THE ILLUSION OF CONTROL: A CASE FOR EXPANDING TITLE VII TO INDEPENDENT CONTRACTORS

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I. INTRODUCTION

Atlanta, Los Angeles, Nashville, and New York are some of the major entertainment industry hubs in America that attract artists and performers.[1] The fierce competition among entertainers in each city[2] makes every performance opportunity crucial to building a career. Unfortunately, many women in the industry often realize their talent, though it may lead to a job, is not what will keep them there. I spoke with a woman about her experience beginning a music career in Nashville, Tennessee at 18 years old. For the purposes of this Note, she will be referred to as "N."

N moved to Nashville with a passion for music, looking for chances to perform.[3] It was not long into N's first performance, however, that she noticed the man organizing the show had only hired women.[4] After the show, he moved through the women he hired, touching them inappropriately.[5] He did not bother to listen to N sing, but pulled her aside saying, "you're so pretty, you're going to be famous."[6] His behavior escalated after each show until she decided she could not subject herself to his treatment of her anymore; she ultimately refused to work for him in the future.[7]

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[1] *See* Kenneth Kiesnoski, *20 US cities with the biggest entertainment bang for your buck*, CNBC (Sept. 17, 2019, 10:31 AM), https://www.cnbc.com/2019/09/17/20-us-cities-with-the-biggest-entertainment-bang-for-your-buck.html [https://perma.cc/77XA-9JB7].

[2] *See* Nikki Junewicz, *Music industry insiders talk about harassment in entertainment, react to Webster case*, FOX 17 NEWS (Nov. 2, 2017), https://fox17.com/news/local/music-industry-insiders-talk-about-harassment-in-entertainment-react-to-webster-case [https://perma.cc/F8D4-DPYP].

[3] Telephone Interview with Anonymous Artist (Jan. 15, 2021) (on file with author).

[4] *Id.*

[5] *Id*.

[6] *Id.*

[7] *Id.*

N realized this man organized a majority of the Nashville shows in which she hoped to perform.[8] His position in the music industry gave him the power to keep her out of his own shows and shows organized by others.[9] Sadly, when she moved to Los Angeles for the chance to continue performing, the harassment she endured from those who hired her worsened.[10]

Since N worked as an independent contractor at these shows, she had limited options for how she could seek relief from this harassment. Had she been considered an "employee"[11] she may have been able to pursue a claim for sexual harassment under Title VII of the Civil Rights Act of 1964[12] ("the Act").[13] Title VII offers employees protection from sexual harassment,[14] but does not provide the same protection to independent contractors.[15] As an independent contractor, N was left with an ultimatum: change careers or endure the harassment.[16]

N's experiences are common. The entertainment industry[17] relies on independent contractors for about a third of its workforce.[18] Many of these independent contractors are women.[19] At the same time, the rate of sexual harassment in the entertainment industry continues to outpace that in other industries.[20] Title VII's exclusion of independent contractors is harmful in

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] 42 U.S.C. § 2000e(f) (2020) (defining an employee as an "individual employed by an employer.").

[12] *Id.* §§ 1981–2000-6.

[13] *Id.* § 2000e-2.

[14] Sexual harassment constitutes a violation of Title VII when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a) (2020).

[15] *See, e.g.*, Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 489–92 (8th Cir. 2003) (holding an independent contractor musician could not sue her previous employer for sexual harassment under Title VII because the statute applies to employees, not independent contractors).

[16] Anonymous Artist, *supra* note 3.

[17] For the purposes of this Note, this phrase encompasses visual art, music, theater, film, dance, and media occupations.

[18] *See Professionals in the Contingent Workforce 2016 Fact Sheet*, DEP'T FOR PRO. EMPS. 3 (Aug. 19, 2016), https://static1.squarespace.com/static/5d10ef48024ce300010f0f0c/t/5e309195f48583726f252783/1580241302235/Professionals+in+the+Contingent+Workforce+2016+Ed+Format+Update.pdf [https://perma.cc/R7NB-J6NH].

[19] *Id.* at 6; *see also* Katherine Lim et al., *Independent Contractors in the U.S.: New Trends From 15 Years of Administrative Tax Data*, INTERNAL REVENUE SERV. 19 (July 2019), https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf [https://perma.cc/S574-XA7M].

[20] *See* Riley Griffin et al., *#MeToo: One Year Later*, BLOOMBERG (Oct. 5, 2018),

an industry notorious for harassment,[21] and can be even more harmful in situations where one person controls multiple work opportunities.[22] Despite the danger the exclusion poses to many women in the entertainment industry, Title VII's application has not changed. Independent contractors in the entertainment industry require federal protection from the sexual harassment they experience in the workplace.

Part II of this Note will discuss the issue of sexual harassment in the entertainment industry, as well as Title VII of the Civil Rights Act of 1964. Part III explains why so many workers in the entertainment industry are excluded from Title VII protections, and how that exclusion contributes to the industry's high rates of sexual harassment. Part III will also analyze the effectiveness of other protections currently offered to independent contractors: the court system, unions, and state legislation. To remedy the issue of sexual harassment in the entertainment industry, Part IV of this Note proposes an expansion of Title VII's scope to include independent contractors. Alternatively, this Note proposes new federal legislation mirroring New York's Executive Law § 296 to achieve the same goal.

II. BACKGROUND

To analyze how Title VII's limited scope affects entertainment industry workers, it is important to understand both the prevalence of workplace sexual harassment in the entertainment industry, as well as how Title VII is interpreted and applied.

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https://www.bloomberg.com/graphics/2018-me-too-anniversary/ [https://perma.cc/3W4P-PDGC]; *see also* Charles Trepany, *Alanis Morissette says 'almost every woman' in music 'has been assaulted, harassed, raped'*, USA TODAY (Apr. 28, 2020, 10:28 PM), https://www.usatoday.com/story/entertainment/music/2020/04/ 28/alanis-morissette-expect-explosion-metoo-stories-music-industry/3045671001/ [https://perma.cc/BN R6-2L45]; *see also* Andrew Pulver, *94% of women in Hollywood experience sexual harassment or assault, says survey*, THE GUARDIAN (Feb. 21, 2018), https://www.theguardian.com/film/2018/feb/21/94 -of-women-in-hollywood-experience-sexual-harassment-or-assault-says-survey [https://perma.cc/SEZ4-ZUYV]; *see also* Anonymous, *Top Female Exec on Sexual Misconduct in Music: 'There Are Stories of Assault and Abuse in This Industry, Too'*, BILLBOARD (Nov. 30, 2017), https://www.billboard.com/articl es/news/women-in-music/8053946/top-female-exec-sexual-harassment-music-industry-interview [https: //perma.cc/BHN5-CY7K].

[21] *See* Trepany, *supra* note 20; *see also* Pulver, *supra* note 20; *see also* Anonymous, *supra* note 20.

[22] *See* Anonymous Artist, *supra* note 3.

A. Sexual Harassment in the Entertainment Industry

The entertainment industry has not broken away from the sexist culture and gender biases that were accepted in the workplace decades ago.[23] The industry's frequent use of non-disclosure agreements leaves scarce resources for analyzing litigation arising from this aspect of the industry.[24] However, the few cases available recognize the entertainment industry's informality[25] and need for creativity,[26] which contribute to its culture of sexual harassment.

Sexual harassment is widespread in the entertainment industry.[27] Ninety-four percent of women in one study claimed to have been sexually harassed during their Hollywood careers in film and television.[28] Only twenty-five percent of these women said they would report these issues, largely because of the fear of retaliation.[29] Of the women who did report, only twenty-eight percent saw an improvement in the workplace.[30] Some of the most well-known perpetrators accused of sexual harassment include entertainment's former *Today Show* anchor Matt Lauer,[31] comedian and

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[23] Even as more women are hired in the industry, sexism and sexist content continues to be "associated with success" in entertainment professions. When sexism is so ingrained in an industry, it becomes "difficult for women employees to resist ideas and attitudes associated with success in their profession." When women do want to resist these ideas, especially to colleagues, "professionalism limits the possible presentations and defuses radical critiques." Gaye Tuchman, *Women's Depiction by the Mass Media*, *in* 4 SIGNS 528, 534–35 (1979); *see also* Edward Lee, *Can Copyright Law Protect People From Sexual Harassment?*, 69 EMORY L.J. 609, 609 (2020) (referencing Harvey Weinstein's statement that workplace behavior was "different" when he was young).

[24] Sara Khorasani, *Mixed Messages: Harvey of Hollywood: The Face that Launched a Thousand Stories*, 41 HASTINGS COMM. & ENT. L.J. 103, 122 (2019).

