

THAT’S JUST SHOW BUSINESS: RELYING ON INDUSTRIAL REVOLUTION SOLUTIONS FOR A “KIDFLUENCER” PROBLEM

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INTRODUCTION

“I was staying up all night editing videos,” she said. “I wouldn’t be able to wake up in the morning, and my mom would be like, ‘oh, you’re so lazy.’ But I was just working, working, working. It was never enough. She wanted me to be famous enough and make enough money where I could provide for the entire family . . . She would be able to quit her jobs; my dad would be able to quit his job . . . She always told me that she would never touch a cent, and then it became, ‘I want 30 percent; I want 50 percent; I’m owed this.’”¹

Thirteen-year-old Allie’s testimonial is one of countless similar experiences seen by children today when they assume the role of a “kidfluencer.” A “kidfluencer” is a child who has been posted on various social media platforms, ultimately producing substantial engagement with their content and earning income for sponsored posts.² Social media influencing has become an integral part of life for young Americans, but the idea of kidfluencers is a relatively recent phenomenon.³ Kidfluencers are capable of earning millions of dollars through advertising and their content enjoyed by millions of subscribers and followers.⁴ However, the reality is that the swooning fans do not get a glimpse into what these children may be exposed

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¹ Rachel Dunphy, *The Dark Side of YouTube Family Vlogging*, N.Y. INTELLIGENCER (Apr. 17, 2017), <https://nymag.com/intelligencer/2017/04/youtube-family-vloggings-dark-side.html> [https://perma.cc/H4PF-JAB3].

² Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers,”* 169 U. PA. L. REV. 577, 579 (2021).

³ Matthew Townsend, *Influencer Nation: 86% of Young Americans Want to Become One*, BLOOMBERG (Nov. 5, 2019), <https://www.bloomberg.com/news/articles/2019-11-05/becoming-an-influencer-embraced-by-86-of-young-americans?leadSource=verify%20wall> [https://perma.cc/U5TZ-5B5G].

⁴ Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them From Parents*, THE HOLLYWOOD REP. (Aug. 20, 2019), <https://www.hollywoodreporter.com/business/digital/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968/> [https://perma.cc/2VMD-N3JD].

to behind the camera.

For instance, the Hobson children, who are also known by their YouTube channel “Fantastic Adventures,” faced a plethora of physical abuses from their mother.⁵ Along with unimaginable abuse, the Hobson’s mother removed them from school for several years in order to focus on filming content for their channel.⁶ If the children forgot their lines or were not performing to their mother’s standard, their mother would beat, pepper-spray, molest, and starve them.⁷

Child exploitation and abuse are not isolated incidents among kidfluencers. Monetizing children comes with exploitation—especially from parents who stand to see the full benefit of the thousands to millions of dollars in revenue produced by kidfluencers—due to a lack of legal protection for these children.⁸ In the summer of 2022, TikTok moms posting their children on the social media app for views and money reignited the conversation regarding the lack of protection for these very young minors.⁹

Kidfluencers possess many of the characteristics that are indicative of child entertainers, but they are not afforded any of the protections that entertainers receive.¹⁰ Both kidfluencers and child entertainers face long hours, are constantly in the spotlight, and experience similar power dynamics with the adults that oversee their work.¹¹ For a parent to make their child a star on social media, however, they do not have to go through all the steps or spend the large amounts of money it takes to allow their child to see success in the child actor industry.¹² Essentially, the only resources a parent needs to get their child to capture the hearts of millions of fans is access to a social media account and luck.

Neither the current federal child labor laws nor Coogan laws, which are designed to protect the earnings of child actors, apply to kidfluencers.¹³ This lack of legal protection allows the parents of child social media stars to

⁵*YouTube Mom Charged with 30 Counts of Child Abuse*, CBS NEWS (Mar. 26, 2019), <https://www.cbsnews.com/news/machelle-hobson-charged-youtube-mom-behind-fantastic-adventures-channel-indicted-30-counts-child-abuse/> [https://perma.cc/SG76-LXJP].

⁶*Id.*

⁷ Masterson, *supra* note 2, at 578–79.

⁸ *Id.* at 579.

⁹ E.J. Dickson, *A Toddler on TikTok Is Spawning a Massive Mom-Led Movement*, ROLLINGSTONE (July 20, 2022), <https://www.rollingstone.com/culture/culture-news/tiktok-wren-eleanor-moms-controversy-1385182/> [https://perma.cc/DN 94-YWEU].

¹⁰ Munirat Suleiman, *Is Kidfluencing Child Labor?: How the Youngest Influencers Remain Legally Unprotected*, COLUM. UNDERGRADUATE L. REV. (June 16, 2020), <https://www.culawreview.org/journal/is-kidfluencing-child-labor-how-the-youngest-influencers-remain-legally-unprotected> [https://perma.cc/DW8V-YVA2].

¹¹ Jessica Pacht-Friedman, *The Monetization of Childhood: How Child Social Media Stars Are Unprotected From Exploitation in the United States*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 361, 380 (2022).

¹² Masterson, *supra* note 2, at 579.

¹³ *Id.*

put their personal financial interests ahead of their children's health and safety, as seen in Allie's case and even more severely in the Hobson children's case.¹⁴ Under the current legal system, kidfluencers are not recognized as workers so they may work an unrestricted number of hours at the discretion of their parents or other supervising adults.¹⁵ Today's federal child labor laws are outdated as Congress enacted Section 212 of the Fair Labor Standards Act (FLSA) in 1938 and has not updated the Act since the 1974 amendment that introduced an increased minimum wage.¹⁶ While thirty-three states have statutes that afford protections to child entertainers, there are none that regulate kidfluencers.¹⁷

The current child labor laws are modeled on a system of labor that relies on children for agricultural and manufacturing work.¹⁸ In order to provide protections for kidfluencers, an overhaul of the current federal child labor laws is necessary to adapt to the changing nature of child labor. A look into the lack of protection for children is vital as the presence of social media networks, on which minor content is present and profitable, increases.

This Note seeks to pinpoint the current shortcomings in federal child labor laws, which lack protections for children working for their parents as kidfluencers. In Part I, this Note begins by exploring the history of child labor in the United States along with what sparked the child labor reform movement in the nineteenth and twentieth centuries. Part I will also address the introduction of the federal child labor standards and how they apply to child actors. Next, Part II addresses the exploitation and abuse issues present with the introduction of kidfluencers. Part II also demonstrates the lack of legal protection provided to kidfluencers through the FLSA, Coogan Laws, and state laws applicable to child entertainers. Finally, Part III of the Note proposes a uniform federal labor law for child entertainers and kidfluencers alike that seeks to bridge the gaps seen in the current FLSA, state child entertainer laws, and Coogan laws. The proposed revisions to the current FLSA rests on abolishing Section 213 of the FLSA, which includes the child actor exception and adding provisions to address the child's earnings, work hours, and schooling.

¹⁴ See Vanessa Cezarita Cordeiro, "Kidfluencers and Social Media: The Evolution of Child Exploitation in the Digital Age," HUMANIUM (Feb. 23, 2021), <https://www.humanium.org/en/kidfluencers-and-social-media-the-evolution-of-child-exploitation-in-the-digital-age/> [https://perma.cc/8ZMN-XGXF].

¹⁵ Masterson, *supra* note 2, at 594.

¹⁶ 29 U.S.C. § 212.

¹⁷ *Child Entertainment Laws as of January 1, 2023*, U.S. DEP'T OF WAGE & HOUR DIV. (Jan. 1, 2023), <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> [https://perma.cc/AB66-8TZ5].

¹⁸ See *Child Labor*, HISTORY, <https://www.history.com/topics/industrial-revolution/child-labor> [https://perma.cc/TLF3-PY9H] (last updated Aug. 24, 2022).

I. BACKGROUND: CHILD LABOR AND THE PUSH TOWARDS REGULATION

To analyze the current shortcomings in the federal child labor laws for kidfluencers, it is vital to highlight the extensive history of child labor in the United States, the attempts to regulate child labor which led to the enactment of the FLSA, and the limited protections currently available to child actors in some jurisdictions.

