

COMMENT

ALL WORK AND NO PLAY CAN MAKE A KID A MILLIONAIRE: CHILD LABOR LAWS AND THE ROLE OF THE DOL TO PROTECT MINORS IN THE GROWING INDUSTRY OF SOCIAL MEDIA EMPLOYMENT

CAROLINE SISSON*

INTRODUCTION	161
I. SOCIAL MEDIA AND THE NEW AGE OF CHILD EMPLOYMENT.....	164
A. <i>Instagram</i>	165
B. <i>YouTube</i>	166
C. <i>TikTok</i>	167
II. HISTORY OF CHILD LABOR LAWS IN AMERICA	168
III. DOL AND THE ENTERTAINMENT INDUSTRY	171
A. <i>Scope of DOL's Activities</i>	171
B. <i>DOL and Child Employment in the Entertainment Industry</i>	172
1. <i>Coogan Laws</i>	173
C. <i>State Regulations on Children in the Entertainment Industry</i>	174
1. <i>California</i>	176
2. <i>New York</i>	177
3. <i>Tennessee</i>	178
IV. RECOMMENDATION	178
CONCLUSION	182

* J.D. Candidate, American University Washington College of Law (2023); B.A. Political Science, Pepperdine University (2020). Thank you to the entire *Administrative Law Review* for their thoughtful contributions to this piece and my friends and family for their encouragement throughout this process. A special thank you to my parents for always inspiring and supporting me.

INTRODUCTION

Many child influencers, actors, and musicians experience groundbreaking success well before the age of eighteen.¹ For example, through the rise of TikTok, the D'Amelio family garnered worldwide attention and millions of followers.² Charli D'Amelio, who only recently turned eighteen years old, is one of the most famous TikTok star with, as of August, 2022, 145.4 million followers as well as her own makeup and clothing line.³ According to Forbes and the Wall Street Journal, Charli, who started posting videos of herself dancing on TikTok in 2019, made \$17.5 million in 2021, while the median pay for many U.S. CEOs was \$13.4 million.⁴ Because of her success, brands are fiercely competing for Charli to promote their products on her social media accounts.⁵

In September 2021, Hulu released a documentary series about the D'Amelio family following their short journey to viral fame.⁶ The series highlights the pressures and struggles that Charli and her older sister Dixie, age twenty, now experience after launching into the spotlight and obtaining a global platform.⁷ Some have described the show as “startlingly dark,” which is evident when Charli expresses her desperation, stating, at various points throughout the show, “[m]y job is never over;” “I feel like I’ve had a constant anxiety attack for the past four years;” “I am physically and

1. See *Influencer*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/influencer> (last visited Aug. 16, 2022) (defining an “influencer” as “a person who is able to generate interest in something (such as a consumer product) by posting about it on social media”).

2. See Rebecca Jennings, *The D'Amelio Kids Are Not Alright*, VOX (Sept. 14, 2021), <https://www.vox.com/the-goods/22672582/charli-damelio-show-hulu-dixie> (discussing the D'Amelios' quick rise to worldwide fame in only two years).

3. Team Nas Academy, *Charli D'Amelio's Net Worth: This TikTok Celebrity's Worth Will Blow Your Mind*, NAS ACAD. (July 19, 2021), <https://nasacademy.com/blog/article/charli-damelios-net-worth>; Charli D'Amelio (@charlidamelio), TIKTOK, <https://www.tiktok.com/@charlidamelio> (last visited Aug. 16, 2022) (followers as of Aug. 16, 2022).

4. Joseph Pisani & Theo Francis, *These TikTok Stars Made More Money Than Many of America's Top CEOs*, WALL ST. J. (Jan. 13, 2022), <https://www.wsj.com/articles/these-tiktok-stars-made-more-money-than-many-of-americas-top-ceos-11642078170> (comparing Charli D'Amelio's \$17.5 million 2021 earnings to those of Exxon Mobil's Darren Woods (\$15.6 million in 2020), Starbucks' Kevin Johnson (\$14.7 million), Delta Air Lines' Ed Bastian (\$13.1 million), and McDonald's' Chris Kempczinski (\$10.8 million)). *But see id.* (admitting that some CEOs make more than the TikTok star, like Activision-Blizzard's Robert Kotick (\$155 million in 2020) and Apple's Tim Cook (almost \$99 million)).

5. See Jennings, *supra* note 2 (referencing D'Amelio's partnerships with Hollister and Dunkin' Donuts).

6. *Id.*; *The D'Amelio Show* (Hulu Sept. 2021).

7. *The D'Amelio Show*, *supra* note 6.

mentally exhausted;” and “I don’t know how long anyone expects me to keep going as if nothing is wrong.”⁸

Child actors experience similar pressures and strenuous working environments. Miley Cyrus, a former Disney teenage actress and singer, was the wealthiest child in the world when she was fifteen years old.⁹ JoJo Siwa, American dancer, singer, and YouTuber, just turned nineteen years old and has a \$20 million net worth.¹⁰ Olivia Rodrigo, the top singer-songwriter of 2021, also recently turned nineteen years old and has a \$5 million net worth.¹¹ Taylor Swift—American music icon—signed her first contract with SONY/ATV at age fifteen.¹² Justin Bieber, the Canadian singer discovered on YouTube, released his first album when he was fifteen years old.¹³

Alyson Stoner, an American actress, singer, and dancer who landed her first acting role at eight years old, speaks out about the reality of her working conditions as a child actor:

[Z]ero productions acknowledge that after their shoot, I will go to another, record an interview during my lunch break, train for multiple hours, skip dinner, and meet for a late-night rehearsal. After all, their responsibility is to deliver a product on time and in-budget, not to babysit. Meanwhile, agents are encouraging me to look at early emancipation so I can work *longer* hours. This will increase my hire-ability.¹⁴

The U.S. Department of Labor (DOL) can protect children from being overworked in the entertainment industry. At the beginning of the 1900s, over

8. Jennings, *supra* note 2.

9. See Beth Hilton, *Miley Cyrus to be a Billionaire*, DIGIT. SPY (May 5, 2008), <https://www.digitalspy.com/showbiz/a95256/miley-cyrus-to-be-a-billionaire/> (explaining, in 2007, that then fifteen-year-old Miley Cyrus earned \$17 million solely from her concert tour. In 2009, the hit Disney Channel T.V. show starring Cyrus, *Hannah Montana*, was worth \$1 billion).

10. See *JoJo Siwa Net Worth*, CELEBRITY NET WORTH, <https://www.celebritynetworth.com/richest-celebrities/singers/jojo-siwa-net-worth/> (last visited Aug. 16, 2022) (stating that at sixteen years old, Siwa bought a \$3.5 million house in Los Angeles).

11. See Samantha Olson, Carolyn Twersky, & Leah Campano, *Olivia Rodrigo’s Net Worth Has Skyrocketed Since the Beginning of the Year*, SEVENTEEN (Dec. 13, 2021), <https://www.seventeen.com/celebrity/a36651869/olivia-rodrigo-net-worth/> (reporting that Rodrigo’s net worth has grown from around \$500,000 to \$5 million within one year).

12. *Songwriter Taylor Swift Signs Publishing Deal with Sony/ATV*, BROAD. MUSIC, INC. (May 12, 2005), https://www.bmi.com/news/entry/20050512Taylor_Swift_Songwriter_Taylor_Swift_Signs_Publishing_Deal_With_.

