at 383; *see* 29 U.S.C. § 203(r)(1) (defining "enterprise" statutorily).

[51] 29 U.S.C. § 203(r)(1). The statute, however, explicitly excludes from coverage "the related activities performed for such enterprise by an independent contractor," despite the fact that the activities may be for a "common business purpose." *Id.* The statute also makes clear that an independently owned retail or service establishment must individually satisfy the enterprise coverage requirements separate from the company with whom it has an agreement

> (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

Id.

[52] ROTHSTEIN ET AL., *supra* note 38, at 384.

[53] 29 U.S.C. § 203(s)(1)(A)(i).

[54] ROTHSTEIN ET AL., *supra* note 38, at 385.

or business transactions.[55] Unlike traditional coverage, where employees of the same business may have a different status with regard to coverage, if a business meets the requirements for enterprise coverage, the FLSA covers every employee of that business.[56]

3. Employee Versus Independent Contractor and Misclassification. Protection under the FLSA, however, is not granted immediately upon satisfaction of one of the three types of coverage. Coverage is dependent upon the establishment of an employer–employee relationship,[57] and if a worker is an independent contractor, there is no employer–employee relationship.[58] In that case, the worker is not covered by the FLSA.[59]

Whether a worker is an independent contractor or an employee is often hotly contested. But proper classification is important, as independent contractors do not enjoy any benefits under the FLSA.[60] The FLSA defines *employee* as "any individual employed by an employer"[61] and *employ* as "to suffer or permit to work."[62] Given its great breadth, this definition has become subject to much judicial interpretation.[63] The Supreme Court has held that whether a worker has an employee or independent contractor

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[55] 29 U.S.C. § 203(s)(1)(A)(ii). Hospitals, nursing homes, similar residential institutions, schools, colleges, universities, and public agencies qualify for enterprise coverage without having to satisfy the commerce test or the dollar volume test. *Id.* § 203(s)(1)(B)–(C).

[56] *See* ROTHSTEIN ET AL., *supra* note 38, at 383 (noting individual employee duties do not matter for coverage purposes under enterprise coverage).

[57] 1 ABA SECTION OF LABOR & EMP'T LAW, *supra* note 28, at 3-5.

[58] ROTHSTEIN ET AL., *supra* note 38, at 385; *see also* RESTATEMENT (THIRD) OF AGENCY § 1.01 reporter note c (2006) (stating that the definition of *independent contractor* in RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958) does not preclude an agency relationship but that an independent contractor may not qualify as a "servant") (citing Wiggs v. City of Phoenix, 10 P.3d 625, 628 (Ariz. 2000)).

[59] ROTHSTEIN ET AL., *supra* note 38, at 385.

[60] *Id.* ("If an individual . . . is a true independent contractor, no employment relationship and therefore no FLSA coverage exist.").

[61] 29 U.S.C. § 203(e)(1) (2006).

[62] *Id.* § 203(g).

[63] *See* Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979) ("Courts have adopted an expansive interpretation of the definitions of 'employer' and 'employee' under the FLSA, in order to effectuate the broad remedial purposes of the Act." (footnote omitted)).

relationship with the employer depends on the situation as a whole.[64] Drawing on a variety of sources, courts basically use two tests—the right-of-control test and the economic-reality test;[65] the economic-reality test is the test utilized for claims under the FLSA.[66]

Under the right-of-control test, the more supervision and control an employer exerts, the more likely that the worker will be classified as an employee rather than an independent contractor.[67] The economic-reality test is broader than the right-of-control test.[68] This test looks to all the circumstances of the workplace environment,[69] focusing on whether workers are economically dependent upon their employer or, instead, are in business for themselves.[70] A hybrid of the right-of-control test and the

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[64] *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) ("We think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."); *see also* U.S. Dep't of Labor: Fair Labor Standards Act Advisor, http://www.dol.gov/elaws/esa/flsa/scope/er14.asp (last visited Mar. 19, 2013) (listing various elements that the Supreme Court has considered significant, although not individually dispositive, including: "(1) [t]he extent to which the worker's services are an integral part of the employer's business . . . ; (2) [t]he permanency of the relationship . . . ; (3) [t]he amount of the worker's investment in facilities and equipment . . . ; (4) [t]he nature and degree of control by the principal . . . ; (5) [t]he worker's opportunities for profit and loss . . . ; and (6) [t]he level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise").

[65] *See* Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 458 (1999) ("The tests are drawn from statutes, regulations, rules, policies, rulings, case law, and the like.").

[66] *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 291 (1985) (stating that "the test of employment under the [FLSA] is one of 'economic reality' ").

[67] *See, e.g.*, BRUCE S. FELDACKER, LABOR GUIDE TO LABOR LAW 75 (2d ed. 1983) (giving an example of two cab drivers, A and B, where A is "assigned to work in a certain area of the city from 8:30 A.M. to 5:30 P.M., must wear a uniform, take all paging calls, and turn over a percentage of the fares to the cab company," whereas "B is told neither when nor where to work; he is only required to pay the company a flat fee for use of the cab and the paging service," and concluding that A would likely be classified as an employee and B as an independent contractor).

[68] *See* Barron, *supra* note 65, at 460 (noting that the economic-reality test "broadens coverage by taking a more inclusive approach to classifying a worker").

[69] *Id.*

[70] *See* Cromwell v. Driftwood Elec. Contractors, Inc., 348 F. App'x 57, 59 (5th Cir. 2009) (citing five factors, none of which are determinative, including: "(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss

economic-reality test has developed as well.[71] In applying the hybrid test, the court considers "all the circumstances involved to determine the *economic reality* of the relationship" yet considers the employer's right to control as the most important factor.[72]

Given that independent contractors are not entitled to the same benefits and protections as employees, "such as family and medical leave, overtime, minimum wage and unemployment insurance,"[73] a workforce comprised of independent contractors is often less costly than to a staff predominately comprised of employees.[74] Moreover, if a worker is classified as an independent contractor, the employer will not have to pay federal employment taxes, thereby further reducing its cost of business.[75] For these reasons, employers often are incentivized to hire independent contractors instead of employees.[76] However, if an employer improperly classifies a worker as an independent contractor but treats him or her as an employee, the repercussions can be very costly, creating significant liability for unpaid benefits and taxes[77] as well as criminal and civil sanctions.[78]

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is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship" (citing Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008))).

[71] *See* Barron, *supra* note 65, at 460 (noting that many courts consider a mix of factors).

[72] *Id.* (alteration in original).

[73] U.S. Dep't of Labor: Wage and Hour Division, *Employee Misclassification as Independent Contractors*, http://www.dol.gov/whd/workers/misclassification/ (last visited Dec. 22, 2012).

[74] Barron, *supra* note 65, at 457 ("There is often less cost to . . . enterprises whose personnel are independent contractors rather than employees.").