A. *Origins of Child Labor Laws in the United States*

The International Labour Organization defines child labor as “work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development.”¹⁹ Work that is mentally, physically, socially, or morally dangerous and harmful to children, and interferes with their schooling further indicates child labor.²⁰ Nonetheless, work that is dangerous and harmful to children has existed since early human history.²¹ Children of hunter-gatherers participated in fishing, hunting, and caring for livestock.²² Labor continued for children with the Puritans who believed that work was the “center of moral life.”²³ Parents in the 1800s did not abandon the child labor ideology and relied on children as young as the age of five to work on the family farm.²⁴

As the Industrial Revolution moved workers from the fields to the factories, factory owners viewed children as “more manageable, cheaper, and less likely to strike” than adult laborers, often preferring children’s work to their adult counterparts.²⁵ By 1820, children under the age of fifteen accounted for 23% of the manufacturing labor force present in the

¹⁹*What is Child Labour*, INT’L LAB. ORG., <https://www.ilo.org/ipcc/facts/lang--en/index.htm> [<https://perma.cc/A5Z8-MR7U>] (last visited Nov. 4, 2022).

²⁰*Id.*

²¹Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, MONTHLY LAB. REV. (Jan. 2017), https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm#_edn9 [<https://perma.cc/4BAB-74CP>].

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*The American Era of Child Labor*, VCU LIBRARIES SOC. WELFARE HISTORY PROJECT, <https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/child-labor/#:~:text=Industrialization%20attracted%20workers%20and%20their,and%20less%20likely%20to%20strike> [<https://perma.cc/LQE4-SAQY>] (last visited Feb. 18, 2023).

Northeast.²⁶ The Industrial Revolution, which ended in 1840, normalized miserable working conditions—including crowded and dirty factories, a lack of safety codes, and long work hours—under which child laborers worked.²⁷

One of the first pushes towards restrictions on child labor came in 1832 from the New England Association of Farmers, Mechanics, and Other Workingmen.²⁸ The group rested on the opinion that “children should not be allowed to labor in the factories from morning till night, without any time for healthy recreation and mental culture . . . [because it] endangers their . . . well-being and health.”²⁹ In 1836, union members at the National Trades’ Union Convention made the first formal public recommendation to states that there should be a minimum age established for factory work.³⁰ In the same year, after the union’s public recommendation, Massachusetts became the first state to pass a child labor law requiring children under fifteen who worked in a factory to attend school for at least three months each year.³¹ Massachusetts then went on to limit the number of hours children could work in a day to ten.³²

Other states attempted to follow Massachusetts’ lead in enacting child labor laws, but their laws were not strictly enforced.³³ As child labor continued to grow, Americans became concerned with the working conditions children faced daily.³⁴ By 1900, states varied with respect to child labor standards and enforcement, and in the early decades of the twentieth century, child labor peaked.³⁵ At the beginning of the twentieth century, “American children worked in large numbers in mines, glass factories, textiles, agriculture, canneries, home industries, and as newsboys, messengers, bootblacks, and peddlers.”³⁶ In 1900, 18% of all American workers were under the age of sixteen.³⁷ After the Industrial Revolution,

²⁶Robert Whaples, *Child Labor in the United States*, EH.NET ENCYCLOPEDIA (Oct. 7, 2005), <https://www.eh.net/page/5/?s=How+much+to+invest+in+children> [https://perma.cc/SF2V-2ST6].

²⁷*Child Labor*, *supra* note 18.

²⁸*Child Labor Reform and the U.S. Labor Movement*, VCU LIBRARIES SOC. WELFARE HISTORY PROJECT, <https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/child-labor-reform-and-the-labor-movement/> [https://perma.cc/6ERY-HAQU] (last visited Feb. 18, 2023).

²⁹*Id.*

³⁰*Id.*

³¹Ariel Tacher, *The Real World: Child Labor and Reality Television*, 20 CARDOZO J. L. & GENDER 489, 494 (2014).

³²*Child Labor Reform and the U.S. Labor Movement*, *supra* note 28.

³³*Id.*

³⁴*See generally* America at Work, *America at Leisure: Motion Pictures from 1894 to 1915*, LIBR. OF CONG., <https://www.loc.gov/collections/america-at-work-and-leisure-1894-to-1915/articles-and-essays/america-at-work/> [https://perma.cc/D7MQ-K8QA] (last visited Feb. 24, 2023) (“The working conditions in factories were often harsh. Hours were long, typically ten to twelve hours a day. Working conditions were frequently unsafe and led to deadly accidents.”).

³⁵*The American Era of Child Labor*, *supra* note 25.

³⁶*Id.*

³⁷*Child Labor*, *supra* note 18.

child labor pervaded almost every American industry.³⁸

Labor and reform movements began to catch steam, resulting in politicians and other social reformers demanding for legislation to regulate child labor.³⁹ As a result of these concerns, the National Child Labor Committee was formed in 1904.⁴⁰ This committee promoted an aggressive national campaign which sought child labor law reform on the state level.⁴¹ During this time, as part of the Progressive Era reform movement, many states passed laws restricting child labor.⁴² Nonetheless, many southern states continued to reject the state-level reforms to child labor which led to an attempt to adopt a federal child labor law.⁴³

In 1916, using its power to regulate interstate commerce, Congress enacted the first federal child labor law, known as the Keating-Owens Child Labor Act (KOCLA),⁴⁴ which

banned the sale of products from any factory, shop, or cannery that employed children under the age of 14, from any mine that employed children under the age of 16, and from any facility that had children under the age of 16 work at night or for more than eight hours during the day.⁴⁵

However, the Supreme Court invalidated KOCLA in 1918 in *Hammer v. Dagenhart*, holding that the act overstepped the purpose of Congress's commerce power.⁴⁶

Nonetheless, after *Hammer*, Congress continued attempting to place restrictions on child labor.⁴⁷ In 1926, Congress introduced the Child Labor Amendment which granted Congress the power to regulate the labor of children under the age of eighteen.⁴⁸ This proposed amendment, however, never took effect because it was only ratified by twenty-eight states, and “[r]atification by 38 states is required to pass an amendment.”⁴⁹ After the failure of the Child Labor Amendment, there was a lull in child labor reform

³⁸ *Id.*

³⁹ *The American Era of Child Labor*, *supra* note 25.

⁴⁰ Tacher, *supra* note 31, at 494–95.

⁴¹ *The American Era of Child Labor*, *supra* note 25.

⁴² *Child Labor*, *supra* note 18.

⁴³ *Id.*

⁴⁴ Tacher, *supra* note 31, at 495.

⁴⁵ Keating-Owen Act of 1916, Pub. L. No. 249, 39 Stat. 675, *invalidated by* *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁴⁶ 247 U.S. 251, 276 (1918).

⁴⁷ See *Keating-Owen Child Labor Act (1916)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/keating-owen-child-labor-act> [<https://perma.cc/S6H5-9WGS>] (last visited Jan. 18, 2024).

⁴⁸ *The Failed Amendments*, U.S. CONST., <https://www.usconstitution.net/constamfail.html> [<https://perma.cc/K84Z-GZM5>] (last visited Nov. 5, 2022).

⁴⁹ *Id.*

until 1936 with the introduction of the Walsh-Healy Act.⁵⁰ The Walsh-Healy Act stated that the United States government would not purchase goods manufactured as a result of child labor.⁵¹ In 1937, the second attempt to federally regulate child labor through the Child Labor Amendment failed by “fall[ing] just short of getting [the] necessary votes” once again.⁵²

In spite of the failed legislation, however, the National Child Labor Committee continued to push for reform, specifically in the agriculture sector.⁵³ Through the Sugar Act of 1937, Congress restricted subsidies to farmers who used children in cultivating sugar beets, sending a message that protecting children from child labor was of crucial importance.⁵⁴ One year later, with the enactment of the Fair Labor Standards Act (FLSA), Congress achieved federal regulation of child labor.

B. *The Emergence of a Federal Child Labor Regulation: FLSA*

Congress used its commerce power to enact the FLSA, which federally regulated the minimum ages of employment and the work hours of children for the first time.⁵⁵ Among its regulations, the FLSA banned oppressive child labor and set a minimum wage to 25 cents per hour.⁵⁶ The FLSA was a landmark law in the Nation's social and economic development.⁵⁷ While the FLSA was a huge achievement for child labor reform, it only regulated about one-fifth of the labor force.⁵⁸

Under the FLSA, children below the age of fourteen may not be employed in non-agricultural occupations that are protected by the Act.⁵⁹ Permissible employment for children under the age of fourteen is limited to

⁵⁰ See *Child Labor Reform and the U.S. Labor Movement*, *supra* note 28.

