The Inequitable Taxation of Low- and Mid-Income Performing Artists

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Abstract

The Internal Revenue Code (IRC) imposes an excessive income tax burden on many low- and mid-income performing artists. Low- and mid-income performing artists suffer a higher effective income tax burden than similarly situated taxpayers who are not performing artists and may also suffer a higher income tax burden than high-income performing artists. This inequity is due to a failure in the Internal Revenue Code, which has been significantly exacerbated by the Tax Cuts and Jobs Act (TCJA) passed in 2017.

This Article makes three key assertions: First, it shows that the IRC and the TCJA do not account for the unique employment structures of the entertainment industry, resulting in low- and mid-income performing artists having to pay income tax on more than their net income. Second, the Article uses stylized examples to show how current taxation of performing artists fails the standard benchmarks of sound tax policymaking. Third, the paper explores several possible solutions to the problem and calls for the passage of the Performing Artist Tax Parity Act (PATPA), which has been introduced with bipartisan support in Congress several times but has yet to pass.

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I. Introduction

Under current law, many low- and mid-income[1] performing artists pay tax on more than their net economic income. This is because our income tax laws do not adequately account for the unique working patterns of performing

1. For purpose of this article, "mid-income" is the average household income before transfer and taxes for the mid-quintile of the income distribution. For 2019 (the latest year for which data is available), that threshold stood at $81,800. *See* Cong. Budget Off., The Distribution of Household Income, 2019 6 (2022), https://www.cbo.gov/system/files/2022–11/58353-HouseholdIncome.pdf (adjusted to inflation, this threshold would be $95,232 as of January 2023).

artists. This problem was significantly exacerbated by the passage of the Tax Cut and Jobs Act in 2017 (TCJA).[2] The reality is that many low- and mid-income performing artists pay higher effective tax rates than similarly situated non-artists. In many cases, they also pay higher effective tax rates than well-to-do performing artists.

Under the internal revenue code (IRC), taxpayers can generally deduct business expenses from their gross income, unless they are employees.[3] In most instances, this makes sense because "employees" do not carry significant out-of-pocket business expenses—their employers do. Thus, it is reasonable to deny business expenses to employees yet grant them to taxpayers who earn income in another capacity, such as an independent contractor.[4] But what about taxpayers who—due to unique industry structure—work like independent contractors in that they carry significant out-of-pocket business expenses, yet are classified as "employees" for tax purposes? This is the tax reality of many, if not most, performing artists.

Performing artists carry significant out-of-pocket expenses, such as headshots, acting classes, demo reels, casting website fees, and agent and manager fees.[5] The latter two alone can easily amount to 25 percent of artists' gross income.[6] Performing artists classified as "independent contractors" for tax purposes should be able to deduct such expenses. As a matter of law, however, most professional performing artists are classified as "employees," meaning they cannot deduct these expenses.[7] Classification as "employees" is desirable because it comes with collective bargaining rights, workplace protections, and other labor law benefits.[8]

Before the enactment of the TCJA, performing artists could at least deduct business expenses "below-the-line."[9] This was less beneficial than above-the-line deductions because below-the-line deductions are subject to various limitations.[10] The TCJA, however, suspended the ability of performing artists to deduct their business expenses altogether, even below-the-line.[11] As

2. Tax Cut and Jobs Act of 2017, Pub. L. No. 115–97.
3. I.R.C. §§ 62, 162. These deductions reduce the taxpayer's Gross Income to derive the taxpayer's "Adjusted Gross Income," or AGI. This would make such deductions "above the line" deductions (the line being AGI).
4. This group of taxpayers may also be referred to as self-employed taxpayers, sole-properties, business owners, or any other name that denotes them as non-employees for tax purposes.
5. *See* discussion *infra* Subpart A.
6. *See infra* notes 50–53 and accompanying discussion.
7. *See* discussion *infra* Subpart .
8. *See infra* notes 30–31 and accompanying discussion.
9. I.R.C. § 63 (prescribing expenses that are deducted from adjusted gross income in order to arrive at the taxpayer's "taxable income").
10. *Id.* §§ 67–68.
11. *Id.* § 67(g) (eliminating miscellaneous itemized deductions for years 2018 through 2025; most business expenses of performing artists would qualify as so-called "miscellaneous

one might expect, well-to-do performing artists can plan around the legal limitations with the help of tax professionals. Given the legal risks and the high costs associated with such planning,[12] such tax planning is unavailable to low- and mid-income performers. The bottom line is that only low- and mid-income performers are denied business deductions and are singled out for an excessive tax burden.

This outcome makes little sense from a policy perspective, because it punishes low- and mid-income artists for their chosen careers.[13] It is also behaviorally distortive because it creates a disincentive to pursue a career in performing arts.[14]

The IRC does contain a provision that is supposedly aimed at correcting these failures, known as the "qualified performing artist deduction."[15] But, as this article explains, this deduction is rarely helpful because it is "switched off" once a performer hits a gross income threshold of $16,000. This laughably low threshold makes the qualified performing artist deduction functionally meaningless. Instead, Congress should adopt proposed bipartisan legislation—known as the Performing Artists Tax Parity Act—to correct these inequities.[16]

Part II provides a brief overview of the deductibility of business expenses and the tax relevance of worker classification in this context. Part III explains how the Internal Revenue Code discriminates against low-income performing artists. It explains the cost of being a performing artist and why many performing artists are classified as employees under current law. It also describes how rich performing artists get around the legal limitations. This part also surveys additional tax detriments to performing artists, other than the denial of business deductions. Part IV offers several stylized examples to color the doctrinal failures in tax policy terms, showing how current taxation of performing artists is inefficient, inequitable, and a source of administrative headache. Part IV also uses income data to suggest it is reasonable to assume that most professional performers are affected by the tax detriments described in the article. Part V surveys a few unsuccessful legislative attempts to correct the problem and considers several other solutions to the problem. It concludes with a call to adopt PATPA.

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itemized deductions," now disallowed). *See* discussion *infra* Part II.

12. *See* discussion *infra* Subpart E.
13. *See* discussion *infra* Subpart A.
14. *See* discussion *infra* Subpart B.
15. *See* discussion *infra* Subpart C.
16. *See* discussion *infra* Subpart .

II. Business Expenses and Worker Classification

A. *Business Expenses in General*

Under the Internal Revenue Code (IRC), taxpayers can deduct "ordinary and necessary" expenses in the carrying of a "trade of business."[17] Under IRC Section 62, such deductions are allowed "above-the-line."[18] This means that taxpayers can deduct business expenses from their gross income to arrive at their "adjusted gross income" (AGI). One important exception is that business deductions are denied above-the-line if the "trade or business" is one of being an employee.[19]

In most cases, the denial of business expense deductions to employees makes sense. We generally would not expect employees to incur business expenses—such as printer paper, business premises rent and utilities, or licensing fees—out of pocket. We would expect their employer would.[20] Thus, saving a few narrow exceptions, employees cannot deduct business expenses against their gross income.[21]

Some deductions that are denied above-the-line may nonetheless be allowed "below-the-line," but only if the taxpayer chooses to itemize deductions.[22] AGI reduced by "below-the-line" deductions gives the taxpayer's taxable income, which is the amount subject to income tax. Before the enactment of the 2017 Tax Cuts and Jobs Act (TCJA)[23], trade or business expenses that were denied above-the-line were deductible below-the-line. From 2018 through 2025, TCJA disallows almost all below-the-line deductions, including business expenses, by disallowing any so-called "miscellaneous itemized deduction" which includes trade or business deductions for employees.[24] The

17. I.R.C. § 162.
18. *Id.* § 62 (defining "adjusted gross income", AGI, as gross income *minus* the deductions listed in that section, including the deduction allowed under § 162).
19. *Id.* § 62(a)(1).
20. One type of business expense that is deductible to employees is unreimbursed expenses carried by the taxpayer in connection with the performance of services as an employee, under a reimbursement arrangement with the employer. *Id.* § 62(a)(1)(A). The corollary is that reimbursed expenses are included in income. As a practical matter, inclusion and deduction of the same amount would result in an economic wash. To alleviate such administrative hassle of reporting matching income and deduction, the regulations exempt employees from reporting reimbursed benefits in income in the first place if certain conditions are met. *See* Treas. Regs. §§ 1.62–2(c)(4), (d)(1). Most performing artists have no reimbursement arrangements with their employers with respect to much of their expenses, so this provision is irrelevant for them. *See* discussion *infra* Subpart A.
21. Some exceptions are listed in I.R.C. § 62(a)(2) and are discussed herein where relevant. The most relevant exception for purposes of this article is the "qualified performing artist" deduction under I.R.C. § 62(b), which is mostly a dead-letter law, as discussed in *infra* Subpart C.
22. I.R.C. § 63 (defining "taxable income" as AGI *minus* the Standard Deduction *or* Itemized Deductions, at the election of the taxpayer).
23. Tax Cut and Jobs Act of 2017, Pub. L. No. 115–97.
24. I.R.C. § 67(g) defines miscellaneous itemized deduction by way of elimination. Any

main takeaway is that from 2018 through 2025, most trade or business expenses are not deductible to employees.

In theory, eliminating the miscellaneous itemized deductions should have had little effect on most taxpayers. In conjunction with eliminating miscellaneous itemized deductions, the TCJA doubled the standard deduction.[25] For most taxpayers, this increase in the standard deduction compensated and even exceeded the denial of the miscellaneous itemized deduction. Indeed, the effect of doubling the standard deduction was a significant reduction in the number of taxpayers who choose to itemize their deductions from 30.6 percent in 2017 (the last year before the TCJA) to 11.4 percent in 2018.[26]

Even before the elimination of miscellaneous itemized deductions, these deductions were less valuable to taxpayers than above-the-line deductions. Miscellaneous itemized deductions could only be deducted to the extent they exceeded 2 percent of AGI.[27] In addition, all itemized deductions were subject to an overall limitation which is gradually phased in as AGI increased above a certain threshold, meaning itemized deductions were being reduced as AGI increased above the threshold.[28]

To summarize the key relevant doctrinal takeaways, business owners can deduct business expenses above-the-line. Since 2018, employees cannot deduct them at all. In most cases, it makes sense because employees do not incur business expenses, and employees still enjoy a generous standard deduction.

B. *The Importance of Worker Classification*

The nondeducibility of business expenses may become an issue for workers who incur significant business expenses out-of-pocket. Under such circumstances, whether a taxpayer is classified as an employee or an independent contractor[29] becomes significant. An independent contractor can deduct trade or business expenses, but an employee cannot.

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deduction not mentioned therein is a "miscellaneous itemized deduction," and as such is no longer allowed under the TCJA. The trade or business deduction under I.R.C. § 162 is not mentioned in I.R.C. § 67.

25. The standard deduction is available to all taxpayers by default, but taxpayers can elect to itemize deductions instead. I.R.C. § 63. The amount of standard deduction depends on the taxpayer filing status and is adjusted to inflation. For example, for in 2023, the standard deduction is $13,850 for individuals and married taxpayers filing separate returns, and $27,700 for married taxpayers filing joint returns. *See* Rev. Proc. 22–38, 2022–45 I.R.B. 451.
26. I.R.S., Pub. No. 1304, SOI Tax Stats – Individual Income Tax Returns Complete Report for 2018 26 (2018), https://www.irs.gov/pub/irs-pdf/p1304.pdf.
27. I.R.C. § 67(a).
28. *Id.* § 68.
29. "Independent contractor" is used herein solely to denote taxpayers who are not classified as "employees." Other common terms frequently used "business owner," "proprietor," "self-employed," and so on.

There are obvious reasons to support classifying low-income workers as employees. Employees, unlike independent contractors, enjoy multiple protections under state and federal laws concerning working conditions, collective bargaining, sexual harassment, liability for a work-related injury, and much more.[30] Employees are also entitled to many financial benefits that are usually denied to non-employees, such as employer-provided health insurance, retirement plan contributions, and paid sick leave, among others.[31] Many employer-provided benefits also receive favorable tax treatment. For example, some fringe benefits, employer-provided health insurance, and employer-provided meals and lodging[32], are not included in an employee's income. Independent contractors must pay out of pocket for such benefits and claim a deduction, which only offers a partial cost offset.[33]

Advocacy supporting employee classification rarely addresses the potential tax cost that comes with it: the denial of deductions for business expenses. The lack of such discussion to date is not surprising for two reasons. First, most employees who hold steady employment have no major business expenses. Their employers carry and deduct the costs associated with their work, such as office supplies and utilities. Second, until 2018—before the passage of the TCJA—employees with business expenses could deduct them below-the-line. Despite the fact that below-the-line deductions were of lesser value than above-the-line deductions, they were still valuable. This meant that, in almost all cases, the benefits of being classified as an employee outweighed any potential tax cost. This cost-benefit analysis significantly changed after the TCJA. If an employee does happen to carry significant business expenses, she can no longer deduct them. This may result in an excessive tax burden.

In summary, taxpayers who are prone to suffer from the current structure of the tax code are taxpayers who (1) are classified as employees and (2), notwithstanding their "employee" classification, carry significant business expenses out of pocket. There are probably not very many of these taxpayers. However, as the following subpart discusses, most low- and mid-income performing artists meet these conditions.