13. Mark Elliot, “*My World 2.0: How Justin Bieber Took It to the Next Level*,” U DISCOVER MUSIC (Mar. 19, 2022), <https://www.udiscovermusic.com/stories/justin-bieber-my-world-2-0-debut-album/>.

14. Alyson Stoner, *Alyson Stoner Pens Eye-Opening Op-Ed on ‘Harrowing’ Childhood Stardom: ‘Revisit the Script,’* PEOPLE (Apr. 7, 2021), <https://people.com/music/alyson-stoner-pens-op-ed-on-childhood-stardom-labor/>.

400,000 children were employed in the state of New York.¹⁵ This led to a growing societal concern for child safety in America.¹⁶ In 1938, Congress passed the Fair Labor Standards Act (FLSA) to regulate employment across America and protect children from “oppressive” employment.¹⁷ Congress chose this terminology to protect children from dangerous agricultural labor.¹⁸ However, a significant carve-out mandates that these child labor provisions “shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”¹⁹ While Congress passed the FLSA to protect children from dangerous agricultural jobs, this carve-out for child performers and the rise of social media has furthered child employment exploitation problems.²⁰

Although posting on social media or acting in a motion picture does not qualify as “oppressive employment” under the FLSA, many children are still overworked and overlooked in the entertainment industry.²¹ The FLSA excludes entertainment employment from its protections, allowing young children to work in the entertainment industry and make money even though other professions maintain an age requirement.²² Many of the existing standards enforced by DOL do not regulate children’s access

15. JEREMY P. FELT, *HOSTAGES OF FORTUNE* 36 (Syracuse U. Press 1965).

16. See Amanda G. Riggio, *The Small-er Screen: YouTube Vlogging and the Unequipped Child Entertainment Labor Laws*, 44 SEATTLE U. L. REV. 493, 499 (2021) (highlighting that this growing concern culminated in Congress passing the Fair Labor Standards Act (FLSA) in 1938).

17. 29 U.S.C. § 203(l) (defining “oppressive child labor” as employment that is “detrimental to [one’s] health or well-being”); see also 29 U.S.C. § 212(c) (“No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.”).

18. See Marina A. Masterson, *When Play Becomes Work: Child Labor Laws in the Era of “Kidfluencers,”* 169 U. PA. L. REV. 577, 586–87 (2021) (differentiating child labor that is “particularly hazardous” from labor in “relatively safe” environments).

19. 29 U.S.C. § 213(c)(3); see Masterson, *supra* note 18, at 587 (explaining that this carve-out allowed young children to explore their talents in the entertainment industry).

20. See LESTER DAVID & IRENE DAVID, *THE SHIRLEY TEMPLE STORY* 23 (1983) (establishing that the success of child actors in the 1930s, like Shirley Temple, motivated Congress to create this carve-out).

21. See Stoner, *supra* note 14 (discussing the rigorous and unrelenting schedule for child performers); Jennings, *supra* note 2 (noting that D’Amelio feels like she is living in a constant state of anxiety from the pressure of the social media spotlight).

22. See *Entertainment Industry Employment*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/youthlabor/entertainmentemployment> (last visited Aug. 16, 2022) [hereinafter *Entertainment Industry Employment*] (specifying that jobs in “motion picture, theater, radio, or television” are excluded from FLSA protections).

to work and profit through social media.²³

Due to the lack of child entertainment labor laws, many employers or companies can forum shop by choosing to conduct their business in a state with few regulations.²⁴ None of the previous examples of child employment are illegal, and many of these children have the extraordinary opportunity to develop their talents at a young age.²⁵ However, inadequate child labor laws combined with the immense access that children have to profit from social media has led to the exploitation of these minors.²⁶ Congress should re-evaluate prior federal statutes like the FLSA to advocate for stronger protections for children in the entertainment industry.

Part I of this Comment discusses how the rise of social media has created a new era of child employment. Part II explains the history of child labor laws in America, and Part III examines DOL's role and reach in regulating harmful working conditions for children in the entertainment industry. Part IV provides a recommendation to re-evaluate prior legislation like the FLSA so that DOL can effectively advocate for stronger protections for children in the entertainment industry.

I. SOCIAL MEDIA AND THE NEW AGE OF CHILD EMPLOYMENT

As of 2021, the social media marketing and advertising industry was worth nearly \$13.8 billion.²⁷ Since television ratings are down, advertisers are using social media to sell products instead of TV commercials.²⁸ Children with

23. Judson MacLaury, *A Brief History: The U.S. Department of Labor*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/aboutdol/history/dolhistoxford> (last visited Aug. 16, 2022) (stating that the U.S. Department of Labor (DOL) standards historically focus on traditional employment with standard eight-hour workdays).

24. See Liana M. Nobile, *The Kids Are Not Alright: An Open Call for Reforming Protections Afforded to Reality Television's Child Participants*, 17 U.C. DAVIS J. JUV. L. & POL'Y 41, 49 (discussing the temptation for producers to choose states with minimal protections for minors to conduct business).

25. See Masterson, *supra* note 18 (explaining that restrictions "do 'not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.'").

26. See Stoner, *supra* note 14 (outlining the rigorous and unrelenting schedule for child performers); Jennings, *supra* note 2 (stating that Charli D'Amelio feels immense pressure and anxiety from having a global platform at such a young age).

27. See Steven Lai, *Influencer Marketing Industry Expected to be Worth \$13.8 Billion This Year*, ION, <https://www.ion.co/influencer-marketing-industry-to-reach-13-8-billion-in-2021> (last visited Aug. 16, 2022) (emphasizing the sizable increase from 2020 where influencer marketing was worth \$9.7 billion); see also Pisani & Francis, *supra* note 4, (noting that Kylie Jenner, an American reality star and influencer, was the highest-paid celebrity of 2020 with an income of \$590 million).

28. Sapna Maheshwari, *Online and Making Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html>.

large social media followings, or “kidfluencers,” have been crucial to this new age of marketing.²⁹ Krishna Subramanian, CEO and co-founder of social-media data company Captiv8, discusses the powerful influence these kids have on their followers, stating, “[s]ocial-media stars give followers a daily taste of life, . . . offering updates on breakups, triumphs and failures. [Followers are] emotionally invested in that creator [and] more inclined to do or buy things [the influencer] tell[s them] to buy.”³⁰ Instagram, YouTube, and TikTok are three of the biggest social media platforms that advertisers target for these sponsorships.³¹

A. Instagram

Instagram is a “photo, video, and message sharing app” that utilizes filters, comments, captions, emojis, and hashtags to connect users with other people.³² Users can follow other accounts and post photos or videos to their own profiles.³³ People can also post photos or videos to their Instagram Story, which can be viewed for only twenty-four hours before it disappears.³⁴ All Instagram account users must be at least thirteen years old.³⁵

Many companies have targeted Instagram users with large followings to advertise their products or services.³⁶ Numerous users are children or parents who profit off their children.³⁷ For example, Kyler Fisher, the father of two-year-old identical twins who have more than two million followers on

29. See Masterson, *supra* note 18, at 577 (“The most successful kidfluencers make up to \$26 million in a year by posting sponsored content and monetizing ad space on their social media pages.”); *id.* at 579 (defining “kidfluencer” as a child with a large social media following that can generate interest in a product).