[75] *See id.* (listing the taxes that are taken out of the income of employees but not that of independent contractors, including federal unemployment insurance, Social Security, and Medicare).

[76] *See Pros and Cons of Hiring Independent Contractors*, FORBES.COM (Oct. 11, 2006, 12:00 PM), http://www.forbes.com/2006/10/10/contractor-IRS-union-ent-law-cx_nl_1011nolo.html (highlighting the pros and cons of using independent contractors instead of employees, with the pros including financial savings through elimination of the need to pay benefits, some taxes, and maintain overhead); *see also* U.S. Dep't of Labor: Bureau of Labor Statistics, *Independent Contractors in 2005*, THE EDITOR'S DESK (July 29, 2005), http://www.bls.gov/opub/ted/2005/jul/wk4/art05.htm (noting that in 2005 independent contractors accounted for 7.4% of all workers, an increase since 1995).

[77] ORRICK, HERRINGTON & SUTCLIFFE LLP, EMPLOYMENT LAW YEARBOOK 2011, at 52 (Timothy J. Long, Andrew R. Livingston & Joshua C. Vaughn eds., 2011).

[78] Barron, *supra* note 65, at 457.

Not only does misclassification impact workers by denying them crucial benefits, it also affects society as a whole.[79] Misclassification generates substantial losses to the Treasury, Social Security fund, Medicare fund, as well as to state unemployment and worker's compensation funds, since employers are not required to pay taxes on wages paid to independent contractors.[80] It also hurts other businesses that are "playing by the rules," according to Secretary of Labor Hilda Solis.[81]

In response to this issue, the Department of Labor (DOL) launched a Misclassification Initiative under Vice President Joe Biden's Middle Class Task Force.[82] In 2011, a Memorandum of Understanding was drafted and signed by the DOL and the Internal Revenue Service (IRS).[83] The agencies declared that they would work together and share information in order to combat the misclassification of employees, reduce the tax gap, and improve compliance with federal labor laws, including the FLSA.[84] Since this initiative's implementation in 2011, the DOL has collected more than $5 million in back wages and has hired 300 additional investigators to probe into complaints of misclassification.[85] In addition to the federal government's efforts to reduce misclassification, workers often attempt to vindicate their own rights by filing suit against their employers for unpaid wages, overtime, benefits, or unlawful deductions.[86]

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[79] *See* U.S. Dep't of Labor: Wage and Hour Division, *supra* note 73 ("The misclassification of employees as something other than employees, such as independent contractors, presents a serious problem for affected employees, employers, and to the entire economy.").

[80] *Id.*

[81] *See* John Blackstone, *Independent Contractors: Good or Bad for Workers?* (CBS news broadcast Dec. 2, 2011, 6:28 AM), *available at* http://www.cbsnews.com/video/watch/?id=7390301n (quoting Secretary Solis who argued that the misclassification of employees, which allows employers to avoid having to pay taxes and other benefits, negatively impacts businesses that must pay these taxes and benefits).

[82] U.S. Dep't of Labor: Wage and Hour Division, *supra* note 73.

[83] *Id.*

[84] *Id.*

[85] Blackstone, *supra* note 81.

[86] *See, e.g.*, Cromwell v. Driftwood Elec. Contractors, Inc., 348 F. App'x 57, 58 (5th Cir. 2009) (involving an action against an employer for overtime spent on telecommunication repairs in the aftermath of a hurricane); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 756 (9th Cir. 1979) (involving a classification of the plaintiffs as employees and minimum

B. BUSINESS CONTRACTS AND CHOICE-OF-LAW CLAUSES

1. General Overview. Given the rise of technology and the increased frequency of multistate transactions, contracting parties are often located in different states. This diversity of parties also leads to the diversity of the applicable law governing the contract, which can be inefficient because dealing with multiple states' regulations can be costly for businesses.[87] Diversity of law breeds uncertainty and commercial problems of predictability for contract drafters.[88] This uncertainty can be costly at the time of both contracting and litigating.[89] Uncertainty at the time of contracting makes it difficult for parties to determine what standards should govern the conduct of the parties, while uncertainty during litigation is costly because legal resources will be expended trying to determine what state law should apply to the contract.[90]

In response to this problem of unpredictability and the economic problems it poses, parties are able to choose the law that will govern their rights and obligations, facilitating party autonomy.[91] Parties usually express their autonomy through a choice-of-law clause in the contract.[92] However, there are

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wage standards under the FLSA); Sanchez v. Lasership, Inc., No. 1:12cv246 (GBL/TRJ), 2012 WL 3730636, at *1 (E.D. Va. Aug. 27, 2012) (involving the misclassification of delivery drivers for a courier service provider entitling them to compensation for unpaid wages, overtime, and unlawful deductions); Grabowski v. C.H. Robinson Co., 817 F. Supp. 2d 1159, 1163 (S.D. Cal. 2011) (involving workers suing their employers for misclassification); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 185–86 (S.D.N.Y. 2003) (involving suit by delivery personnel against drugstore corporations for violations of the FLSA and state minimum wage statutes).

[87] Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 252 (1993).

[88] William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 700 (2001).

[89] Ribstein, *supra* note 87, at 253–54.

[90] *See id.* (providing an example of the difficulties and costs associated with multiple state regulation in the area of franchising, given the variation in franchise law among the states).

[91] *See id.* at 247–60 (discussing the benefits of contractual choice-of-law clauses in avoiding mandatory rules where diverse local laws can make dealing inefficient). Party autonomy is a doctrine that allows parties to choose a particular law to govern their contract, usually accomplished though a choice-of-law clause. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 948 (4th ed. 2004). Party autonomy is recognized in virtually all western legal systems and is formally defined in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). *Id.* at 954 & n.8.

[92] PETER HAY ET AL., CONFLICT OF LAWS 1085–86 (5th ed. 2010).

limitations to the application of the law chosen in the clause.[93] If an issue between two contracting parties is one that cannot be resolved by agreement, the court will have to determine which law should govern.[94] The common law approach to determining what law should govern is set forth in § 187 of the *Restatement (Second) of Conflict of Laws*.[95] Subsection 2 of § 187 provides that the governing law chosen by the parties will be honored if the state whose law was chosen has a "substantial relationship to the parties or the transaction."[96] If the parties choose the law of a state that lacks a "substantial relationship," the clause will be honored so long as the parties can convey that there is a "reasonable basis" for their choice.[97]

The *Restatement* also places a limitation on party autonomy based on public policy considerations.[98] However, the difficulty with regard to choice-of-law clauses and multistate contracts when considering public policy is determining which state's public policy limitations will police the contract.[99] The *Restatement* suggests that the state whose public policy may defeat the parties' choice of law is not necessarily the forum state but rather the state whose law would under § 188 govern had the parties not implemented a choice-of-law clause, and in implementing § 188, the state with the most significant relationship to the dispute and the parties will determine the applicable law.[100]

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[93] *Id.* at 1090.