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30. For summaries of the legal protections accorded to employees, *see* Shu-Yi Oei & Diane M. Ring, *Tax Law's Workplace Shift*, 100 B.U. L. Rev. 651, 667–69 (2020); Christian Ketter, *Curtain-Call for Performing Arts Industry Clauses: Why Nonunionized Stage-Performers are "Employees" not "Independent Contractors"*, 9 Ariz. St. Sports & Ent. L.J. 1, 23 (2020).
31. For a brief summary of benefits accorded to employees but not to independent contractors, *see* Lionel S. Sobel, Taxation of Entertainers, Athletes, and Artists 138–139 (2015).
32. I.R.C. § 119.
33. This is because a deduction merely reduces the tax base. Thus, the value of a deduction is the amount of deduction times the tax rate that would have been applied to the amount had it not been deducted. For example, for a taxpayer at the 35 percent tax bracket, a $100 deduction is valued at $35.

III. Applying the Law to Performing Artists

A. *Being a Performing Artist is Expensive*

When most of us think of performing artists, we imagine the glamour, stardom, and associated riches of the likes of Brad Pitt, Ariana Grande, or the McElroy Brothers.[34] But that is not the reality for most performing artists, and even Brad Pitt, Arianna Grande, and the McElroy brothers had to start somewhere.[35] They earned a little before they earned a lot. Most performing artists do not just shoot themselves into stardom right away.[36] For most, their everyday reality is a slow-grinding, ever-frustrating process of trying to get that breakthrough, which may or may not come. In the meantime, they will work multiple small, relatively low-paying or non-paying performing art jobs every year, while holding on to another job (or two) to pay the bills.[37] In the process, they will carry significant out-of-pocket expenses.

Here is what this might look like, for example, for a working actor. While the discussion below applies to actors, similar patterns apply to all performing artists, such as musicians, vocalists, and dancers. Acting is used to illustrate the cost of being a professional performing artist.

To get invited to auditions, actors need to gain access to casting calls, which are often not made public. Actors must create paid profiles on casting websites, and different websites may cater to other geographical markets. In

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34. Yes, I know most of you probably don't know who the McElroy brothers are. This is a private joke. And in any case, you're probably Googling it right now. So now you know. And, I assume, the McElroy brothers are doing okay financially. Probably not as well as Arianna Grande or Brad Pitt, but enough so that they don't have to worry about most issues I note in this article, because they probably operate through some form of a loanout entity, or would anyway be classified as independent contractors. *See* discussion *infra* Subpart E. And if they don't have a loanout entity, they probably should. Finally, if they mention this footnote in one of their many podcasts, my son will be proud of me forever.
35. Most performing artists who are classified as employees probably do not earn enough to justify or to afford the cost of tax planning that would enable them to access denied deductions. *See* discussion *infra* Subparts E D.
36. There are, of course, the lucky few who are the exception. My personal favorite story is Maisie Williams, who, at the age of 12, was cast in the role of Arya Stark in The Game of Thrones after almost missing the audition for a school trip. *See* Sophie McEvoy, *The Truth About What Happened When Maisie Williams Auditioned for Game of Thrones*, The List (Aug. 5, 2021), https://www.thelist.com/479215/maisie-williams-game-of-thrones-audition-story [https://perma.cc/7X55-8D6J]. Most actors audition dozens of times before ever landing their first, almost always very minimal, role in film or TV. For example, "many agents expect their talent to book at least one job for every 15–25 auditions they go on." *See* Tonya Tannenbaum, *What Is a Booking Ratio*, Acting Magazine (Oct. 2018), https://actingmagazine.com/2018/10/what-is-a-booking-ratio [https://perma.cc/ZFC3-NL5S].
37. For data about performing artists' income levels, and having to hold multiple jobs, see *infra* Subpart D.

Los Angeles, for example, agents and managers would usually require their clients to purchase paid subscriptions, at the minimum, to Actors Access ($68 annual subscription as of writing this article, plus additional fees for uploading headshots and reels), LA Casting ($259.90), and Casting Frontier ($149.99). To summarize, actors must pay close to $500 just to be able to submit themselves to auditions.[38]

To gain the attention of casting directors, actors must also have certain branding assets, such as professional headshots, acting reels, and performance demos.[39] Professional headshots can cost between $400 and $1,500 and must be updated periodically.[40] Demo reels can cost a few hundred dollars to produce.[41]

Actors need training, such as acting and voice classes, to build their resumes.[42] Learning skills that will make them competitive for certain roles, such as martial arts, playing an instrument, or learning a new language, is also advisable.[43] Acting classes with reputable acting coaches can cost between $150 and $2,000, depending on the coach's reputation, location, class duration, and the geographical market.[44] A single audition preparation session with a

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38. This amount may be larger for actors who seek more exposure and subscribe to more than three casting website. There are multiple reputable websites. In addition, there are websites that are catering for specific industries such as Voice Acting or Theatre. Actors who perform on camera, on stage, and in voice art will likely need to subscribe to additional websites.
39. For a list of "must have" assets for a beginning actor, see Benjamin Lindsay, *How to Become an Actor*, Backstage (Nov. 28, 2022), https://www.backstage.com/magazine/article/become-actor-5125 [https://perma.cc/XV9P-U843]. It is generally understood that, at a minimum, an actor must have professional headshots. *Id*. ("Headshots are the foundation of your marketing materials—and, ultimately, your personal brand—which means there's a lot riding on a few photos.").
40. Piyali Syam, *Actor Headshot: A Guide*, Backstage (July 1, 2022), https://www.backstage.com/magazine/article/headshots-everything-need-know-5052 [https://perma.cc/K6AJ-NXBJ] ("Most professional headshot sessions cost between $400–$1,500").
41. *See* Cat Elliot, *Produced Demo Reels and Where to Find Them*, Casting Networks (May 1, 2019), https://www.castingnetworks.com/news/produced-demo-reels-and-where-to-find-them [https://perma.cc/ET4S-Y56W].
42. The accepted view in the entertainment industry is that actors should take acting, and possibly other, classes on a regular basis. *See* Allie White, *How to Choose an Acting Class*, Backstage (Mar. 28, 2022), https://www.backstage.com/magazine/article/choose-acting-class-5715 [https://perma.cc/QLR6-WXPF] ("[M]ost people agree that classes help you become a better actor, and not just if you're a beginner.").
43. *See* Casey Mink, *An Actor's Guide to Special Skills on an Acting Résumé*, Backstage (Dec. 10, 2020), https://www.backstage.com/magazine/article/special-skills-ones-actor-3893 [https://perma.cc/63P2-F3FK] ("Actors are generally expected to include a 'special skills' or 'special talents' section at the bottom of their résumé, which includes a list of any abilities that could come in handy for a role.").
44. Scott A. Rosenberg, *How Much Does Acting School Cost*, Backstage (May 16, 2022), https://www.backstage.com/magazine/article/how-much-does-acting-school-cost-75002/ [https://perma.cc/CU8S-745N] ("In general, acting classes cost between $150 and $2,000, a number that varies greatly depending on location, size of the class,

reputable coach can cost hundreds of dollars per session.[45] Singing and dancing lessons can be just as expensive. It is reasonable for an actor to pay around $3,000 to $5,000 a year for training and audition preparation.

Since the COVID-19 pandemic, most initial audition stages are done through self-tapes recorded at home.[46] While most starting actors use their smartphones to record auditions, many professional actors strive to produce better-quality auditions. For that purpose, they may purchase better cameras, microphones, lighting equipment, and various backdrops.[47]

Experience increases the likelihood of getting the job. Actors must show casting directors they have credits to their name. When just starting, most actors will gain this experience by working in small productions few will ever hear of, such as short films (most likely student films), low-budget internet projects, or local community theaters.[48] Usually, these jobs will come with very little or no pay. Moreover, in many cases, these productions will offer little-to-no reimbursement for travel and meals.

The issue of meals and travel also comes up in the context of larger productions. After an initial self-taped audition, an actor may be invited for a "callback" audition at the location of the production. LA actors, for example, may find themselves flying to NYC to audition for an off-Broadway show. Since the actor is not yet hired at the callback stage, it is unlikely that the actor will be reimbursed for the cost incurred to arrive at the audition.[49]

If an actor is persistent and successful in building their resume and professional expertise, they may be lucky enough to sign with an agent. The main task of an agent is to market the actor to potential buyers in the industry, namely casting directors.[50] Agents have access to casting calls for projects that are not available on the actor-facing parts of the casting websites. If the

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and reputation of the educator.").

45. The author has personal knowledge of actors paying in excess of $250 for a single audition coaching session with reputable acting coaches, on multiple occasions.
46. Peter Allen Stone, *Self-Tapes Are Here To Stay*, Routledge Blog (May 20, 2021), https://www.routledge.com/blog/article/self-tapes-are-here-to-stay [https://perma.cc/AJE5-6UTQ].
47. Amy Russ, *Essential Equipment for Self-Tape Auditions*, Backstage (Feb. 15, 2023), https://www.backstage.com/magazine/article/8-must-haves-for-a-self-tape-home-studio-67425 [https://perma.cc/RB4Q-5NDW].
48. *See How To Build Acting Credits as a New Actor*, Kid's Top Hollywood Acting Coach, https://tophollywoodactingcoach.com/2019/08/build-acting-credits-new-actor [https://perma.cc/LFX2-BTB4].
49. Many actors incur additional expenses by choosing to move and live near big entertainment industry markets such as Los Angeles, New York City, or Atlanta. *See* Lindsay, *supra* note 39 (discussing where actors should live).
50. Kirk Schroder & Jay Shanker, *Fundamentals of Entertainment Talent Representation by Agents and Managers*, *in* The Essential Guide to Entertainment Law: Dealmaking 773, 776 (Jay Shanker & Kirk Schroder eds., 2018) ("The primary task of an agent is to market the client's services and their works to buyers within the industry.").

actor books a paid job, the agent is paid a commission, usually 10 percent of the gross pay.[51]

An actor may also benefit from hiring a manager, if the actor is lucky enough to be signed by one. A manager is the actor's career-development professional, providing services such as advice on which classes to take, which headshot photographers to use, networking, securing agent representation, etc.[52] A manager fee is usually 15 percent of the gross pay for jobs the actors book.[53] Thus, managers and agents fees together can amount to 25 percent of an actor's gross pay.

After securing representation, the next "rite of passage" for actors is joining an actors' union.[54] For actors, the two most relevant unions are (1) The Actors Equity Association (AEA), which is the labor union representing theatre actors and stage managers, and (2) SAG-AFTRA, which is the labor union representing, among others, film & television actors, and radio and voice artists[55]

Union membership is sought-after for multiple reasons. It opens significant opportunities not otherwise available for actors. Most major film, TV and broadcasting productions are union productions.[56] Union members enjoy many benefits such as higher pay, safer working conditions, and eligibility for retirement and health benefits.

There are also downsides to joining a union. For example, union members cannot work non-union jobs. There are many non-union jobs out there, including plays and musicals' national tours. Many TV commercials are also non-union. Most important is the fact that union membership is expensive. For example, the buy-in fee for SAG-AFTRA is $3,000, followed by an annual

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51. *Id.*
52. *Id.* at 801–02.
53. *Id.* at 776.
54. *Membership and Benefits*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits [https://perma.cc/K8X4-YWNA] ("Membership is a significant rite of passage for every working actor, broadcaster and recording artists."). The eligibility to join a union depends on the specific union, but generally requires working one or more union jobs. *See* Alex Ates, *Everything You Need To Know About Actors' Unions*, Backstage, (May 26, 2022), https://www.backstage.com/magazine/article/unions-101-everything-you-need-to-know-70119/ [https://perma.cc/8N5L-A3EM]. This creates a *Catch-22* situation: actors cannot work union jobs unless they are union members but cannot become union member unless work a union job. Different unions offer different paths to union eligibility to get around this problem, but they all generally require actors to be persistent in pursuing union jobs even when they are not yet union members. Many actors spend years working in the profession before they become eligible to join a union.
55. Other artists unions include, among others, AGMA (musical artists), and AGVA (variety artists).
56. For the benefits and drawbacks of joining an actors' union, *see* Robert Peterpaul, *Union or No Union? The Pros + Cons You Should Consider*, Backstage (Dec. 10, 2019). https://www.backstage.com/magazine/article/union-or-no-union-the-pros-cons-you-should-consider-69628 [https://perma.cc/MAP7-AF8L].

membership fee of $227.42 and a union fee of 1.575 percent of the gross payment for any union work.[57] AEA charges a buy-in fee of $1,800, an annual membership fee of $176, and a 2.5 percent cut from gross compensation for union work.[58]

It is evident from the discussion above that actors carry significant out-of-pocket expenses in their professional pursuits. This is no different from other performing artists who have similar expenses. Agents and managers are not exclusive to actors and are common throughout the entertainment industry. Every performing artist must travel to auditions and create a paid profile on an industry-specific website. Most artists must have branding materials like headshots, singing or dancing demos, and performance demos. Musicians need to buy instruments, maintain them, and practice. Dancers must buy dance attire and take dance lessons. Singers take voice lessons and pay for studio time and audio-editing software.

