"THE STAKES OF EMPLOYMENT:" THE IMPORTANCE OF AMENDING THE ELLIOTT-LARSEN CIVIL RIGHTS ACT TO INCLUDE INDEPENDENT CONTRACTORS

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I. INTRODUCTION

One of the fundamental questions of employment law concerns the importance of the "employment" relationship.[1] The "stakes of 'employment'" affect a variety of legal and nonlegal risks and benefits.[2] Most workers are either classified as employees or independent contractors,[3] and a worker's status creates a "host of legal consequences."[4] Many federal statutory protections for workers cover only "employees,"[5] so independent contractors are not able to seek a remedy under federal anti-discrimination and sexual harassment laws.[6] Some state anti-discrimination statutes do cover independent contractors,[7] but workers in states whose statutes do not extend to independent-contractor workers could be left without a way to seek redress for discrimination. [8]

As a consequence, workers across many industries may be impacted by a lack of legal protections against discrimination, harassment, and wage and hour violations.[9] Some studies indicate that independent contractors tend to be older and are more likely to be white than workers in other employment relationships.[10] Those in the white-male demographic still may face discrimination because of certain protected characteristics,

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1. TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW PRIVATE ORDERING AND ITS LIMITATIONS 3 (4th ed. 2019).

2. *Id.*

3. *Id.* (noting that most workers are either employees or independent contractors, as opposed to other relationships including sole proprietors, corporate directors, partners, or another kind of co-owner).

4. *Id.* at 5.

5. *Id.* (listing various federal statutes providing protections for workers). There are exceptions; for example, 42 U.S.C. § 1981 prohibits race and alienage discrimination in contractual relationships, and there are protections for workers under various tort causes of action. *Id.*

6. *See* Bryce Covert, *Actresses—and Millions of Other Workers—Have No Federal Sexual-Harassment Protections*, THE NATION (Oct. 19, 2017) https://www.thenation.com/article/archive/actresses-and-millions-of-other-workers-have-no-federal-sexual-harassment-protections/ [http://web.archive.org/web/20201009152040/https://www.thenation.com/article/archive/actresses-and-millions-of-other-workers-have-no-federal-sexual-harassment-protections/].

7. *See* Orla O'Callaghan, Comment, *Independent Contractor Injustice: The Case for Amending Discriminatory Discrimination Laws*, 55 HOUS. L. REV. 1187, 1211 (2018).

8. *Id.* at 1200.

9. *See*, *e.g.*, GLYNN, *supra* note 1, at 5.

10. *See Contingent and Alternative Employment Arrangements News Release*, U.S. BUREAU OF LAB. STAT. (June 7, 2018, 10:00 AM), https://www.bls.gov/news.release/conemp.htm [http://web.archive.org/web/20210129152638/https://www.bls.gov/news.release/conemp.htm] [hereinafter *Employment Arrangements*].

including age, national origin, sexual orientation, or religion.[11] Additionally, the Supreme Court has interpreted Title VII as prohibiting "[d]iscriminatory preference for any group, minority or majority."[12] Other studies, including a law review article which reviewed labor statistics, found that "women and/or people of color are overrepresented in seven of the eight occupations at highest risk for misclassification, suggesting that misclassification may be removing Title VII protection from workers who most need anti-discrimination rights."[13] And as the percentage of workers considered to be independent contractors rise and the gig economy gains prominence, more workers are likely to be impacted by the lack of federal or state protections.[14]

As noted, some state statutes do provide anti-discrimination protections to independent contractors,[15] but state statutes and case law can be complicated. The Michigan Court of Appeals held in 2005 in *Badiee v. Brighton Area Schools* that Michigan's Elliot Larsen Civil Rights Act ("ELCRA") does not cover independent contractors.[16] Later in 2005, the Michigan Supreme Court in *McClements v. Ford Motor Co.* seemed to open the door to suits by independent contractors and held that

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11. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (finding that Title VII prohibits employers from terminating individuals simply for being gay or transgender, in a case where a gay man alleged discrimination based on sexual orientation under Title VII); Joanna Lahey, *State Age Protection Laws and the Age Discrimination in Employment Act*, 51 J.L. & ECON. 433, 435 (2008) (noting that age discrimination laws appear to "lead to lower employment for older white men").

12. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

13. *See* Charlotte S. Alexander, *Misclassification and Discrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 910 (2017). This article investigated whether groups of workers who are at high risk for employment discrimination (women and people of color) are shut out of Title VII protections by misrepresentation. *Id.* at 910. The author concludes that her "results suggest that misclassification is both gendered and raced, occurring in occupations in which women and/or people of color are overrepresented." *Id.* at 925–26. The article does not suggest why the distribution is occurring but notes that the effects suggest that it reflects a weakening of "an already compromised antidiscrimination regime [Title VII] by removing workers from its reach." *Id.*

14. See Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, 2016) https://www.nber.org/papers/w22667.pdf [http://web.archive.org/web/20210129152833/https://www.nber.org/system/files/working_papers/w22667/w22667.pdf] (noting that "94 percent of the net employment growth in the U.S. economy from 2005 to 2015 . . . occurred in alternative work arrangements" (emphasis omitted)); GLYNN, *supra* note 1, at 35 (estimating the size of the gig economy as thirty-four percent of the workforce and estimating it will rise to forty-three percent by 2020).

15. O'Callaghan, *supra* note 7, at 1211.

16. Badiee v. Brighton Area Schools, 265 Mich. App. 343, 361, 695 N.W.2d 521, 536 (2005).

ELCRA is not limited to employees.[17] A worker can bring a claim "if the worker can establish that the defendant affected or controlled a term, condition, or privilege of the worker's employment;" however, this case did not concern an independent contractor.[18] Relying on *McClements*, the Michigan Court of Appeals' 2019 unpublished decision in *Cook v. Farm Bureau Life Insurance Co. of Michigan* determined that ELCRA applies to independent contractors.[19]

This Note argues that the majority in *Cook* takes the correct position: that based on *McClements,* ELCRA does apply to independent contractors.[20] As this Note will show, although the Michigan Supreme Court does not mention *Badiee* in *McClements*, the *McClements* court intended for its decision to apply beyond the specific facts of the case.[21] Finally, this Note argues that the background of ELCRA and changes in workforce composition supports amending ELCRA to explicitly cover "nonemployees," which includes independent contractors and other workers not classified as employees.[22]

Part II provides an overview of the legal landscape, including Title VII's lack of protections for independent contractors and the demographics of worker classifications. Part II also examines ELCRA and current case law, analyzing whether ELCRA applies to independent contractors and providing an overview of other states' approaches. Part III concludes that, under Michigan cases including *McClements v. Ford Motor Co*. and *Cook v. Farm Bureau Life Insurance Co. of Michigan,* ELCRA applies to "nonemployees" and thus extends to protect independent contractors. Part III also recommends that the Michigan Legislature amend ELCRA to explicitly protect nonemployees from discrimination.

17. McClements v. Ford Motor Co., 473 Mich. 373, 389, 702 N.W.2d 166, 174–75 (2005).

18. *Id.*

19. Cook v. Farm Bureau Life Ins. Co. of Mich., No. 341330, 2019 WL 1460163, at *2 (Mich. Ct. App. Apr. 2, 2019), *appeal denied*, 504 Mich. 972, 933 N.W.2d 273(2019) (mem.).

20. *See infra* Section III.A.

21. *See infra* Section III.A.

22. *See infra* Section III.B.

II. BACKGROUND

A. Classification of Workers as Employees or Independent Contractors

One of the many difficulties in employment law lies in determining whether a worker qualifies as an employee or independent contractor.[23] Many federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act, provide protections only for "employees" and exclude independent contractors.[24] As a result, workers classified as independent contractors may face a lack of legal protections against discrimination, harassment, and wage and hour violations, among other hardships.[25] A general definition of these two classes of workers indicates that "[e]mployees work for wages or salaries under direct supervision . . . [whereas] independent contractors undertake to do a job for a price, decide how the work will be done, [and] usually hire others to do the work . . ."[26] Despite this basic definition, the current legal framework is complicated, and it can be difficult for both workers and employers to distinguish between employees and independent contractors.[27] The relevant legislation typically does not meaningfully define "employee,"[28] and courts have determined that each individual statute employs a different classification test.[29]

For example, Title VII prohibits discrimination based on "race, color, religion, sex, or national origin."[30] However, this statute simply defines

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23. *See* GLYNN, *supra* note 1, at 5.