⁵¹ 41 CFR § 50-201.1 - *The Walsh-Healey Public Contracts Act*, LEGAL INFO. INST., <https://www.law.cornell.edu/cfr/text/41/50-201.1> [https://perma.cc/9AEQ-BAXK] (last visited Nov. 5, 2022).

⁵² *Child Labor Reform and the U.S. Labor Movement*, *supra* note 28.

⁵³ Mary Lyons-Barrett, *Child Labor in the Early Sugar Beet Industry in the Great Plains, 1890-1920*, 25 GREAT PLAINS QUARTERLY 29, 30 (2005).

⁵⁴ *Id.*

⁵⁵ *Constitutional Law—Commerce Clause—1966 Amendments to Fair Labor Standards Act Extending Coverage to Employees in State-Operated Schools, Hospitals, and Related Institutions Held Constitutional—Maryland v. Wirtz*, 66 MICH. L. REV. 750, 756 (1968) [hereinafter *Constitutional Law—Commerce Clause*].

⁵⁶ *Id.*

⁵⁷ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T. OF LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> [https://perma.cc/W35X-9CZL] (last visited Nov. 5, 2022).

⁵⁸ *Id.*

⁵⁹ *Fact Sheet #43: Youth Employment Provisions of the Fair Labor Standards Act (FLSA) for Nonagricultural Occupations*, U.S. DEP'T OF LAB. WAGE AND HOUR DIV. (Dec. 2016), <https://www.dol.gov/agencies/whd/fact-sheets/43-child-labor-non-agriculture> [https://perma.cc/5Y8M-EBSL] [hereinafter *Fact Sheet #43*].

work that is exempted from the FLSA, such as acting and babysitting.⁶⁰ The FLSA establishes sixteen as the standard minimum age of employment.⁶¹ Children ages fourteen and fifteen may be employed in “non-manufacturing and non-hazardous jobs for limited periods of time and under specified conditions.”⁶² Once a person reaches the age of eighteen, they are no longer subject to the federal child labor laws.⁶³

The FLSA also sets a prohibition on oppressive child labor. The Act expressly states: “No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.”⁶⁴ While much of the oppressive child labor that prompted the enactment of the FLSA has disappeared in the United States, children continue to be employed in oppressive conditions even though they may not fall under the same nature of oppressive conditions children experienced in the 1930s.⁶⁵

The enactment of the FLSA was not the end of child labor disputes in the judicial system. In *Prince v. Massachusetts*, the Supreme Court affirmed the conviction of a mother for violating Massachusetts’ child labor laws because she allowed her children to preach and sell religious pamphlets on the streets.⁶⁶ The mother argued that Massachusetts’ child labor laws violated the Court’s earlier decisions recognizing that there is a private realm of family life in which the state cannot enter.⁶⁷ Although the Court acknowledged the private realm of family, it held that the family itself is not beyond regulation in the public interest.⁶⁸ The Court further explained that the state maintains broader authority over children’s activities than it does for adults, especially in matters of employment.⁶⁹ In its reasoning, the Court acknowledged that the government’s ability to regulate child labor rests on the potential harms labor could have on children.⁷⁰ In summary, the *Prince* Court further affirmed the constitutionality of the FLSA and the necessity of child labor reform for public policy reasons.⁷¹ However, even with the public policy concerns which prompted the enactment of the FLSA, not all children

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 29 U.S.C. § 212(c).

⁶⁵ Melody Burke, *New Child Labor Laws Needed to Protect Child Influencers*, ONLABOR (Apr. 27, 2022), <https://onlabor.org/new-child-labor-laws-needed-to-protect-child-influencers/> [https://perma.cc/SSM9-DQK9].

⁶⁶ 321 U.S. 158, 162 (1944).

⁶⁷ *Id.* at 166 (relying on the decisions in *Pierce v. Soc’y of Sisters*, 268 U.S. 510, and *Meyer v. Nebraska*, 262 U.S. 390).

⁶⁸ *Id.*

⁶⁹ *Id.* at 168.

⁷⁰ *Id.*

⁷¹ See Suleiman, *supra* note 10.

were protected under the Act.⁷²

C. In Coogan We Trust – Safeguarding Child Actor's Money

Although the FLSA provides greater protection for children, significant exceptions exist: (1) children working in agriculture and (2) children working in the acting industry.⁷³ With regard to child actors, the FLSA expressly states, “The provisions of Section 12 . . . relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”⁷⁴ The term “performer,” in accordance with the FLSA, encompasses more than just a child actor. A performer is:

[A] person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program. It shall not include such persons as script writers, stand-ins, or directors who are neither seen nor heard by the radio or television audience; nor shall it include persons who participate in the broadcast or telecast purely as technicians such as engineers, electricians and stage hands.⁷⁵

Accordingly, “performer” covers a wide range of child laborers who are afforded no protections. If the role of a kidfluencer fell into the category of a “performer” under the FLSA, those children would effectively be exempt from child labor laws and unprotected against hazardous work conditions.

The first prominent example of the lack of protections for child actors involved Jackie Coogan.⁷⁶ Coogan was a famous child actor who was

⁷² Grossman, *supra* note 57.

⁷³ 29 U.S.C. § 213(c)(1), (3).

⁷⁴ *Id.* § 213(c)(3).

⁷⁵ 29 C.F.R. § 570.125.

⁷⁶ *Coogan Law*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [<https://perma.cc/R2UG-XBWM>] (last visited Nov. 6, 2022).

discovered by Charlie Chaplin.⁷⁷ At the age of nine, Coogan was one of the highest paid actors in Hollywood.⁷⁸ Coogan earned about \$4,000,000 in his acting career, which is worth more than \$50,000,000 today.⁷⁹ Because Coogan was only nine years old, his mother and stepfather began to manage his money, spending almost every dime with the belief that their son would make more.⁸⁰ It was not until Coogan reached the age of twenty one that he discovered his earnings from acting were virtually gone.⁸¹ As a result, Coogan sued his mother in an attempt to recover his earnings.⁸² Coogan won the case against his mother, but after all of the legal expenses, he was only left with \$126,000 of recovery.⁸³

Coogan is not the only child entertainer who experienced a serious depletion in their earnings. Shirley Temple was “left with next to nothing when her father mismanaged her earnings.”⁸⁴ Temple’s earnings were valued at more than \$3,000,000, but she was only left with approximately \$30,000.⁸⁵ Half of Temple’s earnings went to her parents and the rest paid for the living expenses of other family members.⁸⁶

Coogan’s lawsuit exposed the deficiencies in the laws regarding child performers, ultimately leading to the enactment of what is called the Coogan Law.⁸⁷ The Coogan Law was put into effect to prevent future child actors from finding themselves in the same situation as Coogan.⁸⁸ Responding to Coogan’s issue—in which his parents spent the majority of his career earnings—the Coogan Law gave courts discretion to set aside a percentage of a child actor’s income to be placed in a trust account, which the child’s parents are required to establish.⁸⁹ Additionally, under the Coogan Law, the child’s parents must provide the trust account information to the

⁷⁷ *Id.*

⁷⁸ Danielle Ayalon, *Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment*, 35 HASTINGS COMM. & ENT. L.J. 353, 355 (2013).

⁷⁹ Deepa Pokharel, *The Story of Actor Jackie Coogan — a Millionaire Child, Who Was Beaten to the Ends by His Own Parents*, THE MEDIUM (Oct. 31, 2019), <https://medium.com/the-dustbin/the-story-of-actor-jackie-coogan-a-millionaire-child-who-was-beaten-to-the-ends-by-his-own-8d319ab9b02c> [https://perma.cc/6FZ4-RBKM].

⁸⁰ *Id.*

⁸¹ *Coogan Law*, *supra* note 76.

⁸² Ayalon, *supra* note 78, at 355–56.

⁸³ *How a Child Actor Got Robbed of Millions by His Mother*, MEDIUM (June 26, 2021), <https://medium.com/lessons-from-history/how-a-child-actor-got-robbed-of-millions-by-his-parents-81df569e3d6c> [https://perma.cc/CUZ7-HT29].