Whether performing artists can deduct these significant expenses depends on two legal questions. First, whether such expenses are "ordinary and necessary" in the carrying of a "trade or business."[59] Second, assuming the expenses are "ordinary and necessary," whether the performing artist is classified as an "employee" for tax purposes. As explained above, trade or business expenses are disallowed "above-the-line" to employees,[60] and as a result of the TCJA, they are also denied below-the-line.[61] Only expenses associated with performing artists' work as "independent contractors" may be deductible.[62]

The answer to the first question—whether these expenses are "ordinary and necessary"—is easy, legally speaking. All the above expenses almost certainly qualify as "ordinary and necessary" business expenses. "Ordinary" expenses are those that are a "common or frequent occurrence in the type of business involved."[63] All of the expenses described above are standard in the entertainment industry. A "necessary" expense is one that is merely "appropriate and helpful to the business."[64] There is little doubt that all the expenses described above are helpful for a performing artist's career.

Whether these expenses are deductible depends on the second question, namely, whether performing artists are classified as employees for tax purposes.

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57. *Membership Costs*, SAG-AFTRA, https://www.sagaftra.org/membership-benefits/membership-costs [https://perma.cc/KC38-5CD5].
58. *Dues and Fees*, Actors Equity Ass'n, https://www.actorsequity.org/join/dues [https://perma.cc/ML6T-KVFQ].
59. I.R.C. § 162.
60. *Id.* § 62.
61. *Id.* § 67(g).
62. *See* discussion *supra* Subpart B.
63. Lilly v. Comm'r, 343 U.S. 90, 93 (1952).
64. Palo Alto Town & Country Vill., Inc. v. Comm'r, 565 F.2d 1388, 1390 (9th Cir. 1977).

B. *Many (Most?) Performing Artists are "Employees" for Tax Purposes (and what Machine Learning can Teach us)*

Whether a taxpayer is an employee for tax purposes is an area of voluminous adjudication, sometimes with contradictory outcomes. Under current precedents, many low- and mid-income performing artists are employees for tax purposes, and are also regarded as such as a matter of industry practice. Below, I also use a machine learning platform[65] to predict what courts may decide regarding the classification of performing artists under different scenarios, on which there is little or no adjudication.

1. Performing Artists' Classification: Law, Guidance, and Adjudication

Commentators who have addressed the issue of classification seem to agree that, at least as a matter of legal practice, many performing artists who contract their services directly, rather than through an entity, are classified as employees for tax purposes.[66] Others argue that performing artists are employees as a matter of positive law, or should be classified as such as a matter of policy.[67]

Whether one agrees with the normative argument or not, there is no denying that as a matter of practice, many performing artists are treated as employees. This conclusion may seem counterintuitive because performing artists' employment is unsteady. Most performing artists work multiple jobs a year, lasting anywhere from a few hours each, such a small role in a TV commercial, to a few months, such as a traveling musician with a Broadway national tour. A nice example of this unsteady employment pattern can be found on the instructional website for actors and associated YouTube channel, by actor Kurt Yue.[68] Kurt Yue is a successful actor. He works regularly, but mostly in small

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65. *See* discussion *infra* Subpart 2.
66. *See e.g.*, Marilyn Barrett, *Independent Contractor/Employee Classification in the Entertainment Industry: The Old, the New and the Continuing Uncertainty*, 13 U. Miami Ent. & Sports L. Rev. 91, 92 (1995) (describing "Internal Revenue Service's vigorous and zealous pursuit of employee classification" for performing artists"); Sobel, *supra* note 31, at 141 (arguing that the "norm" is classification as "employee", and that this is the norm due to IRS preference). This author rejects the notion that classification is a result of some "zealous pursuit" by the IRS, or a result of some administrative "preference". As further discussed in this subpart, and as predicted by a Machine Learning model, "employee" classification is (1) a correct application of positive law for many (though not all) performing artists, (2) a result of big studios' risk version, causing them to prefer such classification, and—given the power dynamics in the industry—not something that performing artists or small production companies can seriously contest. Whether this is beneficial or not for performing artists, and whether this is the correct policy result, are separate questions.
67. Ketter, *supra* note 30, at 24 (arguing that performers should be classified as employees under current law, whether unionized or not).
68. Yue's instructional website for actors can be found at The Acting Career Center, https://www.actingcareercenter.com [https://perma.cc/PN9S-V8RX].

roles, and has some enviable credits to his name.[69] He appeared in films such as Black Widow, Venom, and Diary of a Wimpy Kid and shows such as Young Rock, Ozark, Cobra Kai, Station Eleven, and the Vampire Diaries.

In his YouTube Channel, Yue annually summarizes his experiences. These summaries give an excellent glimpse into the life of a working actor. For example, in 2021, Yue had a total of 124 (!) auditions.[70] 81 for TV shows, 31 for movies, 15 for commercials, and 4 for voice-over jobs. Of these auditions, he booked 16 jobs: 10 TV shows, 5 movies, and 1 commercial. By industry standards, Yue is a successful actor. 124 is a very high number of auditions, and 16 bookings a year is something most actors would love to have.

Yue's experience is an excellent example of the unsteady, hectic life of actors who are not yet household names, but who are clearly working full-time in the profession. Each audition requires preparation. Many auditions require travel (likely unpaid by the production), or the use of self-purchased equipment.[71] Yet, actors like Yue presumably do not make enough money to live solely on their acting income. They supplement their income elsewhere. Indeed, Yue has his advice website through which he offers paid coaching sessions.

Intuitively, one might assume that such a transitory, unsteady pattern of employment suggests an independent contractor classification for performing artists. The doctrinal reality, however, is such most performers are much more likely to fall into an employee classification. This is certainly true for performing artists working under union contracts.

The law does not provide a clear definition for the term "employee" for income tax purposes. Instead, there exists a very large body of administrative guidance and judicial decisions, which provide multiple factors to consider. As a result, a full-blown discussion of performing artists' tax classification is beyond the scope of this article, but some principles can be distilled. In Revenue Ruling 87–41[72], the IRS lists no less than 20 factors to consider in order to determine whether a taxpayer is an employee or an independent contractor.[73] In *Weber v. Commissioner*, the Tax Court distilled these twenty factors into seven: (1) the principal's degree of control exercised over the details of

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69. Yue's credits can be found on his IMDB page, at Kurt Yue, IMDB, https://www.imdb.com/name/nm4746345/?ref_=nmbio_bio_nm [https://perma.cc/CH6E-PWPK].
70. Kurt Yue, *My 2021 Year in Review: Audition Statistics and Highlights for the Year*, Youtube (Jan. 13, 2022), https://www.youtube.com/watch?v=97OqU7FdHb4.
71. *See* Kurt Yue, *Self-Tape Tools for Auditions: Everything You Need To Record an Amazing Audition at Home*, The Acting Career Center, https://www.actingcareercenter.com/self-tape-tools [https://perma.cc/T7XX-WGQE].
72. *See* Rev. Rul. 87–41, 1987–1 C.B. 296.
73. For a summary of such considerations in the context of performing artists, *see* B. Paul Husband, Marilyn Barrett, & Mitchell R. Miller, *Independent Contractors, Employees, the Entertainment Industry and the IRS: Tax Administration Problem Heads for Hollywood*, 11 Ent. & Sports Law 3 (1993).

the work; (2) the principal's investment in the work facilities; (3) the sharing of profit or loss; (4) the principal's right to discharge; (5) the principal's regular business; (6) the permanency of the relationship; and (7) the relationship the parties believe they are creating.[74] Though all factors must be considered, the "right-to-control" test is the most important according to the *Weber* decision.[75] The IRS also considers "control" the main factor, and considers it to be comprised of three sub-categories: behavioral control, financial control, and contractual relationship as defined by the parties.[76] The higher degree the principal may exercise control, the more likely that the parties are in an employer-employee relationship.

Since most performing artists have no control over their audition schedule, production schedule, or even the location of their performance, there is a compelling argument they are not contractors but employees. The result may be different for artists who work from home and control their own schedules. This would apply, for example, to voice-over artists who record and edit their audio at home and send complete work products to the production.

When applied to performing artists, courts have interpreted the "right-to-control" to focus on the degree to which the production may intervene in the creative aspect of the performance.[77] For example, in *Radio City Music Hall Corp. v. U.S.*, the Second Circuit held that actors were independent contractors[78] where the production's intervention was mostly administrative in nature, such as scheduling and ordering the acts, but each actor had "opportunity to perform without interference".[79]

Radio City, however, is the exception. In most cases, performers have little creative control. In a typical production, the producer has an overall plan for a project, selects the performing artists that fit the roles, decides the

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74. Weber v. Comm'r, 103 T.C. 378, 387 (1994), *aff'd*, 60 F.3d 1104 (4th Cir. 1995).
75. *Id. See* Walz v. Comm'r, No. 17415-03S, 2004 WL 3029726, at *2 (T.C. Jan. 3, 2004) ("The 'right-to-control' test is the crucial test"); *see also* Treas. Regs. § 31.3401(c)-1(b) ("Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.").
76. I.R.S., Pub. No. 1779, Independent Contractor or Employee, https://www.irs.gov/pub/irs-pdf/p1779.pdf.
77. Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717 (1943); *see* Texas Co. v. Higgins, 118 F.2d 636, 638 (1941) (finding the defendant was not an employee because the plaintiff exercised no control except to fix the price and credit permission); Jones v. Goodson, 121 F.2d 176, 179 (1941) (concluding an employment relationship existed generally when one has control and direct the other with details and means to accomplish the tasks); Williams v. Unites States, 126 F.2d 129, 132 (1942) (acknowledging the wide adoption of the control test used to determine employee and independent contractor classifications); *see also* 26 C.F.R. § 31.3401(c)-1(b).
78. Radio City Music Hall Corp, 135 F.2d at 717.
79. *Id.*

location and schedule of the performances, gives clear instructions to the performing artist, and maintains continuing supervision over all phases of production. Under such circumstances, the IRS viewed performers as employees in many instances, even shortly after *Radio City* was decided. For example, the IRS ruled a DJ to be an employee where the radio station designated the hours and programs and had the right to use the DJ's name.[80] A photographer was classified by the IRS as an employee, where the company gave instructions on the operation methods to the photographer, and the photographer periodically reported back to the company.[81]

Court decisions that came in the years following *Radio City* were in line with IRS's view. The Second Circuit itself distinguished *Radio City* a few years after the decision. In *Ringling Bros. v. Higgins*, the Second Circuit concluded that circus performers were employees where performers "were not told the cities in which they were to perform, but agreed to go wherever the circus ordered," and the employer "had the right to place the performer with any circus controlled by it."[82] *Radio City* was further distinguished by *Club Hubba Hubba v. United States*,[83] where the court held that performers were employees where the "proposed program was shown to [management] in advance of practice for the new show, and they had a right to approve or disapprove and to require particular portions and acts to be cut out, and to require new or different acts", even though "this power was exercised rather infrequently."[84]

More recent decisions similarly conclude that where artists lack creative control, as they do in most cases, they are classified as "employees." For example, In *D'Acquisto v. Comm'r*, the Court found a voice actor had failed to establish sufficient control to be classified as an independent contractor where, "upon acceptance of a job, the hiring company provided a script and instructed petitioner to read it according to the company's specifications."[85] In *Walz v. Comm'r*, the Court held that a professional cellist was an employee where a collective work agreement stipulated that the production has "the direction and control over the Services of Musicians" including the "means and details of the performance of Services by the Musicians."[86]

Courts and the IRS also put a strong emphasis on how the productions and the artists contractually define their relationships. This is of particular importance for union artists. The reason is that in most instances union agreements require productions to treat performing artists as employees to ensure

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80. *See* Rev. Rul. 55–718, 1955–2 C.B. 411.
81. *See* Rev. Rul. 56–694, 1956–2 C.B. 694.
82. Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins, 189 F.2d 865, 870 (2d Cir. 1951).
83. Club Hubba Hubba v. United States, 239 F. Supp. 324 (D. Haw. 1965).
84. *Id*. at 326.
85. D'Acquisto v. Comm'r, 80 T.C.M. (CCH) 149, at *3 (T.C. 2000).
86. Walz v. Comm'r, No. 17415-03S, 2004 WL 3029726, at *2 (T.C. Jan. 3, 2004).

artists enjoy certain benefits and protections. When productions treat performers as employees, withhold taxes on their salaries, and issue performers W-2s at the end of the year, it is almost inevitable that the IRS, as well as a court, would view the performers as employees for tax purposes.[87] In addition, the consequences for employers for mischaracterizing employment relationships can be dire. Employers must withhold income and payroll taxes on employees' salaries and remit them to the IRS. A failure to withhold taxes due to the misclassification of workers may subject the employers to significant penalties.[88] As a result, many production studios take the position that performers are employees simply as a risk mitigation measure.[89] This further weighs in favor of classifying performers as employees. It is unlikely that performers could successfully argue they are contractors when the production company treated them as employees.