24. *See id.* (Such statutes include most protections against status discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §630(f) (2018), the Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e(f) (2018), and the Americans with Disabilities Act of 1990, 42 U.S.C. §12111(4) (2018)); *see also* O'Callaghan, *supra* note 7, at 1189 (describing that because the plain language of these statutes only includes the term "employee" and not any other type of employment relationship, independent contractors are not covered).

25. *See* GLYNN, *supra* note 1, at 5.

26. *See* Julien M. Mundele, Note*, Not Everything that Glitters is Gold, Misclassifications of Employees: The Blurred Line Between Independent Contractors and Employees Under the Major Classification Tests*, 20 SUFFOLK J. TRIAL & APP. ADVOC. 253, 270 (2015) (quoting Jane P. Kwak, Note, *Employees Versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry*, 39 J. LEGIS. 295, 298 (2012)).

27. *See id.*

28. *See* GLYNN, *supra* note 1, at 6 (stating that "employee" is often defined as "an individual employed by the employer").

29. *See* O'Callaghan, *supra* note 7, at 1194.

30. 42 U.S.C. § 2000e-2.

'employee' as "an individual employed by an employer,"[31] and thus does not prohibit discrimination against independent contractors.[32] Because the statute only includes the term "employee," and does not mention any other type of employment relationship,[33] workers facing discrimination in the workplace frequently find themselves unable to bring Title VII claims to assert their rights if they are classified as an independent contractor.[34]

1. Classification Tests

Determining whether a worker is an employee or independent contractor is a difficult inquiry, in part because governing federal legislation often fails to provide meaningful definitions for employee or employer.[35] For example, Title VII provides a circular definition for "employee," stating an employee "is an individual employed by an employer."[36] Courts have created several tests to determine whether a worker is an employee or an independent contractor because of the lack of clear definitions.[37] At both the state and federal levels, the test applied by a court depends on which statute governs the issue, and states may even create their own versions of the most common tests.[38] The lack of a universal test for classifying workers, coupled with the varying factors considered by these tests, can lead to uncertain and inconsistent results.[39]

a. Common Law Control Test

The common law test was first articulated by the Supreme Court in *Railroad Co. v. Hanning*.[40] In finding that the worker involved in the case met the definition of an employee, the Supreme Court considered the terms of the worker's contract, which gave the employer railroad complete control over work performed.[41] The rationale behind this test is that an

31. 42 U.S.C. § 2000e(f).
32. *See* O'Callaghan, *supra* note 7, at 1190.
33. *Id.* at 1189.
34. *See id.* at 1199–1200 (outlining cases in which plaintiffs were not entitled to Title VII protections because they were classified as independent contractors and arguing that this loophole may leave claimants without redress).
35. GLYNN, *supra* note 1, at 6.
36. 42 U.S.C. § 2000e(f).
37. *See* O'Callaghan, *supra* note 7, at 1194.
38. Sarah F. Carter, *What Is an Employee? Crafting A More Effective Test for the Modern Workforce*, 47 FLA. ST. U. L. REV. 501, 511 (2020).
39. *Id.* at 512.
40. *See* Mundele, *supra* note 26, at 258; *see also* Railroad Co. v. Hanning, 82 U.S. 649 (1872).
41. Mundele, *supra* note 26, at 258.

employer should be liable for tort damages caused by workers where the employer controls the worker's actions.[42]

This test focuses on the amount of "control the employer has over the employee"—and the more control the employer has over the worker, the more likely the worker will be considered an employee.[43] The Second Restatement of Agency, Tort of Services articulates the factors courts often consider in determining the employer's amount of control over the worker, and thus whether the worker is an employee, as:

> (1) [T]he extent of control that a master can exercise over the details of the work; (2) whether a worker is engaged in a distinct occupation or business; (3) the type of occupation, with reference to its locality and whether the work is usually done under the direction of the employer; (4) the skill by the occupation; (5) whether the employer or the workman supplies his own tools and place of work; (6) the length of the person is employed; (7) the method of payment; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating an employment relationship; and (10) whether the principal is or is not in business.[44]

b. Economic Realities Test

The economic realities test provides that "a worker is deemed to be an employee if the worker is economically dependent upon the employer for continued employment."[45] Courts applying this test typically consider six factors, none of which are dispositive:

> (1) The extent to which the worker's service are an integral part of the employer's business; (2) [t]he permanency of the employment relationship; (3) [t]he amount of the worker's investment in facilities and equipment; (4) [t]he nature and degree of control by the employer; (5) [t]he worker's opportunity for profit and loss; and (6) [t]he level of skill required in performing the job and the amount of initiative, judgement, or foresight in

42. *See* O'Callaghan, *supra* note 7, at 1194–95.
43. *See id.*
44. Carter, *supra* note 38, at 512.
45. *See* O'Callaghan, *supra* note 7, at 1195.

> open market competition with others required for the success of the claimed independent enterprise.[46]

The Department of Labor uses this test in classifying workers as employees or independent contractors.[47] The Fifth Circuit also employs a version of this test in classifying workers under Title VII.[48] Michigan courts examining claims under the Elliott-Larsen Civil Rights Act also apply a version of this test, although the factors considered differ slightly from the six listed above.[49]

c. Hybrid Test

The hybrid test combines the approaches of the control test and economic realities test and looks at "the economic realities of the work relationship as a critical factor in determination but focus[ing] on the employer's right to control the work process as the determinative factor."[50] This approach is commonly used by courts in interpreting anti-discrimination statutes and has been used by the Third, Seventh, Eleventh, and District of Columbia Circuits.[51]

d. ABC Test

In 2018, the California Supreme Court decided *Dynamex Operations West, Inc. v. Superior Court*, which adopted the three-part ABC test for determining whether workers are employees or independent contractors.[52] Under this test, a worker is an independent contractor only if the employer can establish all three of the following prongs:

> (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily

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46. *See* Carter, *supra* note 38, at 517.
47. *Id.*
48. *See* O'Callaghan, *supra* note 7, at 1196.
49. Varlesi v. Wayne State University, 909 F. Supp. 2d 827, 844 (E.D. Mich. 2012).
50. *See* O'Callaghan, *supra* note 7, at 1196.
51. *See* Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 460 (1999); Patricia Davidson, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 214 (1984).
52. Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1, 7 (Cal. 2018).

> engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[53]

The California Legislature codified this test in California Assembly Bill 5 ("A.B. 5"), which passed in 2019.[54]

2. The Problem of Misclassification

Another potential barrier for independent contractors to benefit from legal protection is the misclassification of workers. Businesses may prefer to hire independent contractors instead of employees based on their needs.[55] Some employers seek to cut costs as employers are not required to withhold the worker's share of employment taxes for independent contractors.[56] Employers could also benefit by avoiding the costs of "health insurance, employer-funded pension plans, [and] unemployment insurance."[57]

The relationship between an employer and employee creates rights and obligations owed to employees under many statutes, including the Age Discrimination in Employment Act and the Fair Labor Standards Act, among others.[58] As a result of these duties, employers might choose to misclassify employees as independent contractors to avoid compliance with labor and employment laws, including anti-discrimination statutes.[59] Workers misclassified as independent contractors may be denied benefits

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53. *Id.*

54. Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html [https://web.archive.org/web/20210225221443/https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html].

55. *See* Mundele, *supra* note 26, at 266.

56. Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV. 4 (Jan. 2002), https://www.bls.gov/opub/mlr/2002/01/art1full.pdf [http://web.archive.org/web/20210129151938/https://www.bls.gov/opub/mlr/2002/01/art1full.pdf].

57. *See* O'Callaghan, *supra* note 7, at 1207.

58. *See* Mundele, *supra* note 26, at 266.