[25] Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 134 (Cal. Ct. App. 1996) (stating that sexual harassment occurring outside of the workplace could still give rise to a Title VII claim because "it is not farfetched that plaintiff believed his attendance [at a brunch] had something to do with advancing his ambition to obtain employment as an actor.").

[26] Lyle v. Warner Bros. Television Prods., 38 Cal. 4th 264, 297–301 (Cal. 2006) (Chin, J., concurring) (permitting lewd and obscene talk and gestures in the workplace under the "creative necessity" defense: "the creative process must be unfettered, especially because it can often take strange turns, as many bizarre and potentially offensive ideas are suggested, tried, and, in the end, either discarded or used.").

[27] Anonymous, *supra* note 20.

[28] Maria Puenty & Cara Kelly, *How common is sexual misconduct in Hollywood?*, USA TODAY (Feb. 20, 2018, 3:36 PM), https://www.usatoday.com/story/life/people/2018/02/20/how-common-sexual-misconduct-hollywood/1083964001/ [https://perma.cc/8LGM-UEC3]; Pulver, *supra* note 20.

[29] Puenty & Kelly, *supra* note 28; Pulver, *supra* note 20.

[30] Puenty & Kelly, *supra* note 28; Pulver, *supra* note 20.

[31] Ramin Setoodh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, VARIETY (Nov. 29, 2017, 12:34 PM), https://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959/ [https://perma.cc/N77Q-38M3].

actor Bill Cosby,[32] and disgraced film producer Harvey Weinstein.[33] Musicians other than N have been harassed, too.[34] One report found "gender discrimination, harassment, or abuse" to be "the most frequently cited concern" among women in the music industry.[35] Grammy-winning artist Alanis Morissette stated, "[a]lmost every woman in the music industry has been assaulted, harassed, raped . . . . It's ubiquitous."[36] One woman stated in a music industry report that there is "[c]onstant sexual harassment. Constant. And it hasn't changed."[37] This sexual harassment is tolerated by women so that they might continue to work in their desired field: "Many victims don't come forward [because of] the fear that no one will hire them . . . ."[38]

Since 2017, the #MeToo movement has given many survivors the courage to come forward.[39] The movement attempted "to get people to understand the prevalence of sexual harassment and assault in society" by encouraging "women, and men, to raise their hands."[40] Many people did just that.[41] Twelve million people on Facebook interacted with the movement in the first twenty-four hours.[42] Bloomberg reported that, as a result of the movement, 425 prominent people were publicly accused of sexual harassment.[43] Of that 425, 202 of the individuals accused—almost fifty percent—worked in the entertainment, music, arts, and media

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[32] *Timeline: Bill Cosby: A 50-year chronicle of accusations and accomplishments*, LA TIMES (Sept. 25, 2018, 11:34 AM), https://www.latimes.com/entertainment/la-et-bill-cosby-timeline-htmlstory.html [https://perma.cc/XU6D-J8VL].

[33] Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, NEW YORK TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?auth=login-email&login=email [https://perma.cc/DZ35-RVW9].

[34] *See* Griffin et al., *supra* note 20 (listing instances of sexual harassment that include singers, actors, dancers, and newscasters).

[35] Becky Prior et al., *Women in the U.S. Music Industry, Obstacles and Opportunities*, BERKLEE INST. FOR CREATIVE ENTREPRENEURSHIP 19, https://datasim.info/wp-content/uploads/2019/04/Women-in-the-U.S.-Music-Industry-Report.pdf [https://perma.cc/S9A2-RC2B].

[36] Trepany, *supra* note 20.

[37] Prior et al., *supra* note 35, at 19.

[38] *Id.*

[39] *How 'MeToo' is exposing the scale of sexual abuse,* BBC NEWS (Oct. 16, 2017), https://www.bbc.com/news/blogs-trending-41633857 [https://perma.cc/NT5M-YMQD].

[40] Sophie Gilbert, *The Movement of #MeToo*, THE ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/ [https://perma.cc/THR3-S7P7].

[41] *More than 12M "Me Too" Facebook posts, comments, reactions in 24 hours*, CBS NEWS (Oct. 17, 2017, 6:26 PM), https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/ [https://perma.cc/TGK3-MMZB].

[42] *Id.*

[43] Griffin et al., *supra* note 20.

industries.[44] Even the woman who felt compelled to start the #MeToo movement[45] had her own experiences of sexual harassment as an actress.[46]

B. Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 provides relief to individuals who are discriminated against.[47] While often thought of as an act against racial discrimination, the Act also prohibits discrimination based on "color, religion, sex, or national origin."[48] Title VII of the Act specifically prohibits discrimination in the workplace and is enforced by the Equal Employment Opportunity Commission ("EEOC").[49] Under Title VII, it is:

> [A]n unlawful employment practice for an employer[50] . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[51]

It is also unlawful for employers to retaliate against an employee who opposes these unlawful employment practices.[52] While the Act has not eradicated all discrimination,[53] it promotes the lofty goal of equality.[54]

Unfortunately, women were not initially considered in this goal of equality.[55] "Sex" was added to the Act in a last-ditch effort by opponents to thwart its success.[56] This attitude continued even after the Act passed, as

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[44] *Id.*

[45] The original creator of the movement was Tarana Burke. Actress Alyssa Milano then tweeted the hashtag, encouraging others to use it. This tweet is what drew such attention to the movement. *Id*.

[46] *Id.*

[47] RAYMOND F. GREGORY, THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION 133 (2014).

[48] 42 U.S.C. § 2000e-2(a) (2020).

[49] 42 U.S.C. § 2000e-4.

[50] 42 U.S.C. § 2000e(b) (defining employer as having "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .")

[51] 42 U.S.C. § 2000e-2(a)(1).

[52] 42 U.S.C. § 2000e-3(a).

[53] CHARLES & BARBARA WHALEN, THE LONGEST DEBATE, A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 229 (1985) ("[The Act] was not the opening chord of the Hallelujah Chorus . . . .It was only a beginning . . . .").

[54] *Id.*

[55] *Id.* at 234.

[56] *Id.*

many sex-based discrimination claims were ignored by the EEOC.[57] Eventually, continued pressure from lobbyists and organizations pushed the EEOC to investigate and remedy claims for sex-based discrimination.[58] As sex-based discrimination was increasingly recognized, the EEOC issued new guidelines that defined sexual harassment as a form of workplace sex-based discrimination outlawed by Title VII:

> Sexual harassment constitutes a violation of Title VII when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[59]

The Supreme Court made these guidelines law, stating "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."[60] More than twenty years after the Act was passed, victims of sexual harassment could successfully seek relief in the court system under Title VII for sex-based discrimination.[61]

To allege discrimination under Title VII, employees must first exhaust all administrative remedies, which includes filing a claim with their state or local agency that enforces fair employment policies and has the power "to grant or seek relief."[62] The claim is then submitted to the EEOC,[63] which investigates it.[64] If the EEOC finds there is "reasonable cause" to believe discrimination occurred, it first attempts to resolve the claim through "conference, conciliation, and persuasion."[65] If these efforts fail, the EEOC may "bring a civil action" against the discriminating employer to enforce the law.[66] Regardless of whether the EEOC finds "reasonable cause" to believe the discrimination occurred, complainants will receive a "Notice of

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[57] JO FREEMAN, THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS 54 (1975).

[58] *See* Jo Freeman, *How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 164 (1991).

[59] 29 C.F.R. § 1604.11(a) (2020).

[60] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

[61] *Id.* at 64–67.

[62] Fort Bend Cty. v. Davis, 139 S. Ct. 1843, 1846 (2019); 42 U.S.C. § 2000e-5c (2020).

[63] 42 U.S.C. § 2000e-5e(1) (2020).

[64] 42 U.S.C. § 2000e-5b.

[65] *Id.*

[66] 42 U.S.C. § 2000e-5(f)(1).

a Right to Sue" ("Notice"), which allows them to initiate a civil lawsuit against the party accused of discrimination under Title VII.[67]

When victims of sexual harassment receive their notice, they will succeed in their Title VII suit if they can show the following: (1) they were subject to harassment on the basis of sex; (2) their employer knew or should have known of the harassment; and (3) the harassment either was a condition of their employment, altered a condition of their employment, or was "severe or pervasive enough to create . . . a work environment . . . that a reasonable person would find hostile or abusive."[68] Employers can be held vicariously liable for others' harassing behavior, as well as their own, if these elements are satisfied, even absent a showing of a "tangible employment action" such as a demotion or discharge.[69] In the absence of a tangible employment action, employers can rebut liability by asserting the affirmative defense that they "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[70]

Title VII only protects workers classified as "employees."[71] While not expressly debated during the drafting of the Act, Title VII has been uniformly found not to protect independent contractors.[72] In 1964, "core worker[s],"[73] what is now considered the traditional employee-employer or agent-principal relationship, made up the majority of the workforce.[74] Independent contractors were not numerous enough to grab Congress's attention and, as a result, were not expressly included in the Act's protections.[75] When independent contractors finally became a significant fraction of the workforce, the Supreme Court declared in *Nationwide Mutual Insurance Company v. Darden* that, absent further instruction from Congress, the term "employee" in federal statutes refers to typical employee-employer or agent-principal relationships, but not independent

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[67] 29 C.F.R. § 1601.28 (2020).