[94] *Id.*

[95] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

[96] *Id.* § 187(2); *see, e.g.*, Farris Eng'g Corp. v. Serv. Bureau Corp., 406 F.2d 519, 521 (3d Cir. 1969) (finding a choice-of-law provision effective where the state of the chosen law was "of a state to which the transaction [wa]s significantly related").

[97] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

[98] HAY ET AL., *supra* note 92, at 1098.

[99] *Id.* at 1099.

[100] *Id.* In full, § 188 of the RESTATEMENT states:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

2. Issues with Scope and Application to Employment Contracts. A difficult question that often arises with regard to the interpretation of a choice-of-law clause is the scope of the clause and what the clause specifically governs.[101] Whether the choice-of-law clause governs is often disputed with regard to noncontractual issues that may arise between the contracting parties.[102] Section 187 is silent as to whether the parties may agree in advance on which law will govern noncontractual rights and issues,[103] and the case law regarding this issue is unsettled.[104] While the majority of courts have held that the choice-of-law clause does not govern tort claims arising after the formation of the contract or other noncontractual claims between the contracting parties,[105] some courts have held otherwise.[106]

In determining the scope of the choice-of-law clauses, most courts view this determination as a question of contractual intent between the parties.[107] The court often determines the parties'

> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

[101] HAY ET AL., *supra* note 92, at 1136, 1141.

[102] *Id.* at 1141; *see also* 1143 n.10 (providing examples of cases holding that choice-of-law clauses did not cover noncontractual issues).

[103] *Id.* at 1141; *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (discussing application of the law chosen by parties for contractual rights but failing to mention chosen law for noncontractual rights).

[104] *Compare* M. Block & Sons, Inc. v. Int'l Bus. Machs. Corp., No. 04 C 340, 2004 WL 1557631, at *5 (N.D. Ill. July 8, 2004) (holding that the choice-of-law clause applied to the plaintiff's fraud claims), *with* Baldor Elec. Co. v. Sungard Recovery Servs. LP, No. 2:06-CV-02135, 2006 WL 3735980, at *8 (W.D. Ark. Dec. 15, 2006) (holding that if the parties desired Pennsylvania law to apply to specific noncontractual issues, such language could be included in the contract).

[105] HAY ET AL., *supra* note 92, at 1142.

[106] *Id.* at 1143.

[107] *Id.* at 1144.

intent by analyzing the specific wording of the clause.[108] Whether the clause governs noncontractual disputes can turn on whether the clause uses the phrase "the agreement" or "the contract" versus "the relationship" resulting from the contract or to "any and all disputes" between the parties.[109]

This reluctance to apply choice-of-law provisions to noncontractual disputes, such as tort claims, may stem from the tension between respecting party autonomy and freedom to contract and state sovereignty.[110] Especially in the context of contracts of adhesion,[111] insensitive application of a choice-of-law clause in respect of party autonomy can erode the state law that residents and taxpayers are entitled to.[112] While businesses may use of choice-of-law clauses to mitigate inefficiency due to jurisdictional diversity, this practice can conflict with states' interests in developing an environment best suited to its residents.[113]

This issue of balancing party autonomy with states' interests in ensuring the viability of their laws and protecting their citizens is often at issue in employment contracts, specifically in the context of noncompete clauses[114] as well as misclassification litigation.[115]

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[108] *Id.* at 1144–45.

[109] *Id.* at 1144; *see, e.g.*, Williams v. Deutsche Bank Sec. Inc., No. 04 Civ. 7588(GEL), 2005 WL 1414435, at *5 (S.D.N.Y. June 13, 2005) (finding that contractual language providing that the agreement itself will be governed by a particular state's laws "appl[ies] only to disputes concerning the agreement itself and its interpretation, and not to all disputes arising from the parties' relationship"); Tissue Transplant Tech., Ltd. v. Osteotech, Inc., No. Civ.A.Sa 04CA0819, 2005 WL 958407, at *2–3 (W.D. Tex. Apr. 26, 2005) (finding that a choice-of-law clause using the phrase "[t]his Agreement" did not cover other causes of action, such as fraud); Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1162 (11th Cir. 2009) (stating that a choice-of-law clause that refers "to any and all claims or disputes arising out of the agreement" will be construed broadly to encompass noncontractual claims (internal quotation marks omitted)).

[110] William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 22–24 (2006).

[111] A contract of adhesion is "[a] standard-form contract prepared by one party, to be signed by the party in a weaker position"; consumer contracts are often contracts of adhesion. BLACK'S LAW DICTIONARY 366 (9th ed. 2009).

[112] Woodward, *supra* note 110, at 23.

[113] *Id.* at 25.

[114] HAY ET AL., *supra* note 92, at 1115–16. Noncompete clauses are covenants in which employers seek to prevent their employee from working for the competition for a specified

With the increased use of independent contractors to reduce the costs of business, litigation involving the misclassification of workers is also on the rise.[116]

C. DETERMINING STATUS AS EMPLOYEE OR INDEPENDENT CONTRACTOR FROM STATE TO STATE

While the FLSA establishes a federal definition of *employee* and the economic-reality test is the predominant test used on the federal level,[117] the definition of *employee* and the tests used to determine this status vary on the state level.[118] *In re FedEx Group Package System, Inc.*, a class action suit initiated by delivery drivers alleging misclassification as independent contractors, exemplifies this variation.[119] For example, in the Illinois litigation, the court held that the drivers should be classified as employees,[120] whereas in the Kansas litigation, the drivers were

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amount of time. *Id.* While some states enforce these covenants, others find them to be against public policy. *Id.* at 1116. Therefore, some states will refuse to uphold a choice-of-law clause if it acts to render a noncompete covenant enforceable when it would have been held invalid, absent the choice-of-law clause, in applying states law. *Id.*

[115] *See, e.g.*, Ruiz v. Affinity Logistics Corp., 667 F.3d 1318, 1321 (9th Cir. 2012) (resolving whether the choice-of-law clause governed in a contract between a business and an independent contractor during misclassification litigation); Sanchez v. Lasership Inc., No. 1:12cv246 (GBL/TRJ), 2012 WL 3730636, at *1 (E.D. Va. Aug. 27, 2012) (same); Grabowski v. C.H. Robinson Co., 817 F. Supp. 2d 1159, 1175 (S.D. Cal. 2011) (same); Quinonez v. Empire Today, LLC., No. C 10-02049 (WHA), 2010 WL 4569873, at *2 (N.D. Cal. Nov. 4, 2010) (same); Yeibyo v. E-Park of DC, Inc., No. DKC 2007-1919, 2008 WL 182502, at *4 (D. Md. Jan. 18, 2008) (same); Walker v. Bankers Life & Cas. Co., No. 06 C 6906, 2007 WL 967888, at *1 (N.D. Ill. Mar. 28, 2007) (same).