This brief legal survey suggests that most performing artists are employees for tax purposes. This is clearly the case for union artists. But given that many non-union artists lack control over how and when the work is performed, there is also a good argument they are employees for tax purposes. Although, as a matter of practice, most non-union production will not treat performing artists as employees.[90]

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87. *See id.* at *4 ("The musical organizations treated him as an employee, considered him to be an employee, issued Forms W–2, made withholding of various taxes, and made pension contributions on his behalf"); *D'Acquisto* at *3 ("companies considered him an employee during the engagement because they issued Forms W–2 and withheld FICA, FUTA, and State employment taxes"); *see also* David P. Cudnowski, *Actors and Entertainers: Employees, Independent Contractors, Or Statutory Employees? A Matter of Form (W-2) Over Substance*, 11 U. Miami Ent. & Sports L. Rev. 143 (1993) (discussing how a W-2 creates a presumption that a worker is an employee for tax purposes).
88. Sobel, *supra* note 31, at 148 (discussing the "prohibitively expensive" consequences to employers if they fail to withhold, as a result of the assessment of penalties).
89. Brad Cohen and Shane Nix, *A Guide to Structuring and Taxation in the Entertainment Industry in* The Essential Guide to Entertainment Law; Dealmaking, *supra* note 50, at 669, 715 (noting that in case of misclassification "the employer may be subject to withholding tax liability and penalties for failure to withhold. For this reason, film/TV studios generally will not engage a talent though an LLC or directly without requiring that the talent be treated as an employee . . . "); B. Paul Husband et. al., *Independent Contractors, Employees, the Entertainment Industry and the IRS Tax Administration Problem Heads for Hollywood*, 11 Ent. & Sports Law. 3, 5 (1993) ("Given the difficulty of applying the broad common law test to the particular employment relationships found in the entertainment industry, and the propensity of the IRS to classify workers as employees, major studios adopt a very conservative posture with respect to the classification of workers.").
90. *See* Ketter, *supra* note 30, at 24 (arguing that non-union stage performers should be classified as "employees", contrary to the current practice of treating them as non-employees).

2. Performing Artists Classification: What can Machine Learning Teach us.

Not all performing artists' jobs are created the same. Not all performing artists should be classified as employees, and we do not have adjudication that addresses all unique employment arrangements of artists. To address this issue, this article uses a tax-dedicated machine learning platform called Blue Jay Legal, to try and predict the tax classification of performing artists under various circumstances. Blue Jay contains the entirety of U.S. tax adjudication in its database and uses it to teach machines to try and predict outcomes based on past adjudication. The main takeaways are summarized below. The Appendix contains more information about the platform as well as its application to the hypotheticals below.

Assume three hypothetical performing artists: a Union Actor (Uni), a Non-Union Actor (Nona), and a Non-Union voice-over artist (Val). Assume all reside and work mostly in California.[91]

Uni has no control over the schedule or location of the productions she works for. She uses little equipment of her own on set. She has no continuing working relations with most productions, as she only works a few days for each. That said, under union rules, she is guaranteed a certain level of pay, and some travel and meals expense reimbursement. It is also likely that the contracts she signs explicitly state that she will be treated as an employee by the various productions. It is no surprise then, that Blue Jay predicts with almost complete certainty (>95 percent) that a Federal Court in California would rule that Uni is an employee for tax purposes. This conclusion would be relevant to almost all performing arts jobs covered by a union contract.

Nona's work is very similar to Uni's, except that she is not guaranteed a particular level of pay, and she is unlikely to receive expense reimbursement. In her contracts, the productions state they will treat her as an independent contractor. Nonetheless, given she has almost no control over where, when, and how she performs her work, Blue Jay still predicts, with 87 percent certainty, that a Federal Court in California will classify her as an employee for tax purposes. This is at odds with how most non-union actors, as well as how most productions characterize the relationship as a matter of practice.[92]

Only for Val, Blue Jay predicts an independent contractor classification with a 72 percent certainty. This makes sense. Val probably works from his home studio, using his own recording equipment. Except for having to meet

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91. This is important because that Blue Jay Platform considers the Circuit that may be called to decide the legal question the result of which the platform tries to predict.
92. No court cases could be found addressing the classification of non-union performing artists. However, many non-union performers have little creative control of their performances and little control of the production schedule and location. These factors would weigh in favor of classifying them as employees for tax purposes, as predicted by the Blue Jay platform.

a deadline, he can decide when to record his performances, and how to edit them. The production that hired Val will have the final word as to whether his work production meets their standard, but Val still maintains actual control of the creative process.

The Blue Jay platform predictions are summarized in table 1 below.

TABLE 1 – MACHINE LEARNING CLASSIFICATION PREDICTIONS OF VARIOUS TYPES OF PERFORMING ARTISTS

Type of performing artist	*Blue Jay Prediction*	*Confidence level*
Union Actor	Employee	>95%
Non-Union Actor	Employee	87%
Non-Union, work from home Voice-Over Artist	Independent Contractor	72%

3. A Real-Life Example.

Walz v. CommissionerWalz v. Commissioner[93] offers a perfect illustration of the tax difficulties that performing artists face. In 2000, John A. Walz, a professional cellist, performed for multiple employers, such as the Los Angeles Opera, and the Long Beach Symphony. He also recorded music for multiple film productions. Overall, Walz performed for 25 different organizations during that year under union contracts and received 25 W-2s at the end of the year![94] Walz incurred significant out-of-pocket unreimbursed expenses related to his work. These included a dedicated home studio where he practiced and recorded, repairs and maintenance of his cello, travel expenses to performances and rehearsals, professional CDs, DVDs, sheet music, headshots, and union dues. Walz sought to deduct these unreimbursed expenses above-the-line.[95]

The IRS denied these deductions, claiming that as an employee, Walz was not entitled to deduct these expenses above-the-line, and that in any case, Walz did not substantiate many of the claimed expenses. As a result, the IRS assessed an underpayment of tax in the amount of $18,468 as well as various penalties.[96]

The court had to decide (1) whether Walz was an employee—in which case he would not be able to deduct the expenses above-the-line—, and (2) assuming Walz is an employee, whether any of the expenses can still be deducted below-the-line as miscellaneous itemized deductions. On the first question, after a lengthy analysis, the court concluded that Walz "was an employee during the tax year at issue."[97] Among others, the court noted that "the musical organizations treated him as an employee, considered him to be an employee, issued Forms W–2, made withholding of various taxes, and made

93. Walz v. Comm'r, No. 17415-03S, 2004 WL 3029726 (T.C. Jan. 3, 2004).
94. *Id.* at *1.
95. *Id*. at *2.
96. *Id.* at *1.
97. *Id.* at *4.

pension contributions on his behalf."[98] The court also noted Walz's lack for control of his rehearsal location and schedule[99], his union membership,[100] and his general lack of creative control. All these factors are likely to be applicable to most performing artists working under any union contract, which means that the Tax Court is likely to classify any artist working under a union contract as an employee.

The court then moved to consider whether any of Walz's expenses were nonetheless deductible below-the-line. Analyzing each expense separately, the court found that many of the expenses claimed by Walz were indeed "ordinary and necessary" within the meaning of IRC § 162, and as such deductible. For example, the court allowed deductions for interest on debt-financed purchase of business items, expenses relating to computer use, home studio expenses, cello repairs and maintenance, music supplies costs, purchases of CDs, headshots, union dues, and business-related bank fees. Most deductions that the court denied were on account of Walz's failure to substitute the expense, and a few hundred dollars were denied on account of being personal in nature, rather than business expenses. Walz should have been able to deduct the allowed expenses to the extent they exceeded two percent of his adjusted gross income.[101] This result was not great, but also better than nothing.

Unfortunately for performing artists today, *Walz* is a pre-TCJA decision. Today, all the expenses allowed by the court in *Walz* are no longer deductible because the TCJA abolished the deductions for "miscellaneous itemized deductions." In that, *Walz* demonstrates the current failure of the current tax code: the type of expenses that performing artists regularly carry clearly qualify as "trade or business expenses." Such expenses should be deductible under the most basic tenet of income taxation: that tax is imposed on *net* income. Under the TCJA, Walz would have been denied these deductions completely. Stated simply, many performing artists today pay income tax on more than their net income.

C. *The Meaningless "Qualified Performing Artist" Deduction*

The inequities that affect performing artists are not new. The TCJA simply made them more pronounced. As *Walz* demonstrates, even before the passage of the TCJA, performing artists were treated inequitably because their trade or business deductions were subject to various limitations.[102]

Even though the performing artists were only moderately mistreated under the pre-TCJA law, there was an attempt to correct this. In 1986, Congress added the "Qualified Performing Artists" deduction in IRC § 62(a)(2)

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98. *Id.*
99. *Id.* at *2.
100. *Id.* at *1.
101. I.R.C. § 67.
102. *See supra* notes 24–26 and accompanying discussion.

(B).[103] Under the law still in effect, a "Qualified Performing Artist" can claim an above-the-line deduction for expenses "incurred by him in connection with the performances by him of services in the performing arts."[104]

For that purpose, a "Qualified Performing Artist" is an individual who meets three requirements.[105] First, the individual must perform services in the performing arts as an employee during the tax year for at least two employers.[106] Second, the aggregate amount of trade or business expenses carried in connection with performing arts services must exceed 10 percent of the artist's gross income from performing arts. Third, the artist's gross income, determined without regard to the qualified performing artist deduction, cannot exceed $16,000.[107] This threshold is not adjusted for inflation and is prohibitively low, which means that very few performing artists can use it. Performing artists who make less than $16,000 almost certainly supplement their income from other sources. The qualified performing artists' deduction is functionally meaningless[108] and offers no relief to almost all performing artists.

D. *Additional Tax Issues Faced by Performing Artists*

While the denial of business deductions is the main tax detriment that performing artists face, several additional issues are worth mentioning.

1. The Qualified Business Income Deduction Under IRC Section 199A

IRC Section 199A, added by the TCJA, allows a deduction of up to 20 percent for a taxpayer's "qualified business income" (QBI) from a "qualified trade or business (QTB).[109] Stated simply, if the requirements of Section 199A are met, a taxpayer can deduct 20 percent of her net business earnings, effectively paying tax on 80 percent of these earnings.

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103. Tax Reform Act of 1986, Pub. L. No. 99–514, 100 Stat 2085 (codified in I.R.C. § 62).
104. I.R.C. § 62.
105. *Id.* § 62(b).
106. Nominal employers do not count for such a purpose. To qualify as an employer, the artists must earn at least $200 from that employer during the tax year. *Id.* § 62(b)(2).
107. The $16,000 threshold applies to all income, not just income from performing arts. *See, e.g.*, Fleischli v. Comm'r, 123 T.C. 59, 63 (2004), *aff'd*, 135 F. App'x 975 (9th Cir. 2005) (rejecting an artist's claim that the $16,000 threshold only refers to income earned from performing arts).
108. One very narrow category of performers for whom the deduction may still be relevant, is child performers, early in their careers, who make less than $16,000 a year from performing arts. Adult actors, most likely, will be unwilling to live off $16,000 a year, and will complement their income with other jobs, crossing that $16,000 threshold. Child actors do not need to complement their acting income if they are supported by their parents, and therefore do not cross the threshold.
109. I.R.C. § 199A.

The definition of QTB explicitly excludes the "the trade or business of performing services as an employee."[110] Thus, performing artists who are classified as employees cannot claim the qualified business deduction.

The definition of QTB also excludes certain "Specified Services Trade or Businesses" (SSTBs).[111] SSTB includes, among others, "performing arts."[112] The SSTB exclusion, however, is only triggered if the taxpayer's taxable income, without regard to the 199A deduction, hits a "threshold amount."[113] Once the threshold amount is met, the exclusion is "phased in", meaning it gradually reduces the amount of allowable QBI deduction.[114] For 2023, the threshold amount is $182,110 for single filers (with the deduction completely phased out at $232,100), and $364,200 for joint filers (completely phased out at $464,200).[115] These are rather high thresholds, and most performing artists likely earn below the threshold.[116] This means that many low- and mid-income performing artists are denied the deduction not because of their occupation, but because of their classification as employees. Non-artists with similar work patterns to performing artists are less likely to be classified as employees, and as such are more likely to be able to claim the QBI deduction. Since the potential deduction is a significant amount—20 percent of QBI— the result is significantly disproportionate tax burden on performing artists.

2. Payroll and Self-Employment Taxes

Employers are required to pay a 6 percent tax[117] on the first $7,000 of wage of every employee.[118] These taxes fund the federal unemployment insurance program (FUTA). Independent contractors are exempt from FUTA tax. Even though employers (rather than employees) pay the FUTA tax, "the incidence of FUTA likely falls partially, or even fully, on the employee, through lower wages."[119] Thus, performing artists who are classified as employees carry a FUTA tax burden that similarly situated independent contractors do not.

Employees and employers are also liable to Federal Insurance Contributions Act (FICA) taxes, which fund Medicare and Social Security. The taxes

110. *Id.* § 199A(d).
111. *Id.*
112. *Id.* §§ 199(A)(d), 1202(e).
113. *Id.* § 199A(d).
114. *Id.* § 199A(e).
115. Rev. Proc. 22–38, 2022–45 I.R.B. 445.
116. Per Salary.com, an income, a labor market research company, as of January 2023, the median income for actors and performers was $60,108. The 90th percentile performers earned $85,481, still well below the 199A threshold. *Actor/Performer Salary in the United States*, Salary.com, https://www.salary.com/research/salary/benchmark/actor-performer-salary [https://perma.cc/S8C8-C72L].
117. I.R.C. § 3301.
118. *Id.* § 3306.
119. Eleanor Wilking, *Independent Contractors in Law and in Fact: Evidence from U.S. Tax Returns*, 117 Nw. U. L. Rev. 731, 746 (2022).

are withheld at a rate of 7.65 percent on gross payroll[120] and matched by the employer[121] for a total payroll tax of 15.3 percent. The tax only applies to the first $160,200 of wages.[122] Independent contractors are not subject to FICA, but instead, pay a Self-Employment Contributions Act (SECA) tax at the same combined rate as FICA (15.3 percent).[123]

While an independent contractor's responsibility under SECA is double that of an employee under FICA, there are good reasons to believe employees bear a similar or higher burden than independent contractors. First, like in the case of FUTA, employers probably pass the incidence of payroll taxes to employees in the form of lower wages.[124] As such, the expected tax burden of an employee subject to FICA is similar to the burden of a tax-compliant independent contractor. Second, empirical data suggests that SECA compliance is significantly lower than FICA compliance.[125] For employees, the FICA tax liability is remitted by their employers, who have an incentive to comply because they may be subject to penalties for failure to withhold and remit taxes. Independent contractors self-report SECA taxes, which makes it harder for the IRS to identify non-compliance.