[68] Harris v. Forklift Sys., 510 U.S. 17, 21–22 (1993); 42 U.S.C. § 2000e-2 (2020).

[69] Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998).

[70] *Id*. at 807; *accord.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

[71] *See* 42 U.S.C. § 2000e (2020); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–25 (1992).

[72] *See, e.g.*, Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 489 (8th Cir. 2003).

[73] RICHARD S. BELOUS, THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE 12 (1989).

[74] Emily C. Atmore, Note, *Killing The Goose That Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy*, 102 MINN. L. REV. 887, 897 (2017).

[75] *Id.*

contractors.[76] Following this holding, courts continue to distinguish independent contractors from employees under Title VII.[77] The exclusion is justified by the notion that independent contractors have more freedom in choosing and performing their work.[78]

Title VII should provide recourse to the many entertainment industry workers who are sexually harassed in the workplace. Yet, sexual harassment continues to be a major issue in the industry. This is due to Title VII's exclusion of independent contractors.

III. ANALYSIS: ENTERTAINMENT INDUSTRY WORKERS LACK NECESSARY LEGAL PROTECTIONS FROM SEXUAL HARASSMENT IN THE WORKPLACE

The entertainment industry employs many independent contractors. These independent contractors have tried to seek relief for sexual harassment and discrimination under Title VII, only to be barred from bringing suit due to their employment classification. Since harassment continues to be an issue in entertainment, other avenues of protection are clearly ineffective. Therefore, federal workplace protections for independent contractors must change.

A. Independent Contracting in the Entertainment Industry

Independent contracting has grown in many industries[79] including entertainment.[80] While some independent contractors are truly misclassified employees, this is not the case for the majority of the independent contractors in the entertainment industry.[81]

1. The Growth of Independent Contracting

Not only are entertainment industry jobs and workers increasing altogether,[82] but the ratio of independent contractors to employees is

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[76] *Darden*, 503 U.S. at 322–25.

[77] *See, e.g.*, *Lerohl*, 322 F.3d at 489.

[78] *Id.*

[79] Lim et al., *supra* note 19, at 68.

[80] *Id.*; *Professionals in the Contingent Workforce 2016 Fact Sheet*, *supra* note 18, at 3–4.

[81] *See infra* Part III.A.2.a–b.

[82] Lim et al., *supra* note 19, at 15; Joshua Wright, *The Growing Number of Freelancers in Entertainment*, NEWGEOGRAPHY (Sept. 5, 2012), https://www.newgeography.com/content/003065-the-g

growing as well.[83] One source estimates that thirty-one percent of the entertainment industry was self-employed in 2015.[84] In 2016, independent contracting had grown across all industries by an average of forty-nine percent in fifteen years,[85] while the entertainment industry saw an increase of about 115%.[86] Notably, women were responsible for more than half of this growth.[87] Other measures state that in that same period, even when other industries experienced a decrease in self-employment,[88] twelve of the eighteen broad occupations in the entertainment industry still saw an increase.[89] Another source estimates that between 2001 and 2012, approximately *eighty percent* of new jobs in the sports and entertainment industries consisted of independent contractor positions.[90] 2017 projections expected this growth to continue, estimating that fifty percent of all Americans would be independent contractors by 2020.[91] By 2018, one in every ten Americans worked as an independent contractor.[92] The 2020 COVID-19 pandemic also increased the number of independent contractor, or freelance, jobs.[93]

2. Many Workers in the Entertainment Industry are Independent Contractors

The growing number of independent contractors has been partially attributed to misclassification.[94] Misclassifying employees as independent

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rowing-number-freelancers-entertainment#:~:text=But%20increasingly%2C%20freelance%20workers%20are,norm%20in%20entertainment%20and%20sports.&text=Overall%2C%2058%25%20of%20the%20%E2%80%9C,2001%20and%2056%25%20in%202008 [https://perma.cc/5NQ3-UX68].

[83] Lim et al., *supra* note 19, at 15; Wright, *supra* note 82.

[84] *Professionals in the Contingent Workforce 2016 Fact Sheet*, *supra* note 18, at 3.

[85] Lim et al., *supra* note 19, at 71.

[86] *Id*. at 68.

[87] *Id*. at 19.

[88] *Professionals in the Contingent Workforce 2016 Fact Sheet*, *supra* note 18, at 5.

[89] *Id*.

[90] Wright, *supra* note 82.

[91] Zubair Alexander, *By 2020, 50% of the Americans are Expected to be Working as Independent Contractors*, LINKEDIN (Aug. 22, 2017), https://www.linkedin.com/pulse/2020-50-americans-expected-working-independent-zubair-alexander [https://perma.cc/FB89-PMGP].

[92] U.S. BUREAU OF LAB. STAT., USDL-18-0942, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS SUMMARY (2018).

[93] In the second quarter of 2020, "freelance" job postings increased by 41%. Karen Gilchrist, *The pandemic has boosted freelance work — and hiring for these jobs is booming*, CNBC (July 6, 2020, 11:37 PM), https://www.cnbc.com/2020/07/07/freelance-work-grows-amid-covid-19-math-stats-game-hiring-in-demand.html [https://perma.cc/NS5U-SSSJ].

[94] David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J. L. & PUB. POL 138, 140–41 (2015).

contractors is a common problem in America[95] brought to light by recent lawsuits.[96] Many employers misclassify their workers to save money and "gain a competitive edge over employers that obey the law."[97] In addition to intentional misclassification, worker misclassification is sometimes due to confusion over the "complicated" classification tests.[98]

The recent discussions surrounding misclassification suggest the high rates of independent contractors in the entertainment industry may be due more to misclassification than the industry's actual workforce. However, precedent shows that under every established test artists and performers are properly classified as independent contractors.[99] Even under new tests, like California's ABC test, these workers are left classified as independent contractors.[100] Independent contractors in the entertainment industry are benefitted in many ways by this classification. Yet, since entertainment jobs are not likely jobs that misclassification efforts will affect, these workers will remain unprotected from sexual harassment.

a. Common Worker Classification Tests

In Title VII cases, courts distinguish independent contractors from employees under one of three tests: (1) the common law of agency test,[101] (2) the economic realities test,[102] or (3) the hybrid test.[103] This section explains how artists and performers have been classified as independent contractors under each.

i. The Common Law of Agency Test

The common law of agency test analyzes the hiring party's "right to control the manner and means by which the product is accomplished."[104] The test is reminiscent of *Darden*'s determination that "employee" refers to

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[95] *Id.*

[96] *See, e.g.*, People v. Uber Techs., Inc., 56 Cal. Rptr. 5th 266 (Ct. App. 2020).

[97] Bauer, *supra* note 94, at 144.

[98] *Id.* at 141.

[99] *See infra* Part III.A.2.a.i–iii.

[100] *See* Diane Mulcahy, *California's New Gig Economy Law Is All Bark, No Bite*, FORBES (Sept. 20, 2019, 8:46 AM), https://www.forbes.com/sites/dianemulcahy/2019/09/20/californias-new-gig-economy-law-is-all-bark-no-bite/?sh=6cad9260baef [https://perma.cc/CRS6-Q83B]; *see also infra* Part III.A.2.b.

[101] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

[102] Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 379 (7th Cir. 1991).

[103] Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979).

[104] *Reid*, 490 U.S. at 751.

the standard agent-principal relationship,[105] focusing on the worker's degree of autonomy. The factors considered under this test, none of which are determinative, include:

> (1) [T]he skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business [similar to the worker's work]; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.[106]

Labeling entertainment workers as independent contractors under this test benefits them. For example, in *Community for Creative Non-Violence v. Reid*, an artist crafted a sculpture for a non-profit organization.[107] The organization then claimed it had rights to the sculpture as a "work-for-hire," which applies either to a work made by an employee or a work falling under certain categories.[108] The Court found that the sculptor was an independent contractor because he: performed an activity requiring skill; provided his own instruments and tools; crafted in his studio; worked for a limited time; could refuse or accept future projects; created his work schedule; was paid solely for the completion of this one sculpture; controlled the hiring and payment of his assistants; performed an activity the organization did not regularly engage in; and was not given any benefits outside of payment.[109] Because he was an independent contractor, the artist retained the rights to his work.[110] *Reid* exhibits just one way artists and performers benefit from their classification as independent contractors: Entertainers would be reluctant to work if their hiring party could claim the rights to their craft.