30. See Pisani & Francis, *supra* note 4 (comparing the powerful dedication of kidfluencers’ fans to more private Hollywood stars).

31. See Masterson, *supra* note 18, at 583–84 (describing influencers’ lucrative potential on Instagram and YouTube); Mansoor Iqbal, *TikTok Revenue and Usage Statistics (2022)*, BUS. APPS, <https://www.businessofapps.com/data/tik-tok-statistics/> (Aug. 15, 2022) (explaining the rising popularity of TikTok).

32. *A Parent’s Guide to Instagram*, MENTAL ILLNESS AWARENESS & SUPPORT ASS’N, <https://www.miasa.org.my/resources.html> (last visited Aug. 16, 2022).

33. *Id.*

34. *Id.*

35. See *Continuing to Make Instagram Safer for the Youngest Members of Our Community*, INSTAGRAM (Mar. 17, 2021) [hereinafter *Continuing to Make Instagram Safer*], <https://about.instagram.com/blog/announcements/continuing-to-make-instagram-safer-for-the-youngest-members-of-our-community> (acknowledging that some people will lie about their age when making an Instagram account and that Instagram engineers are developing new technology to detect this).

36. Maheshwari, *supra* note 28.

37. *Id.*

Instagram, said, “a sponsored post on the girls’ account could fetch between \$10,000 and \$20,000.”³⁸ These two-year-old twins have created numerous advertisements for everything from car seats to Carnival cruises.³⁹ Since a single Instagram post can return a profit of over \$20,000, parents can make a significant profit just by posting content of their children on the app.⁴⁰

B. YouTube

YouTube allows anyone to post a video to the internet with the click of a button.⁴¹ Created in 2005, YouTube is free to use and allows people from all over the world to easily access video content.⁴² According to GCF Global, part of the Goodwill Community Foundation non-profit, YouTube visitors watch around six billion hours of video content each month.⁴³ Similar to Instagram, all YouTube account owners must be at least thirteen years old, but children under thirteen can use YouTube with a parent’s consent.⁴⁴ Since YouTube fails to effectively police its age policy, more parents share an account with their children so they can better monitor online behavior.⁴⁵

A YouTube creator can earn approximately \$45,000 for a sponsored video or up to \$25,000 for talking about a company for only sixty seconds in a longer video.⁴⁶ Because of YouTube’s age policy, children can make thousands of dollars on the video-sharing site.⁴⁷ Brooklyn and Bailey McKnight, twenty-two-year-old identical twin sisters, created their joint

38. *Id.*

39. *See id.* (explaining that if an account frequently features children under age thirteen, an adult must indicate that the account is run by them and not the children to comply with Instagram’s age restrictions).

40. *Id.*

41. *What is YouTube?*, GCF GLOBAL, <https://edu.gcfglobal.org/en/youtube/what-is-youtube/1/> (last visited Aug. 16, 2022).

42. *Id.*

43. *Id.*

44. Devorah Heitner, *Your Child Wants to Start a YouTube Channel? Here Are Some Points to Consider*, WASH. POST (July 19, 2018), <https://www.washingtonpost.com/news/parenting/wp/2018/07/19/your-child-wants-to-start-a-youtube-channel-heres-what-to-consider/> (“Children under 13 are legally allowed to create profiles on sites that collect user data, as long as a parent approves the child’s account and knows that user data is being collected.”).

45. *Id.* *See* Belinda Luscombe, *How Ryan Kaji Became the Most Popular 10-Year-Old in the World*, TIME (Nov. 12, 2021, 7:00 AM), <https://time.com/6116624/ryan-kaji-youtube/> (describing how Ryan Kaji’s parents started a YouTube channel for their son that gained rapid popularity and is one of the service’s most popular channels.).

46. Maheshwari, *supra* note 28.

47. *See* Heitner, *supra* note 44 (describing how YouTube restricts users under the age of thirteen.).

YouTube channel in 2013 when they were thirteen years old.⁴⁸ The twins create engaging videos sharing makeup, fashion, and lifestyle advice.⁴⁹ The success of Brooklyn and Bailey's YouTube channel allowed them to make a viable wage while still in high school.⁵⁰

C. TikTok

TikTok is an app that allows users to share short-form videos on any topic and is another social media platform that brands use to advertise their products or services.⁵¹ Each TikTok user has a personalized video feed called a "For You" page that plays "TikToks" based on an algorithm predicting what the user is interested in watching.⁵² In the United States, if a TikTok user is under thirteen years old, they will be moved to the "Younger Users experience" with increased privacy safeguards.⁵³ If someone under age thirteen uses TikTok without the "Younger Users experience," then TikTok will delete the account.⁵⁴ TikTok differs from Instagram and

48. Paige Skinner, *Brooklyn and Bailey McKnight Are YouTube's Big Sisters*, DALL. OBSERVER (Apr. 9, 2019, 4:00 AM), <https://www.dallasobserver.com/arts/mindy-brooklyn-and-bailey-mcknight-are-youtubers-from-texas-11634129>. Brooklyn and Bailey's mother runs her own YouTube account showing various hairstyles and used Brooklyn and Bailey as hair models before the twins created their own channel. *Id.*

49. *13 Up-And-Coming YouTube Stars You Should Be Following*, BUS. INSIDER INDIA, (July 26, 2021, 12:46 PM), <https://www.businessinsider.in/tech/13-up-and-coming-youtube-stars-you-should-be-following/slidelist/46347479.cms>.

50. See Julian, *How Much Money Cute Girls Hairstyles Makes on YouTube—Net Worth*, Nailbuzz <https://nailbuzz.com/much-money-cute-girls-hairstyles-makes-youtube/> (Jan. 30, 2021) (noting their mother's YouTube account is now successful enough to support her family of eight.).

51. Werner Geysler, *What is TikTok? The Fastest Growing Social Media App Uncovered*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/what-is-tiktok/> (Mar. 31, 2022); see also Riggio, *supra* note 16, at 497 (acknowledging that TikTok differs from YouTube because the videos are easy to upload and cannot exceed a few minutes in length).

52. See Louise Matsakis, *TikTok Finally Explains How the "For You" Algorithm Works*, WIRED (June 18, 2020, 1:00 PM), <https://www.wired.com/story/tiktok-finally-explains-for-you-algorithm-works/> (describing that although the algorithm is a mystery, it can curate a fairly accurate queue of videos to the user's preferences); Maggie Tillman, *What is TikTok and How Does it Work? Everything You Need to Know*, EXPLAINER (Aug. 9, 2021), <https://www.pocket-lint.com/apps/news/146960-what-is-tiktok-the-musical-ly-successor-explained> (illustrating that TikTok videos are referred to as "TikToks").

53. *Tik Tok for Younger Users*, TIKTOK (Dec. 13, 2019) <https://newsroom.tiktok.com/en-us/tiktok-for-younger-users/>

54. See *Guardian's Guide*, <https://www.tiktok.com/safety/en/guardians-guide/> (last visited Aug. 16, 2022).

YouTube because there is no explicit restriction against children under age thirteen using the app; however, that child can use the app only with the “Younger Users experience” in place.⁵⁵

TikTok has skyrocketed in popularity in recent years.⁵⁶ As of May 2022, over three billion users have downloaded TikTok.⁵⁷ In 2021, TikTok generated an estimated \$4.6 billion in revenue, a 142% increase since 2020.⁵⁸ As of May 2022, 28% of users were under age eighteen; 35% were between ages nineteen and twenty-nine; 18% were between thirty and thirty-nine; and 19% were over age thirty-nine.⁵⁹ Thus, the number of users under eighteen will likely continue to increase.