⁸⁴ Stephanie Marcus, *Shirley Temple’s Death Reminds Us There Are Still Few Protections for Child Stars*, HUFFPOST (Feb. 16, 2014), https://www.huffpost.com/entry/child-stars-protection-coogans-law_n_4775408 [https://perma.cc/7VBD-QZ5X].

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Ayalon, *supra* note 78, at 353–54.

⁸⁸ *Coogan Law*, *supra* note 76.

⁸⁹ Ayalon, *supra* note 78, at 357.

movie producers so they could deposit the earnings directly into the trust.⁹⁰

However, the newly adopted Coogan Law was not perfect and contained loopholes. One of the major loopholes was that it only provided protection for contracts which were “court approved,” and a majority of the contracts were not.⁹¹ Many contracts were never brought before the court because producers did not seek approval for short-term projects.⁹² Another prominent loophole was that the law applied to a child’s “net earnings,” which was defined as “the income of the child, less taxes, support and care, expenses associated with the contract, and manager's and attorney's fees.”⁹³ Thus, the fees not included in a child’s net earnings allowed parents to drain some of the child’s income before it would be protected by the law.⁹⁴ Further, courts could use discretion to determine the percentage to be held in trust rather than apply a fixed percentage.⁹⁵

In 2000 and 2004, the California legislature revised the Coogan Law in an attempt to remove the loopholes.⁹⁶ The changes to the law in 2000 affirmed that earnings by minors in the entertainment industry are the property of the minor rather than their parents.⁹⁷ However, because minors cannot legally control their own money, the law creates a fiduciary relationship between the children and their parents.⁹⁸ The current law applies to contracts “pursuant to which a minor is employed or agrees to render artistic or creative services . . . includ[ing] . . . services as an actor, actress, dancer, musician, comedian, singer.”⁹⁹ Therefore, the current law does not solely apply to contracts that are approved by courts, but all contracts.

The current law also changed “net earnings” to “gross earnings,” defined as “the total compensation payable to the minor under the contract.”¹⁰⁰ The current law requires that no less than 15% of the child’s gross earnings be set aside by their employer to be held in trust and preserved for the benefit of the minor.¹⁰¹ Except by written order of the superior court, no one may make withdrawals from the trust before the minor-child reaches the age of eighteen.¹⁰² The distinction of “gross earnings” does not allow for

⁹⁰ *Id.* at 355.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Peter M. Christiano, *Saving Shirley Temple: An Attempt to Secure Financial Futures for Child Performers*, 31 MCGEORGE L. REV. 201, 203 (2000).

⁹⁴ *Id.* at 205.

⁹⁵ Ayalon, *supra* note 78, at 355.

⁹⁶ *Id.* at 357–58.

⁹⁷ *Coogan Law*, *supra* note 76.

⁹⁸ *Id.*

⁹⁹ CAL. FAM. CODE § 6750(a)(2).

¹⁰⁰ *Id.* § 6750(c)(1).

¹⁰¹ *Id.* § 6752(b)(1).

¹⁰² *Id.* § 6753(b).

certain deductions to be made before the money is protected.¹⁰³ The law requires the employer to directly place a percentage of the funds into the trust account.¹⁰⁴ By requiring the employer to directly place the funds into the trust account, the child's parents never touch the money or have the chance to use it before it is protected. Other states have laws similar to Coogan's Law, including New York, Illinois, Kansas, Louisiana, Nevada, New Mexico, North Carolina, Pennsylvania, and Tennessee.¹⁰⁵ Even in California and other states that have Coogan Laws, the statutes fail to address the evolving category of kidfluencers.¹⁰⁶

For centuries, concerns of child labor have periled American society and the United States federal government.¹⁰⁷ Although, at the time of its enactment, the FLSA remedied more oppressive child labor practices than ever before, the law only regulated a small percentage of the workforce and denied protection for children employed in nontraditional occupations.¹⁰⁸ The Coogan Law sought to regulate a nontraditional occupation—child acting—but none of the nine Coogan Laws include provisions accounting for kidfluencers.¹⁰⁹

II. ANALYSIS: THE OUTDATED FLSA PROVIDES NO PROTECTION FROM EXPLOITATION FOR KIDFLUENCERS

Section 212 of the FLSA has not been updated since its enactment to reflect the modernization of child labor, apart from an increased minimum wage. With the introduction of social media into society, nontraditional occupations such as influencing, have caused the weaknesses of the FLSA to shine through. With the introduction of social media applications such as TikTok, more fans now recognize the alarming lack of protection for kidfluencers from their parents, increasing the prevalence of the issue of the FLSA's deficient protections. The exploitation and abuse that kidfluencers face remains unregulated through Coogan Laws, the FLSA, and state child entertainer laws. As the social media industry continues to grow, the kidfluencer issue will likely grow in turn and, thus, must be addressed at a federal level.

¹⁰³ Ayalon, *supra* note 78, at 357.

¹⁰⁴ *Id.* at 359.

¹⁰⁵ *Coogan Law*, *supra* note 76.

¹⁰⁶ *Id.*

¹⁰⁷ See *Child Labor Reform and the U.S. Labor Movement*, *supra* note 28.

¹⁰⁸ Grossman, *supra* note 57.

¹⁰⁹ See *Coogan Law*, *supra* note 76.

A. *The Rise of Kidfluencers Without Legal Protection*

Influencing is a relatively new phenomenon—“influencer” was added to the Merriam-Webster Dictionary in 2019 and is defined as “a person who is able to generate interest in something (such as a consumer product) by posting about it on social media.”¹¹⁰ Though influencing only became popular recently, social media growth has certainly made it an integral part of society.¹¹¹ In fact, a study by Bloomberg revealed that 86% of young Americans between the ages of thirteen and thirty-eight would be willing to give influencing a try.¹¹² The survey further broke down the factors that motivate these individuals to want to try influencing—flexible hours and money being the top two.¹¹³ The majority of an influencer’s revenue comes from sponsored posts in which they are paid to post content for a certain brand on varying social media platforms.¹¹⁴ In 2022, the value of influencer marketing was estimated at \$16.4 billion; this figure continues to grow.¹¹⁵

Kidfluencing is an especially recent development in the world of social media. Generally, children capture the hearts of their audience more easily than their adult counterparts. Research shows that videos featuring a child under the age of thirteen receive three times as many views as a video with no children.¹¹⁶ Moreover, videos featuring a child under the age of thirteen that are targeted to a child audience qualify as the most popular type of video content when analyzed by view count.¹¹⁷

Ultimately, children are capable of making millions each year just from posting content on social media.¹¹⁸ This is illustrated by child YouTube star Ryan Kaji, who made \$26,000,000 in one year from posting videos in which he reviewed toys.¹¹⁹ Although making millions by creating and posting videos sounds like a great lifestyle to many, it is not always great for

¹¹⁰*Influencer*, MERRIAM-WEBSTER <https://www.merriam-webster.com/dictionary/influencer> [<https://perma.cc/7BVC-VWLM>] (last visited Feb. 16, 2023).

¹¹¹See *The Influence of Social Media on Modern Society*, THE NYU DISPATCH, <https://wp.nyu.edu/dispatch/the-influence-of-social-media-on-modern-society/> [<https://perma.cc/5R54-A5RK>] (last visited Feb. 24, 2023).

¹¹²Townsend, *supra* note 3.

¹¹³*Id.*

¹¹⁴Cordeiro, *supra* note 14.

¹¹⁵Artyom Dogtiev, *Influencer Marketing Costs (2022)*, BUSINESSOFAPPS (Oct. 26, 2022), <https://www.businessofapps.com/marketplace/influencer-marketing/research/influencer-marketing-costs/> [<https://perma.cc/8AWR-FTVD>].

¹¹⁶Patrick Van Kessel et. al., *A Week in the Life of Popular YouTube Channels*, PEW RSCH. CTR. (July 25, 2019), <https://www.pewresearch.org/internet/2019/07/25/a-week-in-the-life-of-popular-youtube-channels/> [<https://perma.cc/K94F-F5BY>].

¹¹⁷*Id.*

¹¹⁸Masterson, *supra* note 2, at 584.