Entertainment workers' classification under this test remains constant, even in Title VII suits. In *Lerohl v. Friends of Minnesota Sinfonia*, the Eighth Circuit determined a symphony musician could not sue for sexual harassment under Title VII because she was an independent contractor.[111] The court considered that she performed highly skilled work using her own

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[105] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–25 (1992).
[106] *Reid*, 490 U.S. at 751–52.
[107] *Id*.
[108] *Id*. at 733–39.
[109] *Id*. at 752–53.
[110] *Id*. at 753.
[111] Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 489–92 (8th Cir. 2003).

instruments, decided when to work for the hiring party, spent time perfecting her craft on her own or by working for other hiring parties, did not receive benefits from the hiring party besides payment per performance, and was considered a contract worker for tax purposes.[112] Many entertainers work under circumstances similar to those of this symphony musician.[113] Also, it is notable that *Lerohl* involved a far more established, repetitive and continuous working relationship than most entertainment workers have.[114] Since musicians like the one in *Lerohl* are considered independent contractors, other artists and performers who have more limited and itinerant working relationships with the people who hire them[115] will be labeled similarly under this test.

Lerohl and *Reid* prove artists and performers have no "agency relationship" with their hiring parties and are properly classified as independent contractors under the common law of agency test. Classification as an independent contractor under this test allows entertainment industry workers the freedom they need to maintain the rights to their product, as well as deliver a unique and creative performance.[116] However, though these artists control the schedule and execution of their performances, the prevalence of sexual harassment in the industry limits the control these workers have to leave a harassing work environment.

ii. The Economic Realities Test

Some courts have strayed from the "agency" approach to instead look at the "economic realities of the relationship," like whether workers are "economically dependent" on their hiring party.[117] The core inquiry of the economic realities test is whether the worker is working more for herself or the hiring party.[118] If an individual works or has the power to work for

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[112] *Id*. at 491–93.

[113] *Id*.; Anonymous Artist, *supra* note 3.

[114] The symphony in which these musicians played as "regulars" held 70 concerts a year. To play as a "regular," musicians were required to play "the vast majority" of these concerts. *Lerohl*, 322 F.3d at 488. *See also* Anonymous Artist, *supra* note 3.

[115] *See* Sidney S. Fohrman & Ariel D. Shpigel, *The Music Industry Receives Relief from AB5*, THE RECORDER (May 4, 2020, 6:37 PM), https://plus.lexis.com/search?pdsearchterms=LNSDUID-ALM-RECRDR-20200504THEMUSICINDUSTRYRECEIVESRELIEFFROMAB5&pdbypasscitatordocs=False&pdsourcegroupingtype=&pdisurlapi=true&pdmfid=1530671&crid=7e246d69-6e9b-40a5-9663-9e01b3950ac7 [https://perma.cc/U6NJ-GVRB] ("[M]usicians often rely on short-term 'spec' agreements . . . .").

[116] *Id.*

[117] Doty v. Elias, 733 F.2d 720, 722–23 (10th Cir. 1984).

[118] *Id.*

multiple parties, she is not economically dependent on one hiring party.[119] The five factors considered under this test are:

> (1) [T]he extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work[;] (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace[;] (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations[;] (4) method and form of payment and benefits[;] and (5) length of job commitment and/or expectations.[120]

This test is illustrated by a case in which an insurance agent, who resembled an "employee" more than most entertainment workers do, was prohibited from suing for sex-based discrimination under Title VII because she was found to be an independent contractor.[121] The insurance company had control over its agents.[122] The agents were also limited in where they could sell insurance and were not allowed to sell insurance for any other company.[123] Additionally, the agents were required to be in the office two and a half days a week, attend weekly meetings, and "retrieve messages and mail from the office daily."[124] Further, the agency paid the agents on commission and assumed responsibility for costs they incurred while working.[125] Moreover, while the job required skill, the skill was acquired through the company's training.[126] Despite the agency's control, the agents still had a "great deal of freedom in choosing [their] working hours," were able to choose which products to sell and to whom to sell them, and were able to leave their job at any time.[127] This ultimately gave them enough "economic control" over their work to be considered independent contractors.[128]

This insurance agent's relationship with her hiring party included a level of supervision, continuity, and economic dependence that artists and performers do not have.[129] Therefore, classifying entertainment workers as

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[119] Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 379 (7th Cir. 1991).
[120] *Id.*
[121] *Id.* at 377–79.
[122] *Id.* at 378.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 379.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 378–79; Anonymous Artist, *supra* note 3.

employees under this test is extremely unlikely.[130] Entertainment workers rely on limited working relationships[131] and pursue multiple work opportunities simultaneously to make a living.[132] These workers are also properly classified as independent contractors under the rest of the test's factors. N's interview and the facts from *Lerohl* confirm this: Both workers were only supervised in terms of delivering acceptable material during the individual performances and were not otherwise supervised in their work; they were able to choose when to work for the hiring party and could work for other hiring parties; they performed highly skilled activities and practiced their skills outside of the workplace; they paid for and provided their own supplies and instruments; they were paid per performance; and they had limited working relationships with the hiring parties.[133]

Most entertainment jobs rely on short-term, nonexclusive agreements that give the worker freedom to work for multiple parties.[134] According to this test, this type of relationship gives workers and hiring parties "economic independence" from each other. However, the levels of harassment across the industry make artists and performers who wish to continue their careers economically dependent on harassing work environments.[135]

iii. The Hybrid Test

The hybrid test provides a more holistic view of the working relationship.[136] It combines the economic realities test and the common law of agency test.[137] The hybrid test analyzes the following factors:

> (1) [T]he kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6)

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[130] *See* Anonymous Artist, *supra* note 3; *see also* Fohrman & Shpigel, *supra* note 116 (explaining that musicians rely on short-term, informal working relationships).

[131] *See* Anonymous Artist, *supra* note 3; *see also* Fohrman & Shpigel, *supra* note 116.

[132] *See* Anonymous Artist, *supra* note 3; *see also* Fohrman & Shpigel, *supra* note 116.

[133] Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 491–93 (8th Cir. 2003); Anonymous Artist, *supra* note 3.

[134] Fohrman & Shpigel, *supra* note 116.

[135] Pulver, *supra* note 20.

[136] Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979).

[137] Sibbald v. Johnson, 294 F. Supp. 2d 1173, 1175 (S.D. Cal. 2003).

> the manner in which the work relationship is terminated; . . . (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties.[138]

This test would be the most likely of the three to classify entertainment workers as employees since it includes a more thorough analysis of the working relationship. However, as applied, it does not.

The court in *Spirides v. Reinhardt* applied the hybrid test to a worker hired by contract as a foreign language broadcaster.[139] She was not rehired because the hiring party was no longer interested in having a female voice in its broadcasts.[140] The worker claimed sex discrimination under Title VII, but was found to be an independent contractor because the contract labeled her as such.[141] She appealed.[142] The D.C. Circuit remanded the case, insisting that the lower court not end its classification inquiry by reviewing the contract language, but rather by examining the realities of the broadcaster's work circumstances.[143] On remand, the lower court again found her to be an independent contractor because, in addition to the parties' clear intent, she received no benefits, had no tax deductions or social security payments taken out of her paychecks, was only paid per assignment, was only guaranteed one assignment, was free to work elsewhere, and described her pay as "self-employment income" on her tax returns.[144] For the same reasons discussed under the common law of agency and economic realities tests, this classification is correct and in some ways beneficial: This broadcaster could work for other parties and could control the execution of her performances.[145] Those abilities are necessary for creative workers.