As previously mentioned, Charli D’Amelio is one of the most followed user on TikTok with over 145.4 million followers.⁶⁰ The eighteen-year-old makes between \$25,000–\$50,000 per TikTok.⁶¹ For a video that is less than thirty seconds, minors can accumulate several thousands to millions of dollars after a few TikTok uploads. Ultimately, TikTok gives children the opportunity to make substantial amounts of money by advertising products on social media platforms to large followings.⁶²

II. HISTORY OF CHILD LABOR LAWS IN AMERICA

According to the U.S. Census, in 1900, 1.75 million children between the ages of ten and fifteen years old were working—comprising 6% of labor in America.⁶³ At this time, children were primarily working in industrial and

55. *Id.*; see *Continuing to Make Instagram Safer*, *supra* note 35 (noting Instagram users must be at least thirteen years old.); Heitner, *supra* note 44 (noting YouTube intends for users to be at least thirteen years old, but younger children may create profiles with parental approval).

56. See Iqbal, *supra* note 31 (explaining that TikTok was the seventh most downloaded app of the 2010s and was the most popular app in 2019 and 2020, even though it was only launched in 2017).

57. *Id.*

58. *Id.* (noting that the average TikTok user in the United States is on the app for sixty-eight minutes a day).

59. *Id.*

60. Charli D’Amelio (@charlidamelio), *supra* note 3 (followers as of Aug. 16, 2022).

61. Gabrielle Bernadini, *Charli D’Amelio Makes an Insane Amount per TikTok Video*, DISTRACTIFY (Mar. 5, 2021, 4:46 PM), <https://www.distractify.com/p/how-much-does-charli-make-per-tiktok-video>.

62. See Pisani & Francis, *supra* note 4 (showing that in 2021, many TikTok stars made more money than America’s top CEOs. For example, in 2021 Charli D’Amelio made \$17.5 million and the median income for CEOs of S&P 500 companies was \$13.4 million.).

63. Donald M. Fisk, *American Labor in the 20th Century*, U.S. BUREAU OF LAB. STATS. 1 (2003), <https://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf>.

manufacturing settings like farms, mills, and factories.⁶⁴ Many Americans grew concerned over child safety in dangerous working conditions.⁶⁵ In 1918, the U.S. Supreme Court ruled that Congress cannot use its Commerce Clause power to regulate child labor in the states, declaring it a purely local matter.⁶⁶ In 1941, the Court overruled this decision in *United States v. Darby*.⁶⁷

In 1938, Congress passed the FLSA to regulate employment across America and protect children specifically from “oppressive” employment.⁶⁸ Congress used the word “oppressive” to protect children from dangerous agricultural labor.⁶⁹ DOL is responsible for enforcing this legislation.⁷⁰ The FLSA sets the minimum age for employees at sixteen years old.⁷¹ However, for “employment in any occupation found and declared by the Secretary of Labor to be *particularly* hazardous” for minors, the minimum employment age is set at eighteen years old.⁷² The Secretary of Labor defines “particularly hazardous occupations” as those that are “detrimental to [one’s] health and well-being,” which traditionally includes jobs requiring “extensive manual

64. Michael Schuman, *History of Child Labor in the United States—Part 2: The Reform Movement*, U.S. BUREAU LAB. STAT. MONTHLY LAB. REV. (Jan. 2017), <https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-2-the-reform-movement.htm>.

65. *See id.* (discussing the public interest in the number of children in dangerous working conditions: “[f]rom 1902 to 1906, national magazines published [sixty-nine] articles under the heading of ‘child labor,’ while only a handful were penned in the previous [five]-year period.”). *But see* VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD* 66–70 (Princeton Univ. Press 1994) (showing that there was also a strong resistance to regulating child labor laws because families relied on their children’s income).

66. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (holding that the Keating-Owen Act is unconstitutional since child labor in the production of goods is a purely local matter). *Dagenhart*, while based on an issue of child labor and interstate commerce, actually revolved around Federalism and the balance of power between the states and the federal government. *Id.*

67. 312 U.S. 100, 116–17 (1941).

68. 29 U.S.C. § 203(l).

69. *See* Masterson, *supra* note 18 (specifying that “oppressive” child labor is “particularly hazardous” and not conducted in “relatively safe” environments).

70. *Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEP’T OF LAB (Sept. 2016), <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa> [hereinafter DOL Reference Guide] (explaining that the DOL Wage and Hour Division enforces the FLSA for most private employment while the U.S. Office of Personnel Management enforces the FLSA for most Executive and Legislative Branch employees).

71. *See* 29 C.F.R. § 570.2(a)(1). *But see id.* § 570.2(a)(1)(i) (listing exceptions to the sixteen-year-old age minimum for employment such as for agricultural jobs).

72. *Id.* § 570.2(a)(1)(ii) (emphasis added).

labor, including coal mining, manufacturing, and operating machinery.”⁷³ Since the Act focused on physically dangerous forms of work, child performers were largely excluded from any protections under the FLSA.⁷⁴

Furthermore, this significant carve-out requires that the FLSA child labor provisions “shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”⁷⁵ The Code of Federal Regulations defines “performer” as an “actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience”⁷⁶

Lawmakers use many reasons to explain why child performers and entertainers are excluded from the protections under the FLSA.⁷⁷ This carve-out has been called the “Shirley Temple Exception” because, at the time of the FLSA’s ratification, child actress Shirley Temple was a rising star.⁷⁸ If Congress included child performers in the protections afforded by the FLSA, she would not have been able to perform.⁷⁹ Another reason to exclude child performers from the FLSA protections rests on the assumption that all entertainment

73. *Id.*; Riggio, *supra* note 16, at 500. See *Hazardous Jobs*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/youthlabor/hazardousjobs> (last visited Aug. 16, 2022). DOL explains that such occupations include “excavation, manufacturing explosives, mining, and operating many types of power-driven equipment.” *Id.*

74. Riggio, *supra* note 16, at 499 (explaining that Congress did not address child employment in the entertainment industry in the twentieth century because of the correlation between child labor law reform and the needs of the economy); see also Alice G. Walton, *Six Ways Social Media Affects Our Mental Health*, FORBES (June 30, 2017, 12:59 PM), <https://www.forbes.com/sites/alicegwalton/2017/06/30/a-run-down-of-social-medias-effects-on-our-mental-health/?sh=505071982e5a> (recognizing that social media exposure can also have a detrimental effect on a child’s mental health because it triggers sadness, addiction, comparison, and restlessness).

75. 29 U.S.C. § 213(c)(3).

76. 29 C.F.R. § 550.2(b).

77. See Masterson, *supra* note 18, at 587 (discussing various reasons why child performers are excluded from the FLSA).

78. Kimberlianne Podlas, *Does Exploiting a Child Amount to Employing a Child? The FLSA’s Child Labor Provisions and Children on Reality Television*, 17 UCLA ENT. L. REV. 39, 58 (2010).