[116] Renee Inomata, *Perils of Misclassification of Workers as Independent Contractors*, *in* COMPLYING WITH EMPLOYMENT REGULATIONS *1 (2012), *available at* 2012 WL 3279180; Andrea H. Brustein, *Casual Workers and Employee Benefits: Staying Ahead of the Curve*, 7 U. PA. J. LAB. & EMP. L. 695, 696 (2005).

[117] *See supra* notes 61–66 and accompanying text.

[118] *See* Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of Workers and Its Effect on the State*, 20 BUFF. PUB. INT. L.J. 105, 107 (2010) ("Courts, government agencies, and states use various standards to determine the classification of workers.").

[119] 662 F. Supp. 2d 1069 *passim* (N.D. Ind. 2009).

[120] *In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., No. 3:05-CV-529 RM (IL), 2010 WL 2243246, at *6 (N.D. Ind. May 28, 2010).

found to be correctly classified as independent contractors.[121] This difference in outcome hinges on the states' respective tests for determining classification as an employee.

In the Illinois case, the court utilized a three-part test in which an employee is defined as " 'any individual permitted to work by an employer in an occupation,' "[122] but the test excludes any person "(1) who is free—both under the contract and in practice—from control and direction over the work's performance, (2) whose work is performed either outside the employer's usual course of business or outside the employer's place of business, and (3) who is in an independently established business."[123] The court found that FedEx failed the second prong of the test, given that FedEx could not "satisfy its burden of showing that the plaintiffs' work was outside all the places of FedEx's business."[124]

However, in the Kansas litigation, the court utilized a right-to-control test, under which the existence of an employment relationship depends on "whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished."[125] The court ultimately held that the evidence did not support a finding of employee status and that "the only reasonable inference" was that FedEx did not meet the requisite level of control for the drivers to be considered employees, leaving them correctly classified as independent contractors.[126]

While comparing the outcomes in the Kansas and Illinois *FedEx* litigation demonstrates that the test utilized may be outcome determinative, such a difference in outcome can also hinge on

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[121] *In re* FedEx Ground Package Sys., Inc. Emp't Practices Litig., 734 F. Supp. 2d 557, 588 (N.D. Ind. 2010).

[122] *In re FedEx*, 2010 WL 2243246, at *1 (citing 820 ILL. COMP. STAT. 115/2 (2006)).

[123] *Id.* (citing 820 ILL. COMP. STAT. 115/2 (2006)).

[124] *Id.* at *6.

[125] *In re FedEx*, 734 F. Supp. 2d at 584–85 (quoting Wallis v. Sec'y of Kan. Dep't of Human Res., 689 P.2d 787, 792 (Kan. 1984)) (internal quotation marks omitted).

[126] *Id.* at 589. The court also analyzed the intent of the parties: "The contractors understood they were classified as independent contractors and the parties intended to create an independent contractor agreement. This factor weighs strongly in favor of independent contractor status." *Id.*

varied procedural mechanisms, even among states that use the same test to determine whether a worker is an employee. For example, both California and Georgia embrace the right-to-control test.[127] However, a crucial difference is that Georgia provides a rebuttable presumption of independent contractor status, "where the contract of employment clearly denominates the other party as an independent contractor."[128] Therefore, despite using a similar test to determine the classification of a worker, application of Georgia law over California law affords the employer a great procedural benefit, as the plaintiff must overcome this presumption of proper independent contractor classification.

Given the variation in law, as discussed above, and that independent contractors often work in states other than the principal place of business or incorporation of the company for whom they work,[129] businesses attempt to limit the applicable laws with choice-of-law provisions. When independent contractors file suit against a company for misclassification, they often argue that the choice-of-law clause does not govern their claims or is unenforceable as public policy of their state of domicile.[130] While some courts enforce the choice-of-law clause in this context, others

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[127] *See, e.g.*, Elijahjuan v. Superior Court, 147 Cal. Rptr. 3d 857, 869 (Cal. Ct. App. 2012) ("The question of whether plaintiffs are employees or independent contractor turns on the degree of control exercised by defendants."); Phelps v. 3PD, Inc., 261 F.R.D. 548, 555 (D. Or. 2009) (analyzing Georgia law and finding that "the factfinder must determine whether there was, in fact, a right to control the time, manner, and method of the performance of the work").

[128] *Phelps*, 261 F.R.D. at 554–55.

[129] *See, e.g.*, Sanchez v. Lasership, Inc., No. 1:12CV246 (GBL/TRJ), 2012 WL 3730636, at *2 (E.D. Va. Aug. 27, 2012) (employees working in Massachusetts but company headquartered in Virginia); Yeibyo v. E-Park of DC, Inc., No. DKC 2007-1919, 2008 WL 182502, at *4 (D. Md. Jan. 18, 2008) (employees working in District of Columbia while the primary place of business was in Maryland); Walker v. Bankers Life & Cas. Co., No. 06 C 6906, 2007 WL 967888, at *1 (N.D. Ill. Mar. 28, 2007) (employee working in California but insurance company headquartered in Illinois).

[130] Often plaintiffs in California will argue to apply California law due to its favorable treatment of employees in comparison to other state laws. *See* Laura E. O'Donnell, *Defending Against FLSA Collective Actions: A Proactive Approach*, *in* UNDERSTANDING FAIR LABOR STANDARDS ACT VIOLATIONS, at *4 (2010), *available at* 2010 WL 284481 (stating the importance of employers to be familiar with California employment laws, as they are "stringent" and "unique and difficult," including a law that dictates meal times and daily overtime, neither of which is in the federal law).

have not for various reasons, including contract interpretation and public policy considerations.[131]

It is common for companies to use either forum-selection clauses or choice-of-law provisions to avoid liability and costs in other contexts. Is this practice fair in the context of contracts with independent contractors? Should the agreement entered into by the worker and the employer not be binding as a matter of party autonomy and free negotiation, absent any signs of unconscionability? The following analysis will explore the various reasons why courts have chosen not to enforce choice-of-law clauses in this context and analyze the pros and cons of such a lack of enforceability and the potential effects on businesses, particularly small businesses.

III. ANALYSIS

A. APPLICABILITY OF CHOICE-OF-LAW CLAUSES IN MISCLASSIFICATION CASES

1. The Significance of Whether Misclassification Claims Sound in Tort or Contract. In determining whether the choice-of-law clause found in the contract governs the dispute, courts often first consider whether the misclassification claim is one of contract or tort; they then consider whether the choice-of-law clause governs contract claims only, or tort claims as well. This determination often entails parsing the specific language of the choice-of-law clause and comparing the parties' word choice to other provisions within the contract.

For example, in *Sanchez v. Lasership, Inc.*,[132] delivery drivers filed a misclassification claim against their employer, Lasership, seeking compensation for unpaid wages, overtime, and unlawful deductions under the Massachusetts Independent Contractor Statute.[133] Lasership, headquartered in Virginia,[134] established

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[131] *See infra* Parts III.A.*1*–*2*.