This test keeps artists and performers labeled as independent contractors and therefore unprotected by Title VII.[146] Applying the factors from the *Spirides* hybrid test to *Lerohl*[147] and N further illustrates their

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[138] *Spirides*, 613 F.2d at 832.
[139] *Id.* at 827–32.
[140] *Id.* at 827–28.
[141] *Id.* at 828–32.
[142] *Id.* at 828.
[143] *Id.* at 832–34.
[144] Spirides v. Reinhardt, 512 F. Supp. 1, 3–4 (D.D.C. 1980).
[145] *Id.*
[146] *Id.*
[147] Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 488–89 (8th Cir. 2003).

unprotected status.[148] Similar to the broadcaster in *Spirides*, other artists, musicians and actresses work under limited supervision and perform skilled activities with their own equipment.[149] These workers usually have a limited working relationship with the hiring party and are paid per performance.[150] Further, these workers usually have a shared power with the hiring party to terminate or extend the working relationship by choosing whether to offer or accept future work.[151] Lastly, these workers rarely receive any benefits beyond payment and are not considered employees for tax purposes.[152] While artists and performers are correctly classified as independent contractors under this test, there is still no consideration of the industry in which these performers work: Are there other, let alone comparable, opportunities for them where sexual harassment is not an issue?

The hybrid test's combination of the economic realities test and common law of agency test simply affirms entertainment workers' classification as independent contractors. Stagnant classification under each test is not surprising given there is no "functional difference" between the tests.[153] So long as courts rely on each test's factors to serve as the definitive guide to worker classification, artists and performers will continue to be classified as independent contractors. These workers are benefitted in many ways from this classification but still require protection from sexual harassment.

b. The New "ABC" Classification Test

The lack of functional difference between the three common tests might raise an argument for a new, uniform standard. However, entertainment workers remain classified as independent contractors under new tests as well. Consider California's "ABC" test.[154] The test, created by the California Supreme Court and later codified by the California legislature,[155] is a new standard under which independent contractors and employees are distinguished.[156] The test considers:

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[148] *Spirides*, 613 F.2d at 832.

[149] *Lerohl*, 322 F.3d at 488–92; Anonymous Artist, *supra* note 3.

[150] *Lerohl*, 322 F.3d at 491–92; Anonymous Artist, *supra* note 3.

[151] *Lerohl*, 322 F.3d at 491; Anonymous Artist, *supra* note 3.

[152] *Lerohl*, 322 F.3d at 488–92; Anonymous Artist, *supra* note 3.

[153] Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 945 (9th Cir. 2010).

[154] Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 955–56 (Cal. 2018).

[155] *See* Assemb. B. 5, 2019 Leg., Reg. Sess. (Cal. 2019), *repealed by* Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020) (preserving the three-part ABC test but granting exemptions to certain industries).

[156] *See Dynamex*, 4 Cal. 5th at 955–56; *see also* Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal.

> (a) [Whether] the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) [whether] the worker performs work that is outside the usual course of the hiring entity's business; and (c) [whether] the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[157]

The ABC test begins with a presumption that workers are employees.[158] Only those workers who satisfy all three prongs of the test are considered independent contractors; the rest remain classified as employees.[159]

While California courts must use this test,[160] it is unlikely any other courts, including federal courts, would adopt it.[161] First, courts are more likely to adhere to the established tests used in their respective precedents and might be reluctant to reconsider the classification of workers who are repeatedly held as independent contractors, such as the entertainment industry workers at issue. Second, several industries in California lobbied intensively and successfully for an exemption from the test.[162] As a result, the original bill codifying the test, Assembly Bill 5 ("AB5"),[163] was repealed and replaced by Assembly Bill 2257,[164] which preserves the same test but exempts many industries from it.[165] The music industry is one of the industries that is exempt from the California law.[166] The music industry sought exemption because of the complications of reclassification, such as termination of contracts and an inability to work under the short-term agreements the industry relies on.[167] Also, the industry feared workers would relocate to areas where they would remain classified as independent contractors and continue reaping the benefits of that classification.[168] There

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2020).

[157] *Dynamex*, 4 Cal. 5th at 955–56.

[158] Assemb. B. 5, 2019 Leg., Reg. Sess. (Cal. 2019), *repealed by* Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[159] *Dynamex*, 4 Cal. 5th at 956–58.

[160] *Id.*; *see also* Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[161] Currently, no jurisdictions outside of California have adopted the ABC test. Massachusetts employs a similar test, but "[a]s far back as 2008, the Massachusetts Attorney General wrote an Advisory on the law noting the complexities of enforcing it . . . ." Mulcahy, *supra* note 100.

[162] Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[163] Assemb. B. 5, 2019 Leg., Reg. Sess. (Cal. 2019), *repealed by* Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[164] Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[165] *Id.*

[166] *Id.*

[167] Fohrman & Shpigel, *supra* note 116.

[168] *Id.*

is hardly an incentive to uproot longstanding classification tests for a test that cannot even be applied uniformly in the state in which it was created.[169]

Any incentive to adopt the ABC test is further lessened by the reality that the test makes little difference in independent contractors' classifications.[170] This is partly because California does not require employers to reclassify their workers by a certain date.[171] Instead, it relies on future lawsuits for the chance to remedy a misclassification.[172] Despite its similarity to more established tests, some describe the ABC test as too "vague" and "undefined" to be enforced even when a worker claims they were misclassified.[173] Even if the test were applied and enforced uniformly, many entertainment workers would still be classified as independent contractors.[174] As explained in *Lerohl* and *Reid*, many artists are independent and free from control of the party that hires them for performances.[175] Inevitably, there will be hiring parties that are engaged in a business different than what the entertainment worker is hired to do.[176] Also, most artists and performers consider themselves—and prefer to be—independent artists and performers.[177] Therefore, even under new tests like the ABC test, many entertainment workers will remain independent contractors.

B. Title VII's Exclusion of Independent Contractors Leaves Many Workers in the Entertainment Industry Unprotected from Sexual Harassment

Since entertainers are properly classified as independent contractors under all tests recognized by courts,[178] they are barred from suing under Title VII. As this section will discuss, because the other possible avenues of protection are insufficient, these workers will continue to be unprotected from sexual harassment unless some other mechanism is created that provides comparable protection.[179]

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[169] Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[170] Mulcahy, *supra* note 100.

[171] *Id*.; Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[172] Mulcahy, *supra* note 100.

[173] *Id*.

[174] *See id*.; *see also* Fohrman & Shpigel, *supra* note 116.

[175] Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 491–93 (8th Cir. 2003); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752–53 (1989).

[176] *Reid*, 490 U.S. at 752–53.

[177] Mulcahy, *supra* note 100.

[178] *See supra* Part III.A.2.a–b.

[179] *See infra* Part III.B.2.a–c.

1. Title VII Excludes Many Workers in the Entertainment Industry for "Control" They Do Not Have

Title VII's limited scope excludes many entertainment workers from its protections. 2,923,600 people worked in the entertainment industry in 2019.[180] With at least thirty-one percent of these people classified as independent contractors,[181] 906,316 entertainment workers were unprotected from sexual harassment in the workplace in 2019.[182] At least half of these unprotected workers are women.[183] Statistics show that almost every single one of these women will be sexually harassed at work.[184] Further, the recent projections of independent contracting rates[185] suggest that the number of women independent contractors in entertainment who are sexually harassed in the workplace is even higher.

The exclusion of independent contractors was once justified by the "freedom-of-choice"[186] principle that suggests these workers have the autonomy to leave an ill-fitting work environment. As discussed, the industry's reliance on flexible, nonexclusive and short-term working relationships supports this theory.[187] However, when they are sexually harassed in the workplace, independent contractors in the entertainment industry lack the control that the "freedom-of-choice"[188] principle suggests they have. The frequency of sexual harassment in the entertainment industry[189] indicates that workers would more often leave one instance of harassment just to encounter a new one. Title VII's failure to protect independent contractors coupled with these circumstances has created a reality in which many workers endure harassment just to continue working.[190]

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[180] *Employment By Detailed Occupation*, U.S. BUREAU OF LAB. AND STAT., https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm [https://perma.cc/UL6D-B4CP].

[181] *Professionals in the Contingent Workforce 2016 Fact Sheet*, *supra* note 18, at 5.

[182] *See, e.g.*, Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 489 (8th Cir. 2003).

[183] *See Professionals in the Contingent Workforce 2016 Fact Sheet*, *supra* note 18, at 6; *see also* Lim et al., *supra* note 19, at 29.

[184] *See, e.g.*, Pulver, *supra* note 20.

[185] *See, e.g.*, Alexander, *supra* note 91.

[186] *Lerohl*, 322 F.3d at 491.

[187] *See* Fohrman & Shpigel, *supra* note 116.

[188] *Lerohl*, 322 F.3d at 491 (discussing how the "freedom-of-choice principle" distinguishes independent contractors from employees and therefore determines whether a worker can sue under Title VII).

[189] *See supra* Part II.A.

[190] *See* Anonymous, *supra* note 20 ("The reason many victims don't come forward is the fear that no one will hire them . . . .").