3. Tax-Exempt Employer-Provided Benefits

Medical Expenses. Employees have access to certain benefits that are not available to independent contractors. For example, employees can exclude from their income the value of certain employer-provided health insurance[126] and reimbursement for medical expenses.[127] However, many performers work just a few days (or even a few hours) for each employer. Under such circumstances, many employers do not offer such benefits.

While independent contractors cannot receive employer-provided health insurance, they can deduct the cost of health insurance for themselves and their dependents above-the-line.[128]

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120. I.R.C. § 3101 (the aggregate rates imposed by this section amount to 7.65 percent).
121. *Id.* § 3111.
122. The cap is set by IRC § 3121, by incorporating § 230 of the Social Security Act (defining the contribution base, codified at 42 U.S.C. § 430). The amount is subject to inflation adjustments. For 2023, the threshold is $160,200. *See Contribution and Benefit Base*, Soc. Sec. Admin., https://www.ssa.gov/oact/cola/cbb.html [https://perma.cc/F35Z-F8BF].
123. I.R.C. § 1401.
124. Wilking, *supra* note 119, at 747 ("All else being equal, contractors and employees will bear the same share of these payroll taxes, relative to the employer (payer); historically, the lion's share is thought to be borne by the worker.").
125. Richard Winchester, *The Gap in the Employment Tax Gap*, 20 Stan. L. & Pol'y Rev. 127, 127 (2009) (surveying IRS tax gap report, concluding that "[a]ll but a minuscule portion of the employment tax gap is a result of under-reporting by self-employed individuals.").
126. I.R.C. § 106.
127. *Id.* § 105.
128. *Id.* § 162(l), 62.

The result is that many performing artists, again, are worse off in comparison to both other employees, and contractors: Steady employees are more likely to receive tax-exempt employer-provided health insurance than unsteadily employed performers, who must purchase health insurance on their own. The cost of the insurance is unlikely to be deductible to artists, who are classified as employees, while independent contractors can deduct such costs.

Performing artists have access to other health-related tax benefits, but it is unlikely that these benefits put them on equal footing with other taxpayers. For example, under IRC Section 213, taxpayers can claim an itemized deduction for certain medical expenses, including the cost of health insurance.[129] However, this deduction is only available to the extent it exceeds 10 percent of the taxpayer's AGI. As such, this deduction will usually kick in only under catastrophic circumstances.

The Affordable Care Act (ACA) added a tax benefit in the form of refundable credit for low- and moderate-income taxpayers who purchase health insurance through state-based health insurance exchanges.[130] The credit is available for taxpayers with income between 100 percent and 400 percent of the federal poverty level, who do not receive minimum coverage through their employers. The credit is designed to cover most of the cost of the health insurance premium. Taxpayers below the ACA's income level may get Medicaid coverage (also expanded under the ACA) for their healthcare.

The ACA certainly offers an important benefit to low-income performing artists. It is an open question, however, whether the ACA offers low-income performing artists parity with other taxpayers, in terms of tax subsidies for healthcare. While ACA credits are available to employees and independent contractors alike, the adoption of ACA's federally funded benefits was uneven among the states. In states where ACA was not adopted in full, it is reasonable to assume that employer-provided health insurance is still a more cost-effective health insurance option. Moreover, ACA refundable credits are not available to taxpayers who make more than 400 percent of the federal poverty line.[131] Surpassing this modest income puts performing artists back at a disadvantage compared with steady employees and independent contractors.

Retirement Benefits. Under multiple code provisions, both employees and independent contractors can make tax-deductible contributions into qualified retirement accounts. Earnings in such accounts are exempt from taxation until withdrawal.[132] However, there are two reasons to believe that, as a general matter, employees benefit more than independent contractors.

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129. *Id.* § 213.
130. *Id.* § 36B.
131. *Id.*
132. *See, e.g.*, *id.* §§ 401(k), 403(b), 457(b); *see also*, Oei & Ring, *supra* note 30, at 677–79 (discussing employer-provided retirement benefits).

First, many employer-provided plans offer a matching tax-exempt employer contribution to the employee account.[133] However, given the unsteady nature of the employment relationships between performing actors and their employers, it is likely that many low-income performing artists do not receive matching contributions from their employers. Second, the tax-preferred contribution limits to employer-provided retirement plans are higher than the contribution limits for self-funded retirement plans.[134] This probably matters little for low-income performing artists, because they are unlikely to reach their contribution limits.[135] Yet, the bottom line is that many low-income performing artists are unable to access the tax benefits of retirement savings stemming from employee classification.

E. *The Use of Loan-Out Entities by Well-to-do Performing Artists*

Not all performing artists experience the tax disadvantages of their profession equally. Well-to-do performers can establish "loanout" entities, thereby regaining access to tax benefits.[136] As discussed below, the successful structuring of a loanout entity is a complex and expensive endeavor, making it unavailable to low- and mid-income performing artists.

In a typical loanout arrangement, an individual taxpayer forms an entity such as a corporation "in which she is the sole or majority shareholder as well as the sole or principal employee. The corporation then negotiates with a third party . . . to 'lend' the services of the controlling shareholder-employee."[137] Instead of contracting with the performing artist, the production company engages the loanout entity. The production pays the loanout, which then pays a salary (or a dividend) to its sole employee-shareholder—the performer.[138]

If done properly, structuring a loanout company comes with significant tax benefits.[139] Most importantly, all business expenses taken at the entity level

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133. *See* I.R.C.§ 401.
134. For example, in 2023, the maximum deductible contribution employees or self-employed individuals can make to a qualified plan under I.R.C. § 401 is $22,500. The maximum combined contributions of an employee and employer to a qualified plan is $66,000. *See* Notice 22–55, 2022–45 I.R.B. 443.
135. *See* Oei & Ring *supra* note 30, at 678–79 ("these higher limits in employer plans may be less relevant for lower-wage employees unlikely to reach the contribution caps").
136. *See* Cohen and Nix, *supra* note 89, at 679 ("In the entertainment industry, entertainers often operate through a loanout company . . . ").
137. Mary LaFrance, *The Separate Tax Status of Loan-Out Corporations*, 48 VAND. L. REV. 879, 880–881 (1995).
138. *See* Cohen & Nix, *supra* note 89, at 679 ("The loanout company then enters into contracts with the studios other production companies. The studio will pay the loan-out company compensation . . . due for the entertainer's services . . . The loan-out company then pays all or a portion of the income generated from the studio contract to the entertainer as compensation for services.").
139. *See* SOBEL, *supra* note 31, at 161–80 for discussion of the tax benefits of loanout entities.

become deductible.[140] If respected, loanout entities are contractors engaged in the business of providing its artist's performing services. The artist is an employee of the loanout, not of the production. Therefore, unlike employees, the loanout is not limited by the denial of business deductions. Instead of the artist, the loanout is now paying for its shareholder/employee's headshots, casting websites, video reels, voice lessons and dance classes, which all become deductible to the entity. In addition, the salary paid by the loanout to the artist is also deductible. If done properly, these deductions will zero out any potential income to the loanout itself, leaving the performing artist to pay tax on the net economic income.

There are additional tax benefits for operating through a loanout entity. If the loanout entity is set up as an "S-corporation," the artist may be able to enjoy the 20 percent "pass through deduction" under IRC Section 199A.[141] Loanouts can also deduct the costs of certain employee benefit plans, which the employee-artist does not have to include in income, such as disability and medical reimbursement plans,[142] and life insurance.[143] Loanout corporations can also offer better retirement savings. A loanout corporation can make matching contributions to their employee's retirement plans, thus increasing the contribution limits to these tax-favored plans.[144]

Loanouts, however, come with significant burdens to their owners/employees. First, there are significant expenses associated with creating and maintaining a loanout. One must draft proper articles of incorporation, employment agreements with the owner/employee, conduct shareholder and board meetings, maintain proper books, accounting and financial statements, enter into contracts on behalf of the loanout, and prepare and file the loanout's tax returns, to name a few complexities.[145] This requires paying for lawyers, accountants, and tax return preparation.

Second, certain localities impose taxes or other fees on entities. California, for example, imposes a minimum annual tax of $800 on any business entity, whether or not it earns any income.[146] California also imposes a gross receipt

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140. *See* LaFrance, *supra* note 137 at 885 ("By attributing business expenses to her loan-out rather than to herself as an employee, a service provider can take advantage of the ability of corporate taxpayers (like sole proprietors) to deduct their business expenses without regard to the limitations imposed on traditional employees.").
141. Provided the artist's earning is below the threshold level discussed above. *See* discussion *supra* 1. However, organizing as an S-corporation may deny certain other tax benefits such as exclusion from income of health benefits. *See also* I.R.C. § 105(g).
142. I.R.C. § 106.
143. *Id.* § 79 (applying to the extent that the cost of insurance is not in excess of $50,000).
144. *Compare supra* notes 132–135 and accompanying text, *with* Sobel, *supra* note 31, 161–66 (discussing the retirement benefits offered by loanouts) *and* LaFrance, *supra* note 137, at 888–92.
145. *See*, Sobel, *supra* note 31, at 181–82.
146. *See* Cal. Rev. & Tax. Code § 23153.

tax on the income earned in California by an LLC, at graduated rates, up to a maximum amount of $11,790.[147]

Third, certain anti-abuse rules in the Internal Revenue Code require careful financial and tax management of the loanout. For example, IRC Section 541 imposes a tax of 20 percent in addition to any other taxes, on undistributed income of "personal holding compan[ies]."[148] A personal holding company is any company that meets both an income test and a stock ownership test.[149] The income test is met if at least 60 percent of the entity's adjusted ordinary gross income[150] consists of "personal holding company income."[151] Personal holding company income generally constitutes income from passive sources such as rents, interest, dividends, and royalties.[152] The ownership test is met if more than 50 percent of the value of the corporation's stock is owned by not more than five individuals.[153] Loanout entities likely meet the ownership test and need to be managed carefully to prevent them from meeting the income test, usually by paying enough compensation and distributing retained earnings to the owner-artist.[154]

Finally, the use of loanout entities invites scrutiny. The IRS "has frequently viewed efforts to obtain [loanouts'] tax benefits as abusive, and has therefore sought to disregard the structure of the loan-out arrangement."[155] Over the years, IRS challenged loanout structures multiple times, resulting in voluminous guidance and adjudication.[156] This adjudication is beyond the scope of this article. Suffice it to say that structuring a loanout that would withstand IRS scrutiny requires careful planning with the help of expensive tax professionals. Sobel concludes the loanouts are more likely to withstand IRS challenge if the owner/shareholder "would have been independent contractor" without the loanout.[157] This means that a loanout is more likely to be respected in the case of performers that are able to negotiate some level of control of the production location, schedule, and creative aspect. Only well-established, affluent artists have that kind of negotiating leverage.

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147. *See id.* §§ 17941, 17492.
148. I.R.C. § 541.
149. *See id.* § 542(a).
150. For this purpose, adjusted gross income is computed without regard to deductions generating certain passive income items such as rents and capital gains. *See id.* § 543(b).
151. *Id*. § 542(a)(1).
152. *Id*. § 543(a).
153. *Id*. § 542(a)(2). This test is likely almost always met in the case of performers' loanouts.
154. *See* Cohen and Nix, *supra* note 89, at 712 ("Therefore, loanout companies generally should pay compensation and distribute any retained earnings prior to the end of such company's taxable year.").
155. LaFrance, *supra* note 137, at 904.
156. For a detailed review of IRS challenges to loanouts and resulting adjudication, see LaFrance, *supra* note 137.
157. Sobel, *supra* note 31, at 197.

Even if a low- or mid-income performing artist could somehow structure a loanout that is respected by the IRS, it makes no sense to do so. Given the economic and administrative burdens associated with a loanout structure, it is only worth the performing artist's while if the tax savings from a loanout outweigh the associated cost and risks. A general rule of thumb among practitioners is that a performing artist should not form a loanout entity unless that artist *consistently* earns at least $100,000 annually.[158] One good year (or a couple) is not enough, because one cannot just easily unwind a loanout structure with all the associated contracts the loanout is a party to. Artists should only be setting up loanouts if they are rather certain they are going to have significant annual income in the foreseeable future and real leverage in negotiations that will allow them to maintain some creative control.

Moreover, it is highly unlikely that production companies or studios will be willing to deal with loanout entities set by unestablished artists. Loanouts require unique negotiations and non-standardized agreements. Production companies may be willing to engage in such arrangements with well-recognized artists, but they are unlikely to negotiate with new or otherwise unestablished artists. These artists will simply be employed by the production companies and will be paid according to their union salary scale.

