

MINOR LEAGUES, MAJOR EFFECTS: WHAT IF SENNE WINS?

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INTRODUCTION

A common thread in any discussion involving salaries or wages is comparing the salaries received in one industry to the salaries received by professional athletes. Those favoring the argument that athletes are overpaid point to the multi-million dollar contracts received by megastars in baseball, football, basketball, and international soccer, while those who disagree cite the huge revenues received by leagues and argue that athletes simply receive their fair share of the pie.

However, one group of athletes who are certainly not overpaid are minor league baseball players. Under the protection of baseball's exemption from antitrust scrutiny,¹ over the years professional baseball has built a wide array of minor league affiliate networks where those at the bottom are paid considerably less than those at the top. While a meritocracy where those who have the talent and the work ethic to succeed will be rewarded with riches is not inherently bad, the low salaries for players in the minor leagues make for a hard life for the roughly 90 percent of minor leaguers who will never reach a major league roster.²

In the past few years, some of these athletes have pushed to stop this purported abuse. While attempts to fight for higher wages on antitrust grounds have thus far failed,³ a group of former minor

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¹See *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972); *Curt Flood Act of 1998*, 112 Stat. 2824 (1998).

² Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, MOTHER JONES (July/August 2014), <http://www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income> (last visited Jan. 24, 2017).

³ *Miranda v. Selig*, No. 14-cv-05349-HSG, 2015 U.S. Dist. LEXIS 122311 (N.D. Cal. 2015). The case has been appealed to the Ninth Circuit Court of Appeals; oral arguments were heard on April 18 and the case is pending decision. Oral Argument, *Miranda v.*

league players led by former Miami Marlins tenth round draft pick Aaron Senne have sought relief through a more novel approach: arguing that their low salaries violate the minimum wage and overtime rules in the Fair Labor Standards Act (FLSA).⁴

This class action lawsuit against Major League Baseball (MLB) and three MLB clubs has raised interesting questions about minor league player compensation. Based on a fifty-hour week and a twenty-nine week schedule,⁵ a player should earn \$11,962.50 per the federal minimum wage⁶—just above the National Poverty Line of \$11,880 for a single person household.⁷

But according to the original complaint, most minor leaguers earn just \$3,000 to \$7,500 working between fifty and seventy hours per week during the five month season⁸ Additionally, the plaintiffs in *Senne* allege that MLB and MLB clubs have “conspired to pay no wages at all for significant periods of minor leaguers’ work,”

Selig, No. 15-16938 (9th Cir. Apr. 18, 2017), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011376. For a thorough discussion on the antitrust exemption’s applicability to minor league baseball, see Gary R. Roberts, *A Brief Appraisal of the Curt Flood Act of 1998 from the Minor League Perspective*, 9 MARQ. SPORTS L.J. 413 (1999).

⁴ Complaint, *Senne v. Office of the Comm’r of Baseball, et al.*, 105 F. Supp. 3d 981 (No. 14-cv-00608-JCS) (N.D. Cal. 2015) (No. 1).

⁵ *Id.* at 2. The twenty-nine week figure was obtained by adding the five month (twenty week) regular season with nine weeks of spring training. *Id.*

⁶ Based on the current federal minimum wage of \$7.25 with time and a half given past forty hours. *Minimum Wage*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/whd/minimumwage.htm> (last visited Jan. 24, 2017). Since many states have higher minimum wages, this is clearly an issue MLB would prefer to avoid and a major reason why the plaintiffs have thus far been denied class action certification. *Senne v. Kansas City Royals, et al.*, 315 F.R.D. 523 (No. 14-cv-00608) (N.D. Cal. 2016) (denying class action certification); see generally *Minimum Wage Laws in the States – August 1, 2016*, UNITED STATES DEPARTMENT OF LABOR, <http://www.dol.gov/whd/minwage/america.htm> (last visited Jan. 24, 2017).

⁷ *Poverty Guidelines*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, (Jan. 25, 2016), <http://aspe.hhs.gov/poverty/14poverty.cfm> (last visited Jan. 24, 2017).

⁸ Complaint, *Senne v. Office of the Comm’r of Baseball, et al.*, *supra* note 4, at 21. During the 2016 Baseball Winter Meetings, Phillies minor leaguer Dylan Cozens made headlines when he joked during a luncheon that a \$8,000 prize that he received for leading all of minor-league baseball in home runs was more than he had received all season. Matt Breen, *Phillies prospect cashes in at winter meetings*, PHILADELPHIA INQUIRER (December 6, 2016), <http://www.philly.com/philly/blogs/sports/phillies/Phillies-prospect-Dylan-Cozens-cashes-in-at-the-Winter-Meetings.html> (last visited Jan. 24, 2017). His “joke” was not far off from the truth; as a player at the AA level not on the 40-man roster, Cozens earned about \$1,700 per month, or about \$8,500 for the five-month season. *Id.*

including during instructional periods such as spring training, instructional leagues, and winter training.⁹ Even when daily meal allowances of \$25 per day are included, players at the A, Short Season A, and Rookie ball levels remain in poverty.¹⁰ These numbers also do not take into account insurance premiums or clubhouse dues, both of which are deducted from each paycheck.¹¹ The plaintiffs in *Senne* also allege that MLB and MLB clubs have “conspired to pay no wages at all for significant periods of minor leaguers’ work,” including during instructional periods such as spring training, instructional leagues, and winter training.¹²

These salary figures stand in sharp contrast to the salaries received by major league players, especially given that both MLB and minor league players are paid by the MLB club.¹³ Once a player is placed on a club’s 40-man roster, that player is protected by the MLB Players Association (MLBPA) and the minimum salaries prescribed in the MLB Collective Bargaining Agreement (or Basic Agreement),¹⁴ which for 2016 was \$507,500 for MLB service, \$41,400 for minor league players signing their first major league contract, and \$82,700 for minor league players signing a second

⁹ Complaint, *Senne v. Office of the Comm’r of Baseball, et al.*, *supra* note 4, at 2.

¹⁰ Garrett Broshuis, *Playing for Peanuts*, BASEBALL AMERICA (Mar. 31, 2010), <http://www.baseballamerica.com/today/minors/season-preview/2010/269689.html> (last visited Jan. 24, 2017).

¹¹ *Id.*

¹² Complaint, *Senne v. Office of the Comm’r of Baseball, et al.*, *supra* note 4, at 2.

¹³ *See infra* note 71 and accompanying text.

¹⁴ MAJOR LEAGUE BASEBALL AND THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, 2012-2016 BASIC AGREEMENT, 1 (Dec. 12, 2011), *available at* http://mlb.mlb.com/pa/pdf/cba_english.pdf (“The Clubs recognize the Association as the sole and exclusive collective bargaining agent for all Major League Players, and individuals who may become Major League Players during the term of this Agreement”); FAQs, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, <https://www.mlbpa.org/faq.aspx> (“Who is eligible for membership in the Association? In collective bargaining, the Association represents around 1,200 players, or the number of players on each club’s 40-man roster, in addition to any players on the disabled list.”). According to former MLBPA lawyer Gene Orza, the union does not represent minor league players and thus has “no obligation” to them. Lily Rothman, *Emancipation of the Minors*, SLATE (Apr. 3, 2012), http://www.slate.com/articles/sports/sports_nut/2012/04/minor_league_union_thousand_s_of_pro_baseball_players_make_just_1_100_per_month_where_is_their_c_sar_ch_vez_.html (last visited Jan. 24, 2017).

minor league contract.¹⁵ Thanks in part to union protection the average MLB salary has risen by approximately 2,000 percent since 1976, while the average minor league salary has risen by just seventy-five percent during that same time period.¹⁶ However, no minor league union exists, and even with a union there is no guarantee of significant changes by that approach due to MLB's longstanding antitrust exemption.

Regardless of whether the *Senne* plaintiffs succeed or fail, this lawsuit has shone a harsh light on MLB's practices for paying minor league players and provoked a national conversation about minor league salaries. But if the *Senne* plaintiffs do succeed, the implications will have major ramifications throughout baseball—and perhaps the entire professional sports industry.

Some commentators have argued that if the MLB loses the *Senne* case, clubs will be forced to “take measures to reduce the increase in player development costs, including possibly reducing the number of [minor league] affiliates and passing their increased costs on to their remaining affiliates.”¹⁷ These minor league affiliates, many of whom are located in small markets that otherwise would not have access to professional sports and struggle to draw 5,000 fans per game,¹⁸ would likely not survive if they were forced to bear any of these costs. Indeed, a bill to specifically exempt minor league players from FLSA ominously titled the “Save

¹⁵ *MLB minimum salary remains at \$507,500 for 2016*, ESPN.COM (Nov. 16, 2015), http://www.espn.com/mlb/story/_id/14161690/mlb-minimum-salary-remains-507500-2016 (last visited Jan. 24, 2017).

¹⁶ Complaint, *Senne v. Office of the Comm'r of Baseball, et al.*, *supra* note 4, at 2. During the same time period, the value of the dollar has risen by 400 percent. *Id.* For a look at how the MLBPA has often in collective bargaining traded gains for major league players for concessions mainly affecting minor league players written by a future attorney for the *Senne* plaintiffs, see Garrett Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51 (2013).

¹⁷ Jordan Kubritz, *Lobbying Congress in Save America's Pastime Act*, THE DAILY COURIER (July 12, 2016), <http://www.dcourier.com/news/2016/jul/12/column-lobbying-congress-save-americas-pastime-act/> (last visited Jan. 24, 2017).

¹⁸ See Graham Knight, *Minor League Baseball Attendance in 2015*, BASEBALLPILGRIMAGES.COM (2015), <http://www.baseballpilgrimages.com/attendance/minor-leagues-2015.html> (last visited Jan. 24, 2017).

America's Pastime Act" has been introduced in Congress and has been pushed hard by MLB and Minor League Baseball.¹⁹

However, the actual scale of such effects is still a matter of debate. While it is impossible to know exactly what will happen until it happens, this Article seeks to predict the effects of a plaintiff victory in *Senne* by analyzing the current labor market in minor league baseball, and how these expenses would change if FLSA was applied.

Part I of this Article explores the *Senne* case thus far, and analyzes the plaintiffs' chances of prevailing based on FLSA case law and additional perspectives. Part II of this Article looks to qualify the potential results of FLSA application on the minor league baseball labor market, while also raising the possibility that Congress will simply make the problem go away through legislation. Part III of this Article then analyzes what a potential settlement might look like, and how MLB and the minor league players can work together to bridge the gap between minor leaguers' salary concerns and the complications caused by applying the FLSA. Finally, Part IV of this Article considers whether the problem can be solved through Collective Bargaining, either through representation by the MLB Players Association or through the creation of a new minor league players' union.