79. See DAVID & DAVID, *supra* note 20 (explaining that the FLSA exemption for child performers has been nicknamed “the Shirley Temple Act.”).

professions pay high salaries.⁸⁰ This belief, of course, is misguided.⁸¹ Others argue that entertainment occupations are not considered “oppressive” like the factory jobs where children were physically and inhumanely overworked.⁸² However, numerous child performers have spoken out about physically or mentally damaging experiences in unregulated entertainment work environments.⁸³ With the earning potential now on TikTok, Instagram, and YouTube, kidfluencers are speaking out about the pressure and dangers of social media employment.⁸⁴ While the type of oppressive labor targeted by the FLSA has largely disappeared in America, lawmakers have historically refused to consider the potential harm to children employed in the entertainment industry.⁸⁵

III. DOL AND THE ENTERTAINMENT INDUSTRY

A. Scope of DOL’s Activities

Congress established DOL on March 4, 1913 “to foster, promote and develop the welfare of working people, to improve their working conditions, and to enhance their opportunities for profitable employment.”⁸⁶ DOL has a variety of responsibilities ranging from program administration, to compliance, to enforcement.⁸⁷ According to the Congressional Research

80. See 80 Fed. Reg. 38,516 (July 6, 2015) (noting that the FLSA exemption from minimum wage protection is currently at \$455 a week, which was last updated in 2004); Erin E. O’Neill, Essay, *Influencing the Future: Compensating Children in the Age of Social Media Influencer Marketing*, 72 STAN. L. REV. ONLINE 42, 46 (2019) (specifying that performers “do not need the same minimum-wage and overtime protections as other workers”).

81. See generally Ada Tseng, *How to Pay Your Bills When You’re Starting Out in Hollywood*, L.A. TIMES (June 28, 2021), <https://www.latimes.com/entertainment-arts/business/story/2021-06-28/hollywood-day-jobs-make-money-serving-tiktok-twitch>.

82. See Masterson, *supra* note 18, at 587 (acknowledging that Congress did not believe that child entertainment fit the definition of oppressive within the FLSA); see also Schuman, *supra* note 64.

83. See Stoner, *supra* note 14 (discussing the rigorous and unrelenting schedule for child performers).

84. See Jennings, *supra* note 2 (reporting that Charli D’Amelio has suffered from mental health struggles as a result of public opinion); Taylor Lorenz, *Young Creators Are Burning Out and Breaking Down*, N.Y. TIMES, <https://www.nytimes.com/2021/06/08/style/creator-burnout-social-media.html> (Sept. 17, 2021) (quoting Jack Innanen, a TikTok star who compared the pressure to create content to “tapping a keg that’s been empty for a year”).

85. See Masterson, *supra* note 18, at 587 (differentiating child employment in the industrial era involving dangerous machinery and child employment today occurring in relatively safe environments like babysitting and yard work).

86. MacLaury, *supra* note 23. See *About Us*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/aboutdol> (last visited Aug. 16, 2022) (defining DOL’s mission statement).

87. See DAVID H. BRADLEY, CONG. RSCH. SERV., IF10975, MAJOR FUNCTIONS OF THE U.S. DEPARTMENT OF LABOR, (2018) (noting that “DOL is not primarily a grant-making organization”).

Service, DOL has four focal points that include many aspects of workplace protections.⁸⁸ First, DOL can manage wages, leave, and occupational safety under its “worker protection” power.⁸⁹ Second, “income support” allows DOL to support unemployed individuals and manage compensation for work-related injuries.⁹⁰ Third, DOL can give grants to states that provide training and employment support through its “workforce development and training” power.⁹¹ Fourth, “labor statistics and research” allows DOL to analyze the job market and economy across the United States.⁹²

B. DOL and Child Employment in the Entertainment Industry

In 1938, Congress passed the FLSA, which is enforced by DOL Wage and Hour Division for “private employment, State and local government employment, and Federal employees of the Library of Congress, U.S. Postal Service, Postal Rate Commission, and the Tennessee Valley Authority.”⁹³ This established the forty-hour workweek and paid overtime guidelines.⁹⁴ However, as stated above, the FLSA carve-out requires that child labor in the entertainment industry is not federally regulated.⁹⁵

In 1944, the Supreme Court recognized “that the right to raise one’s children is ‘essential’ and [the Court] has only stepped in to prohibit children working for a parent or guardian when the potential for harm is significant.”⁹⁶ Nonetheless, the Court held that the government has broad authority to regulate the treatment and actions of children.⁹⁷ When framing DOL’s mission around the issue of child labor in the entertainment industry, the purpose is not to stifle a child’s talent and opportunities but

88. *Id.* (outlining that DOL is responsible for enforcing over 180 federal laws).

89. *Id.* (noting that DOL sets minimum wage rates and overtime pay requirements, leave requirements for certain family and medical reasons, and health and safety standards).

90. *Id.* (income security programs).

91. *Id.* (“workforce development activities” through various programs).

92. *Id.* (recognizing that DOL collects, analyzes, and disseminates “data on the labor market, working conditions, and prices in the economy”).

93. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> (last visited Aug. 16, 2022); DOL Reference Guide, *supra* note 70.

94. 29 U.S.C. § 207(a)(1).

95. *Id.* § 213(c)(3) (“The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.”).

96. O’Neill, *supra* note 80, at 45; *see also* Prince v. Massachusetts, 321 U.S. 159, 166 (1944) (holding that courts may regulate or prohibit child labor only for the child’s wellbeing).

97. *See* Prince, 321 U.S. at 166 (recognizing the separation between parental supervision and governmental intrusion on a child’s liberties).

to “foster” and “promote” them safely and healthily.⁹⁸

Since social media did not exist when Congress passed the FLSA,⁹⁹ social media employment does not explicitly fit into the category of child entertainment. For example, Charli D’Amelio did not expect her life to change when she posted her first ten-second TikTok at age fifteen.¹⁰⁰ Instead, she was just using a new social media app like other teenagers.¹⁰¹ Now her life has turned into a storm of balancing brand deals and posting sponsored content online.¹⁰² This form of income for minors raises many unanswered questions: What is the role of the minor’s parents? Do they depend on the child’s income from social media content?¹⁰³ What about the amount of labor parents may be contributing compared to the amount of labor children contribute?¹⁰⁴ How would DOL enforce new protections when most social media content is shot from home with no supervision or ability to supervise? Lawmakers should begin to address these unanswered questions.

1. *Coogan Laws*

To protect the financial earnings of children in the entertainment industry, several states have adopted the “Coogan Law.”¹⁰⁵ The law’s

98. See *About Us*, *supra* note 86 (referencing the core elements of DOL’s mission statement).

99. Alexandra Samur, *The History of Social Media: 29+ Key Moments*, HOOTSUITE (Nov. 22, 2018), <https://blog.hootsuite.com/history-social-media/> (compiling a history of social media and showing the first social media site was created in 1997).

100. See Jennings, *supra* note 2 (describing the stark difference between Charli D’Amelio’s simple and normal life two years ago and the pressures of now having hundreds of millions of followers on social media).

101. Tyler Boronski, *Charli D’Amelio on How Life Has Changed Because of TikTok*, (Dec. 18, 2019), https://www.youtube.com/watch?v=phE_EXqZwR0 (stating “[t]his is crazy, it’s just so weird to see how fast this all happened.”); Iqbal, *supra* note 31.