2. Independent Contractors' Other Avenues of Protection from Sexual Harassment are Insufficient

Federal protections for independent contractors would not be necessary if other remedies for sexual harassment were effective. However, as this section will discuss, the three prominent areas of protection for independent contractors who are sexually harassed in the workplace provide little refuge. First, courts have proved unwilling to apply Title VII less restrictively to protect workers who are subject to discrimination.[191] Second, unions, while revered for their advocacy efforts,[192] cannot change the law. Third, while some state laws have changed,[193] federal protection remains necessary as gaps in protection allow superiors in the entertainment industry to escape liability.

a. Courts Will Not Apply Title VII Less Restrictively

Courts could offer independent contractors relief from sexual harassment by broadening their interpretation of Title VII. Yet, two instances illustrate how courts have contributed to independent contractors' lack of protection.[194]

One court examined a particular industry's customs to gain insight into whether a worker was an independent contractor or a true employee.[195] In *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, a court granted summary judgment to an actress who claimed she was an employee and therefore could sue under Title VII.[196] When that court reversed that finding, the actress appealed.[197] On appeal, the First Circuit applied the common law of agency test,[198] but also stated that the level of

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[191] Alberty-Velez v. Corp. de Puerto Rico Para La Difusion Publica, 361 F.3d 1, 9 (1st Cir. 2004); Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006).

[192] Patricia Ball, Comment, *The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them*, 43 SANTA CLARA L. REV. 901, 933 (2003).

[193] *See* MD. CODE ANN., STATE GOV'T § 20-601 (LexisNexis 2020); *see also* 42 R.I. GEN. LAWS § 42-112-1 (2020); *see also* MINN. STAT. ANN. § 363A.17 (Lexis 2020); *see also* N.Y. EXEC. LAW § 296-d (Consol. 2020); *see also* 775 ILL. COMP. STAT. ANN. 5/2-102(A-10) (LexisNexis 2020).

[194] *Alberty-Velez*, 361 F.3d at 9; *Arbaugh*, 546 U.S. at 516.

[195] *Alberty-Velez*, 361 F.3d at 9.

[196] *Id.* at 5.

[197] *Id.*

[198] *Id.* at 7.

control "must be considered in light of the work performed and the industry at issue."[199] While the court labeled her an independent contractor, it explained that finding this actress to be an employee could create a slippery slope that would result in all actors being classified as employees.[200]

An emphasis on custom erects yet another barrier between entertainment industry workers and Title VII protections. If industry "norms" or customs are considered in the analysis of a worker's classification, the frequency of independent contracting in entertainment makes it even more difficult for artists and performers to be considered employees, thus receiving Title VII protections.[201] The assessment of an individual worker could be overshadowed by an industry's common use of independent contractors, even when circumstances show she is an employee.[202] This standard is unhelpful, especially since classification is determinative of protection.[203]

Another court allowed workers to sue under Title VII after examining, in conjunction with standard statutory considerations, whether they were "likely to be susceptible to the discriminatory practices which the act was designed to eliminate."[204] This standard was applied in *Armbruster v. Quinn*, a case that involved a different aspect of Title VII,[205] but would have been beneficial for workers in the entertainment industry who are sexually harassed in the workplace. Unfortunately, that case was overturned by the Supreme Court on other grounds.[206]

Courts could protect workers by shifting their focus from the worker's classification to whether the hiring party's behavior caused the worker to suffer consequences that Title VII was intended to prevent.[207] This approach would provide entertainment workers with protection from sexual harassment, since their reality of enduring harassment simply to work contradicts Title VII's purpose.[208] However, the Supreme Court's previous rejection of *Armbruster v. Quinn*,[209] the constant affirmations that Title VII

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[199] *Id.* at 9.

[200] *Id.*

[201] *See id.*; *see also Professionals in the Contingent Workforce 2016 Fact Sheet*, *supra* note 18, at 5.

[202] *See Alberty-Velez*, 361 F.3d at 5 (stating that at first, "the district court granted partial summary judgment for Alberty on this issue . . . declaring her an employee . . . .").

[203] *See, e.g.*, *id.* at 7.

[204] Armbruster v. Quinn, 711 F.2d 1332, 1340–41 (6th Cir. 1983).

[205] *Id.* at 1338–39 (considering whether the employer's number of employees was a jurisdictional issue).

[206] Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006).

[207] *Armbruster*, 711 F.2d at 1340 (*citing* 42 U.S.C. § 2000(e)).

[208] 42 U.S.C. § 2000e-2 (2020).

[209] *Arbaugh*, 546 U.S. at 516.

does not apply to independent contractors,[210] and the difficulty in uniformly determining Congress's intent in enacting Title VII makes it unlikely that courts will use this approach. The judiciary's inability to successfully apply Title VII in a way that protects independent contractors shows their inability to help entertainment workers who are sexually harassed in the workplace.

b. Unions Cannot Provide Sufficient Protection

Unions provide some protection to entertainment industry workers, but ultimately cannot protect them to the same extent that legislation can. Additionally, most entertainers who join a union will have already endured the continual sexual harassment in the industry.[211] Therefore, while unions are helpful, they do not provide enough protection to these workers.

Virtually every occupation in entertainment has a worker's union.[212] The union Screen Actors Guild - American Federation of Television and Radio Artists ("SAG-AFTRA") is an example of the standard entertainment industry union: Workers may voluntarily join for a fee,[213] even if they are independent contractors, so long as their work qualifies under certain conditions.[214] These unions are strong advocates for their members and are unique in the way they collectively bargain for performers who work in ever-changing jobs.[215] Unions such as SAG-AFTRA have also created

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[210] *See, e.g.*, Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 489 (8th Cir. 2003).

[211] *Membership & Benefits*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits [https://perma.cc/F4YS-F84T].

[212] Rebecca Welch, *Unions and Professional Organizations*, BACKSTAGE (Sept. 11, 2014, 1:42 PM), https://www.backstage.com/magazine/article/unions-professional-organizations-10599/ [https://perma.cc/3CVL-2BAL].

[213] *Membership Costs*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/membership-costs [https://perma.cc/JGX4-AHPV].

[214] SAG-AFTRA membership is available for positions "covered by a SAG-AFTRA (or AFTRA or SAG) collective bargaining agreement, provided that any person qualifying through work as a background actor must have completed three (3) days of work as a background actor under a SAG-AFTRA (or AFTRA or SAG) collective bargaining agreement." "Membership is also available to those who work one (1) day of employment in a principal or speaking role (actor/performer), or as a Recording Artist in a SAG-AFTRA (or AFTRA or SAG) covered production." Ultimately, "the Union will be the sole arbiter in determining whether the employer was legitimate or bogus, and whether the qualifying employment which you performed was actual production work or work created solely to enable you to gain Union membership." *Steps to Join*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/steps-join [https://perma.cc/Y8EG-BSP6].

[215] Ball, *supra* note 193, at 933.

Sexual Harassment Codes of Conduct,[216] and can investigate instances of sexual harassment reported by their members.[217]

Unions can advocate for worker protection but lack the power to require it. First, while unions have some leverage to demand that a harassing workplace or hiring party remedy its behavior, they do not have enough power to force changed behavior or enlarge the legal remedies available to victims of harassment. Second, because membership in these unions is voluntary,[218] venue owners, restaurant owners, or any other hiring parties who sexually harass their independent contractors might simply hire outside of a union to escape any potential liability. For these reasons, the protection from and influence over hiring parties that unions provide is much less than that which legislation could provide.

Also, performers often wait to join a union until they are established in the industry.[219] For example, SAG-AFTRA encourages performers to join only after they have "landed at least one principal or three background roles," and states that "members are the top professionals in their fields . . . ."[220] Once workers join a union, they likely have endured and become accustomed to the industry's frequent sexual harassment. Union efforts are important, but the lack of changed legislation, continuance of harassment, and barriers to membership suggest these efforts are not effective.

c. Current State and Federal Legislation Creates a Patchwork Through Which Hiring Parties Can Escape Liability

Some states have included independent contractors in their workplace protections.[221] Offering any legislative avenue through which hiring parties can be held liable for discrimination is a step in the right direction. However, state legislation does not protect independent contractors as thoroughly as federal legislation would.

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[216] *See SAG-AFTRA Releases Sexual Harassment Code of Conduct*, SAG-AFTRA (Feb. 10, 2018), https://www.sagaftra.org/sag-aftra-releases-sexual-harassment-code-conduct [https://perma.cc/R7N6-DK3E].

[217] *See id.*; *see also How to File a Discrimination or Harassment Complaint*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/equity-inclusion/how-file-discrimination-or-harassment-complaint [https://perma.cc/ALU7-KBH9].

[218] Ball, *supra* note 193, at 933.

[219] *Membership & Benefits*, *supra* note 212.