I. A BRIEF HISTORY OF *SENNE V. MLB*

A. *What Has Happened So Far?*

Thirty-seven months after the filing of their initial complaint on February 7, 2014, the *Senne* plaintiffs gained significant momentum towards a legal victory. On March 7, 2017, Chief Magistrate Judge Joseph C. Spero of the United States District Court of the Northern District of California certified two classes of minor league baseball players, allowing their class action FLSA claims against MLB and its clubs to proceed.²⁰

Leading up to this certification, the plaintiffs' claims had suffered due to natural difficulties with the typicality element

¹⁹ Save America's Pastime Act, H.R. 5580, 114th Cong. (2016). *See infra* Part II(B).

²⁰ Order Re: Motion for Reconsideration Regarding Class and Collective Certification, *Senne v. Kansas City Royals Baseball Corp., et al.*, 2017 U.S. Dist. LEXIS 32949, No. 14-cv-00608 (N.D. Cal. Mar. 7, 2017) (No. 782).

necessary for class-action certification, due to the complexity inherent with a class with multiple states and multiple state minimum wage laws.²¹ Therefore, after several amended complaints the plaintiffs attempted to break their class into subclasses, with class representatives for California, Florida, Arizona, North Carolina, New York, Pennsylvania, Maryland, and Oregon.²²

On July 21, 2016, the United States District Court of the Northern District of California granted MLB's motion to decertify the plaintiffs' class based on the lack of typicality between class member claims.²³ The Court concluded that "at a minimum, the class representatives as a group must fairly and adequately represent the interests of the class for each State Class," and the court could not "determine whether the proposed class representatives for each state class collectively present claims that are typical of the class."²⁴

In response, the plaintiffs in a Motion for Reconsideration Regarding Class and Collective Certification drew back their class and claims considerably, scaling back their potential class to just four subclasses: a Florida Class, for players who had participated in spring training, instructional leagues, or extended spring training in Florida; an Arizona Class, for players who had participated in spring training, instructional leagues, or extended spring training in Arizona; a California Class, for players who had played in the California League; and a California Waiting Time Subclass, for players who played in the California League but are no longer employed as a minor league player.²⁵

Based on these changes, the court allowed certification of two classes of current and former minor league baseball players: a California class, for players who have played in the California

²¹ Sungho Cho and Joshua Smith, *Chen v. Major League Baseball: Hybrid Collective Action under Rule 23 and the Fair Labor Standards Act 216(b)*, 25 J. LEGAL ASPECTS SPORT 154, 165-166 (2015).

²² *Id.* at 4-5.

²³ *Senne v. Kansas City Royals, et al.*, 315 F.R.D. 523 (No. 14-cv-00608) (N.D. Cal. 2016) (initial denial of class action certification).

²⁴ *Id.* at 66-67.

²⁵ Motion for Reconsideration Regarding Class and Collective Certification at *i*, *Senne v. Office of the Comm'r of Baseball, et al.*, No. 14-cv-00608 (N.D. Cal. Sep. 14, 2016) (No. 720).

League for at least seven days;²⁶ and a general FLSA class, for all players who have participated in spring training, instructional leagues, or extended spring training.²⁷ The players were able to convince the court to certify these classes by eliminating winter conditioning claims in favor of claims based on the continuous workday doctrine, where all activities in the course of a normal workday are compensable.²⁸ This change will allow the plaintiffs to establish the “normal workday” of players during spring training and the regular season to establish what players should be paid per day.²⁹

While the pared-down complaint will not have the league-wide effect that the plaintiffs sought in their original complaint, a victory by these class members would still force MLB to pay wages for spring training or instructional league activity, while also changing the minor league system by forcing MLB to pay players in at least one league—the High-A California League—wages as required by the FLSA.³⁰

Such changes could lead to comparable adjustments across the entire minor league system, as MLB may want to avoid the competitive balance implications for teams with affiliates in one league forced to pay their players more than other teams without California League affiliates. Alternatively, MLB may opt to simply cut the California League out of the minor league farm system

²⁶ Order Re: Motion for Reconsideration Regarding Class and Collective Certification, *Senne v. Kansas City Royals Baseball Corp., et al.*, *supra* note 20 at 68-69.

²⁷ *Id.* However, the court declined to certify the Arizona and Florida classes because the “choice of law questions that are likely arise in connection with the Florida and Arizona classes defeat the predominance requirement as to those classes.” *Id.* at 64-65.

²⁸ *Id.* at 12.

²⁹ *Id.* Both the plaintiffs and defendants have appealed this decision to the Ninth Circuit Court of Appeals. The plaintiffs claim that the certification classes are not broad enough. Plaintiffs-Petitioners’ Rule 23(f) Petition for Permission to Appeal Denial of Class Certification, *Senne v. Office of the Comm’r of Baseball, et al.*, No. 17-80043 (9th Cir. Mar. 21, 2017). MLB claims that the certification was in error. Petition for Leave to Appeal Pursuant to Federal Rule of Civil Procedure 23(f), No. 17-80044 (9th Cir. Mar. 21, 2017). MLB has petitioned the district court for a stay until the appeal can be decision. Motion for a Stay, *Senne v. Office of the Comm’r of Baseball, et al.*, No. 14-cv-00608 (N.D. Cal. Mar. 24, 2017) (No. 720). Both the appeal and motion to stay are currently pending.

³⁰ Brian MacPherson, *Friday hearing has major stakes for minor leaguers*, PROVIDENCE JOURNAL (Nov. 30, 2016), <http://www.providencejournal.com/sports/20161130/friday-hearing-has-major-stakes-for-minor-leaguers> (last visited Jan. 24, 2017).

entirely. Regardless, the changes forced by a plaintiff victory would be substantial, and would lead to difficult decisions for MLB and its member organizations.

B. Can Senne Win?

In the wake of *Senne*'s initial filing, several legal scholars have analyzed the plaintiffs' chances of winning based on the FLSA and relevant case law. According to one commentator, since MLB "unilaterally produces unlawful minor league player salary guideline figures," its franchises "violate the FLSA by faithfully adhering to these unlawful standards and compensating their minor league employees with unlawful wages."³¹

On the other hand, another commentator reasoned that victory is unlikely for the minor league players, stating that while it is "unclear how the court will rule regarding whether or not minor league baseball employers are exempt from the FLSA," MLB will still likely prevail by "argu[ing] that minor league players are exempt as 'creative professional employees.'"³² And even if the minor league players were to find some momentum in the case, this commentator predicts that Congress will likely step in and pass legislation exempting minor league players from the FLSA at MLB's request in the same way that Congress wrote the Curt Flood Act of 1998 to exempt minor league players from the Act's weakening of baseball's antitrust exemption.³³

Another comment on FLSA applicability to professional sports organizations argues that the exception under section 213(a)(3) of the FLSA which exempts "seasonal 'amusement or recreational' establishments from minimum wage and overtime obligations" has been muddled, with different courts adopting "differing approaches when applying Section 213(a)(3) to professional sports franchises."³⁴ This exemption, which according to legislative history

³¹ Wilson Raines, Note, *For the Love of the Game*, 4 MISS. SPORTS L.R. 274, 290 (2014).

³² Mark Stanton, "*Juuuusst A Bit Outside*": A Look at Whether MLB Owners Can Justify Paying Minor Leaguers Below Minimum Wage Without Violating the Fair Labor Standards Act, 22 JEFFREY S. MOORAD SPORTS L.J. 727, 749-750 (2015). See *infra* notes 149-155.

³³ *Id.* at 750-751. See *infra* Part II(B).

³⁴ Charlotte S. Alexander & Nathaniel Grow, *Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act*, 49 U.C. DAVIS L. REV.

was supposed to apply to “weather-dependent” establishments like amusement parks,³⁵ has been applied instead to all “amusement or recreational” establishments through a bright-line “seven-month duration test to that establishment’s operations or the receipts test to its revenue.”³⁶ But even if professional sports franchises were found to be exempt from FLSA under the exemption, this “raises questions about the exemption’s policy rationale” as “the fact that employees of professional sports teams may in some cases *legally* be paid subminimum wages casts doubt on the true economic benefits these franchises impart to their host communities, undercutting the job creation and economic development justifications that teams frequently offer when seeking subsidies from taxpayers.”³⁷

Much of the commentary on this exemption as applied to the *Senne* case centers on two competing appellate court decisions where the rules and exceptions to FLSA have been applied to professional baseball: *Jeffery v. Sarasota White Sox, Inc.*³⁸ and *Bridewell v. Cincinnati Reds*.³⁹

In *Jeffery*, the Eleventh Circuit found that a groundskeeper’s FLSA claim against a minor league baseball team was covered by the §213(a)(3) “seasonal amusement or recreational establishment” exemption, and was thus rejected.⁴⁰ While the plaintiff “was employed in the off-season months relative to the preparation and maintenance of the baseball fields,” the focus of the exemption “is on length of the [team’s] seasonal operation.”⁴¹ Because this operation “[did] not last longer than seven months in any calendar year,” the exemption applies.⁴² The court reasoned that a different

123, 127 (2015). See also Kristin Spallanzani, Note, *Major Theft in the Major Leagues: Application of the FLSA Seasonal Employer Exemption to Professional Sports*, 46 SETON HALL L. REV. 281 (2015).

³⁵ *Id.* at 136.

³⁶ *Id.* at 139.

³⁷ *Id.* at 128.

³⁸ 64 F. 3d 590 (11th Cir. 1995).

³⁹ 68 F. 3d 136 (6th Cir. 1995).

⁴⁰ 64 F. 3d at 597.

⁴¹ *Id.* Curiously, the Eleventh Circuit cited a Report and Recommendation from *Bridewell* to determine that the “focus on the exemption is not on the length of time Plaintiff performed his work” but instead “on length of the Defendant’s seasonal operation,” yet still came to a differing result. *Id.*

⁴² *Id.*

conclusion would in essence “require [teams] to completely shut down or to terminate every employee at the end of each baseball season” in order to remain in compliance with the §213(a)(3) exemption of the FLSA.⁴³

But in *Bridewell*, the Sixth Circuit ruled that the FLSA §213(a)(3) “seasonal amusement or recreational establishment” exemption did not apply to employees who perform “maintenance and cleaning duties at Cincinnati’s Riverfront Stadium”⁴⁴ as the team “[did] indeed operate for more than seven months per year.”⁴⁵ The Sixth Circuit stated that “[a]n entity seeking to invoke the §213(a)(3) exemption must both be an amusement or recreational establishment and operate for fewer than eight months per year,” and the parties “incorrectly focus[ed] on the duration of the Reds’ activities at Riverfront rather than on the duration of the Reds’ overall operation.”⁴⁶ Preemptively answering the Eleventh Circuit’s statement in *Jeffrey* that a team would need to fire every full-time employee in order to stay compliant with the §213(a)(3) exemption,⁴⁷ the Sixth Circuit reasoned that, “a truly seasonal business that employs an insignificant number of workers year-round could conceivably qualify for the exemption.”⁴⁸ Yet in this case, the fact that the team employing 120 year-round workers “compels the conclusion that they ‘operate’ year-round.”⁴⁹

These two decisions—rendered less than a month apart⁵⁰—create a split in precedent that the District Court of Northern California—and likely the Ninth Circuit—will have to navigate regardless of whether *Senne*’s claims as a whole will be decided on the merits. An interesting component to the discussion is that in both *Jeffrey* and *Bridewell*, those types of employees would perform work at their respective stadiums throughout the entire season.⁵¹ But minor league baseball players are employees who generally

⁴³ *Id.*

⁴⁴ 68 F.3d at 137.