59. *See* Marissa Ditkowsky, *#UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers*, 26 UCLA WOMEN'S L.J. 69, 119 (2019) ("New York recently passed legislation that prohibits employers from permitting sexual harassment of nonemployees in the workplace, meaning that it is irrelevant whether workers are classified as independent contractors or employees."); *see also* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 240 (1997).

and protections rightfully owed to them under the law.[60] Thus, if a worker is not an employee, they cannot pursue claims under Title VII.[61] Workers might also be unaware of their legal rights, and misclassification may be particularly harmful for low wage workers due to lack of access to legal counsel and limited bargaining power.[62] Although nonemployees are not able to invoke Title VII to protect their rights, many state statutes themselves have a broader reach and cover a wide variety of workers, including independent contractors.[63]

3. Difficulties in Classification in the Gig Economy

Additionally, there have been further changes to the dynamics between employers and workers as the "gig economy" becomes more pervasive.[64] The gig economy has been defined as "a labor market that is characterized by the prevalence of short-term contracts or freelance work as opposed to permanent jobs."[65] Workers are essentially paid "by the 'gig,'" and many gig workers are legally classified as independent contractors and receive compensation for each job they perform.[66] Estimates state that the gig economy applies to about thirty-four percent of the workforce, estimated to increase to forty-three percent by 2020, although others believe those estimates are too high.[67]

One major issue facing the gig economy in particular is the difficulty in classifying workers.[68] There has been much litigation and debate over whether workers in the gig economy, who often work for companies such as Uber, Lyft, Instacart, and others, should be classified as employees or

60. *See Misclassification of Employees as Independent Contractors*, U.S. DEPT. OF LABOR WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/flsa/misclassification [http://web.archive.org/web/20210129152237/https://www.dol.gov/agencies/whd/flsa/misclassification] (last visited Oct. 11, 2020).

61. Ditkowsky, *supra* note 59, at 117.

62. *Id.*

63. *See, e.g.*, *id.*; Meghan Racklin et al., *Blog: State Leadership on Anti-Discrimination Protections for Independent Contractors*, A BETTER BALANCE (Apr. 22, 2020), https://www.abetterbalance.org/state-leadership-on-anti-discrimination-protections-for-independent-contractors/ [http://web.archive.org/web/20210129152317/https://www.abetterbalance.org/state-leadership-on-anti-discrimination-protections-for-independent-contractors/].

64. Danya Shakfeh, *New Employment Laws for a New Generation?,* 32 DUPAGE CNTY. BAR ASS'N BA BRIEF 8, 9 (2019).

65. *Id.* at 8–9.

66. Justin Azar, *Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy*, 27 GEO. J. ON POVERTY L. & POL'Y 409, 411 (2020).

67. *See* GLYNN, *supra* note 1, at 35.

68. *See id.* at 34.

independent contractors.[69] For example, both Uber and Lyft exercise significant control over their drivers but classify them as independent contractors.[70] Drivers have initiated lawsuits alleging that they should be classified as employees, but courts struggle with how to classify these workers, especially under the common-law and control-based tests.[71]

B. What are the Demographics?

According to the Bureau of Labor Statistics, there were 10.6 million independent contractors in May 2017, making up 6.9% of total employment.[72] One report found that from February 2005 to late 2015 the percentage of workers in alternative work arrangements (temporary held agency workers, on-call workers, contract workers, and independent contractors or freelancers) rose from 10.7% to 15.8%.[73] Notably, "94[%] of the net employment growth in the U.S. economy from 2005 to 2015 . . . occurred in alternative work arrangements."[74] In 2015 the total number of workers in alternative arrangements was 23.6 million.[75] As of 2015, independent contractors made up the largest portion of this group at 8.4%.[76]

According to a study, about two thirds of independent contractors were reported to be men in May 2017, and independent contractors were more likely to be white than workers in other alternative and traditional arrangements.[77] The study also showed that "independent contractors were more likely . . . to be in management, business, and financial operations occupations; sales and related occupations; and construction and

69. *Id.*
70. *Id.*
71. *Id.* at 34–35.
72. *See Employment Arrangements*, *supra* note 10 (noting that these statistics were obtained from the Current Population Survey (CPS), a monthly sample survey of about 60,000 households in the U.S. and that data on contingent and alternative employment arrangements were collected in a May 2017 supplement to CPS).
73. Katz & Krueger, *supra* note 14, at 1.
74. *Id*. at 6–7 (defining "independent contractor" as "individuals who report they obtain customers on their own to provide a product or service as an independent contractor, independent consultant, or freelance worker. 'On-Call Workers' report having certain days or hours in which they are not at work but are on standby until called to work. 'Temporary Help Agency Workers' are paid by a temporary help agency. 'Workers Provided by Contract Firms' are individuals who worked for a company that contracted out their services during the reference week.").
75. *Id.* at 8.
76. *Id.*
77. *See Employment Arrangements*, *supra* note 10 (noting that seventy-nine percent of independent contractors prefer contracting over traditional jobs).