102. See Jennings, *supra* note 2 (outlining the projects that Charli D’Amelio has completed in the last two years: “written and released a book and a podcast, created a fashion line with Hollister, lent her name to makeup products and been the face of several different brand campaigns, launched a ring light business, invented her own Dunkin’ drink, and now, let a camera crew inside her life to document it all.”).

103. See Am. Acad. For Certified Fin. Litigators, *Income Earned by Children: Who Gets the Money?*, AACFL (Mar. 12, 2021), <https://aacfl.org/income-earned-by-children-who-gets-the-money/> (explaining that depending on the state the child lives in, the minor may or may not have control over their money).

104. See Maheshwari, *supra* note 28 (describing how the parents of two-year-old twins are making thousands of dollars from using their children to advertise for companies).

105. See *Coogan Laws*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> (last visited Aug. 16, 2022) (explaining the

namesake, Jackie Coogan, struck comedic success after starring in Charlie Chaplin's 1919 film *The Kid*.¹⁰⁶ Once he turned twenty-one, Coogan discovered that his parents had depleted all of his financial earnings from his film career.¹⁰⁷ Coogan successfully sued his mother to claim the money he made and as a result, California created the "Coogan Law."¹⁰⁸ This law requires fifteen percent of a minor's earnings to be placed in a trust called a "Coogan Account."¹⁰⁹ Although the Coogan Law protect a minor's financial earnings from one's parents, other aspects of child labor in the entertainment industry remain unregulated.¹¹⁰ Though Coogan Laws are beneficial, they are not sufficient because protections for children in the entertainment industry are not federally enforced.¹¹¹

C. State Regulations on Children in the Entertainment Industry

As of 1998, DOL's main goal is to bolster employment and training across professions.¹¹² As previously noted, current child labor law is state-based because the FLSA does not protect child performers due to the carve-out.¹¹³ Without federal protections, each state has developed different labor standards governing child performers leading to significantly disparate protections for these workers depending on the state in which the child works.¹¹⁴ For example, California and New York have extensive regulations,

development of Coogan Laws); Masterson, *supra* note 18, at 589 (describing the events leading up to California passing the Coogan Law in 1939).

106. *Coogan Laws*, *supra* note 105.

107. *Id.*

108. *Id.*

109. *Id.*

110. See generally *Child Entertainment Laws As of January 1, 2022*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/state/child-labor/entertainment> (last visited Aug. 16, 2022) [hereinafter *Child Entertainment Laws*] (noting that states like Tennessee have little to no regulations for child labor in the entertainment industry). See *Entertainment Industry Employment*, *supra* note 22; 29 U.S.C. § 213(c)(3) (providing an exemption to the FLSA for child performers).

111. See Am. Acad. for Certified Fin. Litigators, *supra* note 103 (explaining that children who do not live in California do not enjoy the protections of Coogan's Law). Cf. Nobile, *supra* note 24, at 48–50 (noting that state laws are not adequate for child performers because of the high incentive to forum shop and avoid strict regulations).

112. MacLaury, *supra* note 23.

113. See 29 U.S.C. § 213(c)(3) (providing an exemption to the FLSA for child performers); *Entertainment Industry Employment*, *supra* note 22 (specifying that jobs in "motion picture, theater, radio, or television" are excluded from FLSA protections).

114. *Child Entertainment Laws*, *supra* note 110.

whereas Montana has none.¹¹⁵ New Mexico has vigorous protections, while Tennessee—a popular area for young musicians—surprisingly has no regulations.¹¹⁶ As of 2022, seventeen states have no regulations for child employment, and twenty-four states do not require children employed in the entertainment industry to have work permits.¹¹⁷ Due to this discrepancy, child performers “have been subject to unequal and often insufficient protection depending on where their work is performed.”¹¹⁸

According to the U.S. Bureau of Labor Statistics, California, New York, and Tennessee are three of the most popular states for people to pursue acting, music, or other types of entertainment employment.¹¹⁹ However, the accessibility of social media easily gives minors in any state the ability to profit from their posts.¹²⁰ Since states differ greatly in their labor regulation requirements for child performers, some may be incentivized to “forum shop” to avoid arduous rules.¹²¹ For example, Tennessee is a largely unregulated state concerning child performers, but also has a high number of young people working in the entertainment industry.¹²² It is time for DOL

115. *Id.* (stating that the following states have no regulations for child entertainment: Arizona, Kansas, Kentucky, Maine, Mississippi, Montana, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin).

116. *Id.*; see *Tennessee Child Labor in Entertainment & Performing Arts*, Minimum-Wage.org, <https://www.minimum-wage.org/tennessee/entertainment-child-labor-laws> (last visited Aug. 16, 2022) (noting that Tennessee does not regulate the employment of minor musicians).

117. See *Child Entertainment Laws*, *supra* note 110.

118. Masterson, *supra* note 18, at 588.

119. See Riggio, *supra* note 16, at 502 (describing California and New York as centers for child performers); *Occupational Employment and Wages, May 2021: Musicians and Singers*, U.S. BUREAU OF LAB. STATS. (Mar. 31, 2022), <https://www.bls.gov/oes/current/oes272042.htm> (showing a high concentration of musician and singer employment in California, New York, and Tennessee); *Occupational Employment and Wages, May 2021: Actors*, U.S. BUREAU OF LAB. STATS. (Mar. 31, 2022), <https://www.bls.gov/oes/current/oes272011.htm> (showing New York as a leading state for actor employment).

120. See, e.g., Iqbal, *supra* note 31 (noting TikTok’s international presence and that it was “downloaded 693 million times in 2019 and 850 million times in 2020.”).

121. See Nobile, *supra* note 24, at 48–50 (“[A] state’s interest in revenue may greatly outweigh its interest in protecting its children, leading producers in states with relatively lax labor laws to boast about the laws (or lack thereof) as an attempt to attract production to their state.”).

122. TENN. DEP’T OF LAB. & WORKFORCE DEV. & U.S. DEP’T OF LAB., ADMIN. NO. 337206, CHILD LABOR LAWS [hereinafter CHILD LABOR LAWS], https://www.ornl.gov/sites/default/files/directorate-files/Child_Labor_Laws_0.pdf; U.S. BUREAU OF LAB. STATS., *supra* note 119 (illustrating how Tennessee and the Nashville metropolitan area lead the nation in musician and singer employment).

to confront the lack of child performer protections as more aspiring child musicians, actors, and influencers flock to states with fewer regulations.

1. California

Public attention on child labor laws in the entertainment industry swelled in California after a tragic accident on a movie set in 1982 resulting in three deaths.¹²³ One morning during the filming of *Twilight Zone: The Movie*, a helicopter, “disabled by a special-effects explosion, plunged from the sky and killed actor Vic Morrow, [age fifty-three], and the two children—Renee Chen, [age six], and Myca Dihn Lee, [age seven].”¹²⁴ This tragic event occurred early in the morning and outside the legal working hours for minors in California.¹²⁵ Although the children’s parents permitted their employment, they never obtained work permits.¹²⁶ California legislators responded to this tragedy by developing a regulatory framework to protect the safety of children working in the entertainment industry.¹²⁷

Today, California has implemented extensive requirements and regulations for children employed in entertainment.¹²⁸ For example, a minor must obtain specific documentation from one’s school district for the Labor Commissioner to issue a work permit.¹²⁹ Minors cannot work for more than five consecutive days and will be excused for only five absences from school each year.¹³⁰ Courts in California can require a portion of the child’s earnings to be placed in a trust.¹³¹

123. Robert W. Stewart, *Attorney Pressed on “Twilight Zone” Allegations*, L.A. TIMES (Nov. 1, 1985), <https://www.latimes.com/archives/la-xpm-1985-11-01-mn-786-story.html>.