⁴⁵ *Id.* at 138.

⁴⁶ *Id.* at 139.

⁴⁷ *Jeffrey*, 64 F.3d at 597.

⁴⁸ *Bridewell*, 68 F.3d at 139.

⁴⁹ *Id.*

⁵⁰ *Jeffrey*, which ruled in favor of the employer, was decided “first,” on September 15, 1995. *Bridewell*, which ruled in favor of the employee, was decided on October 12, 1995.

⁵¹ *Jeffrey*, 64 F.3d at 597; *Bridewell*, 68 F.3d at 139.

only work directly for their respective teams during spring training and the season, which typically lasts from mid-February through the beginning of September—a span of less than seven months.⁵²

As the Ninth Circuit has been observed to be generally pro-employee,⁵³ the district court or the Ninth Circuit on appeal will likely rule in favor of the *Senne* plaintiffs based on public policy rationale and the original limited scope of the §213(a)(3) exemption.⁵⁴ At the same time, the analyses provided by the courts in *Jeffrey* and even *Bridewell* seem to disfavor such a narrow application of the exemption. While the plaintiff prevailed in *Bridewell*, the Sixth Circuit as noted stated that the team had “120 year-round workers [which] compels the conclusion that they ‘operate’ year-round.”⁵⁵ But the court also said that “a truly seasonal business that employs an insignificant number of workers year-round could conceivably qualify for the exemption.”⁵⁶ Since almost all of the on-field staff including the players are employed and paid by the major league affiliates,⁵⁷ minor league baseball teams carry significantly fewer year-round employees than major league teams.⁵⁸

⁵² Brian MacPherson, *Minor league baseball: Squeezed by low pay*, PROVIDENCE JOURNAL (Feb. 21, 2015), <http://www.providencejournal.com/article/20150221/Sports/150229787> (last visited Jan. 24, 2017).

⁵³ See generally Kimberlee W. Dewitt, Note, *Ninth Circuit Joins Sister Circuits in Holding that Employees May be Required to Arbitrate USERRA Claims*, HUNTON EMPLOYMENT & LABOR LAW PERSPECTIVES (Nov. 4, 2016) <http://www.huntonlaborblog.com/2016/11/articles/employment-policies/ninth-circuit-joins-sister-circuits-holding-employees-may-required-arbitrate-userra-claims/> (last visited Jan. 24, 2017) (“[T]he Ninth Circuit [is] a traditionally pro-employee circuit.”); Andrew H. Friedman, *The best and worst employment cases of 2015*, ADVOCATE - JOURNAL OF CONSUMER ATTORNEYS ASSOCIATION FOR SOUTHERN CALIFORNIA (June 2016), available at <http://www.helmerfriedman.com/docs/Best-Worst-Employment-Law-Cases-June-2016-CAALA.pdf> (“With the exception of several decisions involving the removal of cases from state to federal court, the Ninth Circuit generally issued pro-employee decisions.”).

⁵⁴ See *supra* notes 44-46 and accompanying text.

⁵⁵ *Bridewell*, 68 F.3d at 139.

⁵⁶ *Id.*

⁵⁷ MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, Rule 56, 172-183.

⁵⁸ For example, the Class-AAA New Orleans Baby Cakes have 27 listed employees. *Contact Us*, NEW ORLEANS BABY CAKES, http://www.milb.com/content/page.jsp?ymd=20070201&content_id=41061432&sid=t588&vkey=team1 (last visited Jan. 24, 2017). These employees almost exclusively handle

If the court does lean towards viewing minor league affiliates as “separate establishments under the FLSA,”⁵⁹ this interpretation would seem to strongly point to coverage under the seasonal recreational employee exemption. But under the FLSA, “alleged employees’ injuries are only traceable to, and redressable by, those who employed them.”⁶⁰

Here, it is important to note that affiliate minor league teams technically do not pay their players; the affiliate major league teams pay those player salaries and thus “employ” those employees.⁶¹ According to Rule 56(g)(5)(A) of the Major League Rules:

Salaries and Other Compensation. The Major League Club is responsible for the payment of all obligations to or for the benefit of all players assigned, transferred, leased or loaned to, or otherwise directed to play for, or otherwise assigned to any list of, the Minor League Club, including all salary and other compensation, responsibility for all benefits, payroll taxes, worker’s compensation coverage, unemployment insurance coverage, and any other benefits or taxes associated with players’ employment.⁶²

As the court has acknowledged that the MLB clubs are the employer of the minor league players,⁶³ the plaintiffs have a better case, as the facts concerning the number of full-time employees that

off-field activities, such as marketing, ticket and sponsorship sales, and maintenance of the field and stadium. *Id.* Per the Major League Rules, the only on-field workers employed by the minor league team are groundskeepers; the “Major League Club [has] the sole right to select and employ, and the sole obligation to compensate and provide benefits for, the manager, coaches, instructors and trainers for the Minor League Club” and “[a]ll of these individuals [are] under contract exclusively with the Major League Club.” *Id.*; MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, Rule 56(g)(4), 179.

⁵⁹ Alexander & Grow, *Gaming the System*, 49 U.C. DAVIS L. REV. at 169-170.

⁶⁰ *Berger v. NCAA*, No. 16-1558, 2016 U.S. App. LEXIS 21642, at *6 (7th Cir. Dec. 5, 2016) (citing *Roman v. Guapos III, Inc.*, 970 F. Supp. 2d 407, 412 (D. Md. 2013)).

⁶¹ MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, Rule 56, 172-183.

⁶² *Id.* at 179. The Major League affiliate is also responsible for all spring training and travel expenses for the Minor League Club. *Id.* at 179-180.

⁶³ *Senne v. Kansas City Royals*, 105 F.Supp.3d 981, 991 (N.D. Cal. 2015) (“MLB teams employ a small number of players who play at the highest level, the Major Leaguers . . . They also employ a larger number of Minor Leaguers, who the teams acquire through either an amateur draft or free agency.”).

the team retains lean closer to *Bridewell* than *Jeffrey*.⁶⁴ The fact that the players only work directly for their teams for less than seven months out of the year does lean against the players, especially now that the plaintiffs have dropped their claims for offseason training work.⁶⁵ But since case law suggests that “[e]xemptions under the FLSA are to be construed narrowly against the employer asserting them”⁶⁶ and that “[t]he employer has the burden of showing that it is entitled to the exemption,”⁶⁷ the plaintiffs would seem to have a strong case, assuming that the issues surrounding the size and character of their class can be resolved.

II. THE POTENTIAL EFFECTS OF A *SENNE* VICTORY

A. *Applying the FLSA to Minor League Baseball*

If the *Senne* plaintiffs win, the effects of the victory would change minor league baseball significantly. Even with the complaint pared down to include claims involving spring training and the California League,⁶⁸ successful litigation would force teams to institute a number of changes in order to maintain compliance with the FLSA. Such changes would affect all teams for spring training. Moreover, the new structure would likely affect even teams without a California League affiliate. Teams will either adapt to avoid further litigation, or be forced to change after more comparable suits are filed.

If the *Senne* plaintiffs win and minor league players are considered full-time, non-seasonal-recreational employees,⁶⁹ teams will have to increase the salaries of minor league personnel in order to adhere to the minimum wage requirements under § 206(a) of the

⁶⁴ See *Bridewell*, 68 F.3d at 139 (“[T]he fact that the [MLB] Reds employ 120 year-round workers compels the conclusion that they ‘operate’ year-round.”).

⁶⁵ MacPherson, *Friday hearing has major stakes for minor leaguers*, PROVIDENCE JOURNAL, *supra* note 39.

⁶⁶ *Brock v. Louvers and Dampers, Inc.*, 817 F.2d 1255, 1256 (6th Cir. 1987) (citing *Arnold v. Ben Kanowsky*, 361 U.S. 388, 396 (1960)).

⁶⁷ *Id.* at 1256 (citing *Arnold*, 361 U.S. at 397).

⁶⁸ Motion for Reconsideration Regarding Class and Collective Certification, *Senne v. Office of the Comm’r of Baseball, et al.*, *supra* note 31, at *i*; see *supra* note 36 and accompanying text.

⁶⁹ See *supra* Part I(B).

FLSA. This would require teams to pay minor league players \$7.25 per hour at minimum, or possibly more for those teams located in a state or city with a higher minimum wage than the federal level.⁷⁰ Most minor league players would suddenly be eligible for overtime benefits as well.⁷¹

These changes would have extensive ramifications. Especially when compared to the response of those that feel a higher national wage would lead to job losses in other industries, some commentators see a downside should the *Senne* plaintiffs prevail.⁷² Additionally, teams would be forced to pay minor league players above minimum wage for spring training activities.⁷³ Consequently, the resulting raise in salary for minor league players would significantly reduce the number of viable minor league teams, and thus, a corresponding loss of jobs for players, front office and event staff, and baseball industry suppliers.⁷⁴

In recent years, many industries outside of professional sports have had this same discussion. For example, the city of Seattle recently increased their minimum wage to \$15.00 per hour.⁷⁵ Subsequently, the Bureau of Labor Statistics reported the city suffered from a lower supply of jobs and a higher rate of unemployment.⁷⁶ Indeed, a frequent topic of study among political economists is the effect a higher federally mandated minimum wage would have on the economy. One recent study found that such an increase would lead to “consistent[] . . . negative effects” on job

⁷⁰ Fair Labor Standards Act, 29 U.S.C. §201, §206(a)(1)(C).

⁷¹ Under their current pay, only AAA would be ineligible for overtime pay under the “creative professional exemption” to the FLSA. U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #17D: EXEMPTION FOR PROFESSIONAL EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), 2 (July 2008), available at https://www.dol.gov/whd/overtime/fs17d_professional.pdf (hereafter “Fact Sheet #17D”); see also Raines, *supra* note 29.

⁷² See Kubritz, *supra* note 17; Stanton, *supra* note 30, at 752-753 (“while a win for minor league players may enhance their current situation, many will lose their jobs because the overall minor league system would face extreme economic pressure”).

⁷³ Kubritz, *supra* note 17.

⁷⁴ *Id.*

⁷⁵ Tim Worstall, *Seattle’s \$15 Minimum Wage: Jobs Down, Unemployment Up. This Isn’t Working, Is It?*, FORBES (Feb. 19, 2016), <http://www.forbes.com/sites/timworstall/2016/02/19/seattles-15-minimum-wage-jobs-down-unemployment-up-this-isnt-working-is-it/#208d6baf3712> (last visited Jan. 24, 2017).