¹¹⁹Madeline Berg, *The Highest-Paid YouTube Stars of 2019: The Kids are Killing It*, FORBES (Dec. 18, 2019), <https://www.forbes.com/sites/maddieberg/2019/12/18/the-highest-paid-youtube-stars-of-2019-the-kids-are-killing-it> [<https://perma.cc/W55V-KZKX>].

the children. The potential to make millions can drive parents to do whatever it takes to make as much content as possible, even if that means removing their children from school.¹²⁰ The harsh reality is that there are no laws to protect kidfluencers from exploitation by their parents.¹²¹

The lack of legal protection for kidfluencers is a worldwide issue. In fact, in October of 2020, the French National Assembly adopted a law to provide a legal framework for the online activity of child influencers on social media.¹²² The law provides that kidfluencers will be protected under the French Labor Code similar to the way child actors or models are currently protected.¹²³ The law stands to protect the child's income, which the child will have access to upon reaching the age of sixteen.¹²⁴ The child's income is to be placed in a safeguarded bank account, similar to a Coogan trust account.¹²⁵ The French law also regulates the hours kidfluencers under the age of sixteen may work.¹²⁶ So far, France is the only country that has taken an affirmative step to address the issue of the exploitation of kidfluencers.¹²⁷

B. Abuse and Exploitation that Kidfluencers Face

It is not uncommon for children with a social media following to encounter exploitation and emotional and physical abuse from their parents. In the case of the Hobson children, their mother exposed them to horrific physical abuse behind the scenes of the perfect family life shared to their viewers.¹²⁸ Hobson sprayed pepper spray on the children's genitals, applied lighters and stun guns to their bodies, and locked them in the closet for days at a time without access to food, water, or the bathroom.¹²⁹ This unthinkable abuse was the direct result of the children not performing for the camera in the way their mother desired.¹³⁰ Essentially, the abuse did not stem from any reason other than the labor the children were conducting for their mother.¹³¹

¹²⁰ *YouTube Mom Charged with 30 Counts of Child Abuse*, *supra* note 5.

¹²¹ Pacht-Friedman, *supra* note 11, at 371.

¹²² Nicolas Boring, *France: Parliament Adopts Law to Protect Child "Influencers" on Social Media*, LIBR. OF CONG. (Oct. 30, 2020), <https://www.loc.gov/item/global-legal-monitor/2020-10-30/france-parliament-adopts-law-to-protect-child-influencers-on-social-media/> [<https://perma.cc/SJ8C-C5J5>].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *France Passes New Law to Protect Child Influencers*, BBC NEWS (Oct. 7, 2020), <https://www.bbc.com/news/world-europe-54447491> [<https://perma.cc/5ZLG-SZ9L>].

¹²⁶ *Id.*

¹²⁷ Pacht-Friedman, *supra* note 11, at 385.

¹²⁸ *YouTube Mom Charged with 30 Counts of Child Abuse*, *supra* note 5.

¹²⁹ *Id.*

¹³⁰ Masterson, *supra* note 2, at 578–79.

¹³¹ *Id.*

Kidfluencers also experience emotional and verbal abuse when they are not producing content at the standard that their parents are expecting.¹³² When thirteen-year-old Allie started seeing monetary success from the YouTube videos she was creating, her mother stepped in and started pushing her to work long hours of filming and editing.¹³³ Allie's mother often insulted her by calling her "lazy" if she did not do "enough" filming or editing, even if she stayed up all night working on her content.¹³⁴ Due to the constant verbal abuse Allie experienced, she developed an anxiety disorder.¹³⁵

Unfortunately, Allie is not the only child influencer to experience verbal abuse. In early 2022, eleven teens sued Tiffany Smith for abuse they faced while producing videos for "Piper Squad" on YouTube.¹³⁶ The teens alleged that Smith and her boyfriend subjected them to sexually explicit comments and exploited them without pay for their video appearances.¹³⁷ The lawsuit further stated that Smith often verbally harassed the teens if "she felt they were doing something wrong in a video," often causing the children to break down into tears.¹³⁸ Verbal abuse such as this is common among kidfluencers and leads to long-term effects on their health and well-being.¹³⁹

Fans have recently accused "TikTok moms" of monetarily exploiting their children for sexual predators.¹⁴⁰ Three-year-old Wren Eleanor's TikTok account is controlled by her mother, Jacquelyn, and has recently sparked massive controversy.¹⁴¹ Jacquelyn posts Wren for an audience of more than seventeen million followers.¹⁴² While most of Wren Eleanor's TikTok videos appear fairly innocent—such as eating donuts and bursting water balloons—there are questionable videos showing Wren Eleanor playing with a tampon or taking a bath in a bikini.¹⁴³ These questionable videos drew the attention of many, and commenters have pointed out:

[N]ot only that such videos get more likes and saves than

¹³² See Dunphy, *supra* note 1.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Kenneth Niemeyer & Kieran Press-Reynolds, *11 Kids Have Sued YouTube Star Piper Rockelle's Mom and Her Boyfriend Alleging Abuse and Exploitation*, INSIDER (Jan. 14, 2022), <https://www.insider.com/piper-rockelle-11-kids-sue-youtubers-mom-alleging-abuse-exploitation-2022-1> [<https://perma.cc/A4A3-VG75>].

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Dunphy, *supra* note 1.

¹⁴⁰ See Dickson, *supra* note 9.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

some of Wren's other videos . . . [commenters] have even tracked down the social media footprints of some of Wren's followers, pointing to concerning comments they have made or other videos they have saved to indicate they may be sexually attracted to children.¹⁴⁴

Fans also noticed trending searches on TikTok that included "Wren eating corn dog" and "Wren scandalous outfits," suggesting Jacquelyn receives profits from the toddler's sexualization.¹⁴⁵ While Jacquelyn denied the allegations that she is sexually and monetarily exploiting her daughter, the uproar raises questions as to whether there should be regulations in place to protect child influencers.¹⁴⁶ Abuse of kidfluencers can range from sexual and monetary exploitation to verbal and physical abuse.¹⁴⁷ With the introduction of new social media applications such as TikTok, the issue of kidfluencer abuse remains prevalent—and will continue to be—so it must be regulated.¹⁴⁸

C. Current Child Labor Laws Do Not Adequately Protect Kidfluencers from Abuse and Exploitation

While child actors may receive minimal protection from exploitation through Coogan Laws and state child entertainer laws, neither apply to kidfluencers. Further, the FLSA does not apply to kidfluencers or child actors. Thus, kidfluencers remain completely unprotected from the exploitation and workplace abuse from which Coogan Laws and state child entertainer laws seek to shield children.

1. Deficiencies in the Coogan Law and FLSA

Although the public recognizes the abuse and exploitation kidfluencers face, current child labor laws do not adequately protect kidfluencers.¹⁴⁹ Even with the existence of Coogan Laws, the FLSA, and

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Elissa Bain, *Wren Eleanor's Mom Says Rumors Are '100% False' and Daughter is 'Happy and Healthy'*, HITC (Aug. 6, 2022), <https://www.hitc.com/en-gb/2022/08/06/wren-eleanors-mom-says-rumors-are-100-false-and-daughter-is-happy-and-healthy/> [<https://perma.cc/C2QW-5L94>]; Dickson, *supra* note 9.

¹⁴⁷ See Tacher, *supra* note 31, at 491.

¹⁴⁸ *But see, e.g.*, Masterson, *supra* note 2, at 606.

¹⁴⁹ Burke, *supra* note 65.

state laws regulating child entertainers, kidfluencers remain unprotected.¹⁵⁰

In 1938, Section 213 of the the FLSA exempted child entertainers from any federal regulations, which led to states attempting to provide some protections to children employed in nontraditional occupations.¹⁵¹ The FLSA has not been amended to cover kidfluencers, despite the topic of their protection frequenting public debate in recent years.¹⁵² The FLSA's goal was to prevent oppressive child labor by placing wage and hour restrictions on employers of minors.¹⁵³ States like California and New Mexico seek to apply the FLSA's goal to child actors through statutes that include extensive hour restrictions broken down by age group.¹⁵⁴ However, because kidfluencers are not recognized as a protected group, their parents can force them to work unlimited hours, as seen in Allie's case.¹⁵⁵ Further, there is no regulation for kidfluencers requiring their parents to preserve their profits for their benefit.¹⁵⁶ Thus, kidfluencers can legally work more hours than any other child their age and receive no monetary compensation.¹⁵⁷

Coogan Laws attempted to fill in the gap where the FLSA denies protection.¹⁵⁸ Coogan Laws only apply to child actors and do not protect them from the oppressive conditions that the FLSA prohibits.¹⁵⁹ Current Coogan Laws do not effectively fill the gaps to account for the abuses kidfluencers experience due to a societal shift in occupations away from the hazardous industrial work environments existing at the enactment of the FLSA. Thus, while Coogan Laws attempt to remedy the lack of legal protection for child performers, it is not the perfect solution as the law protects only a very small percentage of a child actor's income.¹⁶⁰

While Coogan Laws seek to address the legal gaps and provide financial protection for child performers, not every state has enacted these laws.¹⁶¹ As of 2022, only nine states have adopted some form of a Coogan Law intended to provide protection for child actors.¹⁶² The statutes in these states have minor differences, but all of them require a Coogan trust account to be established for a percentage of the child's earnings before the work

¹⁵⁰ Tacher, *supra* note 31, at 498.