[132] No. 1:12cv246 (GBL/TRJ), 2012 WL 3730636 (E.D. Va. Aug. 27, 2012).

[133] *Id.* at *1. The suit originally filed in Massachusetts was removed pursuant to the forum-selection clause in the contract, which designated the Eastern District of Virginia as the forum. *Id.* at *3.

Independent Contractor Agreements with the plaintiffs that contained the following choice-of-law provision: "[the] Agreement shall be construed according to the laws of the United States and of the Commonwealth of Virginia, without regard to the choice of law rules of such Commonwealth or any other jurisdiction."[135] Despite the language of the provision and the fact that, according to the court, "Virginia law looks favorably upon choice of law clauses in contracts,"[136] the court found that the choice-of-law clause did not apply in the action.[137] Although the language of the provision seemed to establish the intent of the parties for the contract to be governed by Virginia law—since it stated that the agreement would be governed by Virginia law, "without regard to the choice of law rules of . . . any other jurisdiction"—the court found that the language did not make this intent clear enough.[138]

In reaching this conclusion, the court looked to other provisions in the contract, specifically the forum-selection clause.[139] That clause stated, "Any claims or disputes arising from or in connection with this agreement, whether under federal, state, local, or foreign law, shall be brought exclusively in the state or federal courts serving Vienna, Virginia."[140] In comparing this language with the choice-of-law clause, the court found the forum-selection clause's use of the phrase "claims or disputes arising from or in connection with this Agreement" to be broader than the choice-of-law provision.[141]

Although it seems that reference to "the Agreement" in the choice-of-law provision would include a dispute regarding the employment relationship, or lack thereof, that was created by the agreement between the parties, the court held otherwise. The court held that such language narrowed application of the choice-

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[134] *Id.* at *2.

[135] *Id.* at *6 (alteration in original).

[136] *Id.* at *5 (quoting Colgan Air, Inc. v. Raytheon Aircraft Co., 507 F.3d 270, 275 (4th Cir. 2007)) (internal quotation marks omitted).

[137] *Id.* at *7.

[138] *Id.* at *6 (internal quotation marks omitted).

[139] *Id.*

[140] *Id.* (internal quotation marks omitted).

[141] *Id.*

of-law provision,[142] making the provision only applicable in matters regarding interpretation of the contract.[143] Thus, the court found that the governing-law provision did not bar the application of the Massachusetts Independent Contractor Statute to the claims of the case.[144]

The result is surprising, though. The entire premise of "the Agreement" between the workers and the defendant was to set forth the status of their employment. Just because the workers claim to be misclassified, does not necessarily make that claim outside of "the Agreement." The better explanation seems to be that the misclassification claim is, in fact, related to the Agreement and therefore should be subject to the choice-of-law clause. Put simply, an independent contractor agreement would include a claim disputing the employer's classification of the worker as an independent contractor. It is also possible that the choice to not enforce the choice-of-law clause was more realistically rooted in a public policy motivation but rather masked through the use of contract interpretation principles.[145]

In *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*,[146] the First Circuit followed a similar approach to that in *Laserhip*. In *Vertex*, the plaintiff filed a wage-claim suit based upon a Georgia statute; the issue was whether application of the Georgia statute was barred by the contractual provision prescribing the application of Massachusetts law.[147] There, too, the court held that the forum-selection clause's use of the phrase "relating to,

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[142] *Id.*

[143] *Id.* at *5.

[144] *Id.* at *7. Interestingly, the defendant also argued for summary judgment because the Massachusetts Independent Contractor Statute was preempted by the Federal Aviation Administration Authorization Act of 1994. The argument was that application of the Massachusetts Independent Contractor Statute would significantly impact the prices, routes, or services of Lasership as a motor carrier; however, its motion was denied, allowing for discovery of the actual effect of the Massachusetts Independent Contractor Statute. *Id.* at *9.

[145] In the initiative to crack down on the misclassification of workers, discussed *supra* Part II.A.*3*, Massachusetts has enacted one of the toughest tests for properly classifying someone as an independent contractor. Inomata, *supra* note 116.

[146] 390 F. App'x 1 (1st Cir. 2010).

[147] *Id.* at *1–2.

arising under, connected with, or incident to this Agreement" was broader than the choice-of-law provision that used the phrase "terms of this Agreement."[148]

However, in *Vertex*, the argument for the narrow interpretation of the choice-of-law provision seems clearer than in *Lasership*. In *Vertex*, the choice-of-law provision explicitly states that it applies to the "terms" of the agreement, which logically suggests that the provision applies to just that—the interpretation of the terms of the agreement.[149]

However, in *Lasership*, the provision seems a bit broader. Reference to an "Agreement" may not explicitly mean the terms of the agreement but could also be interpreted as the general relationship between the parties and the agreement that they have with one another. It is not clear whether this contrasting interpretation would make a difference in the effect of the choice-of-law provision, as the court could still find that the misclassification claim would not fall within the original agreement between the parties. It does seem, however, that such an interpretation would more likely lead to the enforcement of the governing-law provision.

Contrasting these cases, in *Yeibyo v. E-Park of DC, Inc.*, the court found that because employment relationships "are paradigmatically contractual in nature," the plaintiffs' misclassification and wage claim would be assessed as a contract claim rather than a tort claim.[150] However, in that dispute, no choice-of-law provision was at issue, just a general choice-of-law analysis, which required the court to determine which state's law would apply.[151] Yet in reaching this conclusion, the court cited another opinion that foreclosed claims under the Maryland wage statute when the parties previously contracted for Massachusetts law to govern their employment relationship.[152] While the prior

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[148] *Id.* at *2–3 (internal quotation marks omitted).
[149] *Id.* at *3.
[150] No. DKC 2007-1919, 2008 WL 182502, at *5 (D. Md. Jan. 18, 2008).
[151] *Id.* at *4–6.
[152] *Id.* at *5–6 (citing Taylor v. Lotus Dev. Corp., 906 F. Supp. 290, 297–98 (D. Md. 1995)).

case did not involve a misclassification claim,[153] the enforcement of that choice-of-law provision, coupled with the *Yeibo* decision leaves open the possibility that a choice-of-law provision in the context of misclassification would be upheld.