The bottom line is that the use of loanout entities, and their associated tax benefits, is only available to a narrow sliver of high-earning, well-established performing artists. It is not available to the majority of performing artists.

IV. Using Stylized Examples to Explain the Tax Policy Ramifications

The doctrinal failures in the tax treatment of performing are undesirable as a matter of tax policy. They lead to inequitable and inefficient outcomes. They also create significant administrative and compliance issues. Stylized examples are used below to demonstrate these arguments.

A. *Equity Considerations*

A tax system is "equitable" if it takes into consideration the particular circumstances of different taxpayers when determining their tax burdens.[159] In particular, an equitable tax system requires that the amount of tax paid derives from a taxpayer's "ability to pay." The two design aspects of a tax system that address these issues are "vertical equity" and "horizontal equity."[160]

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158. *See, e.g.*, *How to Successfully Run a Loan Out Company*, Fusion CPA (Aug. 25, 2021) https://www.fusiontaxes.com/thought-leadership/blog/how-to-run-a-loan-out-company [https://perma.cc/8WW2-2TZX] ("Many tax advisors believe that loan companies are not beneficial unless the income exceeds $100,000 a year.").

159. Joel Slemrod & Jon Bakija, Taxing Ourselves: A Citizen's Guide to the Debate over Taxes 59 (2008).

160. *Id.*

Vertical equity is achieved when taxpayers' tax burden correlates with their well-being.[161] This means that affluent taxpayers should carry a higher overall tax burden than poor taxpayers. Horizontal equity addresses "under what, if any, circumstances it is acceptable that that two equally well-off households bear a different tax burden."[162] Absent a good normative justification, taxpayers that earn the same amount of net income should pay the same amount of income tax. As explained below, both of these principles are violated for low- and mid-income performing artists.

1. Performing Artists and Horizontal Equity

Alice is single, a professional actress, and a member of SAG-AFTRA and the AEA. Given her union status and the fact she only performs in jobs covered by union contracts, she is an employee in all her acting endeavors. In 2022 she performed in two plays in regional theaters, participated in several TV commercials, had a few guest-star and co-star roles in TV series, and acted in several short films. She earned $60,000 from her acting. To supplement her income, she also worked part-time as an employee in a local veterinary clinic, where she earned $30,000. In total, her gross income for the year was $90,000.

Of her acting income, Alice paid a 10 percent commission ($6,000) to her agent and a 15 percent commission ($9,000) to her manager, for a total of $15,000. She paid $2,000 for acting classes during the year, $500 in fees for various casting websites, $700 for new headshots, and $500 in union fees. Alice also spent $1,300 to purchase health insurance. Alice's expenses amount to $20,000, which means that her net economic income for the year is $70,000.

All of Alice's expenses are clearly "ordinary and necessary" business expenses connected with Alice's trade or business of acting. However, the expenses are not deductible above-the-line because Alice incurred them as an employee. Before 2018, Alice would have been able to deduct such expenses "below-the-line" to the extent they surpassed 2 percent of her income ($1,800), for a total below-the-line deduction of $18,200. The TCJA denies Alice this deduction, at least until 2026. Alice also cannot claim the qualified performing artists deduction because her gross income exceeds $16,000.[163]

The bottom line is that Alice can claim no itemized deduction for any of her expenses. She is only eligible to claim the standard deduction, which for 2022 was $12,950.[164] This means Alice's taxable income for the year would be $77,050. This is more than her net economic income of $70,000. Alice's tax liability would be $12,568.[165] The resulting effective tax rate on her economic income is approximately 17.95 percent.

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161. *See id.*
162. *See id.* at 60.
163. *See* I.R.C. § 62(b)(1)(C).
164. *See* Rev. Proc. 21–45, 2021–48 I.R.B. 764.
165. *See* Rev. Proc. 21–45, 2021–48 I.R.B. 764.

Now compare Alice with Eli, an unmarried individual, who has a steady job as a graphic designer at an advertising agency. Eli is paid $68,700 for his work. In addition, Eli receives health insurance through his employer, valued at $1,300. Eli does not need to include the health insurance benefit in his income.[166] Eli's economic income for the year is the same as Alice's, $70,000. However, his gross income for tax purposes is only $68,700 (since the health insurance benefit is not included). He is also entitled to claim the standard deduction of $12,950, bringing his taxable income to $55,750. His tax liability on that income is $7,882.[167] That is $4,686 less than Alice's tax liability, notwithstanding that both earned the exact same amount of net income in 2022. His effective tax is 11.26 percent, significantly lower than Alice's 17.95 percent.

Now compare Alice with Bella, who owns a small coffee shop as the sole proprietor. Bella made $90,000 in gross sales in 2022. Her 2022 expenses include $9,000 in rent for the coffee shop space and $7,000 paid to services providers, such as her business accountant and part time employees. She paid $2,000 in utility bills for the coffee shop and $700 for various business-related permits from municipal authorities. She also purchased a $1,300 health insurance for herself.

Like Alice, Bella's net economic income is $70,000. Unlike Alice, however, Bella is not an employee, but a self-employed business owner. As such, she gets to deduct the costs of rent, payments to services providers, utilities, and permits, as "ordinary and necessary business expenses." As a self-employed individual, she can also deduct the cost of health insurance.[168] As a sole proprietor, she gets an additional deduction under IRC Section 199A, of 20 percent of her net business income, or $14,000. In total, her taxable income is $56,000, resulting in a tax liability of $7,937.[169] Bella's effective tax rate is 11.33 percent, which is comparable to Eli's 11.26 percent, but significantly lower than Alice's 17.95 percent.

In summary, we have three taxpayers whose net economic income is the same. Horizontal equity dictates that, absent a compelling reason, they should be subject to similar tax burdens. However, one of the three—the performing artist—suffers a uniquely high tax burden. Alice's excessive tax liability is a result of the fact that the current law requires her to pay tax on more than her net income. Table 2 summarizes these results.

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166. See discussion *supra* Subpart 3.
167. Rev. Proc. 21–45, 2021–48 I.R.B. 764.
168. *See* I.R.C. § 162(l).
169. *See* Rev. Proc. 21–45, 2021–48 I.R.B. 764.

TABLE 2 – A COMPARISON OF A MID-INCOME PERFORMING ARTIST WITH SIMILARLY SITUATED NON-ARTISTS.

		Alice (actor)	Bella (business owner)	Eli (non-artist employee)
Gross income for tax purposes	A	$90,000	$90,000	$68,700
Nontaxable benefits	B	$0	$0	$1,300[170]
Gross economic income (A+B)	C	$90,000	$90,000	$70,000
Business expenses	D	$18,700	$18,700	$0
Other expenses	E	$1,300[171]	$1,300[172]	$0
Total expenses (D+E)	F	$20,000	$20,000	$0
Net economic income (C-F)	G	*$70,000*	*$70,000*	*$70,000*
Allowed deduction	H	$12,950[173]	$34,000	$12,950[174]
Taxable income (A-H)	I	*$77,050*	*$56,000*	*$55,750*
Tax paid	J	$12,568	$7,937	$7,882
Effective tax rate (J/G)		*17.95%*	*11.33%*	*11.26%*
Net value after tax (G-J)		$57,432	$62,943	$62,118

2. Performing Artists and Vertical Equity

Now compare Alice with Pat Brid, a rather well-known actor who is consistently working in film and television. On the advice of her accountant, Pat set up a loanout corporation through which she provides her acting services. Studios contract with the loanout for Pat's services and Pat is the sole employee and shareholder of the loanout.

In 2022, Pat's loanout earned $130,000 for contracting Pat's acting services. Pat's loanout had the exact same acting-related expenses as Alice: it paid for Pat's acting classes, union dues, headshots, and so on, for a total of $18,700. Pat's loanout also purchased health insurance for her. The insurance was exempt for Pat as an employee of the loanout. The cost of the health insurance was $1,300. The loanout incurred additional expenses of $21,300 paid to lawyers and accountants to maintain the corporate books, file its tax returns, and negotiate its contracts. In total, the expenses amounted to $41,300. All these expenses are deductible to the loanout as ordinary and necessary business expenses. The loanout paid the remaining amount, $88,700, as salary to Pat. This is also deductible to the loanout, zeroing out the loanout's income.

170. This is the economic value of health insurance.
171. Cost of health insurance.
172. Cost of health insurance.
173. Standard deduction.
174. Standard deduction.

Pat receives $88,700 in salary and has no other expenses (as all were covered by the loanout). She also has a non-taxable health insurance benefit of $1,300. Her net economic income is therefore $90,000. She is eligible to claim the standard deduction ($12,950), in her own capacity. This results in a taxable income of $77,050, and an associated tax liability of $12,568.[175] This is the same taxable income and tax liability as Alice's, notwithstanding the fact that Alice's economic income was $70,000, or $20,000 less than Pat's. Pat's effective tax rate on her economic income is approximately 13.76 percent, about 4 percent lower than the lower-earning Alice.

Vertical equity dictates that Pat, the higher earner of the two performers, should bear a higher effective tax burden than Alice. But in this example (and in practice) the reverse is true. The lower-earning actor ended up paying a higher effective tax rate.[176] The example is summarized in Table 3 below.

TABLE 3 – A COMPARISON OF A LOW-INCOME ARTIST AND A HIGH-INCOME ARTIST USING A LOANOUT

		Alice (low-income)	Pat (high-income)
Gross loanout income	X	N/A	$130,000
Loanout deductions (other than pay to actor)	Y	N/A	$41,300
Leftover loanout pay to actor (X-Y)	Z	N/A	$88,700
Loanout taxable income (X-Y-Z)		N/A	0
Gross income for tax purposes (individual)	A	$90,000	$88,700
Nontaxable benefits	B	$0	$1,300
Gross economic income (A+B)	C	$90,000	$90,000
Business expenses	D	$18,700	$0
Other expenses	E	$1,300	$0
Total expenses (D+E)	F	$20,000	$0
Net economic income (C-F)	G	*$70,000*	*$90,000*
Allowed deduction	H	$12,950	$12,950
Taxable income (A-H)	I	*$77,050*	*$77,050*
Tax paid	J	$12,568	$12,568
Effective tax rate (J/G)		*1795%*	*13.76%*
Net value after tax (G-J)		$57,432	$78,732

175. *See* Rev. Proc. 21–45, 2021–48 I.R.B. 764.

176. It is worth noting Alice would not benefit from setting up her own loanout under the example, because the cost of the loanout alone would reduce her economic income to $70,000 (the same as in the current example), before any other expenses are considered.

B. *Efficiency Considerations*

In tax policy, "efficiency" considerations reflect the fact that tax has "disincentive effects."[177] Taxpayers' economic decisions are affected by taxes. An "efficient" tax system is one that adequately funds the government without causing too large behavioral distortions.

It is rather obvious from the example above that the current taxation of low-income performing artists may cause performing artists to change their behavior. Consider Alice and Eli from the example above. After several years of juggling multiple jobs with an unpredictable schedule, Alice is offered the same full-time job as Eli, for the same annual salary of $68,700 plus health benefits. In her current job(s) as an actress, she is making more on a gross basis ($90,000) but is left after tax with a net value of $57,432. If she gives up acting and takes a similar job to Eli's—a job that pays $20,000 less in gross income—she will be better off, as her after-tax value will be $62,188.

Setting aside potential aspirations and passion for the performing arts, a rational taxpayer would give up acting altogether, resulting in a loss of $20,000 in the gross product in the economy. Unless there is government policy to purposefully dissuade people from pursuing careers in performing arts[178], then this is an undesirable tax policy result.

C. *Administrability and Compliance Considerations*

Notwithstanding the unavailability of multiple tax benefits to low- and mid-income performing artists, there is a good reason to believe they still incur a unique tax compliance burden.

The IRS internal audit guide for the entertainment industry explicitly states that "taxpayers in the entertainment industry tend to be aggressive or abusive when deducting expenses . . . Our goal is to bring the allowable deductions back within the confines of the Code. The distinction between ordinary/necessary and *extravagant* must be more clearly drawn."[179] Judging by the entertainment industry audit guide, the IRS views performing artists with suspicion, which may result in heightened levels of scrutiny.

Moreover, due to their unique employment patterns, performing artists may face more complex tax reporting than similarly situated taxpayers. Most employees, for example, receive one W-2 form at the end of the year. Copying the information into their tax returns is relatively straightforward, with little room for error. Performing artists may receive dozens of W-2s,[180] significantly increasing their compliance burden and the chances of error.

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177. Slemrod & Bakija, *supra* note 159, at 66.

178. . No such policy has been argued for as far as the author is aware, nor there are any reasonable justifications for such a policy.

179. I.R.S., Entertainment Audit Technique Guide 17 (Mar. 20, 2023), https://www.irs.gov/pub/irs-pdf/p5774.pdf [hereinafter I.R.S. Audit Guide] (emphasis added).

180. *See., e.g.*, Walz v. Comm'r, No. 17415-03S, 2004 WL 3029726, at *1 (determining the

Another compliance burden stems from the fact that many low-income performing artists earn income both as employees and as independent contractors. The reason is that many performing artists are forced to supplement their employment income with self-employment income, such as offering acting lessons, voice coaching, and other freelance services that do not violate union rules. In such a case, taxpayers must allocate and apportion the expenses between their employment income, which will not be deductible, and non-employment income, which will be deductible. This may prove a complicated issue, especially given that there is no formal guidance on this issue.