¹⁵¹ 29 U.S.C. § 213; 29 C.F.R. § 779.505.

¹⁵² 29 U.S.C. § 213.

¹⁵³ *Constitutional Law—Commerce Clause*, *supra* note 55, at 756.

¹⁵⁴ N.M. Stat. Ann. § 50-6-18 (2022); CAL. CODE REGS. tit. 8, § 11760 (2022).

¹⁵⁵ Dunphy, *supra* note 1.

¹⁵⁶ *Coogan Law*, *supra* note 76.

¹⁵⁷ 29 U.S.C. § 213.

¹⁵⁸ *Coogan Law*, *supra* note 76.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² *Id.*

permit may be issued.¹⁶³ Although these states recognize the need for protection of child entertainers' earnings, none of their statutes include kidfluencers.¹⁶⁴ Further, not only do these laws fail to include the growing number of kidfluencers, their major deficiencies afford inadequate protection for the child actors they are designed to benefit.¹⁶⁵

One weakness of the Coogan Law is that only 15% of a child actor's gross income ends up in the protected trust account.¹⁶⁶ With only a small portion of a child's income deposited into the trust, 85% of the child's income remains unprotected.¹⁶⁷ Thus, the vast majority of a child actor's earnings are still accessible to their adult guardians to use as they please.¹⁶⁸ For example, if a child actor received \$1,000,000 from an acting role, only \$150,000 of this income would be required to be put into a trust account under the current Coogan Law. Thus, \$850,000 of the child actor's earnings from the job remains unaccounted for. This example demonstrates one shortcoming that makes the Coogan Law ineffective at achieving its major goal of financial protection for minors.¹⁶⁹

Not only does the current Coogan Law ineffectively protect the majority of a child actor's earnings, the law also does not address oppressive work conditions, from which the FLSA attempts to prevent children from being exposed.¹⁷⁰ The FLSA specifically addresses oppressive child labor due to the number of children working in dangerous industrial cities at the turn of the twentieth century.¹⁷¹ However, in today's reality, the majority of children no longer work with dangerous machines, and the oppressive child labor the FLSA seeks to extinguish has largely disappeared in America.¹⁷² The Code of Federal Regulations defines oppressive child labor as:

- (1) any employee under the age of 16 years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of 16 years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of 16 and 18 years

¹⁶³ *Id.*

¹⁶⁴ Pacht-Friedman, *supra* note 11, at 362.

¹⁶⁵ *Id.*

¹⁶⁶ Marcus, *supra* note 84.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Masterson, *supra* note 2, at 587.

¹⁷¹ *Id.* at 585.

¹⁷² *Id.* at 587.

or detrimental to their health or well-being) in any occupation, or

(2) any employee between the ages of 16 and 18 years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being.¹⁷³

Largely, this definition focuses on whether the employment is “detrimental to the [child’s] health or well-being” when determining whether the labor is oppressive.¹⁷⁴ The definition further establishes that labor is generally not oppressive so long as it does not interfere with the child’s schooling.¹⁷⁵

However, the definition of oppressive labor affirmatively excludes employment of children by their parent.¹⁷⁶ It is not uncommon for two- and four-year-old children to have hundreds of thousands of followers on social media.¹⁷⁷ Because young children cannot manage their own social media accounts, they often end up working for their parents.¹⁷⁸ While kidfluencers are often “employed” by their parents, this arrangement can impact their schooling along with their health and well-being.¹⁷⁹ For example, in the case of the Hobson children, their parents took them out of school for years in order to continue filming their YouTube videos.¹⁸⁰

Some kidfluencer parents may choose to homeschool their children, but they are often not spending an adequate number of hours properly teaching their children in order to have more time to film content.¹⁸¹ While parents generally have the right to direct the education of their children—including the right to homeschool—compulsory education laws require parents to enroll their children in some form of schooling and provides age requirements for enrolling in school.¹⁸² Although not all kidfluencer parents allow social media to impact the schooling of their children, it is not an

¹⁷³ 29 C.F.R. § 779.505.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Zulie Rane, *The Terrifying Rise of the Child Influencer and the Parents Who Profit*, ONEZERO (Oct. 25, 2021), <https://onezero.medium.com/the-terrifying-rise-of-the-child-fashion-influencer-e7b03278d887> [<https://perma.cc/VC3W-9EVV>].

¹⁷⁸ *See id.*

¹⁷⁹ *YouTube Mom Charged with 30 Counts of Child Abuse*, *supra* note 5.

¹⁸⁰ *Id.*

¹⁸¹ Alexandra Whyte, *Mo’ Money, Mo’ Problems?*, KIDSCREEN (Aug. 12, 2019), <https://kidscreen.com/2019/08/12/why-arent-there-laws-protecting-kid-influencers/> [<https://perma.cc/7UYU-XL5K>].

¹⁸² *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

uncommon theme for kidfluencers to be “homeschooled” or to skip school to create content to keep up with the demands of their online audience.¹⁸³

The FLSA seeks to protect against oppressive child labor, addressing child labor’s interference with education, which, notably, is an issue not addressed by the Coogan Law.¹⁸⁴ But the FLSA and Coogan Laws are not the only sources that speak to the protection of child entertainers.¹⁸⁵ Because the FLSA exempts child actors from protection, states have their own child labor laws that regulate child actors.¹⁸⁶ The lack of federal protection for child actors leaves a patchwork of state laws, but none apply to kidfluencers.¹⁸⁷

2. Current State Child Labor Laws Provide No Legal Protection for Kidfluencers

While most states do not afford protection through Coogan Laws, the majority of states have enacted laws which specifically regulate child entertainers.¹⁸⁸ As of January 2023, thirty-three states have laws that protect child entertainers in some form.¹⁸⁹ However, none of these laws apply to kidfluencers or address exploitation of the minor.¹⁹⁰ Most of the state child entertainer laws outline requirements for child employment permits, such as a requisite age of the employed child.¹⁹¹ States that do not have child entertainment regulations completely exempt children employed in the industry from child labor requirements.¹⁹² Many of the state laws address schooling and age requirements, modeling the protections afforded to other child laborers under the FLSA.¹⁹³ Ultimately, there is no uniformity among the states when it comes to regulating child entertainers.

Indiana’s statute, for example, states that minors under the age of eighteen cannot engage in employment that is “detrimental to the life, health, safety, or welfare of the minor, or interfere with their schooling.”¹⁹⁴ This wording is almost identical to the FLSA’s oppressive child labor

¹⁸³ *YouTube Mom Charged with 30 Counts of Child Abuse*, *supra* note 5.

¹⁸⁴ *What is Child Labour*, *supra* note 19.

¹⁸⁵ *See Child Entertainment Laws as of January 1, 2023*, *supra* note 17.

¹⁸⁶ *Id.*

¹⁸⁷ Masterson, *supra* note 2, at 582.

¹⁸⁸ *Child Entertainment Laws as of January 1, 2023*, *supra* note 17.