⁷⁶ *Id.*

growth.⁷⁷ Other studies have found, however, that an increase of the minimum wage causes little to no effect on employment levels.⁷⁸

Given the unique nature of the business, such changes would affect professional sports much in a much different way. Unlike the economics of traditional businesses, MLB clubs cannot simply outsource jobs to a country with a lower minimum wage. Furthermore, the public relations backlash of “America’s Pastime” moving to Mexico to avoid paying the minimum wage would cripple the sport. Moreover, MLB clubs will not be willing to hire cheaper international talent like other industries often do, because skill level required to play professional baseball is irreplaceable, and a forced ban on talented prospects would be unacceptable to most teams. Therefore, the best talent will be on the field, regardless of price.

At the same time, if the Ninth Circuit reverses the district court’s decision to grant class action certification and dismisses the claim against MLB without a decision on the merits of the FLSA claim, or if the court limits the class action to a trivial number of players, teams could simply opt to release any player willing to bring up the claim again. There explains why only two active players are part of the *Senne* litigation:⁷⁹ the great majority of players are not willing to risk jeopardizing their pursuit of one day making the major leagues.⁸⁰ While federal law technically prohibits MLB or its clubs from retaliating against players who join the suit, it would be easy for any club to provide a baseball-related justification for a firing unless the player is a consensus top

⁷⁷ Jonathan Meer & Jeremy West, *Effects of the Minimum Wage on Employment Dynamics*, 15 J. HUMAN RES. 500, 518 (2016).

⁷⁸ See Laura Giuliano, *Minimum Wage Effects on Employment, Substitution, and the Teenage Labor Supply: Evidence from Personnel Data*, 31 J. LABOR ECON. 155 (2013); Arindrajit Dube, T. William Lester, & Michael Reich, *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties*, 92 REV. ECON. STAT. 945 (2010); Madeline Zavodny, *The Effect of the Minimum Wage on Employment and Hours*, 7 LABOUR ECON. 729 (2000).

⁷⁹ Motion for Reconsideration Regarding Class and Collective Certification, *Senne v. Office of the Comm’r of Baseball*, et al., *supra* note 31, at 22.

⁸⁰ As one minor leaguer, Dan Peltier, testified before Congress, “[W]hat minor league player is going to jeopardize his career by challenging the system?” Complaint, *Senne v. Office of the Comm’r of Baseball*, et al., *supra* note 4, at 2.

prospect.⁸¹ According to baseball agent and labor-relations attorney Bryan Symes, a claim for unlawful termination on this issue “would be almost impossible to prove in the absence of smoking gun evidence like an email from the front office.”⁸²

However, it is once again important to note that minor league salaries are paid by MLB clubs, not minor league clubs directly.⁸³ This is a vital distinction, as major league teams are significantly more sustainable than minor league teams. While minor league baseball salaries have risen by just 75 percent since 1976,⁸⁴ revenues in the baseball industry have tripled since 2000, in large part due to ever-increasing media rights deals.⁸⁵ In 2015, MLB received about \$9.5 billion in revenue⁸⁶—about \$317 million per club—with the league and its member clubs reaching record media rights deals seemingly every year.⁸⁷ According to *Forbes*, the average MLB team in 2016 was worth \$1.3 billion, with teams ranging from the New York Yankees (\$3.4 billion valuation with \$516 million in 2015 revenue) to the Tampa Bay Rays (\$650 million valuation with \$193 million in 2015 revenue).⁸⁸ By contrast, Minor League Baseball teams are only worth an average of \$37.5 million, with the top valued team valued at \$49 million.⁸⁹

⁸¹ Jesse Burkhart, *Minor Leaguers Weigh Risks in Minimum-Wage Lawsuit*, FANGRAPHS (Jan. 18, 2016), <http://www.fangraphs.com/blogs/minor-leaguers-weigh-risks-in-minimum-wage-lawsuit-3> (last visited Jan. 24, 2017).

⁸² *Id.*

⁸³ MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, Rule 56, 172-183, *supra* notes 70-71.

⁸⁴ Complaint, *Senne v. Office of the Comm’r of Baseball, et al.*, *supra* note 4, at 2; see *supra* note 16 and accompanying text.

⁸⁵ Alexander Wolff, *The Revolution [Will Not Be Televised]*, SPORTS ILLUSTRATED, Dec. 12, 2016, at 117.

⁸⁶ Maury Brown, *MLB Sees Record Revenues For 2015, Up \$500 Million And Approaching \$9.5 Billion*, FORBES (Dec. 4, 2015), <http://www.forbes.com/sites/maurybrown/2015/12/04/mlb-sees-record-revenues-for-2015-up-500-million-and-approaching-9-5-billion/#29f5b4e92307> (last visited Jan. 24, 2017).

⁸⁷ *Id.*; see also Craig Edwards, *Estimated TV Revenues for All 30 MLB Teams*, FANGRAPHS (Apr. 25, 2016), <http://www.fangraphs.com/blogs/estimated-tv-revenues-for-all-30-mlb-teams/> (last visited Jan. 24, 2017).

⁸⁸ Mike Ozanian, *Baseball’s Most Valuable Teams*, FORBES (Mar. 23, 2016), <http://www.forbes.com/sites/mikeozanian/2016/03/23/baseballs-most-valuable-teams/#6b3182331ddd> (last visited Jan. 24, 2017).

⁸⁹ Sergei Klebnikov, *Minor League Baseball’s Most Valuable Teams*, FORBES (July 8, 2016), <http://www.forbes.com/sites/sergeiklebnikov/2016/07/08/minor-league-baseballs-most-valuable-teams/#6e7d961150a1> (last visited Jan. 24, 2017).

Further, MLB teams often put a premium on player development and have shown a willingness to spend money to build a strong minor league system.⁹⁰ Current figures on player development spending is not made public, but economist Andrew Zimbalist calculated in 2007 that the average MLB team spent more than \$20 million on its player development system.⁹¹ Moreover, MLB estimates that teams spend \$125 million per year on international player facilities, along with the \$200 million each year that teams spend on signing bonuses for these players.⁹² In addition to these expenses, each MLB team has a player development academy in the Dominican Republic.⁹³

According to a white paper written for *Fight for Florida*, a “diverse coalition of labor, faith and community organizations fighting to better the lives of all working families across the state of Florida”⁹⁴ stated that MLB’s lobbying for an exemption from the FLSA minimum wage requirements in the *Senne* case and in Congress⁹⁵ is a symptom of “endemic” wage-and-hour violations in

⁹⁰ Larry Stone, *Shifting nature of free agency will put premium on player development and scouting*, SEATTLE TIMES (Apr. 2, 2013), <http://blogs.seattletimes.com/hotstoneleague/2013/04/02/shifting-nature-of-free-agency-will-put-premium-on-player-development-and-scouting/> (last visited Jan. 24, 2017).

⁹¹ ANDREW ZIMBALIST, *CIRCLING THE BASES: ESSAYS ON THE CHALLENGES AND PROSPECTS OF THE SPORTS INDUSTRY* 95 (2011).

⁹² David Lagesse, *Baseball Is A Field Of Dreams — And Dashed Hopes — For Dominicans*, NATIONAL PUBLIC RADIO (Apr. 3, 2016), <http://www.npr.org/sections/goatsandsoda/2016/04/03/472699693/baseball-is-a-field-of-dreams-and-dashed-hopes-for-dominicans> (last visited Jan. 24, 2017). A new rule in the 2017-21 MLB Collective Bargaining Agreement caps team spending on international free agents to \$4.75 million per club for most teams (six teams are allotted a \$5.25 million cap while six additional teams are allotted a \$5.75 million cap—both based on the teams’ market size and revenue). Ben Badler, *How MLB’s New International Rules Change the Game*, BASEBALL AMERICA (Dec. 7, 2016), <http://www.baseballamerica.com/international/mlbs-new-international-rules-change-game/#BVb7qoMf3l8t1YGV.97> (last visited Jan. 24, 2017). However, this still allows teams to spend as a whole \$151.5 million on international signing bonuses—still a huge figure for largely unproven players, most of whom are 16- or 17-years old. See Ben Badler, *Scouting Children: Why MLB Has Teams Competing for 14-Year-Olds*, BASEBALL AMERICA (Apr. 10, 2014), <http://www.baseballamerica.com/international/scouting-children-why-mlb-has-teams-competing-for-14-year-olds/#0BhY565yZZMb3pWz.97> (last visited Jan. 24, 2017).

⁹³ Lagesse, *supra* note 101.

⁹⁴ *About Us*, FIGHT FOR FLORIDA, <http://fightforflorida.com/about/> (last visited Jan. 24, 2017).

⁹⁵ See *infra* Part II(B).

the baseball industry.⁹⁶ The organization points to two Department of Labor investigations of the San Francisco Giants for the mistreatment of clubhouse attendees and other workers.⁹⁷ The Department of Labor has also investigated other teams—including the Oakland Athletics, Miami Marlins, and Baltimore Orioles—for FLSA violations against clubhouse workers and interns.⁹⁸

According to this organization, MLB has “abused the antitrust exemption by depressing wages below the poverty line” and “there is no need for an exemption to wage-and-hour laws for baseball or for minor league players” as “the cost of compliance would be minimal—especially in an industry with skyrocketing revenue.”⁹⁹ Since “MLB teams need the minor league teams to assist in the development of their players,” they “will not push costs onto the minor league teams in a manner that will jeopardize the survival of any minor league teams.”¹⁰⁰

Despite these factors, there is still the possibility of a loss of minor league jobs. Not every MLB team makes a profit,¹⁰¹ and even

⁹⁶ FIGHT FOR FLORIDA, PROFESSIONAL BASEBALL’S MODERN DAY SERF SYSTEM: AN ARROGANT ATTEMPT TO GAIN AN EXEMPTION FROM MINIMUM WAGE AND OVERTIME LAWS, 6 (Feb. 27, 2015), available at <http://fightforflorida.com/wp-content/uploads/2015/03/White-Paper-on-Minor-League-Salaries.pdf>.

⁹⁷ *Id.* at 6; see also Michael Arria, *Major League Baseball Has a Wage Theft Problem*, WORKING IN THESE TIMES (Oct. 15, 2014), http://inthesetimes.com/working/entry/17261/major_league_baseball_s_wage_theft_problem; Memorandum from Robert D. Manfred, Jr. to MLB Presidents and Club Counsel (Sept. 12, 2013), available at <http://www.fairwarning.org/wp-content/uploads/2013/10/Sept.-12memo.pdf>.