[220] *Id.*

[221] *See, e.g.*, MD. CODE ANN., STATE GOV'T § 20-601 (LexisNexis 2020).

Six states have enacted legislation that includes independent contractors in their workplace protections against discrimination.[222] Other states have enacted laws that grant limited protections to independent contractors.[223] The Washington Supreme Court expanded the state's freedom from discrimination statute[224] to apply to independent contractors as well.[225] Independent contractors' inclusion in these state laws is recent, which makes it difficult to assess long-term benefits and consequences such as decreased harassment or increased legal remedies. A clear benefit of this legislation is the concrete legal protection afforded to independent contractors who are sexually harassed in the workplace.[226]

However, it might not be possible to remedy the sexual harassment of independent contractors solely through state legislation. While the protections offered by California's AB5 were broader than protections against sexual harassment, the reaction to AB5 offers insight as to what states can expect from expanding any independent contractor protections. First, the entertainment industry might lobby for exemptions from any new independent contractor laws, as the music industry did in California after the passage of AB5.[227] If that is not possible, the industry might use the patchwork of legislation to its benefit by moving to where protection is lacking.[228] This movement might create a "race to the bottom" among states to attract this profitable industry by requiring the least protection for workers.[229]

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[222] *See id*. (including independent contractors in definition of "employee" in statute prohibiting discrimination in employment); *see also* 42 R.I. GEN. LAWS § 42-112-1 (2020) (prohibiting discrimination in the making or enforcement of contracts based on sex); *see also* MINN. STAT. ANN. § 363A.17 (Lexis 2020) (prohibiting intentional refusal to do business with an individual based on sex); *see also* N.Y. EXEC. LAW § 296-d (Consol. 2020) (expanding workplace discrimination protections to nonemployees); *see also* 775 ILL. COMP. STAT. ANN. 5/2-102(A-10) (LexisNexis 2020) (prohibiting the harassment of nonemployees); *see also* CAL. GOV'T CODE § 12940(j)(1) (Deering 2020) (prohibiting harassment of independent contractors).

[223] *See* 43 PA. STATE. AND CONS. STAT. ANN. §§ 954–55 (LexisNexis 2020) (protecting certain statutorily defined independent contractors from discriminatory practices); *see also* N.J. STAT. ANN. § 10:5-12 (LexisNexis 2020) (prohibiting refusal to contract on the basis of sex); *see also* Axakowsky v. NFL Prods., No. 17-4730, 2018 U.S. Dist. LEXIS 193937, at *7–8 (D.N.J. 2018) ("The [New Jersey] statute expressly covers only refusals to do business with a person based on a protected characteristic. Axakowsky does not assert a *quid pro quo* sexual harassment claim; she expressly states in her opposition brief that her claim is based on 'ongoing, severe and pervasive harassment.'").

[224] WASH. REV. CODE ANN. § 49.60.030 (LexisNexis 2020).

[225] Marquis v. City of Spokane, 922 P.2d 43, 52 (Wash. 1996).

[226] *Id.*

[227] *See* Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[228] *See* Fohrman & Shpigel, *supra* note 116.

[229] Tennessee tried to protect independent contractors, but the bill did not pass. S.B. 2130, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); Disneyland, among other businesses, has considered leaving California for other, more "business-friendly" locations. Jack Witthaus & Richard Bilbao, *Exclusive:*

Having seen it done successfully under AB5, the entertainment industry might attempt to exempt itself from any state laws that protect independent contractors.[230] There are two possible arguments against this. First, sexual harassment protections would likely create fewer complications than AB5 did,[231] since AB5 affected more areas of worker protection like pay and leave. Second, California has anti-harassment legislation in place for independent contractors and was not required to make similar exemptions under that law.[232] However, hiring parties in the entertainment industry might still be reluctant to accept any more liability to a worker with whom they have a limited relationship. The music industry's ability to exempt itself from AB5[233] might give the entertainment industry new confidence to resist and argue for exemption from any future state legislation that affects it.

If the entertainment industry could not exempt itself, any inconsistency in legislation between states might push it to move elsewhere.[234] For example, the industry might migrate to Tennessee which, despite having considered legislation that would do so, has no protections for independent contractors.[235] Inconsistent state legislation could impose two options on entertainment workers: stay in a city with protections and watch work opportunities diminish, or continue to move where the opportunity is, but endure harassment.

If states attempt to offer fewer independent contractor protections to attract the profitable entertainment industry,[236] the same reality could occur. This incentive to undo, or never enact, protections would further disadvantage independent contractors and allow superiors in entertainment to continue to escape responsibility. If workers were protected under federal law, states would not need to worry about the repercussions of enacting their own protections.

Disney may move some of its California divisions to Orlando, sources say, ORLANDO BUSINESS JOURNAL (Jan. 8, 2021, 6:30 PM), https://www.bizjournals.com/orlando/news/2021/01/08/disney-may-move-some-la-divisions-to-orlando.html [https://perma.cc/88SV-W7EL].

[230] Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020) (exempting the music industry from the previous Assembly Bill 5).

[231] Assemb. B. 5, 2019 Leg., Reg. Sess. (Cal. 2019), *repealed by* Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[232] CAL. GOV'T CODE § 12940(j)(1) (Deering 2020).

[233] *See* Assemb. B. 2257, 2019 Leg., Reg. Sess. (Cal. 2020).

[234] *See* Fohrman & Shpigel, *supra* note 115; *see also* Faiz Siddiqui, *Uber and Lyft don't want to make California drivers employees, so they're on the verge of shutting down*, WASHINGTON POST (Aug. 19, 2020), https://www.washingtonpost.com/technology/2020/08/19/uber-lyft-ab5/ [https://perma.cc/VE44-LC5L].

[235] Fohrman & Shpigel, *supra* note 115; S.B. 2130, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).

[236] *See* Junewicz, *supra* note 2 ("The music business is a $9.7 billion industry in the Nashville Metropolitan area . . . .").

Independent contractors in the entertainment industry will continue to be unprotected from the sexual harassment they experience in the workplace without increased, uniform protection.[237] Undoubtedly, state legislation is a starting point for protecting these workers. But federal legislation would better protect independent contractors from workplace sexual harassment because it would apply uniformly, eliminate the ability of industries to forum shop, and allow states to apply their own protections without fear of losing industries.

IV. RESOLUTION: FEDERAL LEGISLATION TO PROTECT INDEPENDENT CONTRACTORS FROM SEXUAL HARASSMENT

Federal protection is required to fully protect independent contractors from sexual harassment, specifically in industries like the entertainment industry. An expansion of Title VII would include these workers in the already established procedures and protective framework of the Act, and grant them relief from workplace sexual harassment. Alternatively, supplemental federal legislation could protect these workers from workplace sexual harassment without interfering with Title VII.

A. Expanding Title VII

Just as the Civil Rights Act of 1964 was the "beginning"[238] of remedying racial discrimination, it should likewise be seen as the starting point for remedying sex discrimination. "Congress remains free to extend Title VII . . . to . . . independent contractor relationship[s] if it determines that to be in the public interest."[239] The #MeToo movement[240] and recent state legislation[241] show this expansion is in the public interest. Expanding Title VII would require a simple alteration of its definitions which would offer much-needed protection to the growing category of independent contractors in America.

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[237] *See* Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #metoo Movement*, 22 RICH. PUB. INT. L. REV. 237, 267 (2019) (urging for improvements in sexual harassment law "to work their way into the federal law and change our culture so that all working people can earn the money they need without facing sexual harassment and retaliation.").

[238] WHALEN, *supra* note 53, at 229.

[239] Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 492 (8th Cir. 2003).

[240] *See, e.g.*, *More than 12M "Me Too" Facebook posts, comments, reactions in 24 hours*, *supra* note 41.

[241] *See, e.g.*, MD. CODE ANN., STATE GOV'T § 20-601 (LexisNexis 2020).

In 2018, legislation was introduced in Congress to expand the scope of Title VII along with many other employment statutes.[242] It was not adopted, likely because of its breadth.[243] The Protecting Independent Contractors from Discrimination Act[244] ("PICDA") expanded the definition of "employee" to include independent contractors in the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act of 2008.[245] Sweeping protections like PICDA might seem too extreme to some lawmakers since they would overhaul so many longstanding statutes. Furthermore, broad legislation might seem like a slippery slope to offering independent contractors statutory protections across the board, which could lead to difficulties similar to those imposed by reclassification.[246]

PICDA's failure shows Congress is not willing to expand the scope of all federal workplace legislation to align with the significant growth of independent contracting in the general workforce. A more feasible alternative would be legislation aimed at ending independent contractor discrimination by focusing solely on sexual harassment, one of the most pressing issues these workers face.[247] Expanding only Title VII's scope to include independent contractors would protect the many workers currently unprotected from workplace sexual harassment without overhauling other longstanding legislation, as PICDA would have.[248] The prevalence of sexual harassment, specifically in the entertainment industry, requires fast, uniform and effective change to enforce equality in employment. An expansion of Title VII would provide this in ways other avenues cannot.