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ Ind. Code Ann. § 22-2-18.1-14 (2022).

definition.¹⁹⁵ Indiana's statute, however, allows minor to engage in "singing, playing, or performing in a studio, circus, theatrical, or musical exhibition, concert, or festival, in radio and television broadcasts, or as a live or photographic model."¹⁹⁶ Nevertheless, Indiana's statute exempts a child actor or performer from hours and days restrictions.¹⁹⁷ Thus, even though Indiana attempts to protect child entertainers, they ironically exempt child entertainers from restrictions that other children in traditional work environments experience. Ultimately, none of the protections in Indiana's statute apply to kidfluencers to protect their health, safety, and education.¹⁹⁸

Massachusetts' law allows minors under the age of sixteen to take part on the stage in a theater so long as they give no more than two performances in a day and no more than eight performances in a week.¹⁹⁹ However, the attorney general must approve the child's participation and must be satisfied "that the supervision of such children is adequate, that their living conditions are healthful, and that their education is not neglected."²⁰⁰ Similar to Indiana's statute, Massachusetts' law concerns the same aspects of the child's life that the FLSA seeks to regulate. The statute speaks directly to education and will not allow children to take part in acting if it is detrimental to their health and well-being.²⁰¹ The statute also addresses children participating in fashion shows, stating, "[T]his section shall not prevent participation of a child under fifteen years of age in a fashion show, provided such child is accompanied by either one of his parents."²⁰² Although the statute regulates fashion shows and stage performances, it is silent on the regulation of kidfluencers.²⁰³

New Mexico is a state with a Coogan Law and other laws directly addressing employment of children in the entertainment industry.²⁰⁴ New Mexico's child performer law speaks specifically to children working in performing arts.²⁰⁵ A performer under the age of eighteen is subjected to the state's child labor laws unless, "(1) the performer has satisfied the compulsory education laws of the state; (2) the performer is married; (3) the performer is a member of the armed forces; or (4) the performer is legally

¹⁹⁵ 29 C.F.R. § 779.505.

¹⁹⁶ Ind. Code Ann. § 22-2-18.1-14 (2022).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Mass. Ann. Laws ch. 149, § 60 (2022).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Child Employment Entertainment Law*, N.M. DEP'T OF WORKFORCE SOLUTIONS 1– 2 (July 2019), https://www.dws.state.nm.us/Portals/0/DM/LaborRelations/Child_Employment_Entertainment_Law.pdf [<https://perma.cc/YG36-ENQ4>].

²⁰⁵ N.M. Stat. Ann. § 50-6-18 (2022).

emancipated.”²⁰⁶ Thus, the New Mexico statute provides much greater protection for child actors than other state regulations, but still does not account for kidfluencers.

The New Mexico law only allows a child under the age of sixteen to be employed after the school superintendent, principal, or other appropriate school officers issue a permit.²⁰⁷ This permit may also come from the director of the labor and industrial division.²⁰⁸ Further, the child’s work must be certified as not dangerous as outlined in the FLSA’s hazardous list, which addresses concerns of children’s health and well-being.²⁰⁹

New Mexico limits the number of hours a child entertainer can work based on their age.²¹⁰ A child under the age of six is limited to six hours of labor per day, while a child between the ages of six and nine is limited to eight hours of labor per day.²¹¹ Further, children ages nine to sixteen may work nine hours a day, and a child over the age of sixteen can work no more than ten hours in a day.²¹² New Mexico requires a certified teacher to be on set if the child engages in employment on school days, directly addressing the FLSA’s educational interference concern.²¹³ Thus, New Mexico’s extensive regulations largely model the FLSA. Nonetheless, kidfluencers remain an unprotected class in New Mexico.

There is a wide spectrum of state laws regulating child entertainers.²¹⁴ Some states provide no protection for children employed in the entertainment industry, while other states attempt to provide protections modeled off the FLSA’s regulation of general child labor.²¹⁵ However, one thing that all states have in common is their failure to protect kidfluencers under child entertainment laws.²¹⁶ Though they are offered no protection, kidfluencers experience the very abuse and exploitation that state laws attempt to address.²¹⁷

While there is some legal protection available for child actors, none of these apply to kidfluencers.²¹⁸ Further, Coogan Laws often are not effective in achieving financial protection for minors because they only

²⁰⁶ *Id.*

²⁰⁷ *Child Entertainment Laws as of January 1, 2023, supra note 17.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*; *Fact Sheet #43, supra note 59* (“There are currently 17 HOs [Hazardous Occupations] which include a partial or total ban on the occupations or industries they cover.”).

²¹⁰ N.M. Stat. Ann. § 50-6-18(D) (2022).

²¹¹ *Id.* § 50-6-18(D)(1), (2) (2022).

²¹² *Id.* § 50-6-18(D)(3), (4) (2022).

²¹³ *Id.* § 50-6-18(E).

²¹⁴ *See Child Entertainment Laws as of January 1, 2023, supra note 17.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Pacht-Friedman, *supra note 11*, at 388.

²¹⁸ *See Coogan Law, supra note 76.*

require a small percentage of the child's gross earnings to be placed in trust.²¹⁹ The FLSA provides no protection because it exempts child entertainers, and state laws do not address the exploitation and abuse kidfluencers face either.²²⁰ Thus, the issue of kidfluencers should be addressed on the federal level to ensure that all kidfluencers receive the same legal protections.

III. RESOLUTION: ABOLISHING SECTION 213 AND AMENDING THE FLSA TO REQUIRE EXPLOITATION PROTECTION FOR KIDFLUENCERS

The most probable solution for the current lack of protection of kidfluencers is to amend the FLSA to provide uniform federal protection for kidfluencers and child actors alike. By providing uniformity through a federal regulation, there will be clarity and stability for companies who may choose to contract with a kidfluencer regardless of which jurisdiction they reside.²²¹ The amendment should address the oppressive labor conditions seen by kidfluencers that are a primary concern of FLSA regulations.

A. Amending the FLSA to Address the Exploitation and Abuse Kidfluencers Face

The FLSA must eliminate Section 213(C)(3) which states, “the provisions of Section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”²²² By eliminating this exemption, child actors and kidfluencers alike will qualify for protection under the FLSA just as their peers in “traditional” areas of labor. However, simply providing protection under the FLSA will be inadequate as the Act proves to be outdated and inconsiderate of unconventional labor practices.²²³ Thus, there should be a FLSA provision added that directly addresses the exploitation and abuse of kidfluencers.²²⁴

²¹⁹ *See id.*

²²⁰ 29 U.S.C. § 213(c)(3); *Child Entertainment Laws as of January 1, 2023, supra* note 17.

²²¹ *See* Marshall McKusick, *Uniformity of Law and Its Practical Application in the Negotiable Instruments Act*, 9 MARQ. L. REV. 217, 228 (1925).

²²² 29 U.S.C § 213(c)(3).

²²³ *See* Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old is New Again*, 104 CORNELL L. REV. 557, 560 (2019).

²²⁴ While criminal laws serve to prevent child abuse, many states rely heavily on mandatory reporting laws in

The amendment should include a restriction on the number of hours child actors and kidfluencers can work, similar to the FLSA's restrictions for traditional child laborers. Moreover, to curb the issue of improper homeschooling, the amendment should include a provision stating that children's work cannot impact their education. Finally, the amendment should include a Coogan Law aspect in order to address the issue of monetary exploitation that kidfluencers face.

1. Requiring a Trust Account for 85% of a Kidfluencers Income to Remedy Monetary Exploitation

Following the example of California's Coogan Law, the proposed amendment should set standards for trusts protecting children's income.²²⁵ The amendment should apply to the child's gross earnings rather than net earnings, just as in California, because using net earnings allows the parent to take out "support and care, manager's fees, and attorney's fees" before the earnings are placed into trust.²²⁶ Thus, the kidfluencers' gross earnings should be placed in a Coogan Trust directly by their employer to minimize the risk of parents mishandling funds.

Not only should the child's gross earnings be required to be placed in a Coogan Trust, but the traditional Coogan provision should be "flipped" on its head. Traditionally, only 15% of the child's gross earnings are placed in trust, leaving the vast majority of the funds to the hands of their parents, directly conflicting with the goals of a Coogan Trust.²²⁷ To address this issue, the amendment should require 85% of the kidfluencers' gross income to be placed in trust, while 15% may continue to be accessed by the parents. The proposed language of the amendment is as follows:

Notwithstanding any other statute, the court shall require that 85% of the minor's gross earnings be set aside and

order to take action against the abuse. Relying on reporting can be problematic in a kidfluencer situation because the content shown to fans is heavily edited to display their lives as perfect, leaving no thought in a viewer's mind of possible abuse. See generally *Mandatory Reporters of Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY 2-5 (2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [<https://perma.cc/AMM8-Q4BR>]; see also Meghdeeba Choudhury, *Dark Secrets of Social Media Influencers*, NICKI SWIFT (Nov. 26, 2022), <https://www.nickiswift.com/1112084/dark-secrets-of-social-media-influencers/> [<https://perma.cc/6G94-XEZJ>].