⁹⁸ Arria, *supra* note 93. The Department of Labor has reached two settlements with the Giants: for \$544,715 in 2013 and for \$220,793 in 2014. *Id.* The Miami Marlins settled for \$288,290 in 2014 for claims involving 39 team employees, including clubhouse and office staff. Myron Levin & Stuart Silverstein, *Investigation of Pay Practices Targets Two More Major League Teams, the Orioles and A’s*, FAIRWARNING (May 22, 2014), <http://www.fairwarning.org/2014/05/investigation-pay-practices-major-league-baseball-expands-two-teams> (last visited Jan. 24, 2017). The Oakland Athletics settled in 2014 for \$266,358 for claims by clubhouse workers who were apparently often paid \$70 on gamedays regardless of how many hours they worked. Myron Levin, *Federal Wage Investigation Snags Another Major League Baseball Team, the Oakland A’s*, FAIRWARNING (Sep. 4, 2014), <http://www.fairwarning.org/2014/09/oakland-athletics-latest-major-league-team-pay-settlement-alleged-wage-violations> (last visited Jan. 24, 2017).

⁹⁹ FIGHT FOR FLORIDA, *supra* note 105, at 7-8.

¹⁰⁰ *Id.* at 8.

¹⁰¹ According to Forbes, three teams had a negative operating income in 2015: the Texas Rangers (\$-4.7 million), the Philadelphia Phillies (\$-8.9 million), and the Los Angeles Dodgers (\$-73.2 million). *The Business of Baseball*, FORBES,

those that do will be loath to add significant salary in an area of limited previous expense. For example, most teams have eight minor league affiliates, including one affiliate in the AAA, AA, A-Advanced and A levels, either one Short-Season-A and one Rookie level affiliates or two Rookie level affiliates, and two affiliates in the Dominican Summer League.¹⁰² However, the Arizona Diamondbacks, Houston Astros, New York Mets, and Tampa Bay Rays have two Rookie level teams, for a total of nine minor league affiliates.¹⁰³ Similarly, the New York Yankees have three Rookie level teams and a total of ten minor league affiliates.¹⁰⁴ To lessen the additional salary burden, some of these teams may opt to cut one or more of these extra Rookie level teams; thus lessening their available roster spots for players all throughout the whole minor league system¹⁰⁵ and also reducing the job pool for coaches and trainers as well.¹⁰⁶

But in terms of the expenses themselves, the additions would be fairly minimal. Most MLB clubs have around two hundred active

<http://www.forbes.com/mlb-valuations/list/#tab:overall> (last visited Jan. 24, 2017). The last team on that list is notable, as the Dodgers are currently working with MLB to remain in compliance with an MLB rule that requires clubs to “limit[] debt to no more than 12 times annual revenue, minus expenses.” Bill Shaikin, *After \$1 billion in player spending, Dodgers under MLB mandate to cut debt*, LOS ANGELES TIMES (Nov. 26, 2016), <http://www.latimes.com/sports/dodgers/la-sp-dodgers-debt-payroll-20161126-story.html> (last visited Jan. 24, 2017). According to the Los Angeles Times, the Dodgers currently have about \$400 million in debt and have not made a profit in the three years since new ownership took control of the club. *Id.*

¹⁰² *Teams by Affiliation*, MINOR LEAGUE BASEBALL, <http://www.milb.com/milb/info/affiliations.jsp> (last visited Jan. 24, 2017).

¹⁰³ *Id.* The St. Louis Cardinals have two Rookie level affiliates and one Short Season A level affiliate but just one Dominican Summer League team for a total of eight minor league teams. *Id.* The Cleveland Indians, Colorado Rockies, Miami Marlins, San Francisco Giants, and Washington Nationals each have just one Dominican Summer League affiliate for a total of seven minor league teams each. *Id.* The Pittsburgh Pirates have two Rookie level affiliates and one Short Season A level affiliate but no Dominican Summer League teams for a total of seven minor league teams. *Id.* The Atlanta Braves, Chicago White Sox, Los Angeles Angels, Milwaukee Brewers, and Minnesota Twins, have two Rookie level affiliates, but do not have Short Season A affiliates and only have one Dominican Summer League affiliate, for a total of seven minor league teams each. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Rookie level teams can carry up to 35 active players, thus each Rookie level team cut would decrease the number of available minor league jobs by 35. *MiLB.com Frequently Asked Questions*, MINOR LEAGUE BASEBALL, <http://www.milb.com/milb/info/faq.jsp?mc=business#19> (last visited Jan. 24, 2017).

¹⁰⁶ See *supra* note 67 and accompanying text.

players in their farm systems at any given time, spread across seven to ten minor league affiliates.¹⁰⁷ Thus based on estimates of current minor league expenses, clubs currently pay just under \$1.1 million in minor league salaries, not including meal allowances and stipends for players who are inactive or assigned to extended spring training.¹⁰⁸

Table 1 – Current Estimated Minor League Salaries Per Club¹⁰⁹

	Player s	Per Month	Month s	Yearly Pay	
				Per Player	Per Club
AAA	25 ¹¹⁰	\$2,150	5	\$10,750	\$268,750
AA	25	\$1,500	5	\$7,500	\$187,500
H-A	25	\$1,250	5	\$6,250	\$156,250
L-A	25	\$1,250	5	\$6,250	\$156,250
S-A	30	\$1,100	3	\$3,300	\$99,000

¹⁰⁷ *Id.* Using the Boston Red Sox system as an example (not including inactive players and players classified in extended spring training), they will have 25 players in each of AAA, AA, High-A and Low-A, 30 players in Short-A and 35 players in each of their rookie level affiliates for a total of 200 players. Mike Andrews, *Projected 2017 Red Sox Major League & Minor League Rosters*, SOXPROSPECTS.COM, <http://www.soxprospects.com/org.htm> (last visited Jan. 24, 2017).

¹⁰⁸ Salary figures obtained from Complaint, *Senne v. Office of the Comm'r of Baseball*, et al., *supra* note 4, at 21. MLB clubs have at least seven affiliates, including one AAA-level affiliate, one AA-level affiliate, three A-level affiliates (one A-Advanced, one A, and one Short Season-A), and two Rookie-level affiliate. *Teams by Affiliation*, MINOR LEAGUE BASEBALL, <http://www.milb.com/milb/info/affiliations.jsp> (last visited Jan. 24, 2017). Many MLB clubs have more affiliates, with the additional affiliates placed at the Rookie-level. For example, the New York Yankees have 10 affiliated clubs, including five Rookie-level affiliates. *Id.*

¹⁰⁹ Salary figures obtained from Complaint, *Senne v. Office of the Comm'r of Baseball*, et al., *supra* note 4, at 21.

¹¹⁰ Some AAA (and possibly even AA) players are on MLB 40-man rosters, and thus would receive significantly more than \$2,150. See *supra* note 15 and accompanying text. For the purposes of this (rough) tabulation, only minor league players who are not and have never been on a 40-man roster are considered. See *id.*

R1	35	\$1,100	3	\$3,300	\$115,500
R2	35	\$1,100	3	\$3,300	\$115,500
Total	200				\$1,098,750

If, hypothetically, the *Senne* plaintiffs were to force MLB clubs to pay their minor league players the federal minimum wage of \$7.25 per hour for the fifty hours per week of work alleged in the complaint (forty hours of \$7.25 per hour plus ten hours of “time and a half” overtime), plus an additional two months of “wages” for spring training, the total expenditure rises to just under \$2 million per club.

Table 2 – Estimated Minor League Salaries Per Club at \$7.25 per Hour for 50 Hours per Week (including Spring Training)

	Players	Per Week	Per Month	Months	Yearly Pay	
					Per Player	Per Club
AAA	25 ¹¹¹	\$398.75	\$1,595	7	\$11,165	\$268,750
AA	25	\$398.75	\$1,595	7	\$11,165	\$187,500
H-A	25	\$398.75	\$1,595	7	\$11,165	\$156,250
L-A	25	\$398.75	\$1,595	7	\$11,165	\$156,250
S-A	30	\$398.75	\$1,595	5	\$7,975	\$99,000
R1	35	\$398.75	\$1,595	5	\$7,975	\$115,500
R2	35	\$398.75	\$1,595	5	\$7,975	\$115,500
Total	200					\$1,914,000

¹¹¹ See *supra* note 110.

While these figures remain fairly low, it is important to note two factors that would undoubtedly increase these numbers significantly. First, at \$7.25 per hour for a fifty hour week AAA-level players would actually be taking a pay cut, so that figure will likely remain at \$2,150 per month, or increase from there.¹¹² Second, the \$7.25 per hour federal minimum wage is superseded by a higher state or city minimum wage,¹¹³ and many states and cities do have a higher minimum wage than the federal level.¹¹⁴ Thus, the salary costs per club when accounting for minimum wage laws will be both higher than the totals in Table 2, and vary from club to club based on the market-draw locations of their minor league affiliates.

Using the Houston Astros as an example, raising salaries to account for minimum wage and salary rules adds a little over \$1 million in expenses to the team's annual budget, plus an additional cost for players in their two teams in the Dominican Summer League.¹¹⁵

Table 3 – Estimated Minor League Salaries for the Houston Astros, Based on 2017 State Minimum Wage Laws¹¹⁶

Players	Location	Min. Wage	Per Month	x	Yearly Pay	
					Per Player	Per Club

¹¹² MLB will likely also wish to keep the current structure where monthly salaries rise as a player rises through the different minor league levels, but that is difficult to estimate.

¹¹³ *Minimum Wage*, UNITED STATES DEPARTMENT OF LABOR, <https://www.dol.gov/general/topic/wages/minimumwage> (last visited Jan. 24, 2017).

¹¹⁴ *See 2017 Minimum Wage by State*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 5, 2016), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> (last visited Apr. 18, 2017).

¹¹⁵ *Teams by Affiliation*, MINOR LEAGUE BASEBALL, <http://www.milb.com/milb/info/affiliations.jsp> (last visited Jan. 24, 2017). For the purposes of simplicity, Dominican Summer League teams were not included in this analysis. The applicability of Dominican minimum wage laws to minor league baseball players could be the subject of a separate article, but at this point is a moot issue, as the minimum wage in the Dominican Republic is just \$130.24 USD per month. *No raise on Dominican Republic's 'too many' wages of misery*, DOMINICAN TODAY (Sept. 24, 2016), <http://www.dominicantoday.com/dr/poverty/2016/9/24/60713/No-raise-on-Dominican-Republics-too-many-wages-of-misery> (last visited Jan. 24, 2017).

¹¹⁶ *Id.*; *see also Teams by Affiliation*, MINOR LEAGUE BASEBALL, <http://www.milb.com/milb/info/affiliations.jsp> (last visited Jan. 24, 2017).