Expanding Title VII's scope would surely change the entertainment industry's culture of sexual harassment. If Title VII applied to independent contractors, then artists and performers like N who are harassed while working could pursue a claim for sex discrimination through the Act's normal processes. This recourse for victims is itself a benefit of expansion, but expansion also will likely deter hiring parties from harassing their

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[242] Protecting Independent Contractors from Discrimination Act of 2018, H.R. 4972, 115th Cong. § 2 (2018).

[243] *Id.*

[244] *Id.* § 1.

[245] *Id.* § 2.

[246] Nancy Levit, *Business Law Forum: The Protected-Class Approach to Antidiscrimination Law: Logic, Effects, Reform: Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 470–71 (2012).

[247] *See supra* Part II.A.

[248] Protecting Independent Contractors from Discrimination Act of 2018, H.R. 4972, 115th Cong. § 2 (2018.).

independent contractors. This deterrence is another benefit of expanding Title VII. What has always been a secretive, pervasive issue could become something hiring parties actively work against to protect themselves from litigation. Moreover, imposing liability for hiring parties' own actions, as well as their failure to remedy other workplace harassment, will incentivize them to take further steps to ensure a safe work environment for independent contractors.[249] Encouraging an active effort against harassment and providing a remedial solution for victims would help stop sexual harassment in the industry at the source, and allow the Act to comply with its purpose of promoting equality in the workplace.[250]

The substantial growth of independent contractors in the workforce has limited Title VII's scope and effectiveness. For the Act to fulfill its purpose, its definitions must reflect the workforce by including independent contractors in its protections. With this change, women like N could work in the entertainment industry without regularly enduring sexual harassment. However, PICDA's failure suggests this is not a path Congress will soon take, thus other options should be examined.

B. Supplemental Federal Legislation

If Title VII is not expanded, supplemental federal legislation mirroring recent state law could solve the problem of independent contractor sexual harassment.

1. New York's Executive Law §296

New York's Executive Law § 296 provides a template for effective federal legislation. Under Executive Law § 296, it is illegal for:

> [A]n employer, licensing agency, employment agency or labor organization to subject any individual to harassment because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence

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[249] Courts have recognized this type of incentive, noting that, to avail themselves of available affirmative defenses, employers will make reasonable efforts to "prevent and correct promptly any sexually harassing behavior." *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998).

[250] 42 U.S.C. § 2000e-2 (2020) (prohibiting discrimination in the workplace based on an individual's race, color, religion, sex, or national origin).

> victim status, or because the individual has opposed any practices forbidden under this article or because the individual has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims.[251]

A hiring party violates Executive Law § 296 when "it subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's membership in one or more of these protected categories."[252] This statute does not require the person subject to discrimination to have made a complaint to the hiring party[253] and has a three-year statute of limitations.[254] Executive Law § 296 enables complainants to recover compensatory damages, punitive damages, and "other remedies as may be appropriate."[255]

Executive Law § 296 applies to non-employees.[256] "Non-employee" includes contractors, anyone working under a contract in a workplace, and employees of those working under a contract in a workplace.[257] The law also states "[i]t shall be an unlawful discriminatory practice for an employer to permit unlawful discrimination against non-employees in its workplace."[258] Similar to Title VII, liability arises when "the employer, its agents or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action."[259] Executive Law § 296 considers the extent of the hiring party's control over the worker, but this factor is not determinative of the statute's application.[260]

2. Independent Contractors' Anti-Discrimination Act

New federal legislation tailored to reducing the sexual harassment in the entertainment industry, as opposed to discrimination across the board,

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[251] N.Y. EXEC. LAW § 296(1)(h) (Consol. 2020).
[252] *Id.*
[253] *Id.*
[254] *Id.* § 297(5).
[255] *Id.* § 297(9).
[256] *Id.* § 296-d.
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*

should combine Executive Law § 296[261] with Title VII protections.[262] For the purposes of this Note, this proposed legislation will be referred to as the Independent Contractors Anti-Discrimination Act ("ICADA"). ICADA should declare it an unlawful employment practice for:

> [A]n employer, licensing agency, employment agency or labor organization to subject any . . . individual working pursuant to contract to [discrimination or] harassment, . . . which includes but is not limited to subjecting an individual to inferior terms, conditions, or privileges of employment [or work], . . . [because of an individual's] race, color, religion, sex, or national origin, . . . or because the individual has opposed any practices forbidden under this article or because the individual has filed a complaint, testified or assisted in any proceeding under this article.[263]

Like Executive Law § 296, ICADA should allow for recovery of damages, including back pay, front pay, and punitive damages.[264] All other aspects of Title VII, such as filing with and involving the EEOC, as well as attempting to reach conciliation initially, could still apply to any complaints made by independent contractors.[265] The perpetrator's control over the worker could be considered, but should not be determinative of protection.[266] The new law should also include a longer statute of limitations, such as three years, and explicitly state that complainants are not required to have complained to a superior.[267] These particular changes take into account the fear that accompanies experiences of sexual harassment, particularly in the workplace, and recognize the possible consequences of complaining of harassment to the perpetrating party.

Legislation like ICADA would bring federal protections into line with current workplace realities without overhauling Title VII's longstanding definitions and interpretation. The growing class of independent contractors who have long been unprotected from sexual harassment would have a new avenue through which to seek protection that does not overcomplicate their work relationships. Also, hiring parties would actively work to prevent harassment to avoid litigation. At the same time, using this legislation

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[261] *Id.*
[262] 42 U.S.C. § 2000-e2 (2020).
[263] N.Y. EXEC. LAW § 296(1)(h) (Consol. 2020).
[264] *See id.* § 297(9).
[265] *See supra* Part II.B.
[266] § 296-d.
[267] *See id.* § 296(1)(h); *see also id.* § 297(5).

instead of amending Title VII would allow courts to adhere to their precedent.

For example, N could have sued solely under this new law. She would not have had to challenge Title VII's interpretation of "employee," and her control over her performance would not have outweighed the fact that her hiring party could control her ability to work. By proving to a court that the sexual harassment she experienced in the workplace altered the conditions and privileges of her work, she could receive damages for her lost performances, as well as have had a renewed opportunity to perform and audition without fear of rejection solely based on her refusal to endure harassment. Ultimately, this law would give artists and performers the ability to continue in their careers, free from constant sex discrimination.

A statute such as ICADA would protect independent contractors from sexual harassment without complicating existing work relationships or disturbing Title VII's settled definitions and interpretations. Certain aspects of Executive Law § 296, like the abolition of Title VII's "severe and pervasive"[268] requirement, are admirable but perhaps unnecessary right now. This new federal legislation could also be a "beginning"[269] from which Congress and courts adopt new standards as the workforce inevitably evolves. ICADA offers the protections currently necessary to promote the ideal of equal opportunity in the workplace.

V. CONCLUSION

The entertainment industry is an industry in which women are frequently subjected to sexual harassment.[270] Since many of these women work as independent contractors,[271] they lack statutory protections against harassment, regardless of how often it occurs.[272] This is due to Title VII's definition of "employee,"[273] which turns a blind eye to many workers and increasingly separates the Act's application from its purpose. Because current avenues of protection have proved ineffective in helping women artists and performers escape harassment, federal protection is required. This Note urges for legislation that will align federal workplace protection statutes with our country's changed workforce and attitude toward

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[268] Harris v. Forklift Sys., 510 U.S. 17, 21 (1993); 42 U.S.C. § 2000e-2 (2020).

[269] WHALEN, *supra* note 53, at 229.

[270] *See, e.g.*, Puenty & Kelly, *supra* note 28.

[271] *Professionals in the Contingent Workforce 2016 Fact Sheet*, *supra* note 18, at 6.

[272] Anonymous, *supra* note 20.

[273] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–25 (1992); *see also* 42 U.S.C. § 2000e (2020).

discrimination. Expanding Title VII, or enacting supplemental federal legislation, would provide recourse to independent contractors who are harassed in the workplace and incentivize their hiring parties to prevent harassment. As more workers become independent contractors, the need for federal legislation to conform to changes in the workforce will only intensify. American workers, specifically women in entertainment, are deserving of legislation that allows them to work in their desired industry without enduring harassment.