124. *Id.*

125. *See id.* (noting regulators fined Warner Bros. and members of the production team two years prior for allowing children to work later than 6:30 PM in violation of child labor laws).

126. Riggio, *supra* note 16, at 503.

127. *See* Robert Weintraub, *A New Dimension of Filmmaking*, SLATE (July 26, 2012), <https://slate.com/culture/2012/07/the-twilight-zone-tragedy-how-vic-morrows-death-changed-the-way-films-are-made.html> (following this accident, the film industry adopted standards on various aspects of filmmaking, from gunfire to aircraft, and the insurance industry ensured adherence reviewing project safety).

128. *Child Entertainment Laws*, *supra* note 110.

129. *Id.*

130. *See id.* (establishing that school districts must allow students “to complete all assignments and tests missed during [an] absence.”).

131. *Id.*

2. *New York*

New York has different requirements for work permits based on age.¹³² An infant is permitted to work as a child performer in New York as long as they are at least fifteen days old.¹³³ Any models under eighteen must obtain a work permit from “education authorities.”¹³⁴ Until they turn eighteen, a minor who is at least age sixteen needs an employment certificate.¹³⁵ If the performer is under age sixteen, they must obtain a permit from the mayor or a chief executive from the company.¹³⁶ Certificates and permits require “written parental consent . . . proof of age, and a certificate of physical fitness.”¹³⁷

Like California, courts in New York can require a portion of the child’s earnings to be set aside in a trust for the minor.¹³⁸ In *Scheller v. Bowery Savings Bank*,¹³⁹ a mother spent all of her son’s earnings that were meant to be held in a trust until the New York child actor turned eighteen.¹⁴⁰ New York grants guardians the legal right to possession of a child’s funds; however, the rules may change depending on private agreements.¹⁴¹ Here, the son reluctantly continued his career in entertainment because his mother promised to keep his earnings in a trust so he could use them to pay for college.¹⁴² Because the mother did not maintain the agreement with her son, the New York Supreme Court awarded the former child actor \$261,609.¹⁴³

132. *Id.*

133. N.Y. DEP’T OF LAB., LS 559, CHILD PERFORMER PERMITTED WORKING HOURS (2018), https://dol.ny.gov/system/files/documents/2021/02/ls559_child_performer_permitted_work_hours-.pdf.

134. *Child Entertainment Laws*, *supra* note 110; see N.Y. DEP’T OF LAB., LS 561, APPLICATION FOR CHILD PERFORMER PERMIT (2018), https://dol.ny.gov/system/files/documents/2021/02/ls561_application_for_a_child_performer_permit.pdf (indicating an educational authority is a school official or representative who can affirm a minor’s satisfactory academic performance).

135. *Child Entertainment Laws*, *supra* note 110.

136. *Id.*

137. *Id.*

138. *Id.*

139. 630 N.Y.S.2d 62, 63–64 (N.Y. App. Div. 1995).

140. *Id.*

141. *Id.* at 64.

142. *Id.* at 63–64.

143. *Id.* (dismissing the mother’s statute of frauds defense to her commitment to hold her son’s earnings).

3. Tennessee

Tennessee does not regulate child entertainment and does not require a work permit for minors employed in entertainment.¹⁴⁴ According to the Tennessee Department of Labor and the U.S. Department of Labor, “[m]inors employed as actors or performers in legitimate entertainment productions” are excluded from regulated child labor in Tennessee.¹⁴⁵ Tennessee courts can also require a portion of the child’s earnings to be placed in a trust for the minor.¹⁴⁶ Under Tennessee Code, a child may not receive more than \$25,000 at a time from their earnings without a court order.¹⁴⁷

In 2003, the Tennessee General Assembly enacted the Tennessee Protection of Minor Performers Act, which requires the creation of trusts like those required by Coogan Laws and ensures that the production company can enforce its contract.¹⁴⁸ This Act applies to all child performers who do business in Tennessee even if that person is not a resident of the state and allows a minor to void one’s own contract.¹⁴⁹

IV. RECOMMENDATION

To protect the growing number of minors profiting from social media, Congress must revisit existing child labor laws. Since there are no federal protections, kidfluencers and child performers are falling through the cracks of the patchwork legislation. DOL enforces the FLSA, so DOL can oversee “worker protections” by enforcing new regulations to protect children working in the entertainment industry.¹⁵⁰

144. *Child Entertainment Laws*, *supra* note 110.

145. CHILD LABOR LAWS, *supra* note 122.

146. *Child Entertainment Laws*, *supra* note 110.

147. Tenn. Code Ann. § 34-1-104(b) (2019).

148. 2003 Tenn. Pub. Acts 168.

149. *Id.*; see *Stroupes v. Finish Line, Inc.*, No. 1:04-cv-133, 2005 WL 5610231, at *5 (E.D. Tenn. Mar. 16, 2005) (concluding that minors’ employment contracts are voidable under the Tennessee Protection of Minor Performers Act); see also FLSA, 29 U.S.C. § 213(c)(3) (describing an exception from the child labor provisions of the FLSA for “any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions” which applies to minors who work via social media.).

150. See DOL Reference Guide, *supra* note 70 (noting that DOL enforces the FLSA); Bradley, *supra* note 87 (defining the four main categories of DOL’s activities: worker protection, income support, workforce development and training, and labor statistics and research).

First, various labor unions should advocate for Congress to expand the definition of child performers in the FLSA to include minors employed through social media platforms like Instagram, YouTube, and TikTok.¹⁵¹ Unions empower and protect working people in America by ensuring higher wages, better benefits, and a safer workplace.¹⁵² The American Federation of Labor and Congress of Industrial Organization (AFL-CIO) is the largest federation of unions in the United States, comprised of over fifty-seven national and international labor unions.¹⁵³ At least seven AFL-CIO unions currently exist that can advocate for better protections for child performers and kidfluencers.¹⁵⁴ In 2021, the AFL-CIO called on Congress and the Biden Administration to strengthen worker protections through five goals: worker empowerment, worker safety and the pandemic, good jobs and public investment, racial justice and democracy, and economic security.¹⁵⁵ Unions are the best suited to call on Congress to expand the FLSA because union workers are protected from retaliation and can testify firsthand about a lack of regulations for children in the entertainment industry.¹⁵⁶

To achieve this goal, advocates could select an existing union and lobby them to expand their protections to kidfluencers and social media

151. See 29 U.S.C. § 213(c)(3). The FLSA currently defines “child performers” as “any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.” *Id.* Amending this definition to include minors who work in social media would be a logical extension of this limited definition of child performers.

152. See *What Unions Do*, AFL-CIO, <https://aflcio.org/what-unions-do> (last visited Aug. 16, 2022) (emphasizing that unions give working people a voice to advocate for “better . . . working conditions without fear of retaliation”).

153. See *About Us*, AFL-CIO, <https://aflcio.org/about-us> (last visited Aug. 16, 2022) (showing that the American Federation of Labor and Congress of Industrial Organization (AFL-CIO) represents over twelve million Americans).