AAA	25	Fresno, CA ¹¹⁷	\$10.50	\$2,310	5	\$11,550	\$288,750
AA	25	Corpus Christi, TX	\$7.25	\$1,595	5	\$7,975	\$199,375
H-A	25	Buies Creek, NC	\$7.25	\$1,595	5	\$7,975	\$199,375
L-A	25	Davenport, IA	\$7.25	\$1,595	5	\$7,975	\$199,375
S-A	30	Troy, NY ¹¹⁸	\$11.00	\$2,420	3	\$7,260	\$217,800
R1	35	Kissimmee, FL ¹¹⁹	\$8.10	\$1,782	3	\$5,346	\$187,110
R2	35	Greenville, TN	\$7.25	\$1,595	3	\$4,785	\$167,475
Spr.	200	Kissimmee, FL ¹²⁰	\$8.10	\$1,782	2	\$3,564	\$712,800
<hr/>							
Total	200						\$2,172,060

An additional \$1 million per club investment is obviously not too heavy a fiscal burden for a MLB team. But perhaps the real issue with adding minimum wage laws into the mix is that if the courts found that the FLSA applies to minor league players, clubs will be forced to adjust to a wide variety of constantly-changing minimum wage laws., This would muddle salary computation for the clubs, raise competitive balance issues between teams, and add an additional layer of difficulty in minor league contract negotiations.

But even beyond this, it is conceivable that minimum wage rules will vary from day-to-day based on away games, just as tax responsibilities for players often vary from day-to-day. Under the series of tax laws known colloquially as the “jock tax,” athletes are taxed by the states they visit for away games for income that they

¹¹⁷ California’s minimum wage will increase to \$11.00 per hour on January 1, 2018, and \$1.00 per year after that until January 1, 2023, at which point it will increase annually based on the Consumer Price Index. *2017 Minimum Wage by State*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 5, 2017), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> (last visited Apr. 19, 2017).

¹¹⁸ New York’s minimum wage will increase to \$11.00 per hour on December 31, 2016, \$13.00 per hour on December 31, 2017, and \$15.00 per hour on December 31, 2018. *Id.*

¹¹⁹ Florida’s minimum wage increases annually based on cost of living measurements. *Id.*

¹²⁰ *See supra* note 119. For the purposes of this calculation, only active players were included in the spring training total. However, in practice this total will also include inactive players and minor league non-roster invitees, thus raising this total again slightly.

earned while in that state.¹²¹ While this issue has (obviously) not been tested for minimum wage laws, if minimum wage laws were applied to minor league players based on the same legal reasoning, an extremely complicated legal issue may arise about which minimum wage should apply day-by-day for teams traveling out of state for away games.

For example, when the Astros' A-level affiliate Quad City River Bandits (based out of Davenport, IA) travel to Illinois to play the Peoria (IL) Chiefs, are the Astros responsible for paying the River Bandits players based on Iowa's minimum wage of \$7.25 per hour, or Illinois's minimum wage of \$8.25 per hour?¹²² Contrarily, when the Astros' AAA-level affiliate Fresno (CA) Grizzlies play the nearby El Paso (TX) Chihuahuas, will the Astros still be responsible to pay players at \$10.50 per hour based on California's minimum wage, or can they get away with paying their players the mere \$7.25 per hour required in Texas?¹²³

For first-year players, whose salaries are mandated by MLB to stay consistent from team-to-team, this issue may not be of any concern. MLB will likely continue their practice of mandating equal salaries for first-year minor league players¹²⁴ and will simply raise that mandated monthly salary to an equivalent of the salary needed to stay compliant based on the teams in each minor league level.¹²⁵ But for all other minor league players, the jobs of team accountants will get much more complicated, and major responsibility will fall on agents to ensure that their players' paychecks are calculated correctly so their clients are receiving the salaries they are legally due based on the various states' minimum wage laws.

¹²¹ See Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORT L. 229 (1994); see also John DiMascio, Note, *The Jock Tax: Fair Play or Unsportsmanlike Conduct*, 68 U. PITT. L. REV. 953 (2007).

¹²² *2017 Minimum Wage by State*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 5, 2016), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> (last visited Apr. 18, 2017).

¹²³ *Id.*

¹²⁴ MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, Rule 3(c)(2), 26.

¹²⁵ That mandated salary may simply be the \$455 per week necessary to reach the FLSA's creative professional exemption. See FACT SHEET #17D, *supra* note 69.

B. Will Congress Legislate the Problem Away?

As one scholar predicted in 2015,¹²⁶ MLB and Minor League Baseball have looked to solve the issues raised by *Senne* by lobbying Congress to simply make the problem go away through legislation. In June 2016, Representatives Brett Guthrie (R-KY) and Cheri Bustos (D-IL) introduced the “Save America’s Pastime Act,” which would add “any employee who has entered into a contract to play baseball at the minor league level” to § 16(a) of the FLSA.¹²⁷ If this bill passes, future minor league players would be facially exempted from bringing any FLSA claim, including those for violations of the federal minimum wage or overtime rules.¹²⁸

The bill was introduced with full support from MLB and Minor League Baseball, with Minor League Baseball President Pat O’Conner stating that “[f]or over 115 years, Minor League Baseball has been a staple of American communities, large and small, and with the help of . . . members of Congress, it will remain so for years to come.”¹²⁹

MLB took a more pragmatic approach in their statement, arguing that “MLB pays over a half a billion dollars to Minor League players in signing bonuses and salary each year” and “heavily subsidizes Minor League Baseball by providing Minor League clubs with its players, allowing professional baseball to be played in many communities in the United States that cannot support a Major League franchise.”¹³⁰ The league also took the opportunity to attack the *Senne* claim directly, stating that “Minor League Baseball players always have been salaried employees similar to artists, musicians and other creative professionals who are exempt from the Fair Labor Standards Act” and “it is simply impractical to treat professional athletes as hourly employees.”¹³¹

¹²⁶ Stanton, *supra* note 30, at 750-751.

¹²⁷ Save America’s Pastime Act, H.R. 5580, 114th Cong. (2016).

¹²⁸ *Id.*

¹²⁹ Press Release, Minor League Baseball, Minor League Baseball supports new legislation to protect America’s pastime (June 29, 2016), *available at* http://www.milb.com/news/print.jsp?ymd=20160629&content_id=186903512&vkey=pr_milb&fext=.jsp&sid=milb.

¹³⁰ Press Release, Major League Baseball, Major League Baseball statement (June 30, 2016), *available at* <http://m.mlb.com/news/article/187167466/major-league-baseball-statement/>.

¹³¹ *Id.*

Most media outlets roundly criticized the proposed legislation when it was introduced, with some commentators noting that both bill sponsors received donations from MLB's political action committee in the 2016 election cycle, and that Congresswoman Bustos's father, Gene Callahan, was MLB's first lobbyist.¹³² Since 1998, MLB has routinely flexed their muscles on Capitol Hill, and in the 2016 election cycle donated \$303,625 to federal Congressional candidates—including \$1,000 to Congressman Guthrie and \$2,000 to Congresswoman Bustos.¹³³ This lobbying is one step in a larger strategy for MLB and minor league baseball, as according to minor league baseball vice president Stan Brand, the two leagues plan to storm Washington “[l]ike the 17-year locusts” in order to secure an exemption from the FLSA.¹³⁴

Facing heavy public backlash, Congresswoman Bustos withdrew her support of the legislation just a few days after its introduction, citing “several concerns about the bill” and affirming her apparent view that “Major League Baseball can and should pay young, passionate minor league players a fair wage for the work they do.”¹³⁵

¹³² See Ted Berg, *The ‘Save America’s Pastime Act’ in Congress will do nothing of the sort*, USA TODAY (June 30, 2016), <http://ftw.usatoday.com/2016/06/save-americas-pastime-act-minor-league-minimum-wage-lawsuit-mlb-salaries> (last visited Jan. 24, 2017).

¹³³ Contributions to Federal Candidates, 2016 cycle – Major League Baseball Commissioner’s Office PAC, CENTER FOR RESPONSIVE POLITICS (Nov. 28, 2016), <https://www.opensecrets.org/pacs/pacgot.php?cycle=2016&cmte=C00368142> (last visited Jan. 24, 2017).

¹³⁴ Josh Leventhal, *MiLB Opposes Players, Supports MLB in Lawsuit*, BASEBALL AMERICA (Dec. 11, 2014), <http://www.baseballamerica.com/minors/milb-opposes-players-backs-mlb-lawsuit/#qvl415LRjL3ikKpA.97> (last visited Jan. 24, 2017). Speaking to fans at the 2014 Winter Meetings about the *Senne* case, Brand stated: “Just as we did in the 1990s to save the antitrust exemption, we will need your help to explain to our legislators the importance of this issue to the future of minor league baseball and their communities’ investments in stadia and infrastructure. I do not want to overstate the threat this suit presents, but I think my honest assessment is that it is equally perilous for our future as the antitrust repeal was in the 1990’s.” *Id.* See also Marissa Payne, *Baseball officials to lobby Congress to help MLB avoid paying minor league players minimum wage*, WASHINGTON POST (Dec. 20, 2014), <http://www.washingtonpost.com/blogs/early-lead/wp/2014/12/20/baseball-officialsto-lobby-congress-to-help-mlb-avoid-paying-minor-league-players-minimum-wage/> (last visited Jan. 24, 2017).

¹³⁵ Press Release, Congresswoman Cheri Bustos, UPDATE: Bustos Statement on H.R. 5580 (June 30, 2016), *available at* <https://bustos.house.gov/congresswoman-bustos-and-congressman-guthrie-introduce-bill-to/>.

As of April 18, 2017, the bill remains active with Congressman Guthrie as its sole sponsor.¹³⁶ The bill was referred to the House Education and the Workforce Subcommittee on Workforce Protections on September 19, 2016, but to date has not passed the subcommittee.¹³⁷

Notably, in December 2016, Minor League Baseball acted and established their own political action committee “to lobby Congress for help the league’s ‘legislative issues.’”¹³⁸ According to Minor League Baseball president Pat O’Conner, the *Senne* litigation is “the most immediate and pressing” issue behind the decision to start the political action committee, and O’Conner acknowledged that the league is “going to face this down the road in some other format.”¹³⁹ The establishment of a political action committee, according to O’Conner, allows the league to “be proactive, get engaged, get our troops engaged, [and] get an infrastructure in place that allows [Minor League Baseball] to immediately respond.”¹⁴⁰ Such responses would presumably include defending against further lawsuits in the same vein as *Senne*, as while Minor League Baseball is not a party to that litigation, they will certainly be affected if the plaintiffs prevail.

While the success of this legislation remains to be seen, the fact that MLB and Minor League Baseball have taken such steps shows that they are worried about their chances of winning the *Senne* case and the potential ramifications of a defeat. As the litigation moves along, it will be interesting to see whether MLB and Minor League Baseball act more urgently in regards to their lobbying efforts and whether the legislation advances through Congress.

¹³⁶ *H.R. 5580 - Save America’s Pastime Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5580/committees> (last visited Apr. 18, 2017).

