Symphonic metamorphoses

Variations on vulnerability: orchestral musicians' employment in times of crisis

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13. Back in the USA

"Good labor management is a port in your storm."[1383]

"Holding that temporary 'sharefarmers' [are] employees entitled to workers' compensation coverage."[1384]

This *movement* offers a panoramic portrayal of gig workers, before narrowing the focus to musicians who work as freelance substitute players in the U.S. orchestral sector and their attempts to litigate in order to mitigate precarious employment situations.

Outsourced workers, exemplified by Uber/Lyft drivers and Grubhub/Deliveroo food service workers have attained significant media attention in their quest for employee

[1383] Speech given by Allison Beck, Deputy Director Federal Mediation and Conciliation during the Obama presidency at the 2017 Federation International Musicians (FIM) Conference, Montreal.
[1384] *S.G. Borello & Sons v. Department of Industrial Relations* 48 Cal.3d 341, 342 (Cal. 1989.)

status at the heart of the independent contractor vs. employee debate. Their fight for employee recognition in the U.S. and beyond has given 'face and place' to the debate concerning the evolution of work, where atypical has become the new typical in the context of accepted modes of employment in the 21st century. Employment patterns in the 'developed' world now mirror the patterns of precarity that traditionally plagued the 'developing' world. To shift between such 'world of work' terms as 'atypical,' 'contingent workers,' 'nontypicals,' 'precarious workers,' and last but certainly not least, 'gig' workers abandons those who do this type of work to the whim of nomenclature and vague determinations with little regard for the transformative structures of employment that dominate the world of work, not to speak of the needs for protection on the part of the workers.[1385]

Although the work lives of freelance musicians bear little direct relationship to outsourced app-dependent delivery workers, both types of workers suffer from the same frustrations and share in a quest for a living wage with "all that frosting on the cake, that good stuff that sweetens the dream of adequate employment."[1386] Freelance musicians invariably fashion a 'portfolio career,' or what some interviewed refer to less euphemistically as a 'patchwork career,' in which musicians will work at different jobs often simultaneously in an attempt to earn a living. These musicians face a precarious and competitive labor market characterized by a diversity of ensembles that contract musical services for varying time periods with varying degrees of 'call back success.' Not all orchestras pay their musicians according to collectively bargained contracts. To disseminate the stories told by freelance substitutes in both jurisdictions, not all orchestras are created equal, and not all gigs are paid at a rate that comes close to a minimum wage. Many musicians are forced to take on underpaid work in the hopes that it will lead to something better, that it will widen their circle of possibilities and lead to improved work prospects. More often than not, these improved prospects are illusory.[1387]

13.1 Gig workers in the orchestral sector: a taxonomy

Where does the term gig come from? A survey of dictionaries and encyclopedias netted an interesting etymological source moving back in history from the jazz musicians'

[1385] Contingent workers include those who are independent contractors, who work less than full-time, or whose jobs are structured to last only a limited length of time.
[1386] Conversations with the ultimate bass gig-master, Buell Neidlinger, LA freelancer, former principal bass, Warner Brothers studio orchestra and Los Angeles Chamber Orchestra. Jazz innovator and faculty member, Cal Arts.
[1387] Assertion based on interviews with freelancers see *Recitative: The Interviewed*.

patois that gave the term so much of its pizzazz since first usage in the 1930s. One of the earliest chronicled meanings of gig was "a combination of numbers in betting games."[1388] For a more exact etymology, music historians point to the swinging 1920s when 'gig' was an acronym for jazzers, jazz musicians, the 'cats' who intoned alternatively 'God is Great' when receiving work or, 'Git it Going' to raise the musical temperature and rev up the band.[1389] Discussions of freelancers' work situations and the ups and downs of legal classifications of their employment status that repeatedly established an independent contractor rather than employee status underline the precarity inherent to freelancing. Whereas proponents of the positive aspects of the gig economy, the generic name given to freelance employment in the 21st century repeat the mantra that freelance life holds the dream of crafting your own path in a free and open work environment, "after realizing how much health insurance costs, after eschewing a pension in order to pay rent and after dealing with constant fluctuation in regulation, the notion of being one's own musical boss without much of a support system is a far cry from that dream."[1390]

To open the floodgates inherent to a discussion of the asymmetrical nature of freelancing and its dependence on the largesse or lack thereof regarding employers would be counterproductive to a discussion that purports to discover 'how to make things better' for gigging musicians. For those with a juridical bend, regulation and inclusion might offer the key to improve conditions for all workers, freelance and fully employed. Yet, for freelancers who earn an excellent living by working 'at will,' there is some reticence to support any type of restrictions on their freedom to operate. "You might say that our solidarity moves directly towards our pocketbooks, as long as regulation is good for our earnings, we support it. If not, we would rather be as elusive as possible, that is how giggers are – chameleons who move from place to place, gig to gig, sometimes present and when the taxman comes around, elusive."[1391] There are many types of freelancers in the orchestral field and several types of classifications with regard to the freelancers as employees. This *movement* explores attempts by the legislature and courts to make distinctions between categories of workers in order to determine the reach of the benefits of employment.

[1388] Purportedly dating back to 1847, see, origins of the term 'gig' at, https://www.etymonline.com/word/gig
[1389] Retold by the great American bandleader, Skitch Henderson during a rehearsal of the Stamford Symphony, 1979. Skitch whose nickname came from his ability to resketch anything he heard loved talking about etymology including his take on 'gigs.'
[1390] New York freelancer, Juilliard graduate ten years into a freelance career, anonymity assured. Parallel comments by Dutch freelancers at the Platform voor Freelance Musici (PvFM) meetings bolster this view in the Netherlands.
[1391] Successful LA-based gig musician whose income is primarily based on studio gigs and royalties; anonymity assured.

13.2 Types of freelance orchestral musicians

It is important to make a distinction between classifications of freelance orchestral musicians before turning to copious examples of case law and legislation that attempt to define categories of employees. In the orchestral vernacular, there are several varieties of freelancers who are called upon to take their places to perform side-by-side with contracted orchestral members. Substitute players 'on call' replace regular members who have taken ill, or are off on sabbatical, or for that matter, any mutually and contractually acceptable reason for missing work.[1392]

Another group of orchestral players are the extras, the musicians who are called in to augment the complement when the score, the composer's written musical arbiter demands extra musical reinforcement. Extras are vital as performers in massive pieces within the orchestral repertoire that call for a large number of players; Mahler's Symphony No. 8 "Symphony of a Thousand" is a prime example.[1393] And, dawdling a bit in the great 20th century repertoire, a performance of George Gershwin's *Rhapsody in Blue* would be unthinkable without a soprano sax and a banjo, instruments not commonly employed by orchestras. Much of this enquiry examines the vulnerabilities of freelance substitutes, the musicians who play side-by-side with regularly contracted colleagues in an orchestra. The most vulnerable of all freelance musicians who generally escape notice, are those who perform in pick up orchestras for 'church gigs' and other types of performance venues with a great deal of variance in terms of payment as the following quote reveals:

> *"One of the guys I play with is musical director for a small church…he has recruited me to play. My question for those who play these kinds of gigs is whether any of you are getting paid and, if so, what's the general rate. He is paying barely enough to make it worth setup time, but I do enjoy playing….and it's a church."*[1394]

13.2.1 What's in a name: interim musicians, extra musicians, et al.,

To add to the external complexity of classifying freelance musicians is the contract-driven internal complexity that differentiates orchestral performers and the benefits

[1392] Illness, pregnancy leave other forms of personal leave are the most common reasons to hire substitutes. In the last several decades, it has become commonplace practice to hire substitutes to fill a position left open following auditions if no player(s) are hired. are hired when a vacancy is not filled post-audition.
[1393] Composed in the summer of 1906, Gustav Mahler's monumental composition is scored for eight voices, two mixed choruses, children's chorus, organ, and a very large orchestra including off-stage brass and many harps! Incidentally, Mahler was not partial to the moniker, "Symphony of a Thousand."
[1394] Quote taken from the *Talk Bass* forum website. Available at: https://www.talkbass.com/threads/questions-about-church-gig.1335924/

they may receive. An examination of a U.S. orchestral collective bargaining agreement (CBA) reveals no less than four categories: 'musician,' 'interim musician,' 'part-time musician,' and 'extra musician' within the Dallas Symphony Orchestra (DSO). A musician is "a person employed by the Employer as a playing member or Librarian (interesting definition) under full contract with the DSO."[1395] Two categories are classified by the number of services contracted: "extra musician" performs sixty-four or more services 'not under full contract'[1396] and "part-time musicians" are employed for sixty-three or less services per season.[1397] It would make sense that the latter two categories would be classified as "interim musicians" defined under the CBA as non-tenure track playing members. These musicians are "ineligible to receive a contract for a third consecutive Season and cannot serve on committees but [are] otherwise entitled to all benefits and rights of a Musician."[1398]

13.2.2 Deputies

To add a bit of complexity to the freelance orchestral jargon, colleagues in the United Kingdom rely on a freelance system that involves extras, deputies and a trial system that purportedly leads to employment. An extras list is compiled from several sources including musicians who auditioned for the orchestra and made 'a good enough impression' to be asked to play in the orchestra 'on trial.' Trials can go on for years, even decades, without leading to a permanently contracted position.[1399] "The trial system while keeping many orchestral musicians at work masks permanence. But in the end, a permanent job is a rare phenomenon."[1400] The deputy system in which a musician 'deputises' another musician's seat was a fixture on the busy London musical scene not only in the orchestral arena but also customary for all sorts of musical gigs. The practice described here was in place in the early 20th century and continued as part of the U.K. freelance musical scene in the 21st century.

> *"As there were competing demands for the services of the finest players it was an accepted practice that, even though under contract to play for a concert, a player was at liberty to accept a better-paid engagement if it were offered. He would then engage another player*

[1395] Section 8.14 CBA Dallas Symphony Association and Dallas/Fort Worth Professional Musicians Association, Local Union No. 72-147 American Federation of Musicians, 2015.
[1396] Ibid., art. 8.5
[1397] Ibid., art. 8.18.
[1398] Ibid., art. 8.11.
[1399] Information gleaned from conversations with U.K.-freelancers including Giles Francis and Mick Stirling both based in the Netherlands at present.
[1400] Conversations with Ikuko Takahashi, freelance violinist with a wealth of experience in Dublin, Ireland, presently working in Denmark, Singapore and the U.S.

> *to deputise him for the original concert and the rehearsals for it. The treasurer of the London Philharmonic Society described the system thus: "A, whom you want, signs to play at your concert. He sends B (whom you don't mind) to the first rehearsal. B, without your knowledge or consent, sends C to the second rehearsal. Not being able to play at the concert, C sends D, whom you would have paid five shillings to stay away."*[1401]

Customary rules for deputies hold that a deputy may not play a performance without having performed at a minimum number of rehearsals or shows. The system revolves on the freelancer's ability to get the gigs, replace poorly paid gigs with better gigs and keep the freelance pipeline open. "If a musician has a slightly less professional gig, that they must pull out of at short notice usually because a better gig has come along, you might be asked/expected to find a deputy, to find your replacement. I guess all deps are extras, but not all extras are deps . . . are we thoroughly confused by now? Welcome to the freelance musician's world!"[1402]

13.2.3 'Permanently contracted' freelance players: The MET and its Associates

One orchestra in the U.S., the Metropolitan Opera Orchestra (the MET), dubbed 'the finest opera orchestra in the world' sets the example in leveling the playing field between freelancers and permanently employed players by according 'special' freelancers the title, Associate Musicians. These Associates, listed at the bottom of the official MET Musicians webpage receive competitive salaries and benefits and play an important part within the MET's operatic family.[1403] The list includes a mandolin player who only will be called to play when that (unusual, in scoring terms) instrument appears in an operatic score (think Mozart's *Don Giovanni*, for starters) to a phalanx of strings[1404] and several associate wind and brass players. What grants them this unique status and why are major orchestras so reticent to adopt their 'regular' freelancers? Associates have passed through rigorous audition procedures and are the first calls on the MET substitute lists. The nature of work in an opera orchestra implies long hours playing in the pit, heavy duty performances that often last much longer than symphonic concerts, and of course, a tough schedule of frequent repetitions of the several operas in one week. A brief look at the MET schedule shows that three major operas are given six performances in the space of one week, with back-to-back matinee

[1401] See, Charles Reid. *Thomas Beecham: An Independent Biography* 1961 p. 50.
[1402] Impresario, violinist, and music insider Tara Persaud, Associate Director, Solea Management.
[1403] See, http://www.metorchestramusicians.org/roster
[1404] Ibid., The MET first violins consists of 11 section players plus an additional 7 associate musicians.

and evening performances on Saturdays.[1405] Compare the stamina needed to perform a six-hour *Der Meistersinger* production to the average two-hour orchestral concert and the difference between the workload at an opera orchestra is clarified once and for all.

While the MET Associates enjoy great benefits and the U.K. deputies and subs experience flexibility in their 'working' system to make sure that the 'right musician is in the right seat' at curtain time, the majority of U.S. and Dutch orchestras do not have any sort of defined protocol for hiring substitute players. Wind, brass, and percussion substitutes usually are asked to play upon the recommendation of distinguished teachers who play in the orchestra, often holding principal positions. And, in many cases, principals and associates in other major orchestras are called in to substitute for key concerts.

13.2.4 Yet another category: orchestral musicians at times of industrial action

Solidarity, oft considered to be a subjective attribute of behavior has been substantial amongst colleagues in U.S. orchestras during the many labor disputes in the past few decades. Recurrently, musicians locked out by management during bargaining season are offered first choice status to freelance in orchestras-at-work. "The solidarity in the United States between fellow orchestral musicians is truly amazing. The Dallas Symphony saved my life when the Detroit (Symphony Orchestra) went through its crises. Dallas reached out and offered me a musical home, and a financial safe haven."[1406]

Dutch orchestras post-crisis wavered in showing open support for colleagues from orchestras in crisis. When the Dutch radio orchestras faced their last-gasp battle for survival in 2012-2013, great support came from media outlets and the general public. Little support emanated from national orchestral organizations. "No newspaper ads on our behalf, no conductors speaking from the podia of orchestras that were not threatened and aside from the sympathy of musician-friends, the 'official' part of the sector was very, very quiet."[1407]

13.3 How do you get an orchestral gig in this town?

The lack of a 'system' for hiring substitute players in orchestras relates to different traditions within each individual orchestral organization. For violinists at the New

[1405] See, https://www.metopera.org/calendar/ - /all-events?year=2019&month=8
[1406] Conversations with Emmanuelle Boisvert, former concertmaster, the Detroit Symphony Orchestra, at present, associate concertmaster Dallas Symphony Orchestra.
[1407] Conversations with Netherlands Radio Symphony (NRSO)-Netherlands Radio Chamber Philharmonic (RKF) trombonist and MCO works council member, Cyril Scheepmaker.

York Philharmonic for example, "we are very strict about who gets to play in a string sections with a tradition of substitutes playing in the second violins and our own players, second violinist moving into the first violins if substitutes are called for."[1408] Substitute wind, brass and percussion players in major orchestras are either 'known entities'– professional musicians who hold jobs in other orchestras free to perform in their 'off' weeks – or stellar recent conservatory graduates recommended by leading orchestral players. "Be my guest if you want to call this a system – whatever it is, it is fluid, based on trust, a really high level of specific performance, and a sense of balance of how to get along with the musicians once you walk out on stage."[1409]

Although Dutch orchestras hold auditions for substitute string players, the list of those who pass any given audition is often not adhered to. "I have won places as a 'remplaçant' in three Dutch orchestras and am still waiting for the phone to ring while one of my closest friends from my student days at the conservatory plays regularly in two of those orchestras without ever having gone through the audition process. It's a mystery!"[1410] Wind, brass and percussionists engaged to freelance in Dutch orchestras are hired in much the same manner as their U.S. colleagues: former students of well-respected members and/or musicians who hold positions in other orchestras are called in to perform. "To outsiders, the freelance classical music world seems a bit haphazard as the distribution of work does not follow any particular coordinated structure. Personnel managers do work with lists of players but often, when push comes to shove and a musician calls in sick, the personnel manager will call the freelancers they deem reliable, not necessarily the most recent 'runner up' at an audition."[1411] Perhaps the very nature of a profession centered on public performance calls for a flexible system, or more accurately, the lack thereof. "Other professions warrant more control before a replacement employee shows up to work, we often work with a lead time of a few hours, even less last-minute debacles occur right before a concert. We can't be held accountable for not following a prescribed list: what we need is to reassure the conductor that the empty 'seat' will be filled by a dependable player as soon as possible."[1412]

The Wall Street meltdown and the ensuing international 2007-2008 financial crisis followed by recession compounded by a free fall in union membership in both jurisdictions deepen the frustrations of musicians, "many of [them] social dreamers,"[1413]

[1408] Conversations with Judy Nelson, violist New York Philharmonic Orchestra, 1983-2019.
[1409] Interview, Dutch freelance violinist, anonymity assured.
[1410] Interview, Dutch freelance string player waiting for a breakthrough in the 'major leagues', anonymity assured.
[1411] Conversations with Anne-Marie Boeke, former personnel manager Netherlands Radio Chamber Orchestra (RCO) and Netherlands Radio Philharmonic Orchestra (RFO).
[1412] Ibid.,
[1413] Quoting New York based violist, Monica Gerard.

who hoped that the 21st century would usher in 'better employment' worldwide. For freelance workers at the upper echelons of the self-employed who command high salaries and enjoy 'work-at-will' hours, the advantages of freelance work are evident. At the other end of the spectrum, musicians who work as freelance substitute players in orchestras report an increase in what researchers call 'the slippery slope to precarity' since the crisis. Musicians interviewed on both sides of the Atlantic identify with the 'gig workers in the headlines.'

13.4 Misclassification: let me count thy many ways. U.S. courts' tests to determine who is an employee?

The profound lack of statutory clarity as to who is an employee, compounded by often-conflicting U.S. judicial determinations, has led to increased confusion as to how to classify workers. The Supreme Court of the United States' (SCOTUS) oft-quoted utterance in a landmark case some 75 years young still rings true: "few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."[1414] Penalties for misclassification range from IRS tax penalties[1415] and audits to, in some cases, criminal prosecution. Leading the way, two U.S. states initiated legislation to tackle misclassification: Pennsylvania targeted a specific sector, the construction business in the Construction Workplace Misclassification Act, 43 P.A.§§ 933.1-933.17 that provides for both administrative and criminal penalties for misclassification.[1416] From the specific to the general, the State of California enacted a statute that renders the 'willful' misclassification of workers unlawful as of January 1, 2012.[1417]

13.4.1 Employee vs. independent contractor misclassification

Attention-grabbing headlines exemplified by the following *Forbes* banner: 'Shocker: 40% Workers now have Contingent Jobs says U.S. Government'[1418] are commonplace

[1414] See, *NLRB v. Hearst* Publications, 322 U.S. 111 (1944).
[1415] See, https://www.sfbar.org/forms/jdc/emp-ic-memo.pdf for detailed information concerning tax consequences for misclassification and additional information concerning the 2012 California misclassification statute, Cal.Lab. CODE § 226.8.
[1416] The Construction Workplace Misclassification Act went into effect on February 10, 2011.
[1417] As defined in the California Labor Code § 226.8(i)(4). "Willful misclassification" is set forth as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."
[1418] https://www. forbes.com/sites/elainepofeldt/2015/05/25/shocker-40-of-workers-now-have-contingent-jobs-says-u-s-government/ - dec0e1c14bee

and have put the subject of atypical or contingent workers at the front of the agenda for politicians and researchers crossing into the fields of economics, employment, labor and tax law, public policy, and social justice. Courts, international organizations and national as well as supranational regulators have added layers of definitions in the hotly contested field of workplace classification.

Much rhetoric concerning the freelance/gig economy centers on the rise of a 'shared economy' characterized by dramatic shifts in employment and is linked to underpaid workers who attempt to juggle multiple short-term jobs in an attempt to piece together a living. But for freelance orchestral musicians, "the only thing we seem to share in the post-financial crisis era is increased stress, increased competition between even the best of friends-colleagues, and severely diminished financial returns."[1419] Before examining the focus group for this *movement*, the freelance orchestral musicians who comprise a small segment of the total freelance population, several points need to be made.

13.5 Dilemma: the freelancer's choice

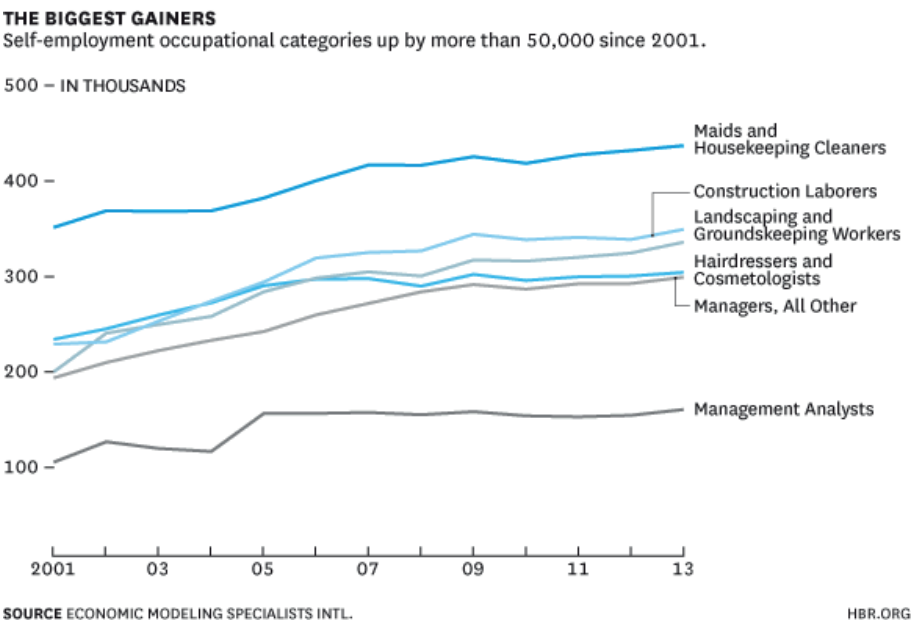
As alluded to above, by and large, there is a great dichotomy between those who 'choose' to freelance and those who are forced to take freelance work to survive. According to 2017 statistics released by the Freelancers Union, a U.S.-based platform with over 300,000 members, 63% of the 6,000 U.S. freelancers polled opted for freelancing as a life choice rather than a necessity. Although touting the virtues of free choice, the same group noted that their greatest concern is income predictability.[1420]

Does this outcome reflect a contradiction, or is it the result of mixing a wide classification of contingent workers into one category? How do these studies define freelancers? Taking a closer look at 'freelance' statistics leads to additional questions regarding definitions. What are the differences between such categories of contingency which the U.S. Government Accountability Office (GAO) describes in its 2016 survey inclusively as: "agency temporary workers (temps), direct-hire temps, on-call workers, day laborers, contract company workers, independent contractors, self-employed workers, and standard part-time workers?"[1421] And, how many of these recognized

[1419] Conversations with New York-based freelancer, anonymity assured.
[1420] https://www.upwork.com/press/2017/10/17/freelancing-in-america-2017/
[1421] The open-source Google link to the GAO survey: https://www.google.nl/search?q=Government+Accountability+Office+on+contingency+work&ie=utf-8&oe=utf-8&client=firefox-b-ab&gfe_rd=cr&dcr=0&ei=NGkUWuaADIq3tgfkoZi4BA

categories reflect cross-over situations? A worker could be simultaneously on-call and an independent contractor; could an agency temp also be an on-call worker?

The breadth of inclusivity of different categories of the working population translates into statistics that give rise to the headlines quoted above. Furthermore, it adds confusion rather than clarity to the crucial question of how this ever-growing 'worker sector' ranging from the 'core contingents' (such as day laborers) and the 'self-employed by choice' (exemplified by the legions of consultants in the IT business) could get



access to social/economic benefits. Relying on a broader definition of contingent work, of course, increases the size of this group, which we might characterize as persons who work under alternative employment arrangements. According to statistics released in 2012, approximately 16 percent of U.S. workers were either independent contractors (12.9 percent) or self-employed (3.3 percent), while another 16.2 percent reported working part time. Thus, approximately two in five U.S. workers (40.4 percent) engaged in some form of contingent work arrangement.[1422]

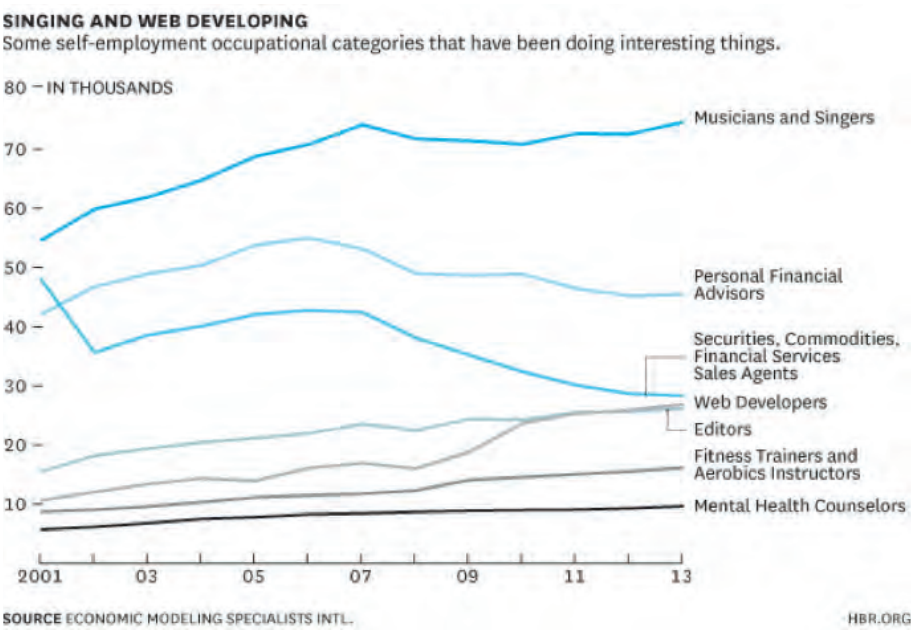
According to both the GAOs' study on Contingent Workforce and the Freelancers Union survey cited above, most contingent workers chose to work part time and/or

[1422] Justin Fox. "Where Are All the Self-Employed Workers?" Harvard Business Review, 2014. https://hbr.org/2014/02/where-are-all-the-self-employed-workers - comment-section

freelance. Yet, placing core contingency workers in unstable employment situations in the same category of 'self-employment' with highflyer web developers does not present a real picture of the race to the bottom for temporary workers-without-choices. One of the most substantial increases in self-employment since the economic crisis 2007-2008 is placed in the category: 'Managers, all other' (see table, above). Again, the issue of how the categories are framed comes to the fore: a large category, a sort of one size fits all, 'Managers' includes financial managers and construction site managers along with purchasing managers who typically receive lower financial remuneration.

As the diagram below indicates, the category topping the charts in terms of growth and numbers of self-employed workers is musicians and singers. (GAO USA 2014).

The GAO reports that most temporary workers would prefer regular full-time employment. However, the upward mobility to contracted full-time work is often



elusive especially amongst the 'core contingents' and, of course, there are significant differences between one category of temporary worker and another.[1423] Professor Arne

[1423] Consider the introductory discussion reflected in the United States Government Accounting Office (GAO) document on Employment Relationships 2006, while the arguments might be considered to be dated in terms of timeframe, most of the issues raised still apply to the freelance, independent contractor and/or temporarily employed workers at the present time. Available at: https://www.gao.gov/new.items/d06656.pdf

Kalleberg's observation based on research at the end of the first decade of the 21st century rings true: unstable part-time employment does not necessarily lead to full-employment in the near future.[1424]

Labor specialist David Pedulla's 2013 systematic analysis on how the introduction and integration of contingent workers and the fully employed at the same workplace interact might have showed different outcomes had the mélange of orchestral freelancers with full-time employed musicians provided an addition to his research. Professor Pedulla substantiated:

> *"Our findings also suggest that there is important variation across types of contingent worker use for the outcomes of standard employees. The distinct nature of different types of contingent workers, as well as how and why they are used in the workplace, likely accounts for these differences. Independent contractors are generally highly skilled workers that remain administratively separate from the organizations where they work and have little interest in moving into a standard employment relationship. Thus, they are unlikely to be seen as new competition or potential replacements by standard employees".*[1425]

In the parlance of professors Pedulla and Kalleberg, freelance musicians are 'highly skilled workers' who perform the same tasks as the 'standard employees' in an orchestra: freelance substitute players are indistinguishable from contracted orchestral players in terms of training and ability to perform as musicians in the employing orchestra. According to observations gleaned from interviews completed between 2013-2021, fully employed musicians feel the "heat of replacement" especially at times of economic uncertainty.

Orchestral employees whose jobs have been systematically whittled down from a comfortable 100% pay for 100% work have fallen to new lows in the Dutch orchestral constellation. With the notable exception of the Royal Concertgebouw Orchestra (RCO) and one other state-subsidized regional orchestra, the North Netherlands Philharmonic (NNO), other Dutch professional orchestral[1426] CBAs offer phased contracts ranging from 90% to 65% with fears of further diminution in the future.[1427]

[1424] See, A.L. Kalleberg. "Precarious work, insecure workers: Employment relations in transition" 2009.
1425 See, David S. Pedulla. "The Hidden Costs of Contingency: Employers' Use of Contingent Workers and Standard Employees' Outcomes" 2013 pp. 721-722.
[1426] See http://www.vvno.nl/ the website of The Association of Dutch Orchestras website (Vereniging van Nederlands Orchestras) for a list of Dutch orchestras 2017.
[1427] Statistics gleaned from the Raad van Cultuur (Council for Culture) website at http://bis2017-2020.cultuur.nl/adviezen/podiumkunsten/symfonieorkesten.Ten Dutch orchestras fall under the basic state (BIS) subsidies in 2018. For more information, the *FAQ movement* offers a brief review of how Dutch 'fully employed' orchestral musicians work post-crisis.

Many Dutch orchestras that survived the major culture cuts (2012-2013) endured cutbacks in employment for the full complement of players. As the examples cited below highlight, musicians under contract post-cuts receive 'partial contracts for full-time work.' New members entering the orchestra are given "percentage contracts," a diminished version of what long-standing members received in years past.[1428] The Dutch Ballet Orchestra (Het Ballet Orkest HBO) has witnessed another variation on the mergers/reorganization theme: a combination of part-time contracts and personnel cuts. It is fair to note that in the Netherlands, maximum scope CAOs are losing out to part-time contracts in the orchestral sector.

Relevant to an enquiry on exacerbated vulnerabilities is the added work stress engendered by the changes in scheduling at the Dutch orchestral workplace where the same rates of production (services) pre and post crisis are performed by ensembles that have endured personnel cuts. Freelancers fill many of the gaps at lower pay rates and the 'fully' employed musicians suffer from increased work stress as with orchestral schedules that call for high rates of production accompanied by the diminution of salaries. A closer look at the HBO schedule in the first two months of the 2017-2018 season brings this into sharp focus: free days (marked vrij (in green) =free, in Dutch) are in short supply, see *Epilogue: Appendix 11.*

One of the many reoccurring questions that freelancers in both jurisdictions pose is: "should we care about our status, isn't it more important just to go about getting gigs?" The short answer, a resounding 'yes' backed up by legislation and case law in the U.S., the Netherlands, and the EU underlines the fact that employee status is certainly desirable. Under U.S. law, rights for an employee include the NLRA protected rights to form a bargaining unit, paving the way to collective bargaining, to flesh out terms of employment and additional benefits/ protection. Workers who are classified as independent contractors do not share in these protections, as they are considered to be of equal standing to the employer, another 'agent' in a free market conception of workers.

13.6 History as a guidepost

The brief historical enquiry that follows is centered on the U.S. experience in coming to grips with worker classification**.** To contextualize classification in the case of orchestral musicians, it is vital to gain an understanding of some of the most

[1428] See, advertisement for a 50% trumpet position at the Netherlands Radio Philharmonic Orchestra *Epilogue: Appendix 25.*

important legal and regulatory battles in broader employment contexts. Formulae developed by administrative agencies, U.S. courts and the NLRB point to a variety of paths to establish worker classification. In the interest of reaching consensus on appropriate and stable regulatory treatment, it is paramount to examine these paths. This *movement* also gives pride of place to cases that center on musicians working at the most precarious end of the orchestral musician spectrum: the orchestral musicians who perform in per-service, regional orchestras. We will discover how different courts and NLRB panels have come to different conclusions in classifying these musicians as independent contractors or more desirably, employees when assessing parallel facts. While Dutch jurisprudence (*FNV KIEM*) and regulatory frameworks have moved toward an acceptance of orchestral substitutes as false self-employed workers, the same workers in the U.S. fall within a regulatory grey zone. It is important to note that the European (and Dutch) focus has centered on side-by-side musicians, performers who play alongside regularly employed musicians, many of the U.S. musician-related cases discussed in the pages to follow center on a different type of orchestral musician: the professionals who perform in per-service, regional orchestras. We aim to open our inquiry by giving priority to orchestral musicians' worker classification in an area in which legal norms and rules are still evolving.

13.6.1 U.S. workers' rights in the pre-NLRA era

To opine that workers' rights are redefined through the responses of courts and legislatures due to a synthesis of economic, political, and social factors, borders on cliché. A journey back to a forty-year stretch at the cusp of the 20th century (1897-1937) conveys deeper insights into an incongruous zone between employers and employees to exposes the push and pull between individual and corporate economic-related activities. The state's regulation of social rights adds relevance to this brief historical reflection as we come to grips with flexible/gig workers' present-day vulnerabilities.

During the *Lochner* era, SCOTUS struck down well-nigh two hundred federal and state laws in the realm of employment legislation. "The doctrine that private commercial activity should be confronted with a minimum of public interference"[1429] not only influenced the courts but also swayed legislative policy. This turbulent period in U.S. labor law history revealed the substantial extent of influence peddling by the elites, industrialists, and early day U.S. robber barons, who feared the force of the union to empower workers. Although the facts of *Lochner v. New York* (1905)[1430] relate to

[1429] William Finley Swindler. *Court and Constitution in the Twentieth Century: A modern interpretation* 1969 p. 37.
[1430] *Lochner v. New York* 198 U.S. 45 (1905)

a particular subject matter, its impact shaped the lives of working Americans for decades. In short, Joseph Lochner, the owner of a small bakery in upstate New York was fined $50 for requiring an employee to work more than 60 hours per week. On appeal, Lochner challenged the constitutionality of the Bakeshop Act 1897 (the Act), because it violated the right of employers and their employees to exercise genuine 'liberty of contract': "to make contracts regarding labor upon such terms as they may think best, or upon which they may agree."[1431]

Resting on the established doctrine of a legitimate exercise of state powers to benefit the people, the State of New York, representing the employee, stressed that the Act was construed to alleviate the common practice of forcing workers to work 12-hour days, 7-days a week. To promote private commercial rights over state intervention SCOTUS recast the Due Process protections in the 14th Amendment. The impact of *Lochner* was as swift as it was far-reaching: legislation in support of any form of redistributive justice for workers met with judicial wrath. Legislation prohibiting anti-union "yellow-dog" contracts in which future employees were required to sign an oath that they would not join the union as part of their employment contract was struck down by the conservative SCOTUS majority in 1915.[1432] A minimum wage law to level the wage playing field for women working in Washington D.C. suffered a similar fate in 1923; SCOTUS held that a wage board to monitor the payment of minimum wages restricted the individual's right to freely contracted labor.[1433] Referring to *Lochner* as the "whipping boy" of judicial misguidance, Ronald Dworkin noted, "[t]he stench. . . does not lie in jurisdictional vice or judicial overreaching. . . The vice of bad decisions is bad argument and bad conviction; all we can do about those bad decisions is to point out how and where the arguments are bad."[1434]

13.6.2 The NLRA: the tide reverses

History in the form of crisis, the dreadful economic downslide following the stock market crash of 1929, was to reverse the *Lochner* tide. In the midst of the Great Depression, New York Senator Robert F. Wagner and a noteworthy cohort of congressional colleagues penned the National Labor Relations Act (NLRA), referred to in much of the literature as the Wagner Act. Establishing a legal framework for collective bargaining and a wealth of union activity, the NLRA reflected an attempt to

[1431] *Lochner*, at 54.
[1432] *Coppage v. Kansas* 236 U.S. 1 (1915)
[1433] *Adkins v. Children's Hospital* 261 U.S. 525 (1923)
[1434] See, Ronald Dworkin. "Pragmatism, Right Answers and True Banality" 1991 p. 359.

mitigate the democratic deficiency in industrial America that was crumbling under the pressure of economic stagnation and the iron grip of *Lochnerian* policies. To quote its preamble, the Act articulates a large step forward to achieve "industrial peace." The impact of the Great Depression in which unemployment averaged 20% in the 1930s, and farms and factories lay fallow, fostered a belief that recovery could only take place if massive reforms including labor reform took a prominent place on the national agenda; collective bargaining formed the core of these reforms.[1435]

With the union as the driving force, workers gained the right to organize, to bargain collectively, and to strike. A legislative antidote to *Lochner* coupled with an attempt to balance the power between worker and employer, the NLRA reshifted national policy and heralded a move towards reinforcing union power. Its objective:

> *"To eliminate the causes of certain substantial obstructions to the of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment free flow. . ."* [1436]

Of particular importance regarding the establishment of worker's rights, NLRA § 7 authorizes:

> *"Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."*

As set forth in NLRA §8, unfair labor practices include any interference with the formation or administration of a labor union, any form of discrimination against employees who aspire to union membership, refusals to bargain collectively with the legally recognized employee representatives, and any attempts to interfere with the administration and/or formation of a labor union at the workplace.

The National Labor Relations Board (NLRB), established under the NLRA is the principal administrative and adjudicative organ for the NLRA. At the very top of the NLRB's administrative pyramid, a three-member board appointed by the President,

[1435] Although a full discussion of the sociopolitical not to speak of economic impetus leading to the NLRA goes beyond the scope of this research these two sources provide a good point of departure: Mark Barenberg "The Political Economy of the Wagner Act" 1993 and William Cooke "Evolution of the NLRA" 1985.
[1436] 29 U.S. Code §151.

with Senate approval, oversees the administrative, economic, legal, publication, and trial divisions. The NLRB has authority to resolve disputes about the scope of a bargaining unit as well as the claims of unions to representation. Accordingly, the Board has the power to "certify" a particular union as the "exclusive representative" of a bargaining unit's employees. The Board's General Council heads the legal division whose trial examiners and administrative law judges (ALJs) are, to quote SCOTUS "functionally comparable" to U.S. District Judges.[1437] To ensure that the NLRA would be adhered to across a substantial jurisdictional space, regional offices of the Board were established to investigate and prosecute unfair labor practice claims in their specific geographic district. Politics at the core of NLRB appointments will pass muster in the context of several cases under scrutiny, further on in the *movement*.

Tomes have been written on the consolidation of union power and the increase in worker's rights as reflected in legislation and jurisprudence post-NLRA enactment.[1438] Union membership, measured by union density rates grew from just over 13% to 34.7% from 1935-1955.[1439] Early NLRA jurisprudence reflects the push and pull of New Deal industrial relations. Importantly, the labor contract solidified rules to govern the workplace. Getting to 'yes' in those contracts became a struggle between employers and unions, with the latter wielding power through the threats of work stoppages and strikes. As many scholars note, this powerful 'calling card' enhanced union ability to bargain successfully.[1440] Employers sought the protection of influential congressional allies to attempt to turn the tides in order to undercut union excesses. The stage was set for amendment.

U.S. historians have written extensively on the post-WWII phenomenon, the 'great strike wave of 1946' according to the U.S. Bureau of Labor Statistics (BLS), "the most concentrated period of labor-management strife in the country's history."[1441] What made the industrial unrest in 1946 so noteworthy was that strikes were not only within the exclusive provenance of heavy industry but spread to other sectors: educational workers, municipal employees, transportation, and utility workers, numbering upwards of 4 ½ million walked out on their employers according to BLS statistics.[1442]

[1437] *Butz v. Economou*, 438 U.S. 478, 513 (1978).
[1438] See, Ellen Danni. "NLRA Values, Labor Values, American Values" 2005 and William Cooke "Evolution of the NLRA" *supra* at fn. 1435 for additional commentary.
[1439] See, Michael Goldfield. The Decline of Organized Labor in the United States 1992 p. 10 Table 1.
[1440] Ibid.
[1441] For a breakdown of strikes, sectors, etc., see, Bureau of Labor Statistics *Bulletin* 918 (1947).
[1442] Ibid.

13.6.3 The Taft-Harley backlash

Within less than one year from the annus horribilis of labor unrest, a strong, anti-labor backlash gained political and legislative power. Although President Truman voiced his strong support for union activities, politicians in both houses of Congress penned a bill to correct runaway union powers that had their legal base in the NLRA. With the passage of the Labor Management Relations Act 1947, commonly referred to as the Taft-Hartley Act (THA), several core NLRA tenets were 'rectified': workers holding managerial and supervisory functions were barred from NLRA protections and the 'right to work' initiated by the THA gave states the power to outlaw union shop clauses and the 'right to refrain' from the NLRA's Section 7 rights to 'self-organize.' [1443]

> *"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have* **the right to refrain** *from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment"*[1444]

Supporters of the THA and subsequent amendments are quick to point out that because of the NLRA, unions had gained disproportional strength in terms of bargaining power, and that the proposed THA amendments would rebalance the power between management and organized labor. President Truman vetoed the "slave labor bill" and vociferously decried what he perceived of as its anti-labor agenda. "If we weaken our system of collective bargaining, we weaken the position of every workingman in the country. This bill would again expose workers to the abuses of labor injunctions."[1445]

An in-depth discussion of the political agendas that influenced these cornerstones of U.S. labor law lies beyond the immediate scope of this research. However, the observation that although the NLRA initially accomplished its goal to diminish the powers of employers in favor of a more even playing field between employers and workers, amendments such as the THA, subsequent SCOTUS decisions, and NLRB rulings in the 1950s and 60s moved the pendulum back to a *Lochnerian* employer-favorable situation.

The NLRA envisaged a semi-closed system of adjudication: Section 3. § 153 NLRA called for the formation of the National Labor Relations Board (NLRB) as an

[1443] See, Taft-Hartley, §14(b) 29 U.S. Code § 164(b).
[1444] See, Taft-Hartley, 29 U.S. Code § 157.
[1445] Radio address by President Harry S. Truman to the American People June 20, 1947 at 10 p.m. https://trumanlibrary.org/publicpapers/index.php?pid=2124&st=&st1=

enforcement agency. Its board members, three at the time of formation in 1935, expanded to five under the THA, are appointed by the President (subject to Senate approval) and hold the mandate to guarantee fairness in union elections, to arbitrate deadlocked labor-management disputes, and to penalize unfair labor practices by employers.[1446] Throughout its history, the NLRB has been criticized for politicization: for reflecting, depending on the political stripe, the pro or anti-labor stance of the party in power.[1447]

Considering its far-reaching case law on labor-related disputes, one could posit that the NLRB monopolizes the adjudication of such disputes. However, the field of adjudication is much wider. Generally, the NLRB considers cases that deal with unfair labor practices while the courts are generally disposed to adjudicate cases related to breaches of a CBA or individual employment contracts. The decisions of the NLRB have often crossed into the provenance of both state and federal courts: specific examples will be brought to the fore with relation to orchestral musicians to ascertain whether there is a 'uniformity of opinion' with regard to this specific group. The NLRB's potential as a rulemaking body supported by the findings in a 1990 healthcare bargaining case at SCOTUS,[1448] has not led to a vigorous attempt on the part of the Board to apply its potential power of rulemaking potentially to employment cases. As a prominent scholar noted with regard to codified NLRB rules, spreading salt on the wounds of any self-respecting orchestral analyst, "these [rules] cover jurisdictional standards for colleges and universities and two relatively insignificant workplaces—symphony orchestras and horse/dog racing."[1449] Patronizing remarks with regard to the orchestral workplace aside, the NLRB at that place of employment has devised flexible criteria for workers who fall in a special circumstance category. The status of these criteria is noteworthy as the protections afforded by the NLRA in terms of union protection are considerable.

13.7 Who is an employee under the NLRA?

NLRA §2 (3) specifically excludes "any individual having the status of an independent contractor" from NLRA protection raising the question as to who is responsible to ascertain the status of an individual or group of individuals as independent contractors

[1446] See https://www.nlrb.gov/resources/nlrb-process for NLRB procedural details.
[1447] See, generally, William B. Gould. *Labored Relations: Law, Politics, and the NLRB; a Memoir* 2001 and Joan Flynn. "A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935-2000."
[1448] *N.L.R.B. v. Am. Hosp. Ass'n* 499 U.S. 606 (1991).
[1449] Jeffrey Lubbers "The Potential of Rulemaking by the NLRB" 2010 p. 413.

or employees. In its consideration of multiple factors leading to a final assessment, the NLRB has wisely opted for a case-by-case analysis, as the 'weight' linked to a factor shifts from one case to another.[1450] Ultimately, in 2001, the Board, backed by court approval determined that the party claiming independent contractor status holds the burden of proof.[1451] In an interesting twist at the state court level that clarifies the issue as to if the description or labeling of a worker as 'independent contractor' could be a factor in final status determination, the United States District Court for the Northern District of California held that "the determination of independent contractor or employee status is a determination of fact and that the label the parties place on the relationship is not dispositive."[1452]

This section reviews several approaches to 'who is an employee?' under the NLRA as derivations from these definitions have been cited in jurisprudence regarding musicians' classification. Under the Definitions section of the NLRA, the following general terms are relevant: [1453]

> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.
> (2) The term "employer" includes any person acting as an agent of an employer directly or indirectly but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
> (3) The term "employee" shall include any employee and shall not be limited to the employees of a particular employer unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, **or any individual having the status of an independent contractor, or any individual employed as a supervisor**, or any individual employed by an employer subject to the Railway Labor Act as amended from time to time, or by any other person who is not an employer as herein defined."

Many questions come to mind when considering the tests, factors, and deliberative points that courts, and NLRB use to reach decisions on worker status. Yet, with an increase in factors, still no 100% watertight consensus has been reached. Is it possible

[1450] *BKN, Inc.,* 333 NLRB 143, 144 (2001) citing *Roadway Package System*, 326 NLRB 842, 850 (1998).
[1451] *BKN, Inc.* and further at the Court level, *NLRB* v. *Kentucky River Community Care Inc.,* 532 U.S. 706, 710-712 (2001).
[1452] *Besag v. Custom Decorators, Inc.,* N.D. Cal. Feb. 10, 2009, No. CV08-05463 JSW.
[1453] 29 U.S. Code § 152 Definitions.

to posit that language including the 'language of the law' is too limited to provide a 'one size fits all' formulation to answer to the variety and nuance of employment-related cases? And, to complicate matters further, different 'entities' rely on different tests: the all-important U.S. tax administration service, the Internal Revenue Service (IRS) relies upon a 20-factor evaluative test to evaluate 'employee' vs. 'independent contractor' status for payroll and withholding tax purposes.[1454]

13.8 Diverse definitions and tests to establishes the employment relationship

In the U.S., courts have grappled with defining 'employee' devising several 'tests' to come to grips with the status of workers "in the borderland between employers and non-employers'[1455] and to extend the former U.S. Supreme Court's Chief Justice Wiley Blount Rutledge's description, the 'borderland' between workers, employees, and quasi-employees in a changing landscape marked by the rise of the 'self-employed.'[1456] Commentators have put forward that "the law is in a complete state of disarray with regard to the definition of employee."[1457] U.S. courts have devised tests to aid in defining 'who is an employee' with a theory of dependency as a point of departure. Employees are dependent on the employer they 'serve' whilst an independent contractor's work is primarily involved in their own business. The complications built into this characterization will be elaborated upon in the cases that follow. The four most commonly applied tests are: the common law agency test, the statutory purpose test, the economic reality test, and unsurprisingly, a 'combination' test referred to as 'the hybrid test.' These tests will be discussed with specific regard to their application in cases involving orchestral musicians.

Back in the 1940s, in *NLRB v. Hearst Publications., Inc* (*Hearst*) the case alluded to above, SCOTUS relaxed in its strict interpretation of the term employer in its rejection of the strict common law "right to control" formula. "Employee is not treated by Congress as a word of art having a definite meaning. Rather it takes its color from its surroundings in the statute where it appears, and derives meaning from the context of that statute,

[1454] For the IRS 20 factor test see, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee

[1455] Chief Justice Rutledge delivered the opinion of SCOTUS in the influential case *NLRB v. Hearst Publications., Inc.*, 322 U.S. 111, 121 (1944).

[1456] We will visit the terminology of 'quasi-employees' in a discussion of the self-employed. Terms such as 'bogus self-employed', fictive self-employed and fake self-employed have been put forth by courts in the U.S. and Europe.

[1457] Mitchell N. Rubinstein. "Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship" 2012.

which must be read in the light of the mischief to be corrected and the end to be attained."[1458] Subsequent cases decided under the economic realities test considered the sensitive balance between the employer's control of access to employment, and the employee's economic dependence on a sole employer. Moving forward to cases settled in the latter part of the 20th century found the Court depending on the hybrid test, a combination of both the common-law agency test and economic realities test. By the time *Nationwide Mutual Insurance Co. v. Darden* (*Darden*) was decided in 1992, SCOTUS rationalized that *Hearst* was a feeble, outdated precedent.

The point of departure to lead to a coherent resolution of "one of the foremost status distinctions at common law is that between an employee and independent contractor;"[1459] the common law agency test developed by the Court in *Darden*.[1460] Subsequently applied to other cases on the applicability of Title VII Civil Rights Act of 1964, the *Darden* Court recommended the evaluation of:

[1] the 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; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.[1461]

SCOTUS held:

> *"If the factors demonstrate that the worker has a sufficient level of control over his duties, the independent contractor designation will hold up in court.*
> *If the factors demonstrate that the employer exercises sufficient control, then the independent contractor designation is deemed incorrect and the worker will have all of the rights and remedies afforded toemployees under . . .Title VII."*[1462]

13.8.1 Employees according to the Restatement (Second) and (Third)

While not considered to be a binding source of law, the American Law Institutes' Restatements of Law are strong secondary sources that summarize leading cases and

[1458] See, *Hearst, supra* at fn. 1455 at 24.
[1459] *Langfitt v. Fed. Marine Terminals Inc.,* 647 F.3D. 116, 1121 (11th Cir. 2011).
[1460] *Nationwide Mutual Insurance Co. v. Darden* 503 U.S. 318, 323 (1992).
[1461] Ibid.,
[1462] Ibid.,

put forth trends in 'black letter law' based on a broad selection of cases and subjects. No less a legal light than Benjamin Cardozo noted:

> *"It will be invested with unique authority, not to command, but to persuade. It will embody a composite thought and speak a composite voice. Universities and bench and bar will have had a part in its creation. I have great faith in the power of such a restatement to unify our law."*[1463]

Richard Posner and fellow proponents of the Law & Economics line of thinking along with Critical Legal Studies advocates are highly critical of Restatements, as in their opinion this 'source' does not take the interdisciplinary nature law-in-action, and its intersections with economics and public policy, into consideration.[1464] Scholarly critique notwithstanding, courts across the U.S., from the Supreme Court to the lower courts, take the Restatements seriously and frequently rely on their persuasive authority.

NLRA §2(3) sets out the basic dichotomy between the terms 'employee' and 'independent contractor' without defining either term. In relevant part, "employee" shall not include "any individual having the status of independent contractor." To determine if individuals who perform services for an entity are employees protected by the NLRA, or 'excluded' independent contractors, the NLRB Ten distinguishing factors enumerated in the Restatement (Second) of Agency § 220 have been further established by NLRB case law as the pages that follow describe:

> (1) the length of time the individual is employed;
> (2) the method of payment, whether by the time or by the job;
> (3) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (4) whether the individual is engaged in a distinct occupation or work;
> 5) whether the employer is "in the business;"
> 6) the skill required in the particular occupation;
> (7) whether the employer retains the right to control the manner and means by which the result is accomplished;
> (8) whether the parties believe they are creating an employment relationship;
> (9) whether the work in question is part of the employer's regular business;
> (10) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain.[1465]

The Restatement (Third) of Agency § 7.07(3) stipulates that, "[a]s a general matter, a hired party is the employee of the hiring party when the hiring party controls (or has

[1463] The eminent Benjamin Cardozo opined with optimism concerning the powers of Restatements in: *The Growth of the Law* 1924 p.9.
[1464] See Richard A. Posner. "The Problematics of Moral and Legal Theory" 1997 pp. 304-307.
[1465] *Pennsylvania Academy Fine Arts* 343 NLRB 846 (2004).

the right to control) the manner and means of the hired party's performance of work. The fact that work is performed gratuitously does not mean that the hired party is not an employee." In contrast, a hired party is an independent contractor when she "is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking"[1466] The benchmark to consider is the amount of control the employer/hiring party exerts over the work of the party who has been hired. The term 'independent contractor' was eliminated in the Restatement (Third) of Agency.

> *"The common term "independent contractor" is equivocal in meaning and confusing in usage because some termed "independent contractors" are agents while others are nonagent service providers. The antonym of "independent contractor" is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider."*[1467]

13.8.2 The U.S. Department of Labor (DOL) restrictions to the definition

As leading U.S. practitioners have observed, "an increasing number of U.S. federal and state government agencies led by the Department of Labor (DOL), are heavily invested in restricting the use of independent contractors and increasing the number of workers classified as employees. Some jurisdictions have limited application of the traditional "right to control" test, which looks primarily to the degree of control exerted or retained by the company to determine if a worker is an employee. Many courts have relied on a more expansive "economic realities" test, which looks at multiple factors, including whether the work is integral to the business, the worker's opportunity for profit and loss, the relative investments of the company and worker, the permanency of relationship, and the company's degree of control. Under this test, the ultimate question is whether the worker is economically dependent on the company (an employee) or is in business for him- or herself- (an independent contractor)."[1468]

To add to the categorization protocols used by courts, several states have adopted what is arguably the most difficult standard to overcome: the "ABC" test, which presumes an individual is an employee, unless the employer can prove the worker's autonomy and independent nature of services in a three-prong test (see **A**-**B**-**C** below).

1. **A**bsence of control: does the worker perform tasks independently?
2. **B**usiness of worker: does the worker engage in specialized tasks?

[1466] Restatement (Second) of Agency § 2(3).
[1467] Restatement (Third) of Agency § 7.07(3).
[1468] Discussions with U.S. attorneys and summarized here: https://www.skadden.com/insights/publications/2016/01/restrictions-on-use-of-independent-contractors

3. **C**ustomarily engaged: does the worker have his/her own business identity? Does the worker rely mainly on one employer?

13.8.3 Different strokes for different folks: the FLSA

Sifting through the main legislative acts that set forth the employment relationship of workers in the U.S. is a tricky business, as different acts bring forth different standards needed to reach the status of employee with a confusing amount of variation between the various acts. For example, the Fair Labor Standards Act (FLSA), the U.S. legislation that provides minimum wage and overtime wage regulations originally promulgated in 1938 provides a wide, remarkably circular definition of the term employee: "an individual employed by an employer."[1469] It also contains the requirement that an employer-employee relationship exists for a worker to be covered by the act's provisions, which require employers to pay minimum wage and overtime wages to employees who work a minimum of 40 hours a week.[1470] Leaving the door open to the courts and Congress to fill in their own interpretations as to who is an employee with its remarkably circular definition of 'employee,' the FLSA sets specific requirements for minimum wage, overtime and other standard work-related regulations.[1471] Under the FLSA, the verb 'employ' is defined somewhat archaically as "to suffer or permit to work."[1472]

With a modicum of wit and savvy, legal scholar Richard Carlson delves into the problems of using a verb-based definition in the statutory quest to define 'employee' in an article bearing the droll title, "Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying."[1473] Taking the reader on a detailed voyage through reams of jurisprudence where SCOTUS, lower courts and Congress attempt to define 'employee' since the enactment of the NLRA, he reached the conclusion that "the borders of any test of employee status are destined to remain forever vague."[1474] Noting that the courts offer holdings to answer to specific situations, Carlson joined by a chorus of international scholars calls on legislators to draft basic rules of coverage for **all** workers regardless of status.[1475]

[1469] See, Fair Labor Standards Act 29 U.S. Code § 203.
[1470] Ibid., 29 U.S. Code § 206.
[1471] Ibid., at §§ 201-219, establishes minimum wage, overtime pay, recordkeeping, and other standards affecting employees in the private sector and in Federal, State, and local governments. See, https://www.dol.gov/whd/flsa/
[1472] Ibid., at §203 (g).
[1473] See, Richard Carlson at: http://scholarship.law.berkeley.edu/bjell/vol22/iss2/2
[1474] Ibid., p. 368.
[1475] For example, Miriam Cherry, Matthew W. Finkin, and Breen Creighton to mention a few scholars who focus on the subject of worker classification.

Judicial interpretation with regard to worker status has led to a great deal of uncertainty and disagreement. Is employee status, the exclusive domain for coverage, the soundest manner to determine statutory coverage? In the best of all scenarios, Carlson places hopes that workers would best be served if Congress and the states would exercise their powers on behalf of workers' rights. However, considering the politics of such legislation, are his hopes realistic? Neil Komesar's comparative institutional analysis theories presented through the lens of property law in a pair of thought-provoking books could provide guidance along a thorny path of definition: Komesar returns time and time again to underline the notion that real rights deserve more than flimsy, en passant solutions. There are many who argue that the different definitions of employee not to speak of exclusions from NLRA coverage have encouraged conflicting court and board decisions.[1476]

SCOTUS brought several factors to the fore to separate employees from independent contractors under FLSA, recommending the economic reality test. Under FLSA, the courts have examined the issue of misclassification by applying the economic realities test and making case-by-case determinations as to whether the workers are employees and thereby covered by the act**.** To test the relationship between 'worker and boss,' the courts underlined the importance to consider the entire activity within a broad reading of work, not merely isolated factors.

13.8.4 NLRB tests to define employees

Although the NLRA grants employees the rights to organize and bargain, there are limits as to who can benefit from these rights. The scope of the NLRA is open to determination by the NLRB, which has held that there is a difference between employees who are protected by the act, and independent contractors who are excluded from the protections of the act. Furthermore, to benefit from the Act, there must be a recognized group of workers, a defined "nexus" in employment terms and conditions common among employees to avail themselves of NLRA stipulated rights. The 'community of interest' test applied by the NLRB to determine the commonality necessary to form a group relies on factors: the degree of interaction among the job titles in the proposed bargaining unit, the management structure at the workplace, and the location at which the employees work. Without this shared commonality, the NLRB will not allow for union representation elections to take place. The NLRB determined

[1476] See, Neil Komesar. *Imperfect Alternatives - Choosing Institutions in Law, Economics, and Public Policy 1994 and Law's Limits - The Role of Courts, the Rule of Law and the Supply and Demand of Rights* 2001.

a formula to delimit the eligibility of parttime employees to form a bargaining unit in *Davison-Paxon.*[1477] According to the original *Davison-Paxon* formula, a part-time or on-call employee must meet the requirement of four or more hours of work per week for a three-month period to demonstrate "a sufficient regularity of employment to demonstrate a community of interest" with employees who are part of the employee bargaining unit, unless "special circumstances" exist.[1478] These circumstances, often widespread in many variations within the entertainment industry, prompted the creation of other eligibility formulae (*Juilliard* and variations).

> **29 CFR § 103.2 - Symphony orchestras**
> The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any symphony orchestra which has a gross annual revenue from all sources (excluding only contributions which are because of limitation by the grantor not available for use for operating expenses) of not less than $1 million. [1479]

The case law developed by the NLRB on the composition of the bargaining unit has revealed a flexible approach to eligibility standards for freelance musicians in their quest for employee rights. The intermittent nature of their employment was not an obstacle but on the contrary, a key to resolution in a series of leading cases. The eligibility standard first set out in the mid-1970s in *Juilliard*[1480] shows a strong pro-union bias with its inclusive eligibility standard. The case centered on the bargaining rights of intermittently employed theater workers at the famed Juilliard School of Music, a renowned educational institution that offers top training to highly skilled young musicians. Such leading *Juilliard* facts as the type of work, the amount of control and supervision the employer exercised over its workers, and the infrequency of 'call backs' parallels several orchestra-related cases to be considered in the pages to follow.

13.9 How are temporary employees defined in case law? *Juilliard* sets the tone

In *Juilliard*, a central argument to support the temporary workers' hopes to form a bargaining unit was that these skilled workers could rely on a reasonable expectation of re-employment for another 'temporary' term. A bargaining unit is a key component within the collective bargaining process as it delimits the group of employees included

[1477] *Davison-Paxon* 185 NLRB 21, 24 (1970).
[1478] Ibid.,
[1479] NLRA 29 U.S.C. §§ 151-169 Section 8 Unfair Labor Practices; Section 9 Representation and Elections; Section 10 Prevention of Unfair Labor Practices.
[1480] *The Juilliard School* 208 NLRB 153 (1974).

within the unit, the specific group of workers entitled to union representation. Here, and in other parallel cases, the temporary employees were hired on a defined date, yet the termination of their employment had not always been stipulated contractually. The workers in *Juilliard* could be categorized as ultra-contingent: stagehands and other experienced backstage theater professionals with a varied history of regular employment. While some of the workers were hired for a mere two productions per annum, they relied on this employment year-after-year. Interviews with freelance musicians hired to work as temporary employees in U.S. regional orchestras attest to similar expectations and similar employment patterns as the plaintiffs in *Juilliard*. To prove reliance, the *Juilliard* Board examined the level of 'repetitive' employment:

> *"The record shows that many of these employees work for periods of time which indicate repetitive employment, and which permit them reasonably to anticipate reemployment in the near or foreseeable future. The Employer hires from the same labor market and some of these 'per diems' work for as long as 35 weeks. Although it uses no rehire list, we find that the Employer makes a practice of hiring employees who are experienced with the facilities at Juilliard and have proven through past performance their capacity to perform their job functions."*[1481]

In the entertainment industry, where employees are often hired to help on a day-by-day basis or production-by-production basis, the Board found that the irregular patterns of employment presented a special circumstance warranting deviation from the *Davison-Paxon* formula. Under *Juilliard*, a widened notion of employment was advanced: workers who perform in two productions for a minimum of five days in one year, or a minimum of fifteen days in two years should be granted access to the benefits of union organization and collective bargaining.

When employees are temporary or seasonal, however, the Board devised alternative formulae calculated to take the special conditions that are inherent to the field of theatrical employment to heart. Citing an obligation to study the particular facts of a case before making a determination as to which formula to use, the Board has shown its creativity in developing variants on the *Davison-Paxon* theme. In one of those variants, the Board emphasized the importance of ascertaining if workers show a "reasonable" expectation being hired by the employer in the future. In *American Zoetrope* the Board underlined the importance of their independence to develop a formula "compatible to our obligation to tailor a general eligibility formula to the particular facts of the case."[1482] Further, the Board opted to limit the voting benefits

[1481] Ibid., at 154.
[1482] *American Zoetrope Productions, Inc. v. Association of Film Craftsmen* 207 N.L.R.B. 621 (1973).

to workers who "average four or more hours of work per week during the quarter preceding the election eligibility date."[1483] The *Juilliard* flexible deviation from *Davison* received additional confirmation beyond the music-related sphere from the landmark *Trump Taj Mahal* decision.[1484]

Expanding on the *Juilliard* standard to embrace intermittent workers in the entertainment sector without an ongoing employment contract, the NLRB reiterated in *Trump Taj Mahal* that *Juilliard* afforded freelancers a benchmark that: "permits optimum employee enfranchisement and *free choice* (emphasis added by the author) without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer."[1485]

13.9.1 Florida Gulf Coast Symphony plays a conservative tune

In the *Florida Gulf Coast Symphony* case in 1980, freelance musicians employed by the orchestra were found to be independent contractors. The court relied on the common law test to demonstrate that these musicians earned more than two-thirds of their income from sources beyond the control of the orchestra.[1486] Additionally, the musicians' distinct occupation placed them within the context of independent contractors, and their employer paid them on a per-service basis. Most importantly, the musicians were free to pursue other sorts of work: "[a]s to the interdependent relationship that exists between petitioner and musicians, we agree that the services of musicians constitute work. Although this element is persuasive, it is not inconsistent with the interdependent relationships which may exist between a principal and an independent contractor."[1487] The veracity of such an observation rests upon the availability of musical work in that particular geographical area, and, as a leading musician who has worked in the successor orchestra of the Florida Gulf Coast Symphony noted, "many fine musicians in this area compete for a small amount of quality work in the classical music profession. Free to pursue other sorts of work is a demeaning way to intimate that those musicians should supplement their income with more lucrative employment."[1488]

[1483] Ibid.,
[1484] *Trump Taj Mahal Casino* 306 NLRB 294, 296 (1992).
[1485] Ibid.,
[1486] *Florida Gulf Coast Symphony v. Dep't of Labor & Employment Sec.,* 386 So. 2d 259 (Fla. App. 1980).
[1487] Ibid.,
[1488] Conversations with Mary Corbett, a violinist in the successor orchestra to the Florida Gulf Coast Symphony, the Florida Symphony.

13.9.2 Ogunquit **upholding** *Juilliard*: **How far should the test reach to designate unusual employment patterns?**

In *Ogunquit*, the Board applied *Juilliard* to a small group of musicians who performed in two musical productions in two seasons at a summer stock theater in Maine.[1489] Of the 28 musicians hired in the 2008 and 2009 seasons, most performed in only one or two shows and approximately half of the musicians had been rehired in 2009. Widening the eligibility for workers to "gain free choice,"[1490] the Board expanded further upon its interpretation of the eligibility test first developed in *Davison-Paxon*.

The NLRB regional director relied on the time-honored Restatement test to ascertain whether freelance musicians were employees or independent contractors in *Ogunquit Playhouse*.[1491] The Board found that the musicians' risk of employment loss was too minimal to confer independent contractor status; the 'unusual' employment features at the playhouse merited a departure from *Davison-Paxon*. Operating on a seasonal summer basis, an alternative eligibility for a union representation protocol was called for as the Playhouse operated for 21 weeks yearly. The Board developed minimum criteria under which musicians who had worked for two productions during the previous two seasons were eligible to participate in union activity.

13.9.3 Deviating from Juilliard: Steppenwolf Theater Co.

To ascertain whether a deviation from *Davison-Paxon* is warranted, the critical consideration is the employment pattern resulting from the total number and incremental length of the employer's stage productions. In *Steppenwolf Theatre Co.,*[1492] the Board examined the degree to which the theater relied on different categories of workers including permanent staff as well as per diem employees who worked during the theater's long season. The theater mounted 14 productions each season that were equivalent to 500 performances over a period of 48-50 weeks per season. The Board came to the conclusion that the theater operated like a regular employer; its musicians and staff members were deemed to be employees. Even though the freelance musicians employed by Steppenwolf Theater were seasonal, they could demonstrate a community of interest with fellow theater unit employees, the group of production

[1489] The term summer stock refers to theater companies who mount shows during the summer. The *Ogunquit* theater offered musicals from late May to early October.
[1490] *Trump Taj Mahal Casino*, supra at fn. 1484.
[1491] *Ogunquit Playhouse Foundation and Boston Musicians' Association, A/W American Federation of Musicians Local Union* No. 9-535 1-RC-22423 (Reg. Dir. Dec. and Direction of Election, March 11, 2010).
[1492] *Steppenwolf Theatre Co.,* 342 NLRB 69,71 (2004)

staffers who held permanent employment contracts. The NLRB took the stance that the strict requirements of *Davison-Paxon* applied abjuring the more relaxed *Juilliard* standard.[1493] The NLRB held that "an employee is deemed to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages four or more hours of work per week for the last quarter prior to the eligibility date."[1494] Thus, for entertainment industry employees who work on a regular, year-round basis, the standard *Davison-Paxon* formula was favored.

A similar focus on the frequency of employment led to the affirmation of employee status in *Columbus Symphony Orchestra*. During the 2002-2006 seasons, the orchestra operated for 46 weeks on a regular performance schedule, averaging over 170 concerts per year. Such an employment schedule contained the regularity needed to achieve the coveted status, and thus, the musicians were employees. Once again, the NLRB bowed to the 'spirit' of free choice within the entertainment industry, in which a group of employees who work infrequently and show strong evidence of an irregular pattern of employment could constitute a collective bargaining unit.

13.9.4 Kansas City Repertory Theatre Inc.: the NLRB mitigates Juilliard

An analysis of *Juilliard*'s progeny highlights the NLRB's interests in placing freelance musicians within the safety net provided by an employee status. Turning to a group of 'on call' freelance musicians in *Kansas City Repertory Theatre Inc.,* the NLRB majority found that the musicians formed a unit. Under the *Juilliard* doctrine, although the musicians are temporary employees who work intermittently, they shared a community of interest that leads to employee status.

> *"The spirit of Juilliard allows for the optimum employee enfranchisement and free choice that is sought by the Board in just this type of case: an entertainment industry employer with a group of employees who, but for an irregular employment pattern, would otherwise constitute an appropriate unit for the purpose of collective bargaining."*[1495]

But was *Juilliard* correctly applied in *Kansas City*? The answer lies in a further analysis of 'who' the workers were. The *Juilliard* workers were mainly 'rehires' – workers asked to return to because of their familiarity with the theater and the demands of the job. Successful 'past performance' played a significant role in the rehiring process. In the case of freelance musicians in *Kansas City*, there is no proof that the same musicians

[1493] *Davison-Paxon,* supra at fn. 1477.
[1494] Ibid.
[1495] *Kansas City Repertory Theatre Inc.,* 356 NLRB No. 28 (2010) at 8.

returned as rehires, as these freelancers were deemed to be 'more itinerant' than the *Juilliard* workers. The *Kansas City* musicians would show up when work became available. Under the NLRA's requirements for a legitimate bargaining unit, would these 'itinerant' musicians share in the 'legitimate bargaining interests of the regular employees?' Or were their interests short-term, sporadic like the nature of their work? Taking another tack, perhaps the court was interested to support all workers regardless of the irregularity of their work. As discussions with freelance musicians have illuminated, "we care deeply about every aspect of our employment and most certainly, the terms and conditions on-the-job."[1496] Temporary employment, the gig story, continues to pose a paradox for courts seeking an appropriate formula of determination with regard to NLRA-related rights to unionize and collectively bargain.

13.10 New developments, the on-demand U.S. cases: impact for orchestral musician status?

Can we make a case for classifying freelance orchestral musicians as employees based on court decisions in an increasing number of U.S.-based cases related to the 'on-demand' economy? After all, a freelance musician is the original 'gig' economy worker: the specific term 'gig' is deeply embedded in the music profession since the 20th century. U.S. courts have flip-flopped[1497] as to whether orchestral musicians are self-employed independent contractors or employees entitled to receive benefits and file class-action suits. And, in the U.S., the debate concerning the misclassification of workers has intensified, from the halls of government and courts to the main streets of public debate fueled by frequent media reports. An analysis of relevant cases and tests to determine employee status will follow the more direct answer to the second question. Simply put, the determination of employee opens the door to a wealth of economic and social benefits under legal regimes that include pensions (Social Security Act), minimum wage, and FLSA. As the cases below show, determination follows increasingly complex tests, some set forth through judicial process, others set by agencies. The Internal Revenue Service (IRS) uses a 'common law control test' consisting of 20 factors with a strong focus on the employer's level of 'control over the employee."

Before examining relevant legislation and leading cases, the precedent-setters that

[1496] Conversations with Kristin Linfante, successful U.S.-based freelance violist.
[1497] In U.S. politics, a term used since the Nixon era with reference to an ideological U-turn. William Safire waxed eloquent on the sources of the 'flip-flop' during a Yale College seminar attended by the author.

shape the course of further judicial decisions, it is important to consider the crucial issue of policy, politics and how changes of political stripe can influence the very definitions of terms such as 'employee' and 'independent contractor.' Reporting on changes during the first months of the Trump Administration in 2017, Department of Labor (DOL) insider David Weil, author of the telling, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done To Improve It*, [1498] reports that a guidance document that provided clear definitions to help employers avoid the pitfalls of misclassification was discredited by President Trump's minions at the DOL. The press release, dated June 7, 2017, announced:

> *"***WASHINGTON** – *U.S. Secretary of Labor Alexander Acosta today announced the withdrawal of the U.S. Department of Labor's 2015 and 2016 informal guidance on joint employment and independent contractors. Removal of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act…, as reflected in the department's long-standing regulations and case law. The department will continue to fully and fairly enforce all laws within its jurisdiction, including the Fair Labor Standards Act."*[1499]

On the one hand, it is possible to argue that the retraction is not worthy of concern. After all, the press release clearly states that such removal does not 'change legal responsibilities' under legislation and legal precedent set by Supreme Court case law. It is the issue that rises to the fore, on the other hand, that raises uncertainty. The Administrator's Interpretation, prepared by David Weil, and staff set out definitions relevant and described the boundaries implied within the concept of the scope of employment relationships under the FLSA.[1500]

13.10.1 The economic realities test

On July 15, 2015, the DOL's Wage and Hour Division issued guidelines on the economic realities test giving credence to the observation that a majority of America's workers who fall within the grey zone of 'independent contractors' would be deemed to be employees. Of paramount importance according to the 2015 DOL analysis is that no single factor should be taken as dispositive; all factors should be considered in relation to one another to engender a 'qualitative' instead of a 'quantitative' analysis:

1. The extent to which the work performed is an integral part of the employer's business.

[1498] Head of the U.S. Department of Labor's Wage and Hour Division under President Obama, May 2014-January 2017. For Weil's theory on the 'fissured workplace', see: https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work

[1499] See, https://www.dol.gov/newsroom/releases/opa/opa20170607

[1500] Administrator's Interpretation No. 2015-1, reference removed from the DOL website, see https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm

2. The worker's opportunity for profit or loss depending on his or managerial skill.
3. The extent of the relative investments of the employer and the worker.
4. Whether the work performed requires special skills and initiative.
5. The permanency of the relationship.
6. The degree of control exercised or retained by the employer.

13.10.2 Sharing in the sharing economy? UBER, Dynamex and beyond

In the central battleground of independent contractors vs. employee status, the on-demand companies epitomized by Uber and Lyft, in which customers and service providers are linked through smartphone apps, has engendered increasingly acrimonious regulatory battles at federal and state agencies and led to a spectacular number of cases in the United States.[1501] The circuit split on the status of Uber drivers is reflected in the problematic delineation as to who is an employee in the sharing economy sector.

In a round of Uber-related decisions emanating from the United States District Court of Northern California,[1502] Judge Edward Chen upheld the plaintiffs' class-action status. A major victor for the entire 'class,' his holding potentially permits approximately 240,000 California-based Uber drivers to bring their claims in front of a jury. In January 2017, SCOTUS granted *certiorari* to address a trio of cases that center on how the interaction between the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA) impact the enforceability of class- and collective-action waivers in arbitration agreements. The future of the Uber cases is uncertain until the Court decides on the future of employers relying on waivers.

Framing the central question in its *certiorari* petition, the NLRB inquired:

> Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in 'concerted activities' in pursuit of their 'mutual aid or protection,' 29 U.S.C. § 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. § 2.

Of relevance to the Uber cases and incumbent issues of classification is the claim in the 2016 Ninth Circuit case *Ernst & Young LLP v. Morris*.[1503] In *Ernst*, the respondent Morris maintained that the well-known accounting firm, *Ernst & Young* had violated the

[1501] Uber is involved in over 70 federal lawsuits in U.S. courts based on database searches in 2016.
[1502] U.S. District Court Northern California *O'Connor v. Uber Techs*., Inc., F. Supp. 3d, 2015 WL 1069092 (N.D. Cal. 2015); *O'Connor v. Uber Techs., Inc*., No. 13-cv-3826-EMC, 2014 WL 1760314 (N.D. Cal. May 2, 2014); *Mohamed v. Uber Techs., Inc*., F. Supp. 3d 2015 WL3749716 (N.D. Cal. 2015)
[1503] *Morris* v. *Ernst & Young LLP* No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016)

FLSA through a deliberate misclassification of employees resulting in the withholding of overtime wages. On appeal, the Ninth Circuit court, commonly regarded as the most liberal amongst the U.S. Courts of Appeal, held that *Ernst* was in violation of the NLRA. The plaintiff-employees had been required to sign a concert action waiver that precluded their rights to enter into a class action suit and were required to file separate arbitration proceedings in case of dispute. According to the Ninth Circuit, if a waiver mandated such separate proceedings, it violated not only the intrinsic nature of plaintiffs' claims but the object and protective purpose of the NLRA.

13.10.3 What is the proper classification for substitute musicians in choral ensembles, closely related to orchestral musicians?

A revealing ruling by the NLRB subsequently upheld by the D.C. District Court, which dealt with a group of musicians whose contracts are even less stable than orchestral CBAs, is of interest, as it accorded employee status to the most precarious amongst classical music performers, singers.[1504] In *Seattle Opera*, substitute choir singers, referred to as alternate choristers, who performed occasionally with the Seattle Opera were deemed to be employees.[1505] The singers supplemented the regular complement of 36 singers and were selected through an audition process. Similar to the U.K. system of deputizing, alternate choristers could attain a "temporary regular status" if they were selected to take the place of a regular member "on leave." The major difference between the categories of singers came in the form of financial remuneration: temporary regulars received a salary plus parking reimbursement, while alternate choristers earned a mere $20 per service capped at $214 per production. The D.C. Circuit emphasized the amount of control the Opera held over the auxiliaries, that was spelled out in the material details concerning their performance, attendance requirements, and the Auxiliary Handbook that specified the conditions of 'employment.' Revisiting *Darden*, the majority pointed out "that the Board can and should consider the common law definition of 'employee.'[1506]

The dissent was fast and furious, or to quote the musical musing of the majority

[1504] The vast majority of U.S. choirs even well-known groups associated with top-tier orchestras (example: The Cleveland Orchestra Chorus) are primarily volunteer groups. The Netherlands top choirs are both paid ensembles (Groot Omroepkoor and Dutch National Opera Chorus) more concerning the underpaid freelancers in the Dutch National Opera Chorus follows.
[1505] *Seattle Opera v. NLRB* No. 01-1127 (D.C. Cir. 2002).
[1506] Ibid., at 6 quoting *Nationwide Mut. Ins. Co. v. Darden* 503 U.S. 318, 322-23 (1992). "When Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship."

"delivered molto agitato"[1507] to decipher several inconsistencies and flaws in the majority reasoning. According to the dissent, the auxiliary choristers could best be described as volunteers who received a nominal reimbursement for expenses incurred such as transportation and meals taken in the course of their performance obligations. Erroneously, the tax status of the auxiliary choristers was not taken into consideration: the Seattle Opera did not list the auxiliaries on their payroll, nor did they withhold taxes from the small amount paid out. The NLRA and the FLSA offer similar markers as how to distinguish an employee from a volunteer. To distinguish a volunteer from an employee, an examination of the total payments "in the context of the economic realities of the particular situation" is paramount.[1508] To afford volunteers the right to bargain collectively ran against the basic tenet of rights for employees, as the former give freely of their time at will, and the latter are paid wages for work. "Everyone was deluded, thinks the Board except for the Board itself. The plain truth is the opposite. the court's review Board decisions to correct such aberrations. Too bad we did not perform that function today."[1509]

13.10.4 A step backwards: Lerohl leaves musicians in the dark

In *Lerohl v. Friends of Minnesota Sinfonia*, two musicians fought dismissal by bringing gender and disability claims against their employer, the Minnesota Sinfonia.[1510] The Sinfonia was an ensemble entirely comprised of freelance musicians. The case revolved around a central question of whether the pair of freelancers could be considered as employees or independent contractors in an ensemble that was by its very nature, parttime and freelance. Citing the element of control as key to a status determination, the court did not consider 'control' to be a key factor that determines the conductor's authority over the orchestra, nor did the court find that the Sinfonia's control of scheduling and other performance related matters was sufficient to hold that the Sinfonia exerted considerable control over its musicians. Perplexing but true, the court opted for an interpretation in which control does not refer to how the workplace controls the musician, but rather, the amount of control freelance musicians retain to accept freelance work in other venues. The court placed a high degree of persuasive authority in a factor that previous courts tended to gloss over: the Minnesota Sinfonia did not deduct withholding taxes, a fact that the *Seattle Opera* court found irrelevant to the employee vs. independent contractor debate.[1511]

[1507] Ibid., at 11.
[1508] See, FLRA 29 C.F.R. s 553.106 (b).
[1509] See dissent filed by Circuit Judge Randolph, *Seattle Opera*, *supra* at fn. 1505.
[1510] *Lerohl v. Friends of Minnesota Sinfonia* 322 F.3d 486 (8th Cir. 2003).
[1511] See, *Seattle Opera*, *supra* at fn. 1505.

To freelance musicians actively pursuing careers in the here and now, this interpretation is incomprehensible as 'control' beyond the workplace bears no relevance to what really goes on during rehearsals and concerts. Although the court showed some realization of the difficulties inherent to taking a decision with regard to an unfamiliar set of professional circumstances such as those encountered by freelance substitute orchestral musicians, their decision-making certainly provided no music to any listener's ears, rather a cacophony of chaos.[1512] Yet, instead of considering the *Seattle Opera* decision in terms of the majority finding, the *Lerohl* court opted to take heed of Circuit Judge Randolph's sole dissenter view as detailed above.[1513]

13.11 *Lancaster* to the rescue

In the waning days of 2011, the NLRB held that musicians playing for community orchestras in three states, Pennsylvania, Massachusetts, and Texas are employees, not independent contractors. The musicians of the Lancaster (PA) Symphony Orchestra took a brave step pinning their hopes on the benefits of union membership: the regional, part-time orchestra with a small core of 'regulars' contacted the local union to start the procedure. The orchestra's management resisted, maintaining that the musicians were freelancers, independent contractors who did not meet the requirements of employment under U.S. law.

The Regional Director's 'first instance' decision in *Lancaster* was based on a weighing of factors that the orchestral musicians shared with independent contractors. The amount of personal control freelance musicians maintains over their work schedules à la *Lerohl*, the fact that musicians are highly skilled professionals who provide their own tools of trade to perform the tasks required within their employment as performers swayed the pendulum in favor of independent contractor classification. In a 2-to-1 decision in *Lancaster*,[1514] the Board reversed the Regional Director's decision that the orchestra's musicians were independent contractors, remanding the case back to the regional board for action.

The Board majority's reasoning sheds an interesting light on the balance of factors to determine whether a worker is an independent contractor or employee. According to

[1512] See, *Lerohl*, *supra* at fn. 1510, here the court cites both *Darden* and *Reid*.
[1513] Ibid.,
[1514] *Lancaster Symphony Orchestra and the Greater Lancaster Federation of Musicians, Local 294 AFM 357* NLRB No. 152.

the majority, Lancaster musicians had a choice whether to perform in a given concert series or not, which weighs in favor of independent contractor status. Yet, the 'choice' factor is outweighed by other employer-control factors: the orchestral musicians had no control regarding their working conditions – from what they wear to how they behave on stage – and in many other respects are subject to strict control by the conductor. In *Lancaster*, the NLRB and the Circuit Court relied heavily on the significant amount of control the orchestra exerted on the way in which musicians' performance at the workplace is controlled. Several examples starting with the conductor's power to determine how musicians perform the score expressed strong control. "Musicians participating in an orchestra are, by necessity, subject to the control and scheduling of the conductor because such control allows the symphony to perform as a single unit."[1515] In its focus on the "control" factor, the court noted that the orchestra as controlling employer requires musicians to give their full attention, to "be attentive" throughout both rehearsals and performances, to show respect by not "crossing their legs" or conversing with one another during rehearsals enhanced the notion of employer control. While to the outside world this factor might point to an unusually strict, authoritarian manifestation, to the musicians, this factor is not an example of unusual control but a normal factor of the status quo of expected behaviors in rehearsal. Even at the onset of the rehearsal, musicians are expected to keep quiet, and as the court noted, reprimands are in order if a musician leaves her chair to talk to a colleague (even if the conversation relates to the music). The orchestra's meticulous specification of the ensemble's concert dress code was interpreted as another example of 'strict control.' Although musicians have some control over their work by choosing whether or not to bid on programs, "once they are selected to work in relation to a particular program, the musicians' control over their work time ends." The Board noted that the orchestra management exerts significant control over the musicians: it sets work hours, payment schedules, dress codes, and standards of musician conduct during rehearsals and concerts.

In its consideration of entrepreneurial opportunity factors key to the independent contractor status, the *Lancaster* court found that, beyond the 'confines' of their employment, the symphony's musicians were free to engage in teaching activities and attempt to find random freelance work such as church service work and wedding gigs. However, unlike the freedom associated with deputy players in the United Kingdom (the musicians could not deputize fellow musicians to replace them if they had to miss

[1515] See, *Lerohl, supra* at fn. 1510.

a concert), no recruitment opportunities existed whatsoever. The court concluded that although the musicians could avail themselves of "limited entrepreneurial opportunity," they did not gain additional meaningful work because of their particular employment with the symphony, a point that tipped the scales in favor of 'employee.' On appeal at the Washington D.C. Court of Appeals, the court opted for the Restatement factors that inspired what came to be known as the 'economic realities test' seminal within the determination in the high-profile *FedEx case*.[1516]

Board member Brian Hayes's dissent provides food for thought. Applying a multifactor analysis, Hayes argued that his colleagues on the Board erred by basing their judgment on an incorrect assessment of relevant factors. He also asserted that the factors that swayed the decision were of insignificant relevance to the bigger picture of orchestral employees working for the Lancaster Symphony. In Hayes's opinion, the central question in the case was "whether the musicians retain discretion to accept or decline to work with the employer and to play elsewhere." Concluding that freelance musicians hold that freedom meant that they could in theory work for multiple employers and take or reject jobs at will. Thus, freelance musicians demonstrate entrepreneurial characteristics that are part and parcel of the definition of an independent contractor. Considering the job opportunities for freelance classical musicians within a 100-mile radius of Lancaster, he concluded that the musicians were able to expand on their work opportunities to reap the benefits of working as professional musicians in 'nearby' cities including the mid-sized metropolises Allentown, Harrisburg, and Philadelphia.

The District Court framed its decision in deference to the NLRB's decision while acknowledging that the circumstances presented "two fairly conflicting points of view" containing elements of employee status and independent contractor status. Because the circumstances of this case thus present a choice between two fairly conflicting views, we must defer to the [NLRB's] conclusion that the Orchestra's musicians are employees."[1517]

On appeal in *Lancaster*,[1518] the United States Court of Appeals for the Circuit of the District of Columbia scrutinized the NLRB decision that granted the musicians "employee" status. In a King Solomon-esque 'share the wealth' ruling, the court acknowledged that although the "relevant factors point in different directions" and both sides brought sound, albeit "conflicting," positions to the fore; deference was

[1516] See, *FedEx Home Delivery v NLRB* 563 F3d 492 and Restatement factors.
[1517] Lancaster Symphony Orchestra v. NLRB No. 14-1247 D.C. Cir. 2016.
[1518] Ibid.,

shown to the NLRB's decision. To reach the fragile tipping point favoring "employee" status, the court reapplied the 10-factor test that had been recently put forth in two leading cases related to delivery services.[1519] This limited entrepreneurial opportunity, however, provides only miniscule support for independent contractor status; the Lancaster musicians could only increase their gig income by accepting jobs with other employers, scarce at best in the greater Lancaster area. And, according to the court's reasoning, if the musicians would opt to renege on a Lancaster Symphony performance contract, they would effectively have shut down their opportunity to earn a living as a musician. Had this quite minor entrepreneurial opportunity been given much weight, it might have engendered an almost automatic classification of many part-time workers as contractors. Yet as the Board explained, "[p]art-time and casual employees covered by the Act often work for more than one employer."[1520]

On the one hand, control was construed as a regulatory factor that allowed the musicians little leeway for personal opinion or action. According to testimony and the contractual obligations signed by musicians, the conductor exercised virtual "dictatorial control" over the musicians in terms of how they play, at what volume, and pitch. Furthermore, the orchestral management exercised great control over the musicians in terms of scheduling but also in minute details concerning "where and what they played, whether they could cross their legs, their posture and even what they could talk about during rehearsals. Work was "part of the orchestra's regular business."[1521] On the other hand, the relatively short period of real employment was taken into consideration: the orchestra engaged the musicians for a very short time period, in the relevant case, a mere 140 to 150 *hours* (emphasis added by the author) per calendar year. The agreements signed voluntarily by the musicians allowed them to work for all or part of the concert season without employment repercussions. Ostensibly, the musicians exercised some sort of entrepreneurial freedom as they could accept other music-related work for example devote time to teaching activities or accept itinerant, occasion-based gigs such as playing at private parties and community events.

13.11.1 Two unpublished NLRB decisions uphold Lancaster

Lancaster is not a stand-alone case; the NLRB issued parallel decisions in cases

[1519] See, *FedEx Home Delivery*, supra at fn. 1516; *Corporate Express Delivery Systems v. NLRB* 292 F.3d 777 D.C. Cir. 2002.
[1520] *Lancaster*, *supra* at fn. 1517.
[1521] Ibid.,

involving regional orchestras in other areas of the United States. Interestingly enough, in two unpublished decisions issued the following day, citing *Lancaster*, a NLRB Board held that the musician members of the *Cape Cod Symphony* (Massachusetts) and the *Plano Symphony Orchestra* (Texas) should be categorized as employees.[1522] The freshly settled *Lancaster* case was cited as the leading precedent, as the same analysis was used to determine employee status.

Taking a closer look at a freelance/gig musicians' work life, does *Lancaster* and the related *Cape Cod* and *Plano* decisions provide fair precedents within the sector? We could argue that musicians are free to take the work they accept, and, of course, free to turn it down. Musicians traditionally use their own instruments to perform, unless of course one points to an orchestral pianist who rehearses and performs on an instrument provided by the employer. Should this factor apply to the orchestral professional, would there be a classification difference between the orchestral violinist and the orchestral pianist? Should this add into the equation on the 'independent contractor' line of argumentation?

Quo Vadis? As the only two federal court cases about the status of orchestral musicians, *Lerohl,* and *Lancaster*, leave the orchestra in dissonance as to what the status of musicians might and even should be. Admittedly, the *Lancaster* court mentioned the discrepancy between the two decisions presenting two main reasons for differentiation. Firstly, *Lerohl* was a discrimination case, while *Lancaster* was an employment definition case. Secondly, the standard of review (see, *de novo* above) was different in the two cases. Do economies of scale play a role in an evaluation? Major orchestras, from the U.S. top-tier to the BIS orchestras in the Netherlands offer (or in the case of Dutch orchestras, used to offer) competitive salaries, paid vacation weeks, and other important benefits. However, unionized regional orchestras, from the ROPA members in the United States to the quickly decreasing number of Dutch regional orchestras, bargain for contracts at significantly lower pay scales than the top-tier ensembles and enjoy fewer benefits. Managers and freelancers at the lower end of the pay scale have opined that the 'employee' status significantly increases the financial burden on the smaller orchestras. Is it possible to validate such arguments? Inevitably, to deny the musicians protections-as-employees would legitimize a race to the bottom.

[1522] Board member Brian Hayes referred to *Lancaster* in his next-day *Cape Cod* determination, "Consistent with my dissent in *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (2011), I would grant the Request for Review, reverse the Regional Director, and find that the symphony orchestra musicians are independent contractors. Thus, I find it unnecessary to address the other issues in this case."

Yet, if orchestras are faced with the terrible dilemma of closing down or continuing with less, which option is actually the best? How do musicians respond at the end of the juridical day?

13.11.2 Fiddlehead **joins in to play the same tune as** *Lancaster*

A Regional Board's 2016 decision in *Fiddlehead*, regarding musicians who performed intermittently at a Boston-based theater played the same tune as *Lancaster*.[1523] Fiddlehead, the name of a theater company, not a reference to a stringed instrument, revolved on the issue of whether musicians who worked temporarily were entitled to the full array of NLRA's entitlements, or whether these musicians were independent contractors. To support the assertion that the musicians were in fact independent contractors, the company brought four factors to the fore:

1. Musicians were hired and performed on a show-by-show basis; those hired for one show were not necessarily employed at subsequent shows
2. Musicians are highly skilled workers
3. Musicians supply their own tools, instruments
4. Musicians were contracted at a flat fee, per service rate for rehearsals and performances as differentiated from a weekly or monthly salary.

The NLRB's Regional Director, however, weighed the factors differently, holding that the musicians were in fact employees, relying heavily on a different set of factors, namely:

1. The employer exercised recognizable and substantial control over the details of the musicians' work,
2. Musicians had negligible input with regard to rehearsal and performance schedules
3. Musicians were required to follow company-established dress code
4. Musicians did not have the potential for entrepreneurial gain based on their relationship with the theatre company (*Fiddlehead*) who had employed them.

At the ideal end of the employment spectrum, orchestral musicians, whether freelance or employed under CBAs, *should* be eligible for the benefits and protections of federal and state laws. And, to receive these benefits, musicians including all categories of contingents, should be recognized as employees, not independent contractors. It appears as if the NLRB espoused this all-embracing, pro-labor stance in the Obama and other Democratic presidential years. Indeed, the Regional Board decision reflected the

[1523] *In the Matter of Fiddlehead Theatre Company, Inc., and Boston Musicians Association et al.,* Case Number 01-RC-179597 (July 26, 2016).

Obama administration's oft-stated desire to expand NLRA protections to an expanded pool of workers previously shut out. However, drifting to a devil's advocate stance, the question arises: does the fact that the common law factors used to determine whether a worker is an employee are not weighted add to the politicization of Board findings? Is it not possible to posit that, had the *Fiddlehead* et al., boards considered the first four factors as superior evidentiary aspects of a gig musicians working life, the musicians would have been excluded from the NLRA?

The NLRB, the IRS, and the DOL rely on their own sets of factors that add to the complexity of how to reconsider the already complex work and work relationships in the 21st century. As to be expected from workers within the cultural sector, freelance musicians do not tick all the boxes, nor do they fit uniformly into the categories. Courts and government agencies developed these categories to serve other classifications of workers. Pundits in the music business worried about the direction board decisions would take as President Donald Trump's NLRB took shape. This brings up the question as to if the DOL and NLRB's expansive stance in favor of employees that took place during the Obama years do justice to the peculiar and precarious freelance musician world? Depending on how the analysis is shaped, freelance orchestral musicians' work shows elements of employment and elements of independent and entrepreneurial contracting. Considering the all-important and leading factor, control, the balance should weigh in on the musician as employee because a theatrical and/or orchestral organization directs all the terms of employment, from scheduling and attendance requirements to the performance dress codes.

13.12 Breaking news 2019: NLRB shuttles back to independent contractor standard

The Trump Administration's replacements of two Democratic NLRB members with Republican appointees, who reflect President Trump's anti-union stance, could well lead to a reverse-face of the NLRB decisions that granted groups of graduate student teachers at U.S. private universities the right to unionize in danger. Before turning to the well-publicized Yale-Columbia cases, the political nature of presidential discretion in appointing NLRB members bears repetition, as it led to an overrule of the 2014 *FedEx Home Delivery* case discussed in regard to *Lancaster*, above. Briefly, resulting from President Trump's pro-employer, anti-labor appointments at the NLRB, the pendulum moved back for freelance, gig workers-as-employees protected under the NLRA, to

precariously unprotected workers. To bolster this point, consider the ambiguously defined notion of "entrepreneurial activity," that became a prime determinant for employment status in *SuperShuttle DFW, Inc*.[1524] The *SuperShuttle* Board determined that the business opportunities afforded franchise shuttle bus driver-owners were considerable: the nonemployee franchisees paid fees to the company, owned their vans, and had the freedom to hire 'relief' drivers to take over shifts. Thus, these operators had ample opportunity to generate revenue, even in the face of SuperShuttle's substantial control regarding the franchise agreement and the non-compete clause limiting franchisees from seeking and taking work at similar companies. Critics found that the relationship of SuperShuttle drivers to genuine entrepreneurial opportunists who "take economic risk and have the corresponding opportunity to profit from working smarter, not just harder," was unsubstantiated.

13.13 The Ivies weigh in on employee status

At Yale and Columbia Universities, two prestigious Ivy League universities where doctoral students have become increasingly vocal with regard to 'employee' status, graduate students are of the opinion that the 'doctoral students' assist faculty.[1525] Their teaching responsibilities, according to Yale sources, take up approximately 1/6 of their time and are a part of their rigorous academic training.[1526] Graduate students do not pay tuition and are remunerated with annual stipends (depending on the university, approximately $32,000) and health insurance benefits. The principle that graduate students are indeed students who hold an academic rather than economic relationship with the educational institution was upheld in the much-discussed *Brown University*[1527] case in 2004 where the NLRB held that this particular group are not employees but "are primarily students and have a primarily educational, not economic, relationship with their university."[1528] At both universities, graduate students protested many aspects of their subordinate status including their right to unionize.

[1524] *SuperShuttle DFW, Inc., and Amalgamated Transit Union Local 1338* No. 16-RC-010963 (Jan. 25, 2019).
[1525] Although the term 'graduate students' is used to denote the category of 'students' seeking employment status, doctoral students is more appropriate for the category as master's degree students are also, 'graduate' students.
[1526] Information gleaned from a conversation with Karen Peart, Yale Office of Public Affairs & Communications: opac@yale.edu
[1527] See, *Brown University* 342 NLRB (2004).
[1528] Ibid, at 487.

In an amicus brief submitted by nine leading U.S. colleges and universities,[1529] the academic institutions distinguished between public and private educational institutions. The argument advanced: "[although the] economic model of graduate assistant service may well be true in the public sector where restricted public funding forces institutions to value the per capita cost of educating undergraduates and where doctoral candidates are not granted the level of support characteristic of preeminent private sector research universities."[1530] As public institutions (state universities) of higher learning fall outside of the scope of NLRA jurisdiction,[1531] another argument was brought forward (the 'economic advantage' argument) to support the anti-NLRA stance in the aforementioned amicus brief. According to this line of thought, the economic advantages of elite private university graduate students placed them in a different category than their counterparts at publicly funded institutions. A fear of union imposition into the higher echelons of academics shaped the viewpoint that collective bargaining could impinge upon academic freedom by giving free rein to an adversarial culture.

Significant to freelance orchestral musician cases, a closing question in *Columbia* is of interest: "If the Board concludes that graduate student assistants, terminal master's degree students and undergraduate students are statutory employees, what standard should the Board apply to determine whether they constitute temporary employees?"[1532] The university emphasized that these graduates were *student assistants* (highlighted by the author) 'casual' employees who had no realistic expectations of employment post-graduation. Is it not possible to assert that the 2010 NLRB decision in *Kansas City*[1533] and subsequent decisions related to 'intermittent' employees who have no direct expectation to continue their employment would have supported a move towards granting these casual/intermittent workers employee status? Ivy hopes ran high that the Board would be sympathetic to the universities' contention that granting employee status would be impractical in an academic setting, where the time limit of employment is traditionally understood as the graduation date.

[1529] Brown University, Cornell University, Dartmouth College, Harvard University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, and Yale University joined to submit the brief on February 26, 2016.
[1530] See, *The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia–GWC, UAW* Case 02-RC-143012 *Brief of Amici Curiae* p. 20.
[1531] Keep in mind, the NLRA governs labor relations of private employers. Public universities fall under state labor laws. One salient difference: in most states strikes by public employees are illegal whereas the NLRA permits strikes.
[1532] See, *The Trustees of Columbia*, *supra* at fn. 1530 at fn. 2 (4).
[1533] See, *Kansas City, supra* at fn. 1495.

In its landmark *Trustees of Columbia* decision, the Board overruled *Brown University* determining that graduate students are indeed employees who hold the right to unionize. The university's argument that traditional collective bargaining had no place within private institutions because graduate students received grant stipends did not sway the Board. The Board held that the significant economic component inherent to the relationship between universities, like Columbia, and their student assistants was a determinative factor overlooked in *Brown University*.[1534] Unquestionably, the graduate students "frequently [took] on a role akin to that of faculty, the traditional purveyors of a university's instructional output."[1535]

Turning to the temporary nature of employment that could have provided a bar to exclude student assistants from employee status, the NLRB rejected the university's assertion that the finite nature of the employment was determinative for status. Rather, the Board considered that, even if the master's and undergraduate student assistants' positions were comparatively short in tenure, these groups held a "community of interest with the unit or their ability to engage in meaningful bargaining." The "critical nexus between an employee's temporary tenure and the determination whether he shares a community of interest with the unit employees" as underscored by a 2003 precedent was leading.[1536]

Relying on *Kansas City* as a point of departure, the Board underlined that it had never ruled out the inclusion of temporary employees from the Act. "The logical consequence of the Employer's argument is that temporary or intermittent employees cannot exercise the rights vested in employees by §9 of the Act. However, no such exclusion appears in the definition of employees or elsewhere in the Act."[1537] Thus, in the holistic view of the Board, the wider group of student assistants encompassing Master's, undergraduate students, and PhD assistants could join as a valid unit to move forward in collective bargaining activities under the NLRA. The sole dissenter, Philip Miscimarra, who was soon to become President Trump's nominee for NLRB Chairman,[1538] raised the specter of disruption. In his opinion, if students were permitted to unionize, the potential for strikes and lockouts would "wreak havoc" on their education.[1539]

[1534] See, *Trustees of Columbia*, *supra* at fn. 1530.
[1535] Ibid, at fn. 104.
[1536] Quoting *Marian Medical Center* 339 NLRB 127, 128 (2003) at fn. 125.
[1537] Ibid, citing *Kansas City, supra* at fn. 1499.
[1538] Mr. Miscimarra served at the helm from the NLRB as Acting President from January 23, 2017 – April 23, 2017, and Board President from April 24, 2017 – December 16, 2017. He cited 'personal reasons' for not extending his term.
[1539] Ibid, dissenting opinion, Philip Miscimarra.

13.14 Where politics meets law: the NLRB

As President Trump has replaced Democratic NLRB members with Republican appointees who reflect the President's anti-union stance, NLRB victories such as the *Trustees of Columbia* and a gamut of 'on call' freelance musician cases hang by a thin thread. In Washington D.C., where politics meets labor decision-making at the NLRB, change arrived at its helm with the appointment and subsequent Senate confirmation of the Republican Peter Robb as General Counsel (GC) in 2017.[1540] The changing of the NLRB GC guard from an actively pro-labor Democrat, the union lawyer Richard Griffin (who hoped to expand employee benefits to wide-range of 'misclassified' workers), to the 'management-side' attorney Robb appointment reflects President Trump's anti-union, anti-labor stance, which was often communicated through the Commander in Chief's favored medium, Twitter.[1541]

Under Mr. Griffin's watch, a trailblazing memorandum written in 2015 and disseminated in 2016 regarding the *Pacific 9 Transportation* case stated that misclassification of individuals as independent contractors violates NLRA Section 7 with its restriction on the right to engage in concerted activity.[1542] Relying on the complaint mechanism under NLRA §8(a)(1), the memo stated that it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. The memo reads in relevant part: "Although the Board has never held that an employer's misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), there are several lines of Board decisions that support such a finding:

1. First, the Board has held that an employer violates Section 8(a)(1) when its actions operate to chill or curtail future Section 7 activity of statutory employees.
2. Second, employer statements to employees that engaging in Section 7 activity would be futile violate Section 8(a)(1).
3. Third, the Board has also found misstatements of law to constitute an unlawful interference with employees' Section 7 rights if the statement reasonably insinuates adverse consequences for engaging in Section 7 activity."[1543]

The only appropriate remedy in this case was for the NLRB regional office to order a cease-and-desist order to prevent ongoing and future violations of employee rights and the retirement for the employer in question to "rescind any portion of its agreements"

[1540] Mr. Robb was sworn in as General Counsel NLRB on November 17, 2017.
[1541] A selection of President Trump's labor/union tweets are readily available @realDonaldTrump
[1542] See, *Pac. 9 Transp., Inc.*, NLRB Div. of Advice, No. 21-CA-150875, 12/18/15 [released 8/26/16]).
[1543] Ibid., *Advice Memorandum NLRB* http://hr.cch.com/ELD/AdvicememoPac921_CA_150875_12_08_15_.pdf

that would misclassify workers as independent contractors.[1544] From its very onset, the NLRB was envisioned as an expert panel with the heavy responsibility to adjudicate the NLRA. Partisan politics should play absolutely no role within the system, yet harsh reality teaches us that what ought to take place lies in the realm of the utopian. From the halls of academia to the epicenters of political action, scholars and practitioners have called for legislative reforms to revitalize the NLRA in order to keep step with rapid changes in the nature of employment.[1545]

Contemplating the wealth of NLRB cases with a locus within the orchestral arena, most have pointed toward a wide interpretation of 'employee,' granting that status to musician-workers in the plethora of cases discussed here. Yet, taking the politically sensitive nature of the NLRB into consideration, the triumph for musicians-as-employees is certainly not memorialized in black letter law. To quote the ever-astute Kevin Case, legal expert in the field of U.S. orchestras, "such determinations are made on a case-by-case basis, however, and can ebb and flow with the political winds depending on which presidential administration appoints the five Board members of the NLRB who adjudicate cases under the NLRA."[1546]

13.15 A third category? Special ordinances in special places for special cases?

In the special case of Uber and Lyft drivers, the Seattle, Washington City Council took matters into its own hand to level the playing field between the transportation network drivers and their employers who have been recalcitrant to grant the rights to organize under union protection. The bill allowing these drivers the right to unionize was passed with a 9-0 vote in December 2015. The Municipality's website provides additional information for Ordinance 125132 in effect as of January 2017.[1547] "The law allows drivers to decide if they want to be represented in bargaining efforts with their respective companies regarding issues such as payments to drivers, vehicle safety, and other matters of mutual interest."[1548] This element of choice is widely embraced in the

[1544] Ibid.

[1545] From Richard Freeman and Benjamin Sachs at Harvard Law School in the U.S. to leading lights in Europe, the clarion call to rethink the balance between flexible employment and social rights has gained increasing momentum post 2007-2008 financial crisis.

[1546] Posted in Kevin Case's enlightening blog *Bargaining Notes*, available at: http://www.caseartslaw.com/CAL/2019/11/28/festivals-behaving-badly/?fbclid=IwAR1Q_CLBhvmOA-WotY3XUtKP3OYdelNMS1iMbxmCDXdD64n1qx6hq5G0TP4

[1547] For the Ordinance text, see, https://seattle.legistar.com/View.ashx?M=F&ID=4705435&GUID=E441CDF8-7BB6-4857-ABC3-D90F302A312E

[1548] See, http://www.seattle.gov/business-regulations/taxis-for-hires-and-tncs/for-hire-driver-collective-bargaining

wishlists of freelance musicians both in the Netherlands and the United States who have started to unite in an attempt to gain more say in their employment futures.[1549]

13.15.1 The California 1099 Self-Organizing Act

The first legislation to introduce a middle road between the full protections of the NLRA reserved for employees and the lack of protections afforded those classified as independent contractors was introduced in California in 2016. The bill carves out a 'third-way forward' in the employee vs. independent contractor debate as it offers 'pseudo' union protections for a hybrid category of workers, 'hosting platform' contingent workers to gain collective bargaining powers. Taking advantage of the NLRA's omission although intended to alleviate the uneven playing field for share-economy workers in companies typified by Handy, Lyft and Uber, the bill could have ramifications for all gig economy workers. State Representative Lorena Gonzalez introduced Assembly Bill No. 1727 as an amendment to the California Labor Code to legalize 'self-bargaining' units for a minimum of ten workers in 'non-protected' hosting platform industries.[1550] Noting that the NLRA had not been amended to embrace the rights of the neglected category of independent workers, while taking notice of the soaring number of contingent workers in California and the runaway profits of the aforementioned companies,[1551] Gonzalez opined, "we have this Wild West economy right now that is being conducted with very few or no rules. It's not fit for the workers, and ultimately not fit for our country."[1552]

Could the California Act serve as a model for legislation for other forms of gig work? And, if so, what would be the basic starting-off point for a definition of a protected gig worker should this model of self-organization be applied? Seth Harris, a faculty member at the Cornell University School of Industrial and Labor Relations, describes this legislation as: "a dramatic departure from traditional labor law. . . it would create what some people call a 'members-only' or minority union bargaining relationship wherein. . . you just need to get 10 or more people working for the company to say they

[1549] More information concerning these 'wishlists' provided in the *Coda: Quo Vadis?*
[1550] Section 1 of Amended Bill 1727 describes hosting platform work as follows:
"A new form of work has proliferated in which individuals work by the job through an electronic platform, such as the Internet or telephone. These individuals are hired through these hosting platforms to perform short-term work, usually of a day or less, for multiple customers."
[1551] According to UC Berkeley's Labor Center 2016 surveys, depending on the sector surveyed, percentages registered in the 'gig economy' rise as high as 8,5% of California's total workforce. Unregistered laborers remain unaccounted for. http://laborcenter.berkeley.edu/what-do-we-know-about-gig-work-in-california/
[1552] Representative Lorena Gonzalez as quoted in a *Los Angeles Times* article. http://www.latimes.com/business/la-fi-gig-workers-bill-20160310-story.html

want to bargain together with the employer. And that's enough. That does not exist in U.S. federal, private sector labor law."[1553]

Scratching beneath the surface of the California Act, it is important to note that this piece of legislation allows for collective bargaining without union representation. Although admirable in conception, this unregulated approach to bargaining does not necessarily improve the gig workers' position with regard to their employer. After all, an inexperienced group of 10 workers doth not make for a strong bargaining unit and could easily be bullied by a strong employer. Another point worth mentioning is that the bill does not take a step forward in the quest to reclassify workers or for that matter, allow for a hybrid classification for gig workers.

13.16 If it looks like an employer, is it an employer? U.S. courts tackle joint employers

A question that reoccurs amongst freelance musicians in multiple jurisdictions is 'how can one determine who is your real employer if there seems to be a chain of command between various employers?' For gig musicians who play 'club dates' at hotels and casinos, this is a common situation: hotel contracts for service state that the musicians hired are employees of the hotel *as well* as the employees of the hiring agency. And, where joint-employee-ship exists, joint employers are a major part of the picture. Instead of one entity serving as the employer, two or more employees hold the responsibility for a wide scale of obligations towards their workers including wages, benefits, and liability responsibility. Increased liability could make a joint employer responsible for workers that fall out of the employer's actual range of control.

Unions are deeply concerned with issues related to joint employers most particularly in 'precarious' industries exemplified by fast food and home care. In the U.S., when workers at a particular local franchise of the national Burger King restaurant chain wanted to unionize, they were obligated to prove that the mother company or parent organization shared control with the local franchise. Joined by worker's rights advocates, unions support a wide approach to the concept of the joint employer to maximize workers' participation in workplace bargaining. The standard corporate response suggests that 'broader liability brings unfair responsibility for workers beyond

[1553] Professor Harris quoted in "Pando: The 1099 Self-Organizing Act: Well done, sharing economy startups" at: https://pando.com/2016/04/21/1099-self-organizing-act-well-done-sharing-economy-startups

the actual reach of control.'[1554] The challenges to prove joint control were well-nigh insurmountable until the NLRB's 2015 landmark. Before turning to cases involving orchestral musicians, an analysis of the leading joint employer cases follows to provide evidence that U.S. courts are still puzzling over the issue of how to determine joint employer standards.

In *Browning-Ferris*, handed down on August 27, 2015,[1555] the Board provided an expansive interpretation concerning joint employment holding that if two or more employers *both* shared 'actual direct and immediate control' over the essential terms and conditions for a particular group of workers, these employers (two or more separate legal entities) could be considered joint employers. To qualify as joint employers, decisions on hiring and firing, salary and benefits, and employee disciplinary actions must have been taken in concert. Under the strict criteria set out in *Browning-Ferris*, the joint employer relationship is the exception rather than the rule, and very difficult to prove in most employment situations. Bargaining obligations can be imposed on multiple employers if they "share or codetermine those matters governing the essential terms and conditions of employment," adding the strong caution "all of the incidents of the relationship must be assessed."[1556]

With the rise of the franchise industry (ranging from the fast-food industry in the 1950s to a wide range business endeavors including childcare, healthcare, and IT industries in 2000) the legal question arose as to who is responsible when labor infractions take place. If there are, for example, workplace safety or overtime issues, should the contingent hire address complaints to the local franchise owner, or the national corporation?

Applying common law principles in the thirty-year period that preceded *Browning-Ferris*, the NLRB held that the core element in deciding whether or not a 'group' of employers were putative joint employers "was whether the putative joint employer's control over employment matters is direct and immediate."[1557] Returning to the crux of 'who is a joint employer' in *Browning-Ferris*, the Board held that such a relationship could be established if the alleged joint employers have the ability to share control

[1554] Gleaned from a variety of media sources: *Washington Post*, *New York Times*, and industry blogs reporting on *Browning-Ferris*.
[1555] 362 NLRB No. 186 (2015), petition for review docketed *Browning-Ferris Indus. of Cal. v. NLRB*, No. 16-1028 (D.C. Cir. filed Jan. 20, 2016).
[1556] *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982).
[1557] See, *Airborne Express* 338 NLRB 597, 597 fn. 1 (2002) citing *TLI, Inc.*, 271 NLRB 798 (1984); see further, *Summit Express Inc.*, 350 NLRB 592, 592 fn. 3 (2007).

of the employment relationship. More importantly, if the 'potential 'exists for joint control, regardless of whether it is exercised or not, a joint employment relationship could conceivably exist.

In its analysis of the borders of 'potential control,' the Board broadened the concept in finding that minimal fiscal control was enough to establish a standard of potential control without the demands of a higher level of direct and/or immediate control. Much criticized by Board dissenters and many scholars,[1558] this relaxed control standard opened the floodgates of joint employer responsibility to all types of corporate entities, including subordinates. In an additional far-reaching clarification, the Board stated that it would move beyond a consideration of measures such as discipline, firing, and hiring to consider the all-important control factor. Issues such as the putative joint employer's control work assignment, the number of workers to be hired, and scheduling could be regarded as determinative factors. Important to the advancement of collective bargaining, *Browning-Ferris* established that a joint employer would be obligated to participate in collective bargaining related to the subject areas that the employer controlled.

At its most fundamental level, the profound differences in philosophy, usually articulated on party lines between Democratic and Republican members of the NLRB, are highlighted by decisions that reflect the changing political makeup of the Board. The NLRB majority showed loyalty to President Obama's stance on upholding the pillars of a solid labor law environment during his two-term presidency.[1559] The Board took note that the existing joint-employer approach was "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships," and vowed to "better effectuate the purposes of the Act in the current economic landscape."[1560] The slippery slope of changes in the environment in which employees were no longer part of 'the firm,' but instead nontypical workers hired by franchises and staffing agencies pushed workers out of the sphere of protection created by labor legislation and supported through the NLRB and court decisions. A subsequent 2016 NLRB decision, which focused on the employer's consent to include both regular employees and jointly employed workers within the same bargaining unit, has been crucial to grant additional rights to agency workers alongside their colleagues at the 'mother' or 'user' firms.[1561]

[1558] Consider the criticism mounted by the dissenters Board Members Miscimarra and Johnson, not to speak of a glut of scholarly opinions and blogposts on the subject readily available at 'Criticism *Browning-Ferris*.'
[1559] NLRB Chairman Mark Gaston Pearce and Members Kent Hirozawa and Lauren McFerran voted in favor.
[1560] *Browning-Ferris*, *supra* at fn. 1556, slip op. at 1.
[1561] *Miller & Anderson, Inc.,* 364 NLRB No. 39 (7 July 2016) Case No. 05-RC-079249.

13.16.1 Joint employers in the orchestral sphere

The NLRB's expanded concept of a "joint employer" finds its application to orchestral musicians in a case involving Bard College's The Orchestra Now (TON). To set the tone, a look at the *Hy-Brand* case decided in 2017 is useful. Decided when a Republican majority controlled the NLRB, the *Hy-Brand* panel articulated that the majority in *Browning-Ferris* had taken it upon themselves to move beyond Congressional mandate and "upend decades of labor law precedent and probably centuries of precedent in corporate law."[1562]

In *Hy-Brand*, two Iowa-based construction companies with seemingly insignificant employment-related links to one another, Brandt Construction Company and Hy-Brand Industrial Contractors, were owned jointly by four individuals, Charles Brandt and his three sons. In an attempt to protest low level pay, negligible benefits, and to bring safety issues to the fore, two employees of Brandt and five employees at Hy-Brand went on strike; these seven employees were fired. After an administrative court held that the 'same ownership' was responsible for the seven illegal firings the case was brought to the NLRB. The Board held that the administrative judge's holding was correct albeit based on an incorrect standard for determination. The judge had applied the standard for joint-employers under the *Browning-Ferris* doctrine, which the Board stated was a 'distortion' of common law standards.[1563] The Trump-appointed Board turned its back on *Browning-Ferris* and shifted back "to the principles governing joint-employer status that existed prior to that decision."[1564]

Overturning *Browning-Ferris* signaled a move back to the previous joint employer standard, which called for a definitive proof that both employers exercised direct control over one another's operations. Franchises and other forms of satellite operations could easily escape this high standard of proof through a complex system of indirect financing that rendered an assessment of 'direct control' improbable. Yet, the *Hy-Brand* victory for the corporates was short lived due to a rather spectacular turn of events relating to a successful conflict-of-interest charge mounted against NLRB Board member and *Hy-Brand* Board adjudicator, William Emanuel. Prior to his appointment to the NLRB Board, Mr. Emanuel's law firm represented one of the parties in the Browning-Ferris litigation; thus, Mr. Emanuel should have sought recusal from the *Hy-Brand* panel, as the case was closely linked to *Browning-Ferris* according to a report

[1562] *Hy-Brand Industrial Contractors, Ltd., and Brandt Construction Co.,* 365 NLRB No. 156 (2017),
[1563] A 'distortion of common law' standards refers to the move away from the precedent previously set by the common law agency test.
[1564] See, *Hy-Brand, supra*, at fn. 1562 at *1.

issued by the NLRB's Office of the Inspector General.[1565] As Mr. Emanuel was found to have breached Presidential Executive Order 13770,[1566] the NLRB was forced to vacate its *Hy-Brand* decision.[1567] All's well that ends well for a wide NLRB-induced standard for joint employer determination? Cautious celebration at best as an examination of the course of U.S. jurisprudence teaches that cases and even legislation that focus on workers vs. employer's rights tend to become highly politicized.[1568]

13.16.2 Wang: variations on a theme with a joint-employer element

A 2016 NLRB decision regarding musicians who performed intermittently at a Boston-based theater Wang (WTI), transposed *Juilliard* into yet another key.[1569] Like *Juilliard* and *Kansas City*, *Wang* revolved on the issue of whether or not a freelancer who performs services intermittently 'on call' at a theater is an independent contractor or an employee able to benefit from NLRA entitlements. Citing both aforementioned cases to establish the special eligibility test for irregular employment, the NLRB Board (Region 1) was consistent in its support of employment status for 'on call' freelancers, no matter how irregular their employment patterns seemed to be. WTI argued that the irregularity and unpredictability inherent to freelance work engenders a situation in which different musicians perform for each and every performance thus obliterating any notion of a pattern of stable work. Basing their decision on *Juilliard* in which, as a memory refresher, a mere two productions for a total of five days over a one-year period or fifteen days in two years was the baseline to establish employment, the Board found that it was precisely this 'special circumstance,' this unpredictability and lack of regular income characteristic of entertainment industry employees, whose "irregular employment patterns" that needed rectification. The small group of seventeen freelance musicians should suffer a denial of the benefits afforded by NLRA protection "simply because they have not worked in a year."[1570]

[1565] David Berry's report concerning Member Emanuel's participation in the Board's December 14, 2017, Decision and Order is posted on the Board's website ("OIG Report Regarding *Hy-Brandt* Deliberations" available at www.nlrb.gov).

[1566] For the full text of Presidential Executive Order 13770 that came into effect on January 20, 2017, see, https://www.whitehouse.gov/Presidential-actions/executive-order-ethics-commitments-executive-branch-appointees/

[1567] NLRB Order Vacating Decision and Order and Granting Motion for Reconsideration in Part, February 26, 2018.

[1568] A mere reflection on the changes wrought by Taft-Hartley to the NLRA brings this point home.

[1569] *The Wang Theatre, Inc. d/b/a Citi Performing Arts Center and Boston Musicians Association, a/w American Federation of Musicians Local Union No. 9-535, AFL–CIO* Case 01–CA–179293
November 10, 2016.

[1570] Ibid.,

Beyond the aforementioned points, *Wang* marks an interesting variation within the context of musicians' employment cases in terms of a theater's control and responsibility with regard to freelance musicians hired to perform. Customarily, the show's producer, not the theater, is deemed to oversee all employment-related issues, most importantly hiring and firing. If the local union and musicians sought bargaining rights, the theater was not the sole employer. At best, a case could be made for joint employer relationship between Wang, and the individual producers of the shows presented. The Board disagreed, citing a precedent that was based on *Wang* and the erstwhile 2004-2007 bargaining agreement with the very same union that sought to *reestablish* (emphasis added by the author) bargaining rights for the musicians who were hired to perform at the theater.[1571]

13.16.3 The American Symphony Orchestra conflict

Less of a lawsuit and more of a sign of the times, another conflict arose after the renowned American Symphony Orchestra, a venerated New York-based ensemble, lauded for decades of commitment to presenting cutting edge programs at Carnegie Hall ran into financial difficulties. In program notes written for the orchestra's 50th season in 2012, Music Director Leon Botstein opined, "the real problem is that the very wealthy no longer consider it their civic responsibility to contribute to the traditions of the symphony orchestra. Their attentions have turned elsewhere."[1572]

In what was called a 'belt-tightening' move, the orchestra's prestigious concert series at Carnegie Hall and another New York venue, Symphony Space, was cut. Alongside its New York City programming, the American Symphony was a regular guest at the performing arts center located in upstate New York, on the campus of Bard College. Mr. Botstein, Bard's President since 1975, was closely involved in the orchestra's presence on 'his' campus.

In 2015, Bard launched a new orchestra, The Orchestra Now (TON). In terms of repertoire and presentation, TON closely resembled the American Symphony. TON's personnel were certainly different from the seasoned freelancers who made up the ranks of the American Symphony: TON operates as an educational operation in which advanced students receive Bard College degrees and performance experience. The

[1571] Ibid.,
[1572] As quoted by Michael Cooper. "American Symphony Orchestra Trims Programs" *New York Times* March 10, 2015.

TON series was offered at both Bard College and in the same prestigious New York City venues as the American Symphony series.

Members of the American Symphony, stunned by their loss of work that bore a strong causal relationship to the formation of TON, queried the union, American Federation of Musicians (AFM) Local 802, if it would be possible to assert that the American Symphony Orchestra and Bard College are joint employers under the new standard, discussed above. If so, would the work undertaken by TON have coverage under terms of the pre-existing contract between Local 802 and the American Symphony Orchestra? The overlap, much related to the position of Mr. Botstein at both organizations was also evident after closer examination of the American Symphony's financial statements. Mr. Botstein and his staff were integrally connected to both organizations.

The musician members of the American Symphony anticipated that the lack of specific determinative criteria in the broad *Browning-Ferris* decision would come to their aid to prove that both Bard College and the American Symphony were in fact, joint employers. A full consideration of Bard College's responsibilities regarding the ensemble could not prove definitively joint employer status. Nonetheless, even though the link was tenuous at best, Bard College eventually did return to negotiate and, as a partially happy ending, the mastermind who conducted both orchestras helped broker a solution in which the advanced student ensemble TON would not directly encroach upon the American Symphony's work. The American Symphony found several new sponsors and announced an adventurous, albeit streamlined, 2018-2019 season.[1573]

13.16.4 Congressional backlash: the "Protecting Local Business Opportunity Act" takes on joint employers

On December 1, 2015, members of the U.S. House of Representatives proposed a bill to clarify the definition of joint employers in a reaction to the NLRB's decision in *Browning-Ferris*.[1574] Designated as the "Protecting Local Business Opportunity Act," the bill called for amending NLRA §2(2) to read, as follows:

> "Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act **only** (emphasis added by the author) if each employer shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate."[1575]

[1573] See, https://www.broadwayworld.com/article/American-Symphony-Orchestra-Announces-2018-19-Season-20180626
[1574] The proposed bill recorded as: H. R. 3459 [Report No. 114–355]
[1575] See, the proposed bill (now quashed) at: https://www.govtrack.us/congress/bills/114/hr3459/text

The proposed bill marked an attempt to mitigate the expansive interpretation of the "joint employer" doctrine set forth by *Browning*. Under the proposed bill, the probability that staffing agencies and similar employer-employee arrangements would be deemed "joint" relationships would diminish leading directly to the observation that these companies would 'escape' the unfair labor practice and collective bargaining requirements of the NLRA. The proposed legislation did not pass both houses of Congress, and thus lies dormant.

A momentous about face during Trump's first year 'in power' showed the impact of the politics close to the surface at the NLRB. Voting along predictable party lines,[1576] in *Hy-Brand*, the circle has come around quickly: the pre-2015 standard that clarifies that a joint-employer must exercise direct and immediate control over contingent workers at a franchise or similar operation has been fully restored.

13.17 The role of the states: what to watch for in the U.S. legal landscape in employee-independent contractor determinations

The role of the states in enacting legislation should not be underestimated. Consider the minimum wage example: federal legislation has set the wage at $7.25, unchanged since July 24, 2009.[1577] States are free to determine minimum wages above the national level; both Massachusetts and Washington lead the nation with their minimum wage 2017 to $11.[1578] In 1986, the state of New York added the specific category of professional musicians and other performing artists amongst its Chapter Three list of 'categories included for coverage' under the New York State Workers Compensation Law and Unemployment Compensation Law. The definition reads, in relevant part:

> *"Employee shall include, for purposes of the Workers' Compensation Law, a professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. The party that is listed in the contract as the musician's or person's employer is responsible for providing workers' compensation coverage. "*[1579]
> **Engaged in the performing arts** *shall mean performing service in connection with the production of or performance in any artistic endeavor, which requires artistic or technical skill or expertise. WCL §2 [4]*

[1576] The three Republican Board members for, the two Democrats against.
[1577] See, https://www.dol.gov/whd/minimumwage.htm, for further relevant information.
[1578] See, https://www.minimum-wage.org/wage-by-state
[1579] See, http://www.wcb.ny.gov/content/main/Employers/EmployerHandbook.pdf

In its Administrator's Interpretation, the DOL issued a warning that as a result of the FLSA's expansive definition of the verb 'employ', "most workers are employees under the [Act]."[1580] The Trump administration's much-touted 'anti-labor' stance has steered federal enforcement away from decision-making on the issue, de-prioritizing misclassification. Most likely, the courts and state legislators in pro-labor states (like California) will take over where the federal government slacks. Of particular interest at the state level is the California Supreme Court's decision in *Dynamex Operations West Inc. v. Superior Court* a case that centered on the status of delivery drivers for a nationwide package and document delivery company. [1581] At issue were California wage orders that impose strict obligations relating to minimum wages, overtime, and meal/rest breaks; it almost goes without saying that Dynamex considered its drivers to be independent contractors rather than employees. The court used a far-reaching definition of employee relying on California's Industrial Welfare Committees (IWC)[1582] expansive definition of the verb 'to employ' as 'to engage, suffer or permit work." Under the IWC's definition, an employer is "any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."[1583] In its decision, the court deviated from precedent in the *Borello* definition by applying an "ABC" test in which all three factors must apply cumulatively:

> A) 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 such work and in fact;
> B) the worker performs work that is outside the usual course of the hiring entity's business;
> C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

13.18 The supervisory-managerial exclusion

As reiterated in the brief survey of NLRA history above, the U.S. Congress sought to protect workers' rights by granting them the right to 'self-organize,' join and assist in the formation of labor organizations, and bargain collectively with the aid of representation. Indeed, the 1935 NLRA had lofty ambitions with its expansive

[1580] See, https:www.dol.gov/whd/workers/Misclassification/Al-2015_1.htm
[1581] *Dynamex Operations West Inc. v. Superior Court* 179 Cal.Rptr.3d 69, 77 (Cal. Ct. App. 2014).
[1582] The IWC refers to a state agency that is tasked to regulate wages, hours and working conditions. The means to this end are called 'wage orders.' Entertainment workers are included within the specific occupations governed by wage orders. governing specific industries and occupations.
[1583] Cal.Code Regs., tit. 8, § 11090, subd. 2(D).

definition of employees. We have seen how politically motivated follow-up legislation and SCOTUS has whittled away at that definition. In a sharply focused article written in 1949,[1584] Robert Leaner points an accusing finger at the Court for denying certiorari in *Foreman's Association*, a case that focused on the 'third arm' of U.S. labor, the supervising 'foremen' in the 1940s.[1585] According to Leaner, the THA and the recasting of 'employees' broke the powerful Foreman's Union (FAA) and weakened industrial relations significantly post-WWII.

> *"Foremen unionized because they saw the necessity of doing so. Although some industries were achieving advances in wage scales and improving conditions, the spread between production workers and foremen was narrowed as gains by supervisors lagged behind. When it became clear to the subordinates, they turned to collective bargaining. A large number of employers bitterly resisted organization of their supervisors."*[1586]

The THA expressly removed managers and supervisors from "employee" status thereby removing them from the NLRA's protective shield. In essence, the Act mitigated the NLRA requirement that a supervisor must direct the work of another employee and perform another function to meet the "supervisor" requirement. The impact was directly palpable, as millions of "employees" – including the 'foremen' – were reclassified as "supervisors."[1587] Supervisors are still specifically excluded from the NLRA's protection. Whether an individual qualifies as a "supervisor" now depends on three important factors, enumerated in NLRA §152(11):

> *"The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."*[1588]

Besides for answering to an exhaustive list of characteristics, the 'supervisor' must utilize independence in his/her exercise of judgment. Moreover, the supervisor must exercise his/her authority in the interest of the employer. To answer the complex questions posed by such an extensive number of characteristics calls for intensive factual determination.

[1584] See, Robert D. Leiter. "Supervisory Employees and the Taft-Hartley Law" 1949 pp. 311-320.
[1585] See, *Foreman's Association of America v. L. A. Young Spring & Wire Corp.*, 21 LRR 168 in response to L. A. Young Spring & Wire Corp. v. NLRB 163 F. 2d 905 1947.
[1586] See, Robert Leiter, *supra* at fn. 1584 p. 313.
[1587] Ibid.,
[1588] 29 U.S. Code § 152. Definitions, available at: https://www.law.cornell.edu/uscode/text/29/152

A significant number of legal scholars and political commentators have turned their attention to the viability of the 'antiquated' NLRA, posing questions as to the legislation's suitability to adapt to changing models of labor organization and economic recession and globalization. The 1935 Act governs employees' rights to organize: to form unions, to bargain collectively. The brainchild of the New Deal's 'framers,'[1589] the NLRA defines the term "employee" broadly. During its formative years, SCOTUS concurred by including any "employee," including "supervisors," in that definition.

In 1947, taking heed of what Polanyi would dub 'neo-liberal dystopia' and the demands of 'big' business, the previously discussed THA was passed. To reiterate, the THA not only excluded supervisors from the definition of "employee," but changed the NLRB's two-part requirement that a supervisor *both* direct the work of other employees *and* perform another stated function to permitting direction alone to suffice for supervisor status.[1590] Thus, in one fell legislative swoop, workers who had enjoyed the protection of the NLRA lost their power to unionize and bargain collectively. The NLRB and U.S. courts have grappled with the definition of "supervisor," and excluded many categories of employees along the way ever since.

Turning to the category of orchestral musicians, the question arises as to whether certain sub-categories in an orchestra, namely principal players and/or section leaders fall within the "employee" or "supervisor" category. In recent years, some U.S. orchestras have experimented with joint management-musician committees, variations on the theme of works councils and codeterminative labor-management paradigms, taking inspiration from their European counterparts.[1591]

Does this departure from the classic U.S. industrial labor-management model impact the status of these musicians as employees under the NLRA? In 1975, "[f]rom the Rochester Philharmonic Orchestra, usually a source of harmonic strains of Mozart or Sibelius, comes the dissonant chord of a labor dispute" relating in part to the 'supervisor' question.[1592] Much of the case in which a conductor purportedly attempted to dismiss musicians essentially focused on the union's attempt to organize. It provides a clear

[1589] See, Mark Barenberg. "The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation" 1993 for a politically sensitive history of the NLRA.
[1590] Karl Polanyi. *The Great Transformation* 1957 reprint.
[1591] The Royal Concertgebouw Orchestra (RCO) operates on a special system unlike any other Dutch orchestra in which musicians serve on the Board of Trustees In two oft-mentioned leading examples, the self-governing Vienna Philharmonic, and Berlin Philharmonic Orchestras operate under a system of shared managerial/musical responsibilities.
[1592] *NLRB v. Rochester Musicians Assn*., 514 F.2d 988, 922-993 (CA2 1975).

reference to the 'reservoir doctrine' that was set aside in the *Florida Power & Light* decision in 1974.[1593] The rationale of that doctrine is that supervisors are a "reservoir of manpower available and likely to be chosen" to take on eventual leading positions as collective bargainers or grievance adjusters:

> *"The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1) (B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in the capacity as, grievance adjuster or collective bargainer on behalf of the employer."*[1594]

Since the demands inherent to 'union discipline' could affect the supervisor's loyalty to the employer, the employer would be restricted in his choice of future representatives.

13.18.1 Jurisdictional standards applicable to 'supervisors' in orchestras

Leading cases revealing circuit splits and NLRB cases (a 2006 lineup for starters) that turn on a definition of 'supervisor' will pass further review. An added variance in the typology of employer-employee relationships in the orchestral world brings other NLRA-related questions to the fore. In 2016, a principal player from the then locked-out Saint Paul Chamber Orchestra (SPCO) took on an additional position as senior artistic director with that organization.[1595] One of the most noteworthy orchestral venues in terms of experimental models of labor organization, the SPCO may well have taken its novel appointment from the pages of European orchestral history where shared supervisory/performing positions are not uncommon.[1596]

Reacting swiftly, the AFM moved to file charges with the NLRB against the SPCO for unlawful interference with a labor organization. Is this NLRA employment 'edifice' still standing for musicians employed in the United States in light of the "supervisor" exclusion and this recent SPCO issue? And further, do interpretations of the NLRA uphold the Act's original and lofty goals: to level the employer-employee playing field, to bring equality into the employer-employee relationship? Or are courts' interpretations of the NLRA contributing to its demise?

[1593] *Florida Power & Light Co. v. I. B. E. W. Local 641* 417 U.S.790 (1974).
[1594] Ibid.,
[1595] The SPCO announced on its website, with effect 2013-2014 season "Kyu-Young Kim, principal second violin of the SPCO as well as the orchestra's Senior Director of Artistic Planning, is one of the most versatile and accomplished violinists of his generation. His appointment as the SPCO's head of artistic planning marks the first time an SPCO musician has served in a senior management role." At present, Mr. Kim has been promoted to SPCO's Artistic Director in January 2016. Information available at: https://content.thespco.org/people/kyu-young-kim/
[1596] Ibid., further discussion about the RCO system is found in the *FAQs*.

In *NLRB v. Kentucky River Community Care Inc.,* (*Kentucky River*) decision of 2001, the Board's attempt to lend a categorical exception to twelve registered nurses (RNs) at a community nonprofit mental health care facility failed to convince SCOTUS.[1597] The care center maintained that the RNs were supervisors because their actual daily duties included making staffing decisions, and overseeing medical services that entailed a modicum of independent decision-making.[1598] The NLRB argued that nurses-as-clinic-subordinates act in the interest of the patients, and not the employer. In a close (5-4) decision, SCOTUS decided against the NLRB. The Court was particularly critical of the Board's assertion that employees do not use "independent judgment" if their employment calls upon technical decisions in order to direct subordinates to perform services. The NLRB's effort to extend NLRA coverage to professionals by creating a specific standard to assess their manner of making independent decisions was unacceptable under previous principles outlined by the Court. If the NLRB were allowed to apply the "professional technical judgment" standard to the exercise of every supervisory task, the result would be the elimination of the supervisory class from the Act.[1599] The NLRB was ordered to realign its test for ascertaining the supervisory status of workers who rely on professional or technical judgments in directing less skilled workers. Dissenter Justice Stevens vociferously disagreed with his colleagues warning that this decision could bar professionals from the right to organize:

> *"Thus, under the Court's view, it is impermissible for the Board to attach a different weight to a nurse's judgment that an employee should be reassigned or disciplined than to a nurse's judgment that the employees should take a patient's temperature, even if nurses routinely instruct others to take a patient's temperature but do not ordinarily reassign or discipline employees. The Court's approach finds no support in the text of the statute and is inconsistent with our case law."*[1600]

13.19 Piercing the veil on misclassification: the NLRB responds in 2006

On September 29, 2006, the NLRB handed down a trilogy of decisions that provide guidelines to assist in the determination of "supervisor" status under the NLRA.[1601] Responding to criticism on the part of SCOTUS, the NLRB provided detailed guidance as to how to formulate a determination of supervisory activity based on the twelve

[1597] *NLRB v. Kentucky River Community Care Inc.,* 532 U.S. 706, 721 (2001).
[1598] 29 U.S. Code § 152, Definitions.
[1599] *Kentucky River*, *supra* at fn. 1597 at 715.
[1600] Referring particularly to *e.g., Yeshiva, NLRB v. Yeshiva Univ*., 444 U.S. 672, at 690.
[1601] *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006); *Golden Crest Healthcare Center* 348 NLRB No. 39 (Sept. 29, 2006); and *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006).

'bases of authority' found within the NLRA. As supervisors are barred from taking part in collective bargaining, these landmarks carry a great deal of judicial weight for workers uncertain of their status. The trio of companion cases dealt with representation petitions filed by unions and provided an answer to the Supreme Court's request for the Board to establish a protocol and set general guidelines to interpret "independent judgment."

The Board reached out to a wide group of third parties to ascertain how employers and employees on the work floor construed and acted upon "the meaning of 'assign,' 'responsibility to direct,' and 'independent judgment,' terms found in the NLRA's Definitions. Armed with a range of insider opinions and amicus briefs, the Board established a test for the status of "supervisors," and provided further guidance concerning 'occasional' supervisors – employees who 'rotate' in and out of the function.

The all-important determinant of supervisor status endures as a hot topic of litigation with unions, employees, and employers keen to discover who is protected by the NLRA and who, as a supervisor, retains a special position of loyalty to the employer who cannot assist labor unions and cannot boycott their own employers by engaging in work stoppages. To the most vocal critics, the NLRB is disproportionally tainted by political bias, which allows the Court to take off where the board fails: "[t]he Court's decisions have been marked by bias combined with ignorance of labor relations realities and a consistent willingness to assume critical facts."[1602]

Continuing our discussion of limitations to participation in collective bargaining set forth by U.S. courts, a closer look at the impact of *Yeshiva* and similar cases leads to a U.S. orchestral case study: the Saint Paul Chamber Orchestra (SPCO). The *movement* closes with an inquiry as to how the Court's designation of managerial employees in *Bell Aerospace* and *Yeshiva* relates to SPCO musicians who undertook collaborative 'managerial' responsibilities in their orchestra.

Although the THA specifically excludes supervisors from coverage, the Act does not specify how to determine what position falls squarely into the category of supervisor-manager and what position could be exempt. Recall that the object and purpose of the NLRA is to bolster workers' rights through the mechanism of collective bargaining, to promote healthy and active negotiation. Initially under the NLRA, all workers were accorded the status of employees. The impact of a powerful, significant lobby of anti-

[1602] Julius G. Getman. "The NLRB: What went wrong, and should we try to fix it?" 2016.

labor employers and their success in motivating Congress to pass the THA cannot be overemphasized.[1603] The majority determined that all persons who were responsible to implement company policy fall into a class of 'managerial employees,' who are excluded from the benefits of collective bargaining and unable to benefit from the NLRA's pro-union stance. SCOTUS followed suit, and by 1980, the radical exclusion of a wide category of so-called 'managers' was effectuated in a seminal case in which the Court turned its attention to university teaching staff-as-managers after full-time faculty members at New York's Yeshiva University sought union certification.[1604]

13.20 The impact of *Lutheran*, *Yeshiva*[1605]

In *Yeshiva*, the NLRB engaged in far-reaching factfinding to study the way the full-time faculty participated in governance. The Board deduced that the faculty's engagement in the decision-making processes, germane to the case, were a result of each individual's independent professional judgments. In other words, decisions that did not fall within the scope of the managerial role, as the University asserted. The case proceeded to the appeals courts after the University refused to negotiate with the faculty who sought unionization. Rejecting the University's assertion that faculty members were indeed managers, the NLRB certified the union. At the SCOTUS level, the Court scrutinized the faculty members' responsibilities, ranging from their teaching methods to their grading policies and associated administrative tasks, to reach the conclusion that these decisions smack of managerial responsibilities. "The controlling consideration is that the faculty exercises authority which in any other context unquestionably would be managerial, its authority in academic matters being absolute. . . the faculty's professional interests . . . cannot be separated from those of the institution."[1606]

Four dissenting justices took the majority to task for confusing a faculty member's ability to shape institutional policy for a real managerial task. Importantly, the dissent chastised the majority for its inability to distinguish between a university setting and other places of employment, noting, "unlike industrial supervisors and managers, university professors are not hired to 'make operative' the policies and decisions of their employer."[1607] This observation deserves a 'hold that thought,' imperative as it

[1603] Taft-Hartley Act Labor-Management Relations Act 29 U.S.C.A. § 141 et seq.
[1604] *NLRB v. Yeshiva Univ*., 444 U.S. 672, 695-696 (1980).
[1605] See, *Yeshiva* at 690. ("Only if an employee's activities fall outside of the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.")
[1606] Ibid, at 682.
[1607] Ibid., at 699-700.

could very well apply to the argument that if university faculty members deserves special scrutiny and possible exclusion, by analogy, an orchestral musician who exercises partial supervisory tasks might also merit such special examination. *Yeshiva* sets out the equation that a professional worker whose function and daily tasks are aligned with management is not protected by the NLRA. And take note, the *Yeshiva* court discussed at length the importance of the act of terminating a contract as intrinsic to a managerial function.[1608] The controversy continued in numerous cases in which the role of the employee as a manager was scrutinized by the courts without reaching a satisfactory definition. Many leading cases post-*Yeshiva* circled around a definition by means of devising complex checklists and tests to make such determinations keeping in mind that the reason to exclude supervisors from NLRA reach was to circumvent any possibility of a conflict of interest possibly engendered by the supervisor's authority to act regarding colleagues within the same bargaining unit. In 1994, SCOTUS exacerbated the situation in a case that deeply divided the Court: *NLRB v. Bell Aerospace Co.*[1609]

As the *FAQ movement* set out, the conventional orchestral structure consists of a 'three-legged stool'[1610] in which a nonpaid board of directors (or trustees), CEO (or President) and music director all play important roles in the organization's governance. To reiterate, the Board is legally responsible for the orchestra, and deputizes artistic responsibilities to the music director and administrative concerns to the CEO and his/her staff members. Musicians according to this practice, much like Haydn's Esterházy star performers, are to be 'heard not seen,' holding limited powers beyond the exhibition of their musical talents.[1611]

The sharply delineated hierarchy that appears to exclude musicians, however, is not a correct reflection of reality within most 21st century orchestras, where musicians serve on audition committees, artistic advisory committees, dismissal review committees, and, importantly, represent their colleagues in collective bargaining. Select U.S. orchestral musicians exercise authority parallel to the university faculty members who had engaged in supervisory activities at Yeshiva University. These musicians serve on peer review committees, engage in binding decision-making concerning renewals,

[1608] Ibid, at 686, n. 23.
[1609] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 276-77 (1994).
[1610] With a tip of the hat to Henry Fogel, former President of both the Chicago Symphony Orchestra and the League of American Orchestras.
[1611] Reference to comments made by Christopher Keene who supported an increased role for musicians as participants in artistic matters, as a true 'fourth leg' of the orchestral stool.

and, in some cases, serve on a governing board, a position that remains controversial for its potential for conflicts of interest.[1612] Perusing the trajectory of SCOTUS cases, highlighted by the Kentucky trilogy regarding the managerial-supervisory exclusion of professional workers from NLRA protection, one finds that the Court has broadened the exclusion. The *Yeshiva* court held that the exclusion not only applies to the professionals in that specific case but to those employed by "any mature educational institution."[1613] Such a sweeping exclusion embracing a wide class of professionals who "use independent judgment to . . . responsibly direct the work of other employees' leads to a union-free workplace for this 'separate' class of a managers-supervisors."[1614] The broad prohibition affects the orchestral workplace in two ways: principal players could be classified as professionals and members of 'decision-making' committees (such as audition, dismissal, and artistic committees) could also be construed as holding supervisory powers. Before proceeding to a discussion of principal players and the 'exclusion' possibility, it is important to mention that SCOTUS was split 5-4 in these leading cases. Although dissents are certainly not binding, their influence on the trajectory of the managerial-supervisory exclusion has not been ignored in the literature and may well influence future cases to weigh in on the difference between managerial professionals and practicing professionals, the latter of which is deemed deserving of NLRA protection.[1615]

13.21 Principal players: supervisory activities

As the subsequent inquiry into the *Rowe* case will spell out in the *movement*, *Of Rowe and race*), principal players in orchestras engage in supervisory activities as part of their unique position within the orchestra and their respective sections. Interviews with musicians from orchestras in both countries studied shows that there is no consistency in how principals work as 'supervisors' within their sections. Aside from their musically related functions related to performing, principals bear the responsibility to maintain the quality within their section, a multifaceted role that involves setting specific musical standards and providing artistic guidance related to the conductor's demands. Are these principals within the orchestra then supervisors who should

[1612] Information gleaned from the American Federation of Musicians Wage Charts. Available at: wagechart.afm.org ICSOM Wage Scales and Conditions in the Symphony Orchestra
[1613] *Yeshiva, supra* at fn. 1604 at 27.
[1614] *Oakwood Healthcare, Inc., supra* at fn. 1601 at 589.
[1615] David Rabban. "Can American Labor Law Accommodate Collective Bargaining by Professional Employees?"1990 p. 689.

be excluded legitimately from the NLRA's protection? Does this designation reflect an accurate differentiation, or simply an artificial construct that satisfies a judicial interpretation of managerial-supervisory exclusion? If principals, members of the orchestral complement are excluded from the protections afforded to their peers in the same section, i.e., the non-principals, this double standard of protection within one organization engenders an unsound labor environment. According to the Court's findings in the *Oakwood Healthcare, Inc.*, and *Kentucky River* cases, principals would be barred from NLRA protection, as they hold the authority to delegate responsibility within their sections and can set the performance schedules for their subordinates.

Henry Fogel, and other orchestral insiders, advocate for increased participation for musicians in the ways and means of running their performance organizations. While provisions for employee involvement in Europe provide for orchestral members' participation in works councils and other forms of players boards, the U.S. has lagged behind in terms of widespread player involvement. The advent of a 'fourth leg' of the 'three-legged stool' was proclaimed by several renowned conductors in the 1980s with orchestral musicians seeking more 'voice,' more say in their employment. Musicians took up the gauntlet shortly thereafter.[1616] Henry Fogel himself argued that the advent of the modern-day maestro, an absentee music director who spends but a few weeks with his/her home orchestra (the orchestra they ostensibly lead) fueled the fires of orchestral discontent. The jet-setting maestro who takes on guest appearances the world over with little time for the daily artistic matters in his/her home orchestra is the rule rather than the exception since the 1980s, according to the well-known music critic and author, Norman Lebrecht.[1617] In a number of U.S. orchestras, the solution to the power vacuum caused by the absentee maestros has been to grant musicians increased powers.

13.21.1 Committees with power and individual orchestra members in managerial positions: the SPCO under scrutiny

One of the most striking examples of an orchestra in which the members participate closely with management in a range of functions is the Saint Paul Chamber Orchestra (SPCO). To quote former CEO and the mastermind behind the winds of change,

[1616] Interestingly, the jet setting maestros Leonard Bernstein and Pierre Boulez led the clarion call in the 1980s.

[1617] See, Norman Lebrecht's *The Maestro Myth* (1991) that places the responsibility for the pursuit of power and enhanced career opportunities firmly in the hands of a new generation of avaricious impresarios.

Bruce Coppock, "savvy insiders with a wealth of information, our musicians are a veritable untapped resource ripe for effective and efficient to effectuate real teamwork with 'management.'"[1618] The SPCO experiment merits further investigation to establish whether it 'breaches' the NLRA requirements or whether its actions merit a call for an orchestral exception. Importantly, although the NLRA classifies "professional employees," the Act does not delimit the term professional workers rather relying on the open-ended characterization of workers whose "decision making is limited to the routine discharge of professional duties in projects to which they have been assigned."[1619]

As touched upon earlier, orchestral musicians regardless of location can avail themselves of participation on various 'subject-based' committees exemplified by: artistic advisory boards, audition committees, community outreach committees, and conductor search committees. In the U.S., the composition of these committees varies, and functions are often defined within orchestral CBAs, as much of the orchestral musicians' occupation is channeled by the master agreement. In Europe, orchestral musicians are elected by their peers to serve as members of works councils,[1620] employee-run bodies that promote the interests of employees at the company level. In the Netherlands, consultation rights concerning management decisions and approval rights related to the organization's employment policies are stipulated by legislation through the *Wet op de ondernemingsraden* (WOR) Work Councils Act.[1621] The significance of this form of representation was discussed with specific reference to the Dutch radio orchestras' reorganization 2012-2013 described in *Requiem for an orchestra*.

13.21.2 SPCO: unfair practice or a progressive orchestral paradigm?

There are hundreds of fine chamber orchestras in the U.S. However, most operate on a per-service, part-time, and/or ad hoc basis.[1622] Formed in 1959, the SPCO is one of a handful of professional U.S.-based chamber orchestras in which musicians enjoy a permanent status as orchestral employees. The Minnesota-based SPCO consisting of 35 members, went through a soul-searching process in the early part of the millennium to discover how to meet the challenges of a new era. In consort with board members and

[1618] Interviews with Bruce Coppock, former President and CEO SPCO (1999-2008) and (2013-2015).
[1619] 29 U.S.C.§ 142(12).
[1620] In Dutch: *ondernemingsraden*.
[1621] See, *Wet op de ondernemingsraden* (WOR) English translation, Work Councils Act, available at: http://www.or.nl/entree/naar/wenrtekstendb.cgi?db=wenrteksten&uid=default&Documentnaam=wcacontent&view_records=1
[1622] Information gleaned from the League of American Orchestras, https://www.americanorchestras.org/.

management, the musicians formed a Contract Renewal Group (CRG) and engaged in contract renewal plans enumerated in a Strategic Planning Process.[1623] Prior to making the commitment to adopt an innovative governance and business model for the SPCO, the chamber orchestra had operated according to the same top-down organizational archetype as most every other orchestra in the nation. Interviews with the orchestra's former CEO/President netted a wealth of inside information concerning the arduous process to take the first steps toward orchestral independence and give musicians more say in more matters related to their employment:

> *"Prior to the millennium 'new road', the SPCO went through a painful self-recognition process. In 1994, orchestra members attended a retreat to discuss their situation, their future and most fundamentally, what was wrong with the orchestra and how to fix it. All comments were written down and distributed to all orchestra members post-retreat. In the name of openness and transparency, even the most painful, personally directed comments were published. Imagine reading that your colleagues think nothing of your contribution to the collective. Bloodletting became part of the SPCO culture, not a healthy development to say the least. And now imagine that the commentary becomes quite explicit. How will this impact your present and future performance not to speak of the manner in which you regard your colleagues and your orchestra from that moment on? We had a long way to go toward recovery. The orchestra was divided by a coalition to get out and experiment with a new vision, to enlarge the box and take a look at what other leading international chamber orchestras such as the Australian Chamber Orchestra, Mahler Jugendorchester and the Chamber Orchestra of Europe were doing and the coalition to recreate the past."*[1624]

The 2004-2005 season marked the initiation of the SPCO experiment: the orchestra took the bold move to incorporate aspects of the strategic plan into the SPCO's CBA. At the top of the artistic pyramid, the music director signed off on artistic decisions ranging from repertoire to hiring/firing. The SPCO's new style repositioned the music director's sole powers to an artistic committee comprised of a triumvirate of musicians and a pair of artistic managers. A group of five held the responsibility for every conceivable facet of artistic operation: musician selection and tenure reviews, repertoire and programming, touring, and planning/scheduling. Innovative in terms of financing, the new plan called for a distribution of funds to orchestral employees only if the SPCO posted a profit at the end of the season.

The SPCO's Artistic Vision Committee (AVC) programmed, selected conductors and guest artists, met with management to decide on the number of performances, all conceivably supervisory activities according to *Yeshiva* standards. Other SPCO

[1623] SPCO Strategic Plan was put in place in September 2000, available at: https://iml.esm.rochester.edu/polyphonic-archive/wp-content/uploads/sites/13/2012/03/spcoStrategicPlan.pdf
[1624] Interviews with Bruce Coppock.

committees, such as the Artistic Personnel Committee and an Artist Vision Committee, put musicians in the 'driver's seat' in concert programming, tour development, artistic choices and most notably the disciplinary, hiring and firing roles traditionally reserved for management. "The [committee members] sit where the buck stops. Musicians will make decisions about every program we play, every soloist, every conductor. Musicians will think about touring not in terms of their own careers but in terms of the orchestra's career. Musicians will think about recording in the same light. That's what makes this a revolutionary document."[1625] Perhaps less revolutionary is the fact that the SPCO musicians did not elect their committee members themselves: the members were selected by management.

A controversial clause in the 2003 agreement concerning peer review and dismissal, as stated in the SPCO's 2010 Agreement (a projection of the SPCO's 2003 Agreement in its 50th Anniversary Year) disseminated by the CRG reads:

> *"This process addresses those situations when an individual's artistic performance jeopardizes the integrity of the whole…. The intension of this process is to assist the individual in reestablishing the high standards of the SPCO. If unsuccessful…the initiation of the dismissal process may be recommended."*[1626]

To a sizeable number of SPCO musicians, this clause, and several others detailing the wide-ranging powers held by musician colleagues indicated that the orchestra's inner circle had crossed a bridge too far. "There was a great deal of pain and bewilderment when long-term, committed SPCO members were confronted with a committee of so-called experts to decide on competence. A suspicion of an inner-circle of favored players who were granted the 'ear' of President Bruce Coppock was held by many faithful SPCO players."[1627] SPCO members voted 19-15 in favor of ratification of the 2003 Agreement. "Because the ratification vote was close, there is a hazard that morale will suffer. But status quo is not good enough. We cannot get to a different place if we don't take some risks including financial risks."[1628]

13.21.3 The possible impact of NLRA exclusion on U.S. orchestral musicians

A strict reading of *Yeshiva* would determine that committee members who serve on audition, dismissal and/or peer review committees would fall under the *Yeshiva*-

[1625] Bassoonist and CRG member Chuck Ullery quoted by Lowell J. Noteboom. "Good Governance for Challenging Times" *Harmony* October 2003.
[1626] Clause IV.D. Intervention Process Description SPCO 2010 Vision Statement, available at http://www.polyphonic.org/harmony_archive/issue-no-16-october-2003
[1627] Conversations with a former SPCO member who opted for early retirement in 2012, anonymity assured.
[1628] Herb Winslow, principal horn SPCO joined the ensemble in 1981, as quoted in *Harmony*, *supra* fn. 1625.

delineated exclusions. "The touchstone of managerial status is thus an alliance with management, and the pivotal inquiry is whether the employee is performing his duties represents his own interests or those of his employer."[1629] And, *Yeshiva* specifies the authority to dismiss as a major factor in determining supervisory authority – all powers that certain SPCO musicians hold. The NLRA protected processes are the cornerstone of established and durable labor relations. Senza protection, management could justify barring SPCO musicians from participation in collective bargaining. The musicians' hard-won say in matters relating to employment, could be thus threatened. In the U.S., the post-financial crisis proliferation of lockouts and strikes give evidence of a pattern of increasing industrial action and often bear witness to sharp differences of opinions between management-boards and orchestral musicians. "Moving forward as independent thinkers and actors in the orchestral sphere is risky, but if the SPCO, a self-reliant type of smaller organization did not take the risk, who would?"[1630]

Yeshiva addressed the issue as to whether faculty members had taken on supervisory roles stepping into the realm of management. As the SPCO moved toward embracing their collaborative model of orchestral organization, all parties concerned concurred that the *Yeshiva* holding should not influence the status of their CBA. AFM negotiator, labor lawyer, and ICSOM advisor Len Leibowitz was approached to draft a waiver clause that would protect the SPCO musicians from *Yeshiva* repercussions. "The question with regard to *Yeshiva* arose as to whether peer review alone would be considered a managerial function sufficient to satisfy *Yeshiva*. The SPCO CBA has many more functions that could be considered to be managerial and 'intent' per se has no legal legs."[1631] Mr. Leibowitz expressed his concern with regard to the possibility of unfair labor practice charges with regard to the SPCO situation. "It was all well and good that President Coppock and his Board were on one line with regard to the functions held by musicians, but what if a future executive and board would take the tack that the union was not in line with the organization. They (CEO-board) could refuse to bargain and subsequently the union could file an Unfair Labor Practice charge. Here's the rub, the board could respond that the musicians were in fact managers and not employees under the NLRA and under *Yeshiva.*"[1632]

Although *Yeshiva* ultimately did not deprive the university's faculty members of their right to certify the union, it withheld their NLRA protections, which could lead to

[1629] *Yeshiva, supra* at fn. 1604 at 686.
[1630] Conversation with Chuck Ullery, principal bassoon, and member of the SPCO's Contract Renewal Group (CRG).
[1631] Interviews with Leonard Leibowitz.
[1632] Ibid.,

an extreme situation in which an 'NLRA excluded' employee could face dismissal for union membership without a shred of redress. In *Yeshiva*, Justice Brennan, writing for the dissent, fought for a reinstatement of the original Board decision that underscored that "the faculty exercised decision making authority in its own interest not in the interest of the employer."[1633] Tellingly in the view of the dissenters, it is for the Board not the Court to "formulate and adjust national labor policy to conform to the realities of industrial life. Accordingly, the judicial role is limited; a court may not substitute its own judgment for that of the Board."[1634] To the dissenters, the fact that the Yeshiva faculty voted in favor of union certification meant that they did not hold the same interests as the administration – their employers.

Taking into consideration the fact the faculty members at Yeshiva were originally classified as non-supervisory personnel by the NLRB regional office before they moved forward with a petition for certification to unionize, the SPCO musician-'managers' might well operate in dangerous waters in terms of their employee classification, taking the results of *Yeshiva* into consideration. Perhaps the fact that all orchestral musicians are, per definition, 'supervised strictly' in their fundamental performance roles under the direction of a music director/conductor might lead to an exception to the *Yeshiva* holding. Yet, while this possible exception might provide support to the SPCO musicians-as-employee argument the elephant in this particular room is the fact that the SPCO's new model eschewed the role of a single supervisory music director. The position of Music Director was eliminated during the 2004-2005 season, replaced by an elite group of Artistic Partners chosen by the SPCO's artistic committee. Thus, there was no one central figure who held the reins at the orchestra, no Music Director, no sole authority.

13.21.4 Unfair labor practices?

On March 14, 2014, a regional labor board under the aegis of the NLRB Region 18 received a charge of unfair labor practices submitted by the SPCO's local union affiliate, AFM Twin Cities local 30-73. According to the AFM, "the participation of (an) upper-level manager in the meetings of the bargaining unit had a chilling effect on the exercise of rights guaranteed under the NLRA."[1635] Focused on the question of whether or not a senior director of artistic planning is an upper-level manager

[1633] *Yeshiva*, *supra* at fn. 1604 at 696.
[1634] Ibid., at 693-94.
[1635] Complaint against Saint Paul Chamber Orchestra, September 2, 2014, filed by Jennifer Garner, AFM Council.

whose loyalties are closely aligned to management fulfilling the *Yeshiva* criteria, the AFM scrutinized the activities of the award-winning violinist Kyu-Young Kim, who served as both Director of Artistic Planning and Principal Violin in the orchestra. To the AFM, the conflict-of-interest situation was quite clear: "you can't participate at a meeting with your local and then go back to your office and put on your management hat following the meeting."[1636]

Although it seems clear from the job description of Artistic Director that Mr. Kim's position was managerial in nature, as he held considerable decision making powers on a wide-range of artistic matters, the charges were not only dropped but according to the SPCO website, "His (Kyu-Young Kim's) appointment as the SPCO's Artistic Director in January 2016 marks the first time a playing member has been tapped to take the artistic helm of a major American orchestra."[1637] As the SPCO's CBA clearly states that the musicians who hold leadership manifest a "direct and important relationship to the artistic quality of the SPCO"[1638] and the Artistic Director commands the final decision-making power and accountability for all "policy decisions,"[1639] a *Yeshiva*-tinted lens was justified in an assessment of his position. Mr. Kim's powers to grant tenure, to hire, and to fire were analogous to the Yeshiva faculty members whose "independent judgment was particularly acute."[1640] The identity of interests that formed the basis of the *Yeshiva* holding, and the facts that the faculty members shared the same building, the same interests and goals with the administration, strikes a parallel to orchestral musicians and their institutional framework. Eventual resolution to the Kyu-Young Kim dual position and its repercussions concerning the manager-supervisor NLRA coverage issue was reached: Mr. Kim was instructed to request permission from union leaders to be able to participate at top-management meetings and was only permitted to attend these meetings if management related issues were not on the agenda.

13.22 The SPCO's lockout saga

Like its 'big sister,' the Minnesota Orchestra, the other famed orchestra located in nearby Minneapolis (the 'other' Twin City) which endured the longest lockout in orchestral history),[1641] the SPCO did not escape the deleterious effect of the financial

[1636] Comment made by Tino Gagliardi, President Local 802 AFM.
[1637] See, the SPCO website at: https://content.thespco.org/people/kyu-young-kim/
[1638] Master Agreement Between the Saint Paul Chamber Orchestra and the Twin Cities Musicians Union Local 30-73.
[1639] Ibid.,
[1640] *Yeshiva, supra* at fn. 1604 at 689.
[1641] The Minnesota Orchestra's 16-month lockout ended on January 15, 2014.

crisis 2007-2008. There are some former SPCO members who insist that the root of the SPCO crisis was linked to some aspects of the orchestra's 2003 innovations especially the organization's much-touted reliance on "radical revenue: a business model that challenged conventional industry thinking."[1642] Management begged to differ: "the choice of an innovative organizational form had absolutely nothing to do with the SPCO crisis, nothing."[1643] According to evaluations made with the aid of management and financial gurus between 2004-2006, the SPCO's "sweeping changes" centered on putting audience patrons at the center of the revenue model: ticket prices were lowered and the subscriber base subsequently grew by 35%. Unfortunately, as the financial crisis 2007-2008 loomed, the SPCO's hopes of a community supported cultural institution with a strong patron base were dashed.

At the heart of the bitter SPCO labor dispute and six-month lockout in 2012-2013 was a management-board crisis. SPCO musicians were informed that they would be expected to participate in a 'musician giveback' plan amounting to $1.5 million per year for the duration of the CBA "to align fixed expenses with predictable sustainable revenue."[1644] In a troubling turn of management events, the SPCO's President/Managing Director resigned on March 1, 2012. The new acting President/Managing Director, Dobson West, reporting to an Interim Board Chair, a marriage 'made in hell' in terms of governance, according to several SPCO musicians interviewed. Mr. West's well-publicized goal was to change the course of the SPCO and turn the storied ensemble into a flexible, 'pick-up' orchestra that could generate more revenue by adjusting to 'the market' and 'adapt its complement accordingly,' an aspiration that compromised the core mission of the SPCO.[1645] The threat of out-sourcing for musicians to perform in the SPCO on a per-service basis was at the center of cost-reduction recommendations. Adding insult to injury, "musician input on artistic decisions, the raison d'être of our Artistic Vision Committee was reduced to a pale shadow of its prior existence."[1646] According to a former SPCO member, the original SPCO revolution was commendable for its initial idealistic plans but suffered greatly as a result of flaws in 'execution.' In place of a true musician-run democracy, "we now [had] a management dominated system in which management [chose] many of the musicians who help make decisions, including the

[1642] Quote taken from Bruce Coppock's article, "Radical Revenue: a new business model challenges industry thinking" *Symphony* January-February 2008 pp. 21-27.
[1643] Conversations with Bruce Coppock.
[1644] As quoted by Leslie Shank, former SPCO violinist. "Saint Paul Settles" 2013 p. 1.
[1645] Numerous articles in St. Paul and Minneapolis publications including the *Star-Tribune*, *Pioneer Press* and the blog, *Song of the Lark* attest to Mr. West's goals.
[1646] Comment by SPCO principal flute, Julia Bogorad.

search committee that. . . announced the re-hiring of Bruce Coppock [and] a search committee comprised of three musicians all chosen by the management."[1647]

During the 2012-2013 lockout,[1648] the SPCO's management and board proposed salary cuts ranging between 56% to 67% and planned drastic reductions in terms of the number of concerts per season. Former President, and CEO Bruce Coppock (1999-2008) was reappointed to his former position: no search process for a 'new' leader was undertaken. The AFM filed an Unfair Labor Practice charge against the SPCO Society (the SPCO's operating organization) for refusing to bargain in good faith toward a CBA, and crucially, for expressing its refusal to cooperate with the AFM to identify the titles and musicians involved in SPCO recordings since 1959. "Apparently the SPCO board is more interested in withholding wages, health care and pension benefits from the orchestra than answering questions about its contract demands."[1649] A 'return-to-work' agreement was ratified on April 30, 2013, after St. Paul's Mayor Chris Coleman mediated a new agreement. "After more than six months without salary or benefits, with the possibility of the remainder of the season being cancelled. . . the musicians felt that the best path to save the SPCO was to ratify the regressive agreement and to hope for a better future."[1650] The salary rate at the SPCO 2011-2012 had been $78,223 and was reduced (hence, regressive agreement) to $60,000 under the three-year 'return-to-work' agreement. A special retirement package, often referred to as a buyout for SPCO members aged 55 and above, was part of the settlement. Bruce Coppock spoke of the retirement offers as a dignified means to bid farewell, whereas older orchestra members spoke frankly about the fact that they were "being cast aside, not particularly gently."[1651] Post-lockout, the SPCO faced the challenge of rebuilding its ensemble and its image. Several key musicians took off for greener pastures and full-time employment in other internationally renowned ensembles. In 2018, the roster of the SPCO consisted of 22 core musicians, five Artistic Partners and a small management and artistic staff including Kyu-Young Kim, Artistic Director and Principal Violin who somewhat ironically held a named position in the orchestra, the Bruce Coppock Chair.

Beyond the legal questions that challenge orchestral musicians who take on managerial-supervisory responsibilities, is it possible to posit that this form of participation may

[1647] Commentary by SPCO former violinist, Leslie Shank, *supra* at fn. 1644.
[1648] SPCO musicians received neither salaries nor benefits during the 191 days of lockout:
[1649] Ray Hair, President AFM quoted in a press release, "St. Paul Chamber Orchestra Charged with Unfair Labor Practices" February 18, 2013 released by the AFM.
[1650] As quoted by Leslie Shank.
[1651] Conversation with former string player SPCO who opted for the retirement buyout, anonymity assured.

have a negative impact on the orchestral entity? For all their insider information and work floor experience, musicians are not necessarily an asset to an organization as board members. Leading ensembles such as the New York Philharmonic do not allow for musician representation on the board, opting for a 'separation of powers' approach to the organization. "Admittedly, that can lead to unnecessary complications exemplified by separate search committees for a new music director: a board-led committee and the musicians' artistic committee with both committees embarking on their own explorations. This might seem to be majorly inefficient, two teams with a similar mandate, however this process must be adhered to in a situation in which music representation is strong but certainly not integrated into the board."[1652] An informed answer to the question as to whether U.S.-based orchestral boards should expand to embrace musician-membership akin to the SPCO experiment depends on the orchestra's culture and a clued-in consideration of the risks of possible unfair practice charges. Further research is needed to assess the impact of this form of participation and orchestral musicians' empowerment. As the self-operating orchestras in London, the Royal Concertgebouw's inclusion of three musician board members, and the 'closed-system musician run' operations at the philharmonics of both Berlin and Vienna indicate, the limitations imposed in the U.S. related to the Court's interpretation of supervisor-manager categorization should not impede musician participation at the top of the orchestral hierarchy.

[1652] Comments by Dawn Hannay, New York Philharmonic violist (1979-2017) and former chair, New York Philharmonic Players Committee.