In *Walker v. Bankers Life & Casualty Co.*, the plaintiff filed a class action seeking the benefits that she was allegedly deprived of due to the defendant's intentional misclassification of her and her class members as independent contractors.[154] The defendant moved to dismiss the California law claims, arguing that the choice-of-law clause in the contract required the application of Illinois law.[155] To determine whether the choice-of-law provision was applicable, the court first decided whether the claims sounded in tort or in contract.[156]

Finding that the claims sounded in tort, the court looked to the specific language of the clause to establish whether the parties' intended to have tort claims governed by the choice-of-law provision.[157] To make this determination, the court looked to whether the plaintiff's claims were dependent on the contract and therefore subject to the choice-of-law clause.[158] The choice-of-law clause in dispute stated, "[t]his contract shall be construed in accordance with the laws of the state of Illinois,"[159] the court found that the provision applied narrowly and thus did not govern the dispute.[160] The court contrasted the language of the provision with phrases such as claims "arising out of" the contract, which the court suggested would be more indicative of the parties' intent for the provision to govern both contract and tort claims between the parties.[161]

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[153] In *Taylor v. Lotus Development Corp.*, plaintiff sued his employer for the alleged failure to pay him sales commissions. 906 F. Supp. at 293–94.

[154] No. 06 C 6906, 2007 WL 967888, at *1 (N.D. Ill. 2007).

[155] *Id.*

[156] *Id.* at *3.

[157] *Id.*

[158] *Id.*

[159] *Id.* at *3 (alteration in original) (internal quotation mark omitted).

[160] *Id.* at *3–4.

[161] *Id.* (citing Omron Healthcare, Inc. v. Maclaren Exp. Ltd., 28 F.3d 600, 603 (7th Cir. 1994)). In *Omron*, the court held that "arising out of" language in the forum-selection

This case is therefore another example of a court declining to enforce a choice-of-law clause, finding that the plaintiff's claim did not arise from the contract but from a tort. However, in this case, the court's classification of the claim as sounding in tort does not seem so clear. In the contract signed by the plaintiff, there was specific language disclaiming an employer–employee relationship.[162] Obviously, this disclaimer does not preemptively obviate the plaintiff's claims, especially if the company misclassified the workers. However, the disclaimer does seem to suggest that the misclassification claim would be governed by the contract and thus subject to the choice-of-law clause.

The preceding case summaries illustrate that the applicability of a choice-of-law clause not only hinges on whether the misclassification claim sounds in tort or contract but also indicate that such a classification is not itself determinative. Once the claim is categorized, courts then look to the specific language of the choice-of-law provision to establish whether the parties intended to have the clause govern the claim, if sounding in tort. If the misclassification claim is contractual, then the analysis is more straight-forward: choice-of-law clauses in a contract are almost certainly intended to govern any contractual dispute.

Why courts decline to apply the choice-of-law clauses in many of these cases is perplexing; a provision provides the specific law to be applied in disputes regarding the "agreement" between the parties, which would also seemingly include a dispute about the relationship between the parties that is created by the agreement. My point is not that the courts should apply a simple, "but for" analysis—that no dispute would exist but for the contract. Such reasoning would lead to illogical, far-reaching applications of the choice-of-law clause. However, in employment contracts, it is a relationship that is being established—if the classification of that relationship is being disputed, it seems appropriate to allow the choice-of-law clause to govern the determination of that relationship.

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clause applied to all disputes that depended on the construction of the contract. 28 F.3d at 603.

[162] *Walker*, 2007 WL 967888, at *1.

2. Public Policy as Grounds for Declining To Enforce a Choice-of-Law Provision. Courts do not only rely on the classification of the misclassification claim and the specific language in the choice-of-law provision to determine whether it is enforceable. Even if a court finds that the misclassification claim is contractual, or that it is a tort claim but the parties intended the choice-of-law clause to govern tort claims as well, the provision may still be unenforceable. Courts often cite public policy to avoid applying the chosen law to a given claim, particularly when the chosen law is contrary to the law and public policy of the forum. This approach is often applied to suits filed in California, as plaintiffs find this forum favorable for wage and hour disputes.[163]

For example, in *Ruiz v. Affinity Logistics Corp.*, the Ninth Circuit found the choice-of-law provision was void because the law it involved was contrary to California public policy.[164] In *Ruiz*, the plaintiff filed a putative class action against Affinity, a trucking company, alleging that the drivers were misclassified as independent contractors.[165] The plaintiffs sought compensation for overtime and wages, including vacation, holidays, sick days, and severance.[166] In the agreement between the plaintiffs and Affinity, there was a provision stating, "This Agreement and *any* dispute thereunder shall be governed by the laws of the State of Georgia."[167] Despite the broad language of this clause, in comparison to the language of the clauses previously highlighted, the court found it inapplicable.[168]

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[163] *See* Inomata, *supra* note 116, at *5 (stating that currently most class action cases for misclassification arise in Massachusetts or California because the standard for classification is "quite high"); Joseph N. Gross, *Resolving Employment Law Disputes Efficiently and Cost-Effectively*, *in* COMPLYING WITH EMPLOYMENT REGULATIONS, 2012 ed., at 73, 74 (2012), *available at* 2012 WL 3279184, at *1 (stating that the trend of new class action lawsuits in the wage and hour area started in California).

[164] 667 F.3d 1318, 1323–24 (9th Cir. 2012).

[165] *Id.* at 1321.

[166] *Id.*

[167] *Id.* (emphasis added). Early in the opinion, the court summarized the choice-of-law provisions, stating that the agreements included a clause that "Georgia law applied to any disputes." *Id.* This implies that the court did not think that the clause solely applied to the terms of the agreement, which, as previously shown, some courts have said precludes applying the choice-of-law provision. *See supra* notes 141–49 and accompanying text.

[168] *Ruiz*, 667 F.3d at 1322.

Initially, the lower court found that the choice-of-law provision applied, allowing Georgia law to determine whether the drivers were employees or independent contractors of Affinity.[169] In reaching this conclusion, the district court employed California's choice-of-law analysis, California being the forum state.[170] Under that framework, "California courts enforce choice-of-law clauses where . . . the chosen state 'has a substantial relationship to the parties or the transaction.' "[171] The district court held that because Affinity was incorporated in and held its principal office in Georgia, the "substantial relationship" requirement was satisfied, allowing for the application of Georgia law.[172]

Following a three-day bench trial and applying Georgia law, the district court ruled in favor of Affinity.[173] Georgia law presumes independent contractor status.[174] The district court held that Ruiz was unable to rebut this presumption and establish that an employer–employee relationship existed.[175] Ruiz appealed both this judgment and the application of Georgia law.[176]

The Ninth Circuit reached the opposite conclusion, reversing the application of Georgia law.[177] While acknowledging that there was a "substantial relationship" between the chosen state and the parties, the court held that analysis should not have halted at this determination because the "substantial relationship" test is only a threshold matter.[178] The court stated that there are two additional steps in the analysis: "(1) whether applying Georgia's law 'is contrary to a *fundamental* policy of California,' and then (2)

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[169] *Id.* at 1321.

[170] *Id.*

[171] *Id.* (quoting ABF Capital Corp. v. Osley, 414 F.3d 1061, 1065 (9th Cir. 2005)) (internal quotation mark omitted).

[172] *Id.*

[173] *Id.* at 1322.