¹³⁷ *Id.*

¹³⁸ Josh Norris, *Minor League Baseball Establishes Political Action Committee*, BASEBALL AMERICA (Dec. 5, 2016), <http://www.baseballamerica.com/business/minor-league-baseball-establishes-political-action-committee/#h51qXK5wMIhq1qul.97> (last visited Jan. 24, 2017).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

III. WHAT COULD A SETTLEMENT LOOK LIKE?

To avoid the complications that would result if a court were to rule in favor of the *Senne* plaintiffs, MLB and the minor league players may look to settle the case by working together to create a system where compensation is raised to avoid FLSA minimum wage and overtime concerns. The best way to accomplish this would be to simply look to the next level of FLSA exemptions after the seasonal recreational exemption—the creative professional exemption.

Per this exemption to the FLSA, employees who work “in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work” may be exempted from the FLSA’s minimum wage and overtime rules based on a two-prong test.¹⁴¹ First, the employee “must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week.”¹⁴² Second, the employee’s “primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”¹⁴³

According to one commentator, the creative professional exemption will allow MLB to prevail in *Senne*, as MLB could simply argue that “the overtime pay the minor leaguers demand is not for work, but rather for their own professional development.”¹⁴⁴ However, the question of whether playing baseball is “original” or “creative” enough to be held under this exemption is a matter of debate.¹⁴⁵ No case has applied or attempted to apply the creative professional exemption to professional athletes. When courts have looked at this exemption in the context of newspaper reporters,

¹⁴¹ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 29 C.F.R. § 541.302 (2004), available at <https://www.dol.gov/whd/overtime/regulations.pdf>.

¹⁴² FACT SHEET #17D, *supra* note 69.

¹⁴³ *Id.*

¹⁴⁴ Stanton, “*Juuuussst A Bit Outside*”, 22 JEFFREY S. MOORAD SPORTS L.J. at 750.

¹⁴⁵ See Lucas J. Carney, Note, *Major League Baseball’s ‘Foul Ball’: Why Minor League Baseball Players Are Not Exempt Employees Under the Fair Labor Standards Act*, 41 J. CORP. L. 285, 295-301 (2015); Keith M. Weddington and L. Elizabeth Gibbes, *Are Professional Athletes Covered Under New Overtime Rules?*, EMPLOYMENT LAW ALLIANCE (Aug. 8, 2016), <http://www.employmentlawalliance.com/firms/parkerpoe/articles/are-professional-athletes-covered-under-new-overtime-rules> (last visited Jan. 24, 2017).

judges have generally stated that in order to meet this exemption, the employee's work must be "original" or "creative," which would be a difficult case to make for an athlete participating in a team sport.¹⁴⁶

But regardless, the "not less than \$455 per week" compensation required for this exemption would result in a fairly substantial pay raise for most minor league players.¹⁴⁷ Assuming

¹⁴⁶ Carney, *Major League Baseball's 'Foul Ball'*, 41 J. CORP. L. at 295-301. Compare *Sherwood v. Washington Post*, 871 F. Supp. 1471, 1473 (D.C. 1994) (holding that a reporter for the Washington Post who was asked to "originate story ideas, piece together seemingly unrelated facts, analyze facts and circumstances, and present his news stories in an engaging style" was a creative employee under the FLSA), and *Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78, 83 (holding that writers for NBC's *Nightly News* program were creative professionals under the FLSA despite the "functional nature of their positions"), with *Kadden v. VISUALEX, LLC*, 910 F. Supp. 2d (S.D.N.Y. 2012) (holding that an employee whose job primarily required "'proofing' and 'revising' graphics that other people created" was not covered under the creative professional exemption), and *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060 (1st Cir. 1995) (holding that local "general assignment" newspaper reporters were not covered under the creative professional exemption).

¹⁴⁷ Fact Sheet #17D, *supra* note 149, at 2. It must be noted that under the direction of the Obama administration, the Department of Labor has attempted to raise the compensation threshold for FLSA overtime exemptions (including the creative professional exemption) to \$913 per week. *Final Rule: Overtime*, UNITED STATES DEPARTMENT OF LABOR, <https://www.dol.gov/whd/overtime/final2016/> (last visited Jan. 24, 2017). This change would undoubtedly include all minor league players not covered by the MLB-MLBPA collective bargaining agreement and force MLB to give these players an even higher raise if they wish to take advantage of the creative professional exemption. But on November 22, 2016, the United States District Court, Eastern District of Texas issued a permanent injunction blocking this rule change. *Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas*, UNITED STATES DEPARTMENT OF LABOR, <https://www.dol.gov/featured/overtime> (last visited Jan. 24, 2017); *State of Nevada, et al v. United States Dep't of Labor, et al*, 2016 U.S. Dist. LEXIS 162048 (No. 4:16-CV-00731) (E.D. Tex. Nov. 22, 2016). The injunction was appealed to the Fifth Circuit Court of Appeals and granted expedited review, and is currently in the briefing stage. *Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas*, DEPARTMENT OF LABOR, <https://www.dol.gov/featured/overtime> (last visited Apr. 14, 2017); see *State of Nevada, et al v. LABR, et al*, No. 16-41606 (5th Cir. filed Dec. 1, 2016). However, it remains to be seen whether President Trump's administration will continue the fight to raise this threshold. See generally Valerie Bolden-Barrett, *29% of business owners think Trump will block the FLSA overtime rule*, HR DIVE (Jan. 19, 2017), <http://www.hrdive.com/news/29-of-business-owners-think-trump-will-block-the-flsa-overtime-rule/434283/> (last visited Jan. 24, 2017); Hannesson Murphy, *The DOL's Final Rule on Life Support?*, THE NATIONAL LAW REVIEW (Dec. 30, 2016), <http://www.natlawreview.com/article/dol-s-final-rule-life-support> (last visited Jan. 24, 2017). Most recently, the Fifth Circuit granted the Department of Justice's request (on behalf of the Department of Labor) for an extension of time to file its reply brief "to allow

four weeks to a month, the \$455 per week required would force MLB clubs to pay minor league players \$1,820 per month to claim this exemption. This would be a pay raise for all but AAA players, who currently make \$2,150 per month.¹⁴⁸

As such, MLB would be well advised to base a settlement offer off this \$455 per week minimum figure. While it would not make the league entirely free from potential litigation (as the question of whether professional athletes are held under the creative professional exemption is unsettled), it would give them a less nebulous legal position than the seasonal recreational worker exemption—especially since they can show that they reached these new compensation figures with player involvement.

For the players, while it is still very difficult to live off of \$455 per week, this change would still represent a significant raise from what players have been making. Players at the Short-Season-A and Rookie levels are currently making \$1,100 per month, or \$3,300 for a three-month season.¹⁴⁹ Under the creative professional exemption minimum of \$455 per week, these players would be making \$1,820 per month, or \$5,460 for the three-month season. And presumably, players at higher levels would be paid at a correspondingly higher rate.

While this potential settlement is not perfect for either side, focusing the discussion on the \$455 per week figure required by the FLSA's creative professional exemption would help solve many of the issues inherent with applying minimum wage and overtime rules to minor league employment. Such a settlement would help the league avoid these difficult discussions, while at the same time granting the players a modest, but significant, pay raise.

incoming leadership personnel adequate time to consider the issues.” *Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas*, DEPARTMENT OF LABOR, <https://www.dol.gov/featured/overtime> (last visited Apr. 14, 2017). Even if the change falls through the Democratic Party has vowed to implement the new rule state-by-state, which would then further add to the complexity faced by MLB clubs if minor league players are granted FLSA rights. Josh Eidelson, *Democrats Want to Revive Obama’s Overtime Rule State by State*, BLOOMBERG (Jan. 13, 2017), <https://www.bloomberg.com/news/articles/2017-01-13/democrats-want-to-revive-obama-s-overtime-rule-state-by-state> (last visited Jan. 24, 2017).

¹⁴⁸ Complaint, *Senne v. Office of the Comm’r of Baseball, et al.*, *supra* note 4, at 21.

¹⁴⁹ *Id.*

IV. CAN THE PROBLEM BE SOLVED THROUGH COLLECTIVE BARGAINING?

Rather than simply settling the *Senne* lawsuit, MLB and the minor league players may look to make widespread changes beyond salary considerations by expanding the discussions to a more holistic collective bargaining agreement. However, this would require union representation for minor league players.

Efforts to unionize minor league players are not new, but have thus far been wholly unsuccessful. Before filing the *Senne* lawsuit, lead plaintiff's attorney and former minor league player Garrett Broshius considered forming a Minor League Baseball Players Union, but he was unable to gain any traction in these efforts.¹⁵⁰ According to the *Senne* complaint, minor league players do not want to unionize as they "fear retaliation" by MLB and MLB clubs and are thus "reluctant to upset the status quo" if it may jeopardize their "lifelong dream of playing in the major leagues."¹⁵¹

However, given the massive potential effects and the plaintiffs' respectable chances of prevailing on the merits, if *Senne* can move past the class action certification stage it may behoove MLB to reach a settlement with the plaintiffs that would include changes to minor league compensation policies. Also, while no minor league players' union exists, this lawsuit could be the first step towards establishing collective bargaining between minor league players and teams. Through collective bargaining, minor league players and management would have the opportunity to respond to the issues raised in *Senne* on their own terms. Moreover, the parties would avoid further dragged out litigation and the sudden changes that would come from a verdict in favor of the plaintiffs.

While the MLBPA does not count most minor league players as part of its membership,¹⁵² the changes it makes allows through collective bargaining with MLB undoubtedly have significant effect on minor league players.¹⁵³

¹⁵⁰ Marc Allard, *Life as Minor League Baseball player far from easy or fair*, NORWICH BULLETIN (July 30, 2016), <http://www.norwichbulletin.com/sports/20160730/life-as-minor-league-baseball-player-far-from-easy-or-fair> (last visited Jan. 24, 2017).

¹⁵¹ Complaint, *Senne v. Office of the Comm'r of Baseball, et al.*, *supra* note 4, at 1.

¹⁵² See *supra* note 13.

¹⁵³ See Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, *supra* note 15; see also Shauna Teresa DiGiovanni, Note, *Underpaid, Unrepresented*,

For example, the new Collective Bargaining Agreement significantly changed the signing rules for international amateur players under the age of twenty-five.¹⁵⁴ Previously, teams could exceed their bonus allotment and merely suffer penalties ranging from a tax on the overage to prohibitions on signing high priced talent in the next one or two international signing periods.¹⁵⁵

But under the new “hard cap” system, teams are absolutely prohibited from exceeding their bonus allotment, which will range between \$4.75 million to \$5.75 million per club.¹⁵⁶ Teams may trade for additional cap room, but they are limited to an additional 75 percent of their additional bonus pool for a maximum of just over \$10 million.¹⁵⁷

By contrast, four players—Adrian Morejon (\$11 million with the San Diego Padres), Yusniel Diaz (\$15.5 million with the Los Angeles Dodgers), Yadier Alvarez (\$16 million, again with the Dodgers), and Yoan Moncada (\$31.5 million with the Boston Red Sox)—each signed for over \$10 million alone in the past two years.¹⁵⁸ As of December 21, 2016, only Moncada has been placed on a team’s 40-man roster and is thus part of the MLBPA.¹⁵⁹ Clearly, these new rules will have significant effect on the money received by non-union players despite the fact that neither these players nor similarly situated had any say in their collective bargaining.

