Date of Hearing: April 21, 2015

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND INTERNET MEDIA
Ian Charles Calderon, Chair
AB 202 (Gonzalez) – As Amended April 15, 2015

**SUBJECT**: Professional sports teams: cheerleaders: employee status.

**SUMMARY**: Would, for purposes of all of the provisions of state law that govern employment, deem a cheerleader utilized by a California-based professional sports team during its exhibitions or games as an employee. The bill would also require the professional sports team to ensure that the cheerleader is classified and treated as an employee. Specifically, **this bill**:

1) Provides, notwithstanding any other law, for purposes of all of the provisions of state law that govern employment, including this code, the Unemployment Insurance Code, and the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), a cheerleader who is utilized by a California-based professional sports team during its exhibitions or games, shall be deemed to be an employee.

2) Further provides that the professional sports team shall ensure that the cheerleader is classified and treated as an employee.

3) Contains the following definitions:

   a) “California-based team” means a team that plays a majority of its home games in California.

   b) “Cheerleader” means an individual who performs acrobatics, dance, or gymnastics exercises on a recurring basis. This term shall not include an individual who is not otherwise affiliated with a California-based professional sports team and is utilized during its exhibitions or games no more than one time in a calendar year.

   c) “Professional sports team” means a team at either a minor or major league level in the sport of baseball, basketball, football, ice hockey, or soccer.

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) *Author and supporter's statement of need for legislation.*

   According to the author, "It takes a lot of time and hard work to be a cheerleader, including an initial financial investment along with a commitment to practice just in order to have an opportunity to professionally dance and cheer for a sports team.

   "Cheerleaders are required to attend and participate in practices, mandatory rehearsals, fittings, preparations, drills, photo sessions, meetings, and workouts. Cheerleaders are required to finance their business expenditures, including travel and investment in their

physical appearance by purchasing required cosmetics, in the normal course of their cheerleading duties.

"During a sporting event, professional cheerleaders are performing and cheering. It is a product of hours upon hours of rehearsing dance routines, gymnastics and stunts. Cheer athletes practice their routines at least 2 to 5 times a week. They must get physically fit in order to carry out intense dance routines and stunts in cheerleading. On game days, a cheerleader's performance can consist of motivating players along with a combination of dance and music, gymnastics and acrobatics. As frontline team ambassadors, they're valuable contributors that add significant value to the entertainment product and fan experience.

"Cheerleaders are featured prominently in advertising and game-day coverage, especially leading in and out of every commercial break on the nationally broadcasted television programs. Prior to each sports season, selected cheerleaders have training camps and practice, photo shoots and swimsuit calendars obligations. Throughout the year, they have non-game day annual responsibilities, such as guest appearances at schools, charity events, or conferences. These are all employee obligations imposed by an employer…

"…After examining numerous factors, it's clear that a cheerleader's position constitutes an employee status. For instance, once cheerleaders are selected to work for a sports franchise, the control over their work time ends. The organization's management directs the set work hours, payment schedules, dress codes and standards for behavior, among other work conditions."

2) *Recent amendments.*

Last week AB 202 was heard in the Committee on Labor & Employment, where issues arose as to the meaning of certain provisions. The author agreed to make the following amendments in order to provide greater clarity and specificity:

> (b) Notwithstanding any other law, for purposes of all of the provisions of state law that govern employment, including this code, the Unemployment Insurance Code, and the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), a cheerleader who is utilized by a California-based professional sports team **directly or through a labor contractor** during its exhibitions, **events** or games, shall be deemed to be an employee.
>
> (c) The professional sports team shall ensure that the cheerleader is classified ~~and treated~~ as an employee.

3) *Origin of legislation: lawsuits filed by NFL cheerleaders.*

ESPN reports that the Oakland Raiders are being sued by current and former cheerleaders claiming wage theft and other unfair employment practices. According to the filing, Raiders cheerleaders are paid $1,250 per season, which amounts to less than $5 per hour for the time they spend rehearsing, performing and appearing at events for which they are not compensated. In the article, Lacy T., identified only by her first name, in accordance with Raiderettes policy for security reasons, was quoted as saying, "The club controls our hairstyle and makeup, and we have to foot the bill," she said. "We also have to pay the costs for

traveling to all kinds of events, including photo shoots...I love the Raiders and I love being a Raiderette, but someone has to stand up for all of the women of the NFL who work so hard for the fans and the teams." An attorney representing the cheerleaders claims, "the Raiders owe thousands of dollars in unpaid wages to women who worked as Raiderettes in previous seasons, while owing thousands of dollars in penalties to the women who worked this season." Perhaps adding insult to injury, the cheerleader's lawyer says NFL teams' male mascots are treated as paid employees with benefits. (http://espn.go.com/nfl/story/_/id/10334429/cheerleaders-file-suit-oakland-raiders-wage-theft-unfair-employment-practices, accessed April 8, 2015)

Similar lawsuits have reportedly been filed against the Tampa Bay Buccaneers, the New York Jets, the Buffalo Bills, the Cincinnati Bengals, and the National Football League itself.