154. See *Our Affiliated Unions*, AFL-CIO, <https://aflcio.org/about-us/our-unions-and-allies/our-affiliated-unions> (last visited Aug. 16, 2022) (listing some of the appropriate unions to advocate for child performers: Actors’ Equity Association, American Guild of Musical Artists, Associated Actors and Artistes of America, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, and Screen Actors Guild-American Federation of Television and Radio Artists).

155. *Advocacy*, AFL-CIO, <https://aflcio.org/what-unions-do/social-economic-justice/advocacy> (last visited Aug. 16, 2022).

156. See Josh Bivens, Lora Engdahl, Elise Gould, Teresa Kroeger, Celine McNicholas, Lawrence Mishel et al., *How Today’s Unions Help Working People*, ECON. POL’Y INST. 13–14 (Aug. 24, 2017), <https://files.epi.org/pdf/133275.pdf> (describing specific ways that unions have improved the workplace by testifying before Congress: nurses now have violence prevention standards, laborer and autoworkers are protected from deadly silica dust, and firefighters now have relief from post-traumatic stress disorder).

employment.¹⁵⁷ One such opportunity lies with the American Guild of Variety Artists (AGVA), which is part of the Associated Actors and Artists of America and a member of the AFL-CIO.¹⁵⁸ AGVA members work as performers in the “variety” area which includes touring singers and dancers, circus performers, comedians, poets, and more.¹⁵⁹ Since social media marketing is a new and dynamic industry, AGVA would be well-suited to represent kidfluencers without expanding the union’s scope.¹⁶⁰

After Congress amends the definition of child performers, these minors will still be excluded from the protections of the FLSA since its purpose is to protect children from “oppressive” labor.¹⁶¹ The world has drastically changed since 1938 when Congress passed the FLSA, and the drafters could not have predicted the rise of kidfluencers in social media marketing.¹⁶² By expanding the definition of “oppressive” labor to include the ways companies overwork children in twenty-first century entertainment spaces, including social media, DOL can protect kidfluencers from exploitation. In the meantime, DOL can create interim guidance under its “worker protection[s]” authority to recognize kidfluencers as child performers.¹⁶³

Since many children under thirteen use social media sites like Instagram, YouTube, and TikTok even though it violates their policy, DOL should work with the Federal Communications Commission (FCC) to regulate underage users.¹⁶⁴

Interagency working groups are “designed to bring agencies together to plan, develop, and implement coordinated” strategies.¹⁶⁵ By creating a

157. *See id.* at 8–17 (exemplifying how unions have lobbied successfully on behalf of their members).

158. *See* Kenneth Quinnell, *Get to Know AFL-CIO’s Affiliates: Actors and Artistes*, AFL-CIO: BLOG (Mar. 18, 2019), <https://aflcio.org/2019/3/18/get-know-afl-cios-affiliates-actors-and-artistes> (explaining the Associated Actors and Artistes of America also represent the Actor’s Equity Association, the American Guild of Musical Artists, the Guild of Italian Actors, and the Screen Actors Guild-American Federation of Television and Radio Artists).

159. *Id.*

160. *See id.* (explaining that kidfluencers would conform with the other “variety performers” the American Guild of Variety Artists (AGVA) currently represent).

161. *See* 29 U.S.C. § 213(c)(3) (referencing the carve-out that excludes child performers from the FLSA protections); *see also id.* § 203(l) (defining “oppressive child labor” as employment that is “detrimental to [the child’s] health or well-being”).

162. *See Wage and Hour Division History*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/about/history> (last visited Aug. 16, 2022) (highlighting the passage of the FLSA in 1938).

163. *See* Bradley, *supra* note 87 (discussing that the DOL Wage and Hour Division oversees the enforcement of various federal labor standards).

164. *See Continuing to Make Instagram Safer*, *supra* note 35 (acknowledging that some people will lie about their age when making an Instagram account).

165. *Interagency Groups*, GLOBAL CHANGE, <https://www.globalchange.gov/about/iwgs> (last visited Aug. 16, 2022).

working group between DOL and the FCC to prevent children under the age of thirteen from creating and using social media accounts, children will be better protected from exploitation online. If DOL can provide grants to social media companies, then those companies can improve their programming to detect and prevent child users under the age of thirteen.¹⁶⁶

Finally, by implementing protections at the federal level, forum shopping in the entertainment industry, caused by differing levels of child performer protection in various states, will become less common.¹⁶⁷ Since many children under the legal employment age of sixteen are working in the entertainment industry, DOL should implement some base level of protection for these children.¹⁶⁸ No state should have zero regulations for children in the entertainment industry; as such, DOL should combine child labor requirements from several states to create robust federal protections.¹⁶⁹ While certain things—like limiting the number of days a child can miss school—should not be nationally mandated, DOL should require work permits for minors seeking employment in the entertainment industry. To prevent parents from taking their child's earnings, DOL should require that the child's money be put into a trust until the child is of age. Companies employing child talent often oppose regulation since it creates more logistical steps for them and their clients.¹⁷⁰ However, by implementing maximum work hours for children in the entertainment industry and requiring companies to see proof of work permits before contracting, DOL can ensure that children balance work with their education, family, and childhood.

These new regulations are easier to implement for child performers who work with unions and production companies, but more challenging for minors making money on their own from social media. Most social media content is produced from one's home with no supervision or ability to supervise.¹⁷¹ However, DOL can determine who is a kidfluencer by

166. See Bradley, *supra* note 87 (showing that while it is not DOL's main function, the agency's resources allow grants).

167. See Masterson, *supra* note 18, at 588 (emphasizing that federal legislation is the best way to ensure adequate protection for child performers across all states); Nobile, *supra* note 24, at 48–50 (emphasizing that federal laws are the best way to ensure adequate protections for child performers across all states).

168. See 29 C.F.R. § 570.2 (a)(1) (The FLSA has set the minimum age for employees at sixteen years old with the exception of agriculture.).

169. See *Child Entertainment Laws*, *supra* note 110 (noting that Tennessee does not regulate child entertainment and does not require a work permit for employed minors).

170. See Nobile, *supra* note 24, at 50 (discussing the tenuous process of entertainment companies relocating to conduct business in the least restrictive area possible).

171. See Dan Sanchez, *Where to Shoot Your YouTube Videos*, DANCHEZ (last visited Aug. 16,

requiring companies to report whenever a minor signs a contract to work with the company.¹⁷² A federal requirement of maximum work hours and a work permit will protect children who make money on social media.

CONCLUSION

Child labor laws do not adequately protect kidfluencers and child performers. As of 2022, DOL reports that seventeen states do not regulate child entertainment even though all fifty states have working child performers.¹⁷³ With the rise of social media and kidfluencers, minors can make a profit from anywhere in the country without even signing a formal contract. If Congress revisits the FLSA and includes minors who profit from social media in its protections, DOL can enforce it. By Congress and DOL implementing baseline protections like maximum work hours and work permits, children working in the entertainment industry can be better protected.

2022) <https://danchez.com/where-to-shoot-youtube-videos/> (suggesting the bedroom, kitchen, or living room as places to film YouTube content).

172. See *supra* Part III (outlining various state's minor contract frameworks DOL can mimic).

173. See *Child Entertainment Laws*, *supra* note 110 (listing seventeen states that do not regulate child entertainment employment).