Unprotected: A Call for a Change in the Status Quo of Minor League Baseball, 22 SPORTS LAW. J. 243, 247-251 (2015).

¹⁵⁴ Jonathan Mayo, *How CBA affects Draft, free agency, international market*, MLB.COM (Dec. 2, 2016), <http://m.mlb.com/news/article/210035584/mlb-cba-affects-draft-international-prospects/> (last visited Jan. 24, 2017).

¹⁵⁵ Jeff Todd, *MLB Releases 2016-17 International Bonus Pools*, MLB TRADE RUMORS (April 5, 2016), <http://www.mlbraderumors.com/2016/04/mlb-releases-2016-17-international-bonus-pools.html> (last visited Jan. 24, 2017).

¹⁵⁶ Mayo, *supra* note 162.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Padres Roster & Staff*, SAN DIEGO PADRES, <http://m.padres.mlb.com/sd/roster/40-man/> (last visited Jan. 24, 2017); *Dodgers Roster & Staff*, LOS ANGELES DODGERS, <http://m.whitesox.mlb.com/la/roster/40-man/> (last visited Jan. 24, 2017); *White Sox Roster & Staff*, CHICAGO WHITE SOX, <http://m.whitesox.mlb.com/cws/roster/40-man/> (last visited Jan. 24, 2017) (Moncada was traded from the Red Sox to the White Sox on December 6, 2016 (Steve Adams, *Red Sox Acquire Chris Sale In Exchange For Yoan Moncada, Michael Kopech, Two Others*, MLB TRADE RUMORS (Dec. 6, 2016), <http://www.mlbraderumors.com/2016/12/red-sox-to-acquire-chris-sale.html> (last visited Jan. 24, 2017)).

Under the precedent set by *Clarett v. National Football League*, it is indisputable that the MLBPA is well within its rights to collectively bargain signing bonus rules, as these terms are “the conditions under which a prospective player . . . will be considered for employment” just like the draft rules in *Clarett*.¹⁶⁰ However, the terms of employment for minor league players as minor league players leave a legal grey area in who actually represents these players, as the minor league salary rules are not collectively bargained by the MLBPA as part of the Basic Agreement.

A court may find that the MLBPA has “acquiesced in the continuing operation” of the minor league salary rules by not challenging them like in *Clarett*.¹⁶¹ However, *Clarett* is likely distinguishable in this context since unlike in the NFL, players drafted or signed as amateur free agents by MLB clubs are not immediately part of the union, since it is extremely rare that such players are immediately placed on 40-man rosters.¹⁶² In fact, since only ten percent of drafted players make it to the major leagues,¹⁶³ it stands to reason that something close to ninety percent of drafted players are never placed on a 40-man roster, and thus never receive this union representation at all. Thus, it makes sense for minor league players to acquire their own union representation if possible, especially for negotiating a potential settlement to the *Senne* case.

¹⁶⁰ 369 F. 3d 124, 141 (2nd Cir. 2004).

¹⁶¹ *Id.* The rule in question in *Clarett*—a minimum age rule for eligibility in the NFL Draft—was not part of the NFL’s CBA at the time; it was part of the league’s Constitution and Bylaws, and thus not collectively bargained with the union. *Id.* Nevertheless, the 2nd Circuit still held the rule as exempt from antitrust challenge under the non-statutory labor exemption, as “the union agreed [in the CBA] to waive any challenge to the Constitution and Bylaws and thereby acquiesced in the continuing operation of the eligibility rules contained therein—at least for the duration of the agreement.” *Id.* at 142.

¹⁶² Clubs have no incentive to do so, as minor league players who are never placed on a 40-man roster are not eligible for selection by other clubs under the Rule 5 Draft until four or five years after they are signed or drafted (MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, Rule 5(c), 56), and not eligible for free agency until seven years after they are signed (MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, Attachment 3, §VI(A), 193).

¹⁶³ Nathan Sorensen, *Minor league ballplayers’ path to the bigs has major obstacles, so family is no small thing*, DESERET NEWS (May 15, 2014), <http://www.deseretnews.com/article/865628804/Minor-league-ballplayers-path-to-the-bigs-has-major-obstacles-so-family-is-no-small-thing.html> (last visited Jan. 24, 2017). This is an estimate, as players are often placed on a 40-man roster without a concurrent or subsequent call-up to the major leagues.

While the MLBPA could bring in minor league players as part of their representative body, the prospects for such a move are bleak. MLBPA founder Marvin Miller once considered bringing minor league players into the MLBPA fold but the “appeal of unionizing every pro baseball player . . . was always outweighed by a lack of resources, the geographic decentralization of the minors, and the dreamy idealism of the players.”¹⁶⁴

MLB players can unionize because there is so much money at stake, but minor league players have “less to gain and more to lose.”¹⁶⁵ Similarly, labor lawyer and minor league unionization champion Don Wollett wrote in his book, *Getting on Base: Unionism in Baseball*, that such a merger would never work as while these players “have a common employer,” there is a “conflict of interest between major league players and minor league players” because MLB players are “advantaged by the fact that [minor league players] are non union and lesser salaries” since “more money is available for their common employer to pay the major leaguers.”¹⁶⁶

Similarly, MLB could not force the MLBPA to represent minor league players against their wishes. While employers generally can combine the bargaining groups for two separate groups of employees where one group is represented by a union and one is not, the accretion doctrine would apply.¹⁶⁷ Under the accretion doctrine, “an employer may incorporate a small group of employees into an already existing collective bargaining unit, without holding elections, so long as the added employees (1) do not constitute a separate bargaining unit, and (2) do not outnumber the employees who belong to the existing bargaining unit.”¹⁶⁸

Here, the MLBPA can be said to represent a little over 1,200 players, given that they represent members of the 40-man rosters for the thirty MLB teams plus additional players who have previously been on MLB rosters but are currently not on a 40-man roster (free agents, players on the 60-day disabled list, and players

¹⁶⁴ Rothman, *supra* note 14.

¹⁶⁵ *Id.*

¹⁶⁶ DONALD WOLLETT, *GETTING ON BASE: UNIONISM IN BASEBALL* 102-105 (2008).

¹⁶⁷ John F. Fullerton III and Paul Salvatore, *Bargaining Unit Consolidations: One Union or Two?*, 20 *LABOR LAWYER* 291, 291-292 (2005) (citing *KHEEL*, *LABOR LAW* §14.03[5], at 14-68 (1995)).

¹⁶⁸ *Local 144 v. NLRB*, 9 F.3d 218, 223 (2nd Cir. 1993).

who have been outrighted).¹⁶⁹ In a given year, MLB farm systems generally include about 5,550 minor league roster spots.¹⁷⁰ In 2016, MLB added 1,216 players to minor league systems through the Rule IV Amateur Draft alone,¹⁷¹ plus many international and undrafted free agents. Thus, the second prong of the accretion doctrine would almost certainly fail as there is no way that MLBPA members outnumber the number of unrepresented minor league players.

Therefore, the only option for minor league players is to create their own union and negotiate their own collective bargaining agreement. However, unionizing minor league players would be difficult since so little money is at stake. Unions generally require dues to function, and since minor league players make so little money anyway, asking players to contribute a portion of their paycheck towards a union is likely asking too much.

Further, the uniqueness of minor league baseball players as employees would also make it difficult for them to unionize. The ultimate goal for any minor league baseball player is to receive a call-up to a major league roster, thus transferring their representation from a potential minor league players' union to the MLBPA. It stands to reason the players with the most negotiation leverage in any league are the top players, as they are the players that the employer-teams are most likely to suffer without if they were to strike.¹⁷²

On the other hand, in the minor leagues the players with the most negotiation leverage are the players most likely to spend the

¹⁶⁹ See *supra* note 14 and accompanying text.

¹⁷⁰ MLB teams generally have about 200 minor league roster spots. See *supra* note 117 and accompanying text. An MLB active roster includes 25 players, leaving about 15 of these roster spots for minor league players. Thus each team would have 185 roster spots for players not on 40-man rosters, or 5,550 total for the 30 MLB teams. This calculation is a rough estimate, as it does not include inactive and extended spring training players, Dominican Summer League players, and players on various MLB and minor league disabled lists.

¹⁷¹ *2016 Draft Tracker*, MLB.COM, <http://m.mlb.com/draft/tracker/#!ft=all> (last visited Jan. 24, 2017).

¹⁷² For example, the 10 lead plaintiffs in the NFL players' antitrust lawsuit against the NFL during the 2011 NFL lockout included the three highest paid quarterbacks, the soon-to-be second overall pick in the 2011 NFL draft, and other top players at various positions. Complaint, *Brady v. National Football League, et al.*, 779 F. Supp. 2d 992 (No. 0:11-cv-00639-PJS-JJG) (D. Minn. 2011); see also *NFL must satisfy antitrust plaintiffs*, ESPN.COM (Jul. 20, 2011), http://www.espn.com/nfl/story/_/id/6783030/nfl-satisfy-tom-brady-antitrust-plaintiffs-seal-deal (last visited Jan. 24, 2017).

least amount of time in the minor leagues and the players who generally have already made the most amount of money through their initial signing bonuses. By contrast, the players most affected by a potential unionization are the longtime minor leaguers, who are often just lucky to have received a roster spot in the first place.

Consequently, minor league unionization is unlikely. Even if the players were to successfully unionize, the negotiation power of that union would be limited, and the move would thus not be likely to result in any substantial change. Accordingly, the *Senne* litigation is the players' best hope at forcing a change in minor league salaries.

CONCLUSION

As with most class action suits involving various state laws, the *Senne* case has a ways to go before it has any sort of effect on the labor market for minor league baseball players. But as this Article has established, the effects could be substantial, if only in the complications it would add towards providing legal compensation for minor league player work. While the financial effects of the litigation, if successful, would not be oppressing enough to require legislation to "Save America's Pastime," the sudden applicability of dozens of different minimum wage laws on the operations of MLB teams and their minor league affiliates would certainly throw a curveball to operating budgets and accounting protocols.

Even with the chances of the concurrent antitrust litigation looking bleak,¹⁷³ the plaintiffs in *Senne* may have found a way to force change outside of the traditional legal theories used by the players in the history of professional sports. As this Article has shown, the plaintiffs in *Senne* may very well prevail, and such a victory would have the potential of facially changing minor league baseball despite limited financial impact. Thus, regardless of whether the result of litigation is a verdict in either direction or a settlement to avoid the issues entirely, the *Senne* litigation is certainly one to watch as it develops.

¹⁷³ See *supra* note 3 and accompanying text.