²²⁵ *Coogan Law*, *supra* note 76.

²²⁶ Christiano, *supra* note 93.

²²⁷ Loring Weisenberger, *A Producer's Guide to Coogan Law*, WRAPBOOK (July 28, 2022), <https://www.wrapbook.com/blog/producers-guide-coogan-law> [<https://perma.cc/CZC3-BY4Z>] ("The Jackie Coogan Law ensures the financial well-being of child actors by mandating that their employer set aside 15% of the child actor's gross earnings in a Coogan Trust Account, where it can be monitored—but not withdrawn—by a legal guardian until the child reaches legal maturity.").

placed in trust by the minor's parent. These amounts shall be held in trust, in an account or other savings plan, and preserved for the benefit of the minor.

Granting parents access to some of their child's income, allows them to use the money to support their child. However, the child will benefit from the earnings they made throughout their childhood once they reach the age of majority, thus rewarding the child for their hard work instead of their parents. Finally, the earnings should be held in trust until the minor reaches the age of eighteen. At the time the child reaches the age of majority, they will be able to decide whether they want to leave the funds in the trust or withdraw the funds. A greater amount of income held in trust will, in part, discourage some of the monetary exploitation to which parents subject their kids because parents will not have access to the majority of their child's earnings.

2. Placing Hour Restrictions by Age Group to Prevent Overworking of Kidfluencers

Unfortunately, monetary exploitation is not the only concern for child entertainers. Some child actors have hourly restrictions depending upon which jurisdiction they are working in, but kidfluencers have zero hourly restrictions.²²⁸ One of the main goals of the FLSA was to place hour restrictions on children because their constant work had a direct impact on their health, well-being, and schooling.²²⁹ This goal, however, is not achieved for child entertainers because they are not recognized as workers by the Act. Thus, the amendment should place a restriction on the number of hours child entertainers are legally allowed to work.

Children of all ages can be employed as child entertainers—not just children ages fourteen and older.²³⁰ Currently, the FLSA restricts work hours for fourteen and fifteen year old children to no more than three hours on a school day and no more than eight hours on a non-school day.²³¹ The Act also limits how many total hours a child can work in a week, dependent upon whether they are in school.²³² The Act, however, does not restrict hours for children sixteen and older, but many state jurisdictions do.²³³ Therefore, for the purpose of uniformity and cohesion, the amendment should apply the

²²⁸ *Child Entertainment Laws as of January 1, 2023*, *supra* note 17.

²²⁹ *Constitutional Law—Commerce Clause*, *supra* note 55, at 756.

²³⁰ *Fact Sheet #43*, *supra* note 59.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

FLSA's current standard for child workers to child entertainers ages fourteen to eighteen.

Because babies may be kidfluencers or actors, the hour restrictions should address each age group below age fourteen. Hour restrictions by age group is likely something that will need to be determined by pediatric psychologists that understand the development of young children and can best recommend an ideal restriction. However, when developing the amendment, legislators should follow California's extensive breakdown of hour restrictions by age group. California's regulation for daily working hours of minors in the entertainment industry is as follows:

- (a) Babies who have reached the age of fifteen (15) days but have not reached the age of six (6) months . . . work shall not exceed twenty (20) minutes . . .
- (b) Minors who have reached the age of six (6) months but who have not attained the age of two (2) years . . . two (2) hours of work . . .
- (c) Minors who have reached the age of two (2) years but who have not attained the age of six (6) years . . . not more than three (3) hours of work . . .
- (d) Minors who have reached the age of six (6) years but have not attained the age of nine (9) years . . . four (4) hours of work . . .
- (e) Minors who have reached the age of nine (9) years but who have not attained the age of sixteen (16) years . . . five (5) hours of work . . .
- (f) Minors who have reached the age of sixteen (16) years but who have not attained the age of eighteen (18) years . . . six (6) hours of work . . .²³⁴

The statute provides a comprehensible breakdown of all minor age groups working in the entertainment industry, which should be applied to kidfluencers at the federal level.²³⁵

3. Applying California's Child Actor Homeschooling Standard to Kidfluencers

Finally, the proposed FLSA amendment should address the

²³⁴ CAL. CODE REGS. tit. 8, § 11760 (2022).

²³⁵ *Id.*

schooling issue seen with kidfluencers and child actors. Because there is not someone monitoring the hours kidfluencers work, the proposal requiring a teacher to be “on set” will serve as a check on parents to comply with this provision. If parents choose to homeschool their children, there should be a requirement for a teacher to be “on set” with them during the time the child is engaged in their homeschooling to ensure the child receives adequate education—just as California requires for child actors.²³⁶ California’s law requires the employer to provide studio teachers for children of all ages up to sixteen, and for children ages sixteen to eighteen if they have yet to graduate high school.²³⁷ However, because there is no legal employer for kidfluencers, the onus should be placed on the parents to provide a teacher.

Since the teacher requirement also applies to children not old enough to attend school, it serves more functions than simply education.²³⁸ The schooling requirement also ensures the child’s best interest in “working conditions, physical surroundings, signs of the minors mental and physical fatigue, and the demands placed upon the minor.”²³⁹ Thus, requiring a teacher other than the child’s parent to be present in the case of homeschooling may curb some of the physical and emotional abuse seen by Allie and the Hobson children. An amendment to the FLSA will aid in addressing the exploitation to which kidfluencers are exposed on a daily basis.

As social media continues to grow, an amendment to the FLSA to address the growing concern of exploitation among kidfluencers is crucial.²⁴⁰ While the primary goal of the amendment is to protect kidfluencers, child actors will benefit from the increased protections included in the amendment. Further, the proposed amendment will provide uniformity and clarity in the current piecemeal system of regulation governing child actors. The amendment should include a trust account for 85% of the child’s gross earnings to curb monetary exploitation. Hour restrictions placed on kidfluencers will prevent children from being overworked by their parents. And requiring a teacher to be present during schooling hours for kidfluencers that are homeschooled will not only ensure they receive proper education but will also help confirm that parents are complying with the new provisions.

²³⁶ *Id.* § 11755.2 (2022).

²³⁷ *Id.*

²³⁸ Masterson, *supra* note 2, at 590.

²³⁹ *Id.*

²⁴⁰ Dickson, *supra* note 9.

CONCLUSION

A major overhaul of the child federal labor law system is crucial to account for the changing nature of society and labor that is seen in the United States today. Child labor has existed since early human history and has been a topic of concern since the first attempt at regulation in the early 1800s. Exploitative child labor was eventually addressed with the enactment of the FLSA, but Section 213 did not allow for protection of children engaged in nontraditional occupations. Although the first adoption of a Coogan Law in California attempted to address some of the FLSA's shortcomings for child actors, there is no Coogan Law today that provides protection for kidfluencers. Furthermore, state child entertainer laws vary, resulting in a lack of uniformity, which creates confusion. Each state's child entertainer law also does not provide legal protection for kidfluencers.

Child influencers experience exploitation and abuse at the hands of their parents, which is often motivated by the profits their children receive from their social media following. The issues kidfluencers face will not likely subside without some kind of federal regulation because influencing is only growing throughout the world. The FLSA is outdated and modeled on a time when children primarily participated in agricultural and dangerous manufacturing jobs. In the 1930s, it is not likely that the drafters of FLSA could have imagined a world where social media existed, let alone the technology used to produce such content. Additionally, the FLSA drafters could not have imagined a society in which social media influencing is so prominent that many people seek to make careers and turn their children into kidfluencers to profit from them. Thus, the Act must be amended to reflect the hazardous work conditions—in differing contexts from agricultural or manufacturing jobs—that children experience today.

The FLSA amendments should include Coogan trust requirements, hour restrictions, and an on-site teacher requirement for parents that choose to homeschool their child. Each of these proposed provisions to the FLSA amendment stem from common problems facing kidfluencers that have a long-term impact on their well-being. These amendments are imperative in order to address the abuse and exploitation seen by Allie, the Hobsons, and dating all the way back to Jackie Coogan. The first step in providing legal protection for kidfluencers is ridding the FLSA of the child actor exception and reworking it to include provisions for kidfluencers and child actors alike. Relying on Industrial Revolution solutions to the dangers of child labor will not be the cure to modern problems.