The IRS's view is that performing artists should first allocate an expense against the resulting income.[181] For example, if an actor earned income as an employee in a specific production and paid a 10 percent commission of the gross amount earned from that production to their agent, the agent fee will be allocated against employment income, making it not deductible. This would require meticulous record-keeping for each expense, to substantiate which expense relates to what income. However, many, if not most, expenses incurred by performing artists cannot be attributed to a particular stream of income, as they support the artist's professional pursuits in general. Headshots, demo reels, acting classes, website fees, instrument purchase and maintenance, and voice training, are all examples of such non-allocable expenses. In such a case, the IRS's position is that the performer must apportion the expenses in proportion to the gross income from employment versus non-employment.[182] While IRS internal guidance is not binding on taxpayers, ignoring it creates a risk of audit and adjustments. It is not clear what authority the IRS rely on for such a purpose. There are other reasonable methods to apportion expenses and these other methods may be more favorable to performing artists. For example, an artist could reasonably apportion expenses based on time spent in "employment" versus "contractor work" jobs. Indeed, in other contexts, Treasury Regulations offer multiple ways to allocate and apportion expenses between different streams of income, allowing taxpayers to choose the methods most suitable for them.[183] It is unclear why such flexibility is accorded in other instances, but not to performing artists.

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deductible expenses of a taxpayer who received twenty-five W-2s for the tax year in dispute).

181. *See* I.R.S. Audit Guide, *supra* note 179, at 23. Internal I.R.S. views are not binding on taxpayers, but offer a glimpse into I.R.S. thinking.

182. *See id.*

183. For example, for the purpose of allocation and apportionment of expenses between different streams of income from multinational activities, Treasury Regulations allow using any method that "reflects to a reasonably close extent the factual relationship between the deduction and the grouping of gross income," and even lists various acceptable methods in addition to the gross income method, such as comparisons of gross sales, number of units sold, profit contribution, assets used, space utilized, time spent, and more. Temp. Treas. Reg. § 1.861-8T(c) (as amended in 2006).

D. *Income Data on Performing Artists*

One might wonder what percentage of performing artists are affected by the tax detriments described in this article. The life of a performer is generally associated with glamour. The reality is much less sanguine. Consider actors, for example. For 2020, the average income for actors was $49,402, less than the national average of $55,954.[184] The income distribution for actors is very right-tailed, meaning actors' income distribution tends to skew heavily toward the low-end. In fact, only about 11.15 percent of actors make more than $100,000—the threshold that would normally justify setting up a loanout. It is therefore reasonable to assume that most actors face the detriments described in this article,[185] if they are earning income as employees.

Similar patterns also affect singers and musicians, with an average income of $34,789 as of 2020.[186] Like actors, the great majority of singers and musicians do not earn enough money to justify setting up a loanout entity.

The "independent artists, writers, and performers" industry segment presents similar income statistics, with an average income of $52,473, and heavily right-tailed distribution.[187]

It is evident from the data that most performing artists are affected by the issues described in the article, if they are classified as employees. Likely most professional performing artists are classified as such.

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184. *Actors*, Data USA, https://datausa.io/profile/soc/actors [https://perma.cc/YC86-WP4B]. Granular income data for various professions is not easily accessible to the public. *See* Steve Lohr, *Website Seeks to Make Government Data Easier to Sift Through*, N.Y. Times (Apr. 4, 2016) https://www.nytimes.com/2016/04/05/technology/datausa-government-data.html [https://perma.cc/PWS5-UWCU]. The data discussed herein is taken from reports by Data USA, a data accessibility project by MIT Media Lab and Deloitte. *Id*. Data USA reports are based on Bureau of Labor Statistics data.

185. The 2020 data also shows that only about 30 percent to 40 percent are potentially entitled to claim the qualified performing artists deduction. *Id.* The two lowest distribution bins report income of less than $20,000, while the deduction is available to anyone making more up to $16,000. *Id.* The real number of taxpayers who can claim the deduction is probably significantly lower. First, the data reports *net* income, while the deduction is eliminated at a $16,000 of gross income. *Id*. It is likely that most if not almost all of the actors in the lowest bins earn more than $16,000. *Id*. For example, if only the standard deduction of about $12,000 is considered, anyone making more than $4,000 per the Data USA report is not entitled to claim the performing artist deduction. *Id*. Second, the Data USA report only includes wage income, and not income from other sources, which is also counted towards the $16,000 threshold. *Id*. It is therefore reasonable to conclude that very few performers are eligible to claim the qualified performing artists deduction.

186. *See Musicians and Singers*, Data USA, https://datausa.io/profile/soc/musicians-and-singers [https://perma.cc/466F-TN2A].

187. *See Independent Artists, Writers, and Performers*, Data USA, https://datausa.io/profile/naics/independent-artists-writers-and-performers [https://perma.cc/NN9G-H4ZB].

V. The Fix

After the enactment of the TCJA, performing artists' unions started lobbying Congress to address the non-deductibility of business expenses.[188] These efforts culminated in a bipartisan bill entitled the Performing Artist Tax Parity Act (PATPA), which was introduced in Congress in 2019 with no less than 29 co-sponsors from both parties.[189]

A. *The Performing Artist Tax Parity Act*

PATPA seeks to increase the threshold for the qualified performing artists deduction. Under current law, performing artists lose this above-the-line deduction in its entirety once their gross income from all sources exceeds $16,000. This threshold is not subject to inflation adjustments. Given how low the threshold is, this deduction is almost never claimed, as most artists seek additional employment to make ends meet.

Under PATPA, the threshold would be increased to $100,000 ($200,000 for married couples filing jointly).[190] Once taxpayers hit the threshold, the deduction is phased out at ten percent increments for every $2,000 ($4,000 for joint filers), or fraction thereof, by which their AGI (ignoring the qualified performing artist deduction) exceeds the threshold amount.[191] Thus, for example, a performing artist making more than $100,000 but less than $102,000 a year, will be able to claim 90 percent of her performing-related business deductions, 80 percent if she earns between $102,000 and $104,000, and so on. The deduction is phased out completely at $120,000 for single filers and $240,000 for joint filers. Finally, unlike the current threshold, the PATPA threshold is subject to inflation adjustment.[192] Unfortunately, PATPA never received a floor vote. It has been reintroduced in 2021 in both chambers of Congress with bipartisan support,[193] and again in the House of Representatives in 2023.[194]

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188. *See* Press Release, Dep't for Pro. Emps., AFL-CIO, Entertainment Unions Urge Congress to Restore Tax Fairness for the Industry's Workers (Dec. 6, 2022), https://www.dpeaflcio.org/press-releases/patpa-letter-dec-2022 [https://perma.cc/4YLG-QYDX].
189. *See* Performing Artist Tax Parity Act of 2019, H.R. 3121, 116th Cong. (2019).
190. *See id.* § 2(a)(2).
191. *See id.*
192. *See id.*
193. The House version had ninety-two cosponsors. *See* Performing Artist Tax Parity Act of 2021, H.R. 4750, 117th Cong. (2021) [hereinafter H.R. 4750]. The Senate version had eighteen cosponsors. *See* Performing Artist Tax Parity Act of 2021, S. 2872, 117th Cong. (2021). The Senate version only slightly differed from the House version. *Compare id.*, and H.R. 4750, *supra*. Under I.R.C. § 62(b), a "qualified performing artist" is a performing artist who, during the taxable year, was an employee for at least two employers. I.R.C. § 62(b). For that purpose, nominal employers are ignored, where the artist earned $200 or less from a particular employee. *Id.* The Senate version of the bill increases the nominal employment threshold to $500, adjusted to inflation. *See* S. 2872 § 2(c).
194. *See generally* Performing Artist Tax Parity Act of 2023, H.R. 2871, 118th Cong. (2023).

There are multiple reasons that make PATPA an elegant, practical solution. First, it is based on existing legislation—the qualified performing artist deduction. It does not require promulgation of major new guidance or institution of major new enforcement and reporting practices. It mostly uses existing legal structures, but with higher thresholds. It is easy to implement.

Second, the PATPA thresholds operate to amend both horizontal and vertical equity issues. From a horizontal point of view, it puts low- and mid-income performing artists on par with similarly situated non-artists. Under PATPA, performing artists will be able to deduct costs that are not borne by similarly situated employees, and that are already deductible to similarly situated business owners. As far as vertical considerations are concerned, the PATPA threshold of $100,000 is a level where setting up a loanout entity makes sense.[195] Thus, low- and mid-income performing artists should be able to deduct business expenses, and if their earnings exceed the threshold amounts, it would make sense for them to set up a loanout and keep claiming business deductions through the loanout.

Third, it is reasonable to assume that the budgetary cost of PATPA is negligible. While there is no official budgetary scoring of the bill, it only affects a small number of taxpayers: performing artists who make less than $120,000 a year. These taxpayers' share of the total income tax revenue collected is very low.[196] This suggests that the effect on income tax revenue should be minimal.

Finally, PATPA has broad bipartisan support and thus has a realistic avenue to become law. This support is not surprising. It seems rather uncontroversial that taxing people on more than their net income is undesirable. However, the issues described herein affect only a relatively small number of constituents concentrated in very few congressional districts. This probably makes PATPA a low-priority item on Congress's agenda.

PATPA also has a few shortcomings. For example, performing artists who make more than the threshold amounts would have to set up loanout entities to claim business deductions. This is a wasteful and risky endeavor. It is also not clear why a performing artist who makes, say, $150,000 a year should be treated differently than an employee or a business owner who makes the same amount. Moreover, once a loanout is set, you cannot trigger it "on and off" easily. It only makes sense to create a loanout if one's income is consistently

195. *See* Fusion CPA, *supra* note 158 and accompanying discussion.

196. According to a Tax Foundation analysis, taxpayers who make less than about $85,000 in AGI, representing the bottom 75 percent of taxpayers, paid about 11.5 percent of all income tax collected in 2020. *See* Erica York, *Summary of the Latest Federal Income Tax Data, 2023 Update*, Tax Foundation (Jan. 26, 2023), https://taxfoundation.org/publications/latest-federal-income-tax-data [https://perma.cc/9MA7-CH3R]. It is reasonable to assume most performing artists that are going to be affected by PATPA are captured in the group. (Others who earn more than that are more likely to have a loanout.) Thus, PATPA will only affect a sliver of a group that already contributes relatively little to income tax revenue, so the revenue loss is likely to be negligible.

above $100,000. If a performing artist happened to have one good year in which she earned $120,000, she is unlikely to have a loanout. That year she will lose all her business deductions on account of the phase-out.

Another issue with PATPA is that even though performing artists are unique, they are not *that* unique. Other taxpayers may also be defined as employees yet incur unreimbursed costs. For example, certain gig workers in California may be defined as employees under a recently enacted law.[197] These workers will not enjoy the benefits of PATPA as they are not performing artists. This would put performing artists in a better position compared with such employees. This is, however, a weak argument against PATPA. We should strive to tax all taxpayers on their net income. We are currently overtaxing a certain group of taxpayers. Solving the issue for some in this group is desirable. It makes no sense to keep the group of over-taxed taxpayers as big as it is just because PATPA does not solve the problem for everyone.

Lastly, PATPA will become less necessary by 2026, even if the law remains unchanged. The provision of the TCJA that deny performing artists miscellaneous itemized deductions is set to expire at the end of 2025.[198] Thus, starting in 2026, performing artists, as well as other employees with business expenses, will again be able to claim business deductions below-the-line. This is also a very weak argument against PATPA for three reasons. First, there is no telling what Congress will do. Congress may decide that just letting the TCJA's temporary provisions expire is a bad idea. Some expiring provisions will result in tax increases for many taxpayers, which is never popular.[199] Second, even if the TCJA's pause on the miscellaneous itemized deduction is allowed to expire, performing artists are still at a disadvantage. As explained above,[200] miscellaneous itemized deductions are taken below-the-line, and as such are subject to various limitations. Performing artists will still carry an excessive tax burden compared with other taxpayers, just less excessive than under current law. Finally, any prospective expiration of provisions will not compensate artists for the loss of deductions during the eight-year period during which the TCJA's expiring provisions will have been in effect.

In summary, it seems that PATPA's shortcomings dwarf in comparison to its benefits for the majority of performing artists and the fact that it is simply a good tax policy. It is an elegant and practical solution. It is not a surprise that

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197. *See* A.B. 2257, 2019-2020 Leg., Reg. Sess. (Cal. 2020).

198. *See* I.R.C. § 67(g).

199. For example, the expiring provisions of the TCJA include the near-doubling of the standard deduction under I.R.C. § 63, as well as a 20 percent qualified business income deduction under I.R.C. § 199A. *See id.* §§ 63, 199A. In addition, the TCJA reduced the headline tax rates for individuals. *See id.* § 1(j). Upon expiration of this provision, the headline rates will increase back to their pre-TCJA levels. *See id*.

200. *See supra* notes 22–27 and accompanying discussion.

performing artists unions and advocacy groups strongly support it.[201] Congress should pass PATPA.

B. *Other Potential Solutions*

While PATPA seems like the most viable solution at the time of the writing of this article, a few additional potential solutions are worth considering in brief.

The first obvious solution is to just stop treating performing artists as employees, but this is a bad idea. Not only would it require new legislation, but it would also end years of advancements—gained mainly through the efforts of unions—in protecting performing artists in an industry in which they have little to no negotiating power. The only reason to mention this option is to dismiss it at the outset. Other options are worth considering, though they are inferior to PATPA.

One option would be to simply allow performing artists to claim unreimbursed business deductions, regardless of whether they are classified as employees or independent contractors. Such a solution recognizes the unique employment patterns of performing artists and the fact that they do not fit the tax definition of either an employee or an independent contractor. This solution, however, would put significant additional pressure on the definition of "performing artist." Taxpayers may be tempted to abuse the definition, checking off a few fake auditions a year to qualify. Treasury would have to address these definitional issues through guidance and the IRS would have to closely scrutinize whether artists are indeed artists. While the pressure of the definition of a "performing artist" would also increase under PATPA, the threshold and the phaseout offer some counterbalance which would reduce the incentive to abuse the definition by taxpayers who are not genuine artists.

Another option is to simply allow certain categories of employees with unique employment patterns to deduct business expenses. For example, employees who hold multiple non-nominal jobs may, similar to performing artists, incur expenses out of pocket. Instead of having Section 62(b) as

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201. *See, e.g.*, *SAG-AFTRA Statement Regarding Today's Introduction of the Bipartisan Performing Artist Tax Parity Act*, SAG-AFTRA (June 5, 2019), https://www.sagaftra.org/sag-aftra-statement-regarding-today%E2%80%99s-introduction-bipartisan-performing-artist-tax-parity-act [https://perma.cc/D3FR-T2ZU]; *IATSE Praises Reps. Chu and Buchanan for Reintroducing Performing Artists Tax Parity Act*, IATSE (July 28, 2021), https://iatse.net/iatse-praises-reps-chu-and-buchanan-for-reintroducing-performing-artists-tax-parity-act [https://perma.cc/4S8E-UTT8]; *Actors' Equity Association Applauds Senate Introduction of the Bipartisan Performing Artist Tax Parity Act*, Actors' Equity Ass'n (Sep. 29, 2021), https://actorsequity.org/news/PR/PATPAIntroduction [https://perma.cc/7FBM-ZA3Q]; *AGMA Supports the performing Artists Tax Parity Act*, Am. Guild of Musical Artists (Apr. 14, 2022), https://www.musicalartists.org/agma-supports-the-performing-artist-tax-parity-act [https://perma.cc/5ACZ-CVBA].

amended by PATPA apply only to performing artists, there is a good argument it should apply to any employee with unsteady work patterns. Think for example of truckers, traveling mining and exploration workers, adjunct professors, gig workers who are employees under state law, seasonal hotel staff, or simply workers who hold multiple part-time jobs as employees. While this solution is worth exploring, it is beyond the scope of this Article and very likely has significant budgetary effects. It also seems a much tougher "sell" from a political point of view. In conclusion, PATPA, or a similar solution, is the way forward. The Article leaves the inquiry regarding other employees with unreimbursed expenses for another day.

VI. Conclusion

Tax doctrine fails to take into account the unique work patterns of performing artists. As a result, performing artists are denied business deductions and end up paying income tax on more than their net income. Well-to-do performers can enlist the help of tax professionals to plan around these limitations, but such planning is prohibitively expensive to most performing artists. The ultimate result is that low- and mid-income performing artists pay higher effective tax rates than similarly situated non-artists. Low- and mid-income performing artists also pay higher rates than many well-to-do performing artists. Since most performers are low- and mid-income taxpayers, the problem described in this article affects the majority of performing artists. There is no tax policy justification for this inequitable and inefficient result.

The current IRC contains a provision which is aimed at correcting these problems, at least on paper. But as shown, this provision is a dead letter. Bipartisan legislation aimed at amending this provision has been introduced several times but has yet to even receive a floor vote. It seems the reason for this is not some technical or political hurdle, but simply a lack of interest.

It is hoped that this Article sheds light on the inequitable taxation of low- and mid-income actors, singers, musicians, dancers, voice-over artists, stage managers, variety performers, and all other performers. The fix to these inequities is simple, known, and easy to implement. There is really no excuse for Congress not to pass PATPA.

Appendix: Machine Learning and Performing Artists' Tax Classification

In Subpart 2 of the Article, three hypothetical situations are fed into the Blue Jay machine learning platform to try and predict how a court might rule on the tax classification of certain performing artists. The Blue Jay platform contains the entire body of U.S. tax adjudication. Cases are reviewed by a team of tax lawyers within the context of specific legal questions (such as worker classification) "to translate them into structured data."[202] A data science team then builds a model "that can make predictions with reasonably high accuracy and that aligns well with legal intuition."[203] The model is then used against a sample of real cases and is corrected based on how its predictions fared compared with actual outcomes. The model is then tested on other samples until this infinite feedback loop produces an accurate enough result.

In practice, the platform works by asking tax practitioners questions about the fact pattern they wish to examine. The factual questions correspond to the variables used by the machine learning algorithms in making predictions. After a series of questions, the platform will generate a prediction for how a court would decide the question for the factual pattern that the tax practitioner described, as well as the level of confidence of the prediction. The platform will also generate a written report to explain the factors that had the most weight on its analysis and will refer to existing court decisions that contain the most factual similarities to the situation described by the tax practitioner. A detailed description of the platform's inner workings is available at Benjamin Alarie & Xue Griffin, *Using Machine Learning to Crack the Tax Code*, 174 Tax Notes Fed. 661, 663 (Jan. 31, 2022).

In the Article, I considered how three performing artists might be classified for tax purposes: a union actor, a non-union actor, and a non-union voice artist working from home. Below are the three predictions for these hypotheticals, accompanied by the input questionnaire as entered by me in the Blue Jay platform. The inputs I entered are based on my understanding of current entertainment industry practices. The full reports are too lengthy to include in the appendix but are available upon request. Moreover, using the questionnaires herein, anyone with access to the Blue Jay platform should be able to recreate the reports verbatim by answering the questionnaires in the exact same manner as I did.

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202. Benjamin Alarie & Bettina Xue Griffin, *Using Machine Learning to Crack the Tax Code*, 174 Tax Notes Fed. 661, 663 (2022).

203. *Id.*

A. *Hypothetical 1: Union Actor*

Prediction: Employee; confidence level: >95%

1. Background

1.1. In which federal judicial circuit does jurisdiction over this matter lie?

9th Circuit

1.2. Which of the following best describes the business or industry of the hirer?

Other services

2. Behavioral control

2.1. Who determines how the work product is completed?

Hirer

2.2. Is the worker able to set his or her own schedule or hours of work?

No

2.3. Does the worker perform the work full-time?

No

2.4. Who determines where the worker does his or her work?

Hirer

2.5. Where does the worker do most of his or her work?

Mobile locations

2.6. Does the worker regularly determine what work product to complete?

No

2.7. Does the worker have assistants that the worker hires, supervises and pays?

No

2.8. Is the worker expected to render services personally?

Yes

3. Behavioral control (cont'd)

3.1. Does the hirer set the order or sequence in which the work is to be done?

Yes

3.2. Is the worker required to submit regular reports to the hirer?

No

3.3. Does the hirer provide the worker with training?

No

3.4. Does the worker perform the same services for any other party during the working relationship?

Yes

4. Financial control

4.1. Who makes the larger investment in the facilities used by the worker?

Hirer

4.2. Who owns the most important equipment or tools that the worker uses while performing services for the hirer?

Hirer

4.3. Does the hirer pay for or reimburse the worker's work-related travel expenses or other expenses incurred in the course of performing his or her duties (excluding commuting expenses)?

Yes

4.4. Other than the loss of work, is the worker personally at risk of loss (e.g., to cover expenses or unsold product)?

No

4.5. Does the worker have the opportunity to profit by his or her own management or initiative?

No

4.6. Whether or not the worker actually performs services for others during the working relationship, does the worker make his or her services available to the market?

Yes

4.7. Is the worker guaranteed a regular salary or wage amount for an hourly, weekly, or other period of time?

Yes

5. Type of relationship

5.1. At the time of contracting, how did the parties intend to characterize the relationship?

Employer-Employee

5.2. Does the hirer provide the worker with benefits such as insurance, a pension plan, vacation pay, or sick pay?

No

5.3. Is there a continuous relationship between the hirer and the worker in terms of duration and consistency?

No

5.4. Are the tasks the worker performs a key activity of the hirer's business?

Yes

5.5. Does the hirer have the right to dismiss the worker at will?

Yes

5.6. Does the worker have the right to terminate the working relationship at will?

Yes

B. *Hypothetical 2: Non-Union Actor*

Prediction: employee; confidence level: 87%

1. Background

1.1. In which federal judicial circuit does jurisdiction over this matter lie?

9th Circuit

1.2. Which of the following best describes the business or industry of the hirer?

Other services
2. Behavioral control
2.1. Who determines how the work product is completed?
Hirer
2.2. Is the worker able to set his or her own schedule or hours of work?
No
2.3. Does the worker perform the work full-time?
No
2.4. Who determines where the worker does his or her work?
Hirer
2.5. Where does the worker do most of his or her work?
Mobile locations
2.6. Does the worker regularly determine what work product to complete?
No
2.7. Does the worker have assistants that the worker hires, supervises and pays?
No
2.8. Is the worker expected to render services personally?
Yes
3. Behavioral control (cont'd)
3.1. Does the hirer set the order or sequence in which the work is to be done?
Yes
3.2. Is the worker required to submit regular reports to the hirer?
No
3.3. Does the hirer provide the worker with training?
No
3.4. Does the worker perform the same services for any other party during the working relationship?
Yes
4. Financial control
4.1. Who makes the larger investment in the facilities used by the worker?
Hirer
4.2. Who owns the most important equipment or tools that the worker uses while performing services for the hirer?
Hirer
4.3. Does the hirer pay for or reimburse the worker's work-related travel expenses or other expenses incurred in the course of performing his or her duties (excluding commuting expenses)?
No
4.4. Other than the loss of work, is the worker personally at risk of loss (e.g., to cover expenses or unsold product)?
No

4.5. Does the worker have the opportunity to profit by his or her own management or initiative?

No

4.6. Whether or not the worker actually performs services for others during the working relationship, does the worker make his or her services available to the market?

Yes

4.7. Is the worker guaranteed a regular salary or wage amount for an hourly, weekly, or other period of time?

No

5. Type of relationship

5.1. At the time of contracting, how did the parties intend to characterize the relationship?

Independent contractor

5.2. Does the hirer provide the worker with benefits such as insurance, a pension plan, vacation pay, or sick pay?

No

5.3. Is there a continuous relationship between the hirer and the worker in terms of duration and consistency?

No

5.4. Are the tasks the worker performs a key activity of the hirer's business?

Yes

5.5. Does the hirer have the right to dismiss the worker at will?

Yes

5.6. Does the worker have the right to terminate the working relationship at will?

Yes

C. *Hypothetical 3: Non-Union Voice-Over Artist Working from a Home Studio*

Prediction: independent contractor; confidence level: 72%

1. Background

1.1. In which federal judicial circuit does jurisdiction over this matter lie?

9th Circuit

1.2. Which of the following best describes the business or industry of the hirer?

Other services

2. Behavioral control

2.1. Who determines how the work product is completed?

Hirer

2.2. Is the worker able to set his or her own schedule or hours of work?

Yes

2.3. Does the worker perform the work full-time?

No

2.4. Who determines where the worker does his or her work?

Worker

2.5. Where does the worker do most of his or her work?

Worker's home or office

2.6. Does the worker regularly determine what work product to complete?

No

2.7. Does the worker have assistants that the worker hires, supervises and pays?

No

2.8. Is the worker expected to render services personally?

Yes

3. Behavioral control (cont'd)

3.1. Does the hirer set the order or sequence in which the work is to be done?

No

3.2. Is the worker required to submit regular reports to the hirer?

No

3.3. Does the hirer provide the worker with training?

No

3.4. Does the worker perform the same services for any other party during the working relationship?

Yes

4. Financial control

4.1. Who makes the larger investment in the facilities used by the worker?

Worker

4.2. Who owns the most important equipment or tools that the worker uses while performing services for the hirer?

Worker

4.3. Does the hirer pay for or reimburse the worker's work-related travel expenses or other expenses incurred in the course of performing his or her duties (excluding commuting expenses)?

No

4.4. Other than the loss of work, is the worker personally at risk of loss (e.g., to cover expenses or unsold product)?

No

4.5. Does the worker have the opportunity to profit by his or her own management or initiative?

No

4.6. Whether or not the worker actually performs services for others during the working relationship, does the worker make his or her services available to the market?

Yes

4.7. Is the worker guaranteed a regular salary or wage amount for an hourly, weekly, or other period of time?

No

5. Type of relationship

5.1. At the time of contracting, how did the parties intend to characterize the relationship?

Independent contractor

5.2. Does the hirer provide the worker with benefits such as insurance, a pension plan, vacation pay, or sick pay?

No

5.3. Is there a continuous relationship between the hirer and the worker in terms of duration and consistency?

No

5.4. Are the tasks the worker performs a key activity of the hirer's business?

Yes

5.5. Does the hirer have the right to dismiss the worker at will?

Yes

5.6. Does the worker have the right to terminate the working relationship at will?

Yes