extraction occupations."[78] They were also more likely to be employed in the industry of "construction and in professional and business services."[79] Independent contractors are generally older, as one in three were age fifty-five or older.[80] This survey also indicated that the proportion of workers who were independent contractors was lower in 2017 compared to February 2005 when 7.4% of workers were independent contractors.[81]

Based on the tendency for independent contractors to be white males—a group that is not typically seen as a target for harassment, some ask whether there is a need to apply anti-discrimination laws to this group.[82] However, those in the white-male demographic still may face discrimination because of certain protected characteristics, including age, national origin, sexual orientation, or religion.[83] The Supreme Court has interpreted Title VII as prohibiting "[d]iscriminatory preference for any group, minority or majority."[84] Title VII was intended to cover white Americans and the EEOC has interpreted the Act as proscribing racial discrimination against white people on the same terms it outlaws discrimination against nonwhite people.[85] Additionally, Title VII's prohibition on sex-based discrimination applies to protect both men and women.[86]

The demographics could also indicate "a need to address the under-representation of protected groups within the independent contractor workforce."[87] The demographics may represent workers' preferences regarding types of employment, but ultimately raise concerns that women and minorities experience discrimination under the current laws.[88] For

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *See* O'Callaghan, *supra* note 7, at 1198; Maltby & Yamada, *supra* note 59, at 244–45.
83. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (finding that Title VII prohibits employers from terminating individuals simply for being gay or transgender, in case where gay man alleged discrimination based on sexual orientation under Title VII); Lahey, *supra* note 11, at 435 (noting that age discrimination laws appear to "lead to lower employment for older white men").
84. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
85. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–80 (1976) (holding that Title VII prohibits racial discrimination against the white petitioners in the case and noting the legislative intent of Title VII was to "cover white men and white women and all Americans" to create an "obligation not to discriminate against whites").
86. *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998).
87. *See* O'Callaghan, *supra* note 7, at 1198.
88. *See id.* (stating that this could "merely reflect worker preferences (e.g., women and minorities may prefer traditional employment over alternative work arrangements and are therefore not seeking as many independent contractor positions as white males)").

example, the under-representation of these groups could indicate that women and minorities face discrimination "in the independent contractor workforce" and as a result do not sustain their employment in these industries because of the lack of protections available under federal law.[89] A review of labor statistics found that "women and/or people of color are overrepresented in seven of the eight occupations at highest risk for misclassification."[90] This risk of misclassification undermines Title VII's ability to protect vulnerable workers, and indeed, those with the greatest need of the statute's protection are removed from its coverage.[91]

C. Michigan Statutes and Case Law

While Title VII does not provide protection to independent contractors, state anti-discrimination laws may go further than the federal law.[92] Michigan's civil rights statute, the Elliott-Larsen Civil Rights Act, protects against discrimination in the state.[93] According to the U.S. Bureau of Labor Statistics, as of September 2020, 4,890,700 workers made up Michigan's civilian labor force.[94]

1. Anti-discrimination Statute in Michigan: the Elliott-Larsen Civil Rights Act

The Michigan Legislature passed the Elliott-Larsen Civil Rights Act ("ELCRA") in 1976 and expanded on the forms of discrimination prohibited by law in Michigan.[95] The statute aims to eliminate discrimination in employment, education, housing, public

89. *See generally id.*

90. *See* Alexander, *supra* note 13, at 910 (listing a table showing top eight occupations by percentage and number of workers misclassified with women and or people of color as judges, magistrates and other judicial workers, real estate brokers and sales agents, hairdressers, hairstylists, and cosmetologists, teaching assistants, door-to-door sales workers, news and street vendors, and related workers, maids and housekeeping cleaners).

91. *Id.* at 921, 957 (stating that anti-discrimination laws are typically invoked by members of disadvantaged groups and the most frequently filed charge of discrimination is race, followed by sex).

92. *See* O'Callaghan, *supra* note 7, at 1211.

93. MICH. COMP. LAWS § 37.2101 