[174] Ross v. Ninety-Two West, Ltd., 412 S.E.2d 876, 881 (Ga. Ct. App. 1991) ("Where the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control.").

[175] *Ruiz*, 667 F.3d at 1322.

[176] *Id.*

[177] *Id.* at 1325.

[178] *Id.* at 1323.

'whether California has a materially greater interest than [Georgia] in resolution of the issue.' "[179]

Applying this test, the Ninth Circuit held that the Georgia law is contrary to a fundamental California policy.[180] In Georgia, if a contract states that the relationship between the parties is one of principal and independent contractor, this is presumed to be true, unless evidence is provided to rebut the presumption.[181] This presumption conflicts with the approach in California, where once a plaintiff alleges that he or she provided a service for an employer, a prima facie employer–employee relationship exists.[182] The Ninth Circuit found that because whether Georgia or California law applied significantly impacted the starting point of the suit, there was a direct conflict between California and Georgia law.[183] The court further held that this procedural difference in Georgia law created a disadvantage for plaintiffs in bringing suit, which is contrary to the California policy of protecting its workers.[184] By violating California's public policy, the application of Georgia law failed the first prong of the two-part test.[185]

The court also held that California law prevailed under the second prong, which considers which state has a greater interest in the outcome of the case.[186] The court reached this conclusion by finding that the only connection to Georgia, Affinity's incorporation and principal place of business, was far outweighed by the contacts of the dispute with California.[187] These contacts included the fact that the contract was entered into in California,

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[179] *Id.* (alteration in original) (quoting Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1152 (Cal. 1992)). California applies this two-step test in accordance with § 187(2) of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS. *Id.*; *see also supra* note 97 and accompanying text.

[180] *Ruiz*, 667 F.3d at 1323.

[181] *Id.* (citing Fortune v. Principal Fin. Grp., 465 S.E.2d 698, 700 (Ga. Ct. App. 1995)).

[182] *Id.* (citing Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010)).

[183] *Id.* at 1323–24.

[184] *Id.* at 1324.

[185] *Id.*

[186] *Id.*

[187] *Id.*

the work was done in California, and the deliveries subject to the contract were made in California.[188]

Although the protection of the workers in *Ruiz* was a legitimate concern of California's, not enough consideration was given to the parties' ability to freely contract with one another, assuming an absence of unconscionability[189] or duress.[190] By agreeing to and signing the contract, the workers did not agree to be misclassified without redress, but they did agree that their claims would be governed by Georgia law.

As previously noted, the language of the choice-of-law provision is rather broad, stating that "any" disputes should be governed by Georgia law. Therefore, it is clear to any party entering into the contract that being subject to Georgia law was part of the basis of the bargain for being employed with the company. Moreover, the company did not arbitrarily choose Georgia law in an effort to seek out a more favorable outcome in anticipation of future litigation. The company is based in Georgia; therefore, the choice of Georgia law is logical and should not have been so readily dismissed by the court.

Another California case following the same reasoning as *Ruiz* is *Quinonez v. Empire Today, LLC*, in which individuals hired by a floor installation company alleged they were misclassified as independent contractors in violation of California Labor Code and sought unpaid overtime and meal benefits.[191] While that case dealt with the applicability of a forum-selection clause,[192] in deciding that the forum-selection clause was not applicable, the court relied on the Ninth Circuit's decision in *Narayan v. EGL, Inc.*, which dealt with the applicability of a choice-of-law clause.[193]

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[188] *Id.*

[189] If a contract is deemed unconscionable or contains a term deemed unconscionable, then a court may refuse to enforce the entire contract or the unconscionable term. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

[190] If a party's manifestation of assent to a contract is made under duress, meaning the party had no other reasonable alternative, then the contract is voidable at the victim's discretion. *Id.* § 175.

[191] No. C 10-02049 (WHA), 2010 WL 4569873, at *1 (N.D. Cal. Nov. 4, 2010).

[192] *Id.* at *1–2.

[193] 616 F.3d 895, 899 (9th Cir. 2010).

In *Narayan*, the Ninth Circuit sent a strong message to employers by reversing the district court's ruling that the choice-of-law clause in the contract governed instead of California law.[194] The court highlighted that, "[t]he label placed by parties on their relationship is not dispositive, and subterfuges are not countenanced."[195]

This Ninth Circuit decision made it clear that wage and hour class actions filed in California, whether rooted in misclassification or not, would be subject to California law and that despite the phrasing of a choice-of-law clause, a claim brought under California Labor Code would be litigated according to that law, given California's strong interest in the protection of its workers.

Refusing to enforce a choice-of-law clause for public policy reasons is not limited to California. Oregon, too, expressed concern with the fact that Georgia law, again the law chosen in a choice-of-law provision, differed procedurally from Oregon law. Specifically, Georgia law provides for a presumption that a worker is an independent contractor if so stated in the contract.[196]

While rational, courts should not consider whether enforcing a choice-of-law provision would violate a public policy goal of the forum state. Given that states like California and Oregon are known for having favorable labor laws, it is customary for wage and hour class actions to be filed in such forums, especially in California.[197] As seen in *Ruiz*, even choice-of-law clauses inclusively drafted, with a substantial connection between the state law chosen and the parties, may not survive challenge in a California court. If a class action survives certification in a California court, then the choice-of-law clause may be rendered unenforceable in many cases. Such an outcome seems to completely vitiate the intent and contractual autonomy of the parties.

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[194] *Id.* at 904.

[195] *Id.* (quoting S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989)) (internal quotation marks omitted).

[196] Phelps v. 3PD, Inc., 261 F.R.D. 548, 555 (D. Or. 2009). The district court in that case, however, did not rule on the applicability of the choice-of-law provision, as this determination was not necessary at that point in the trial. *Id.*

[197] *See supra* note 163 and accompanying text.

Just as it would be unfair for an employer to intentionally label a worker as an independent contractor with the intent of treating the worker as an employee, it is inequitable for a worker to agree to the application of one state's law in an employment contract, only to later disclaim such a provision when the worker files suit. Moreover, while one state's fundamental public policy may be contravened, the state chosen by the choice-of-law clause may also have a legitimate interest in ensuring that a company headquartered in that state does not fail due to unexpected damages caused by the violation of a law that the parties never agreed to be governed by.[198]

IV. THE DIFFICULTY IN COMPLIANCE AND A POSSIBLE SOLUTION

While employers have the responsibility to ensure their workers are properly classified, this is hardly an easy task. Responsible employers often fall prey to the problem of misclassification because the term *employee* lacks a uniform definition.[199] This is especially true for companies that employ workers in multiple states. One issue is that each state has its own employment laws and differing definitions of *employee* versus *independent contractor*, so ensuring that every independent contractor in each state is properly classified becomes extremely difficult.[200] Determining whether a worker is an employee requires an

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[198] *See* Gross, *supra* note 163, at 87, 2012 WL 329184, at *10 (giving an example of a client who was caught "totally off guard" when a salesperson working for the client filed a claim under the Massachusetts Wage Claim Act and the incentive plan being challenged was completely legal in Ohio where the client's company was headquartered).

[199] Bran Noonan, *The Campaign Against Employee Misclassification*, 82 N.Y. ST. B.A. J. 42, 43 (2010).

[200] Robert C. Nagle, *Employers Facing Increased Scrutiny over Worker Classification*, 20 NO. 9 PENN. EMP'T L. LETTER 1, at *2 (2010):

> While some lawmakers and labor groups like to attack employers that misclassify workers as unscrupulous or "greedy," in reality employers are faced with a complex patchwork of laws that determine whether a worker is an employee or a contractor. . . . A common thread among these tests is the degree to which the employer exercises control of the worker's performance of work. However, there are nuances that vary from state to state, and sometimes even within a state, depending on the specific subject.

employer to apply a multitude of fact-intensive tests devised by regulatory agencies and the judiciary.[201]

With this multitude of standards, the application of one state's law versus another can be determinative in the outcome of the case. Moreover, a company facing multi-district litigation can ultimately find itself with varying outcomes in litigation. For example, in 2009, FedEx faced suit for claims of misclassification filed by their drivers, and while the drivers were successful in some states, they were not in others.[202] FedEx, as a large national company, may be able to survive such litigation, but the same cannot always be said of a smaller business that faces misclassification claims, as financial penalties incurred can be very burdensome,[203] perhaps so much so that the company will find itself with no other option but to close shop.

Aside from the ability of a big business to pay the penalties incurred, large corporations with greater capital often have an entire department dedicated to the legal liability the company may face. Smaller or start-up businesses, however, usually will not have the same resources, making the ability to be in conformity with fifty different sets of employment laws particularly onerous. Even with their legal resources, large companies still find themselves in the midst of misclassification litigation.[204]

Given such a disparity in resources, the act of courts rendering choice-of-law clauses unenforceable disproportionately burdens small businesses. A legal regime should not exist where the larger the business, and the greater its success and availability of capital, the more favorable the expected outcome in a misclassification case. Alternatively, a legal regime should not be created in which larger businesses are held to a higher standard due to the

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[201] *Id.*; Noonan, *supra* note 199, at 43.

[202] Inomata, *supra* note 116, at *4 (citing *In re* FedEx Ground Package Sys., Inc., Emp't Practices Litig., 662 F. Supp. 2d 1069 (N.D. Ind. 2009)); Jason M. Goldstein, Note, *Money Under the Bridge: The Worker Misclassification Problem*, 5 FLA. A & M U. L. REV. 107, 108–09 (2009).

[203] Noonan, *supra* note 199, at 43.

[204] *See, e.g.*, *In re* FedEx Ground Package Sys., Inc., Emp't Practices Litig., 758 F. Supp. 2d 638, 654 (N.D. Ind. 2010) (involving alleged misclassification of plaintiff drivers for FedEx as independent contractors instead of employees).

availability of capital and greater access to legal knowledge. However, it is unlikely that a uniform standard for classification of employees versus independent contractors will be established. And, while amending the Fair Labor Standards Act to preempt state law would make compliance a less difficult feat for companies that have workers in multiple states,[205] this is also an unlikely solution.

Therefore, the most viable solution, and one that protects both businesses and workers, is to allow for the enforceability of choice-of-law clauses, subject to limitations. Given that it is common for companies to use either forum-selection clauses or choice-of-law provisions to reduce uncertainty and costs in other contexts, the same should be allowed in the context of contracts with independent contractors. Allowing for the selection of a specific state's law does not necessarily mean that the business anticipates or intends to misclassify its workers. Adoption of such a clause simply allows for the company to limit uncertainty, by requiring compliance with a single state's law.

Importantly, allowing the implementation of a choice-of-law clause should not encourage a race to the bottom, where employers choose the most worker-unfriendly state's law. If courts are to enforce the choice-of-law provisions, the company should be required to present a substantial relationship with the state of the law chosen. Sufficient relationships may be established in the state in which the company is headquartered or is incorporated, but the analysis should not stop here.

As discussed previously, there is also a common public policy concern for protection of the worker that courts often find overrides choice-of-law clauses, regardless of a substantial connection between the employer and the state chosen.[206] Still, in requiring that the contract clearly express the intent of the parties to be governed by the choice-of-law clause, the rights of the worker are not compromised. If the language of the contract is clear, an

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[205] *See* Gross, *supra* note 163, at 87, 2012 WL 3279184, at *10 (proposing that the FLSA be amended to preempt state law as a possible solution to the lack of conformity).

[206] *See supra* Part III.A.*2*.

issue discussed previously,[207] the worker will be aware of their submission to the chosen state's law and the implications of losing the possibility to litigate under the color of their resident state's law. In such cases, the choice-of-law clause is part of the basis of the bargain for accepting employment.

If there is a substantial connection to the law of the chosen state and the language of the contract is clear, the question then becomes whether it is fair for workers to have access to a more favorable law in another state after they have signed the contract with full knowledge that they are subjecting themselves to a particular law. Such an outcome would be akin to unfair forum shopping; moreover, it undermines the basis of the bargain for which the employer hired the worker.

Thus, by requiring that there (1) be a substantial connection between the state designated through the choice-of-law clause, and (2) that the language of the contract be clear so as to unequivocally express the intent of the parties to be bound by the clause in the case of litigating a misclassification claim, the interests of both parties can be protected. Ultimately, the instance of worker forum shopping and the possibility of exploitation of workers by employers can both be avoided through this approach.

V. CONCLUSION

Misclassification of workers is undoubtedly a serious problem facing the nation, both for workers being exploited and denied their rights as employees and for the federal and state governments being robbed of treasury revenue.[208] However, enforcing a choice-of-law clause in the context of misclassification litigation will not necessarily contribute to this problem. Enforcing a choice-of-law clause does not allow misclassification, as the employer must still comply with a state's law regarding classification of employees. Just as businesses are able to utilize forum-selection clauses and choice-of-law clauses in other contexts,

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[207] *See supra* Part III.A.*1*.

[208] *See supra* Part II.A.*3*.

such clauses should be allowed in the context of misclassification litigation, subject to limitations.

Requiring the employer to display a substantial connection to the chosen state will prevent a race to the bottom. Secondly, requiring that the contract clearly express the intent of the parties to be governed by a chosen law will eliminate the question whether the worker is unaware of the consequences of the provision and is being exploited.

Moreover, under such a framework, party autonomy is respected along with the expectations of both the employer and the worker. Both parties will receive the basis of their bargain. The worker is gainfully employed, and the business is able to reduce uncertainty in litigation and save resources by not attempting the difficult task of complying with a richly diverse body of laws—clarification of which is not likely on the horizon.

Koleen Stasia Sullivan