4) *Background:*

a) *Misclassified employees*. Employee misclassification has become a serious problem in the United States, and particularly in California. When companies misclassify workers as independent contractors instead of as employees, these workers do not receive worker protections, including minimum wages, overtime pay, and health and vacation benefits, to which they would otherwise be entitled. Standard employee protections such as anti-discrimination laws and safety regulations also do not apply to independent contractors. Additionally, businesses do not deduct taxes, 401(k), Social Security, or Medicare payments from the paychecks of independent contractors, which results in a loss of state tax income from the businesses as well as a potential loss of income from the individual worker who may not properly report income. Because employers do not pay unemployment taxes for independent contractors, workers who are misclassified cannot obtain unemployment benefits if they lose their jobs.

A number of reports in the last several years have chronicled the societal consequences of and impacts upon American workers of misclassification of workers as independent contractors versus employees. The United States Government Accountability Office conducted a study of misclassification of workers as independent contractors and found that employee misclassification cost the United States government $2.72 billion in revenue from Social Security, unemployment and income taxes in 2006 alone. (GAO, *Employee Misclassifications: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-07-859T (May 8, 2007), pg. 1.)

Similarly, the California Employment Development Department (EDD) reported that the number of misclassified employees increased 54% from 2005 to 2007, reaching 15,751 workers in 2007. During this 3-year period, the EDD recovered a total of $111,956,556 in payroll tax assessments, $18,537,894 in labor code citations, and $40,348,667 in assessments on employment tax fraud cases. (*See* California Employment Development Department, *Annual Report: Fraud Deterrence and Detection Activities*, report to the California Legislature (June 2008)) A Daily Journal article reported on the recent increase in worker misclassification and one person interviewed for the article noted that worker misclassification is attractive to employers because they can cut their labor costs by up to 30% by moving to an independent contractor model. (Ho, *Independent Contractor Status Raises IRS Eyebrows: Contractor Status is Cheaper for Employers; Some Workers are Crying Foul*, Daily Journal (May 17, 2010).)

b) *Statutory employees.* In general, most individuals are determined to be employees under common law, which involves evaluating a number of specific factors. However, a "statutory employee" is defined as an employee by law under a specific statute. For example, Unemployment Insurance Code Section 621 deems certain groups of workers to be employees for purposes of certain employment tax purposes. These "statutory employees" include corporate officers, specified agent/commission drivers, traveling salespersons, certain home workers, and certain artists and authors.

5) *Prior related legislation*

a) SB 459 (Corbett) Chapter 706, Statutes of 2011, which established a scheme of regulatory enforcement and significant civil penalties for the intentional misclassification of employees.

b) AB 950 (John A. Pérez) of 2011, would have deemed port drayage drivers to be employees for employment law purposes, similar to the approach taken by the instant measure, AB 202. Held on the Assembly Inactive File.

c) SB 1583 (Corbett) of 2008, would have provided employment consultant liability for advising unlawful conduct through employee misclassification. Vetoed

d) SB 1490 (Padilla) of 2008, would have required the Employment Development Department to create a form, including factors used by EDD in determining independent contractor status, to be distributed by employers to workers. SB 1490 was held in the Senate Committee on Appropriations.

e) SB 622 (Padilla) of 2007, would have made it unlawful for employers to willfully misclassify an employee as an independent contractor. Vetoed

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

CA Conference Board of the Amalgamated Transit Union
CA Conference of Machinists
California Labor Federation, AFL-CIO
California School Employees Association
California Teamsters Public Affairs Council
Consumer Attorneys of California
Engineers & Scientists of California
International Longshore & Warehouse Union
Jockeys' Guild
Professional & Technical Engineers
South Bay Labor Council
UNITE-HERE, AFL-CIO
Utility Workers Union of America

**Opposition**

There is no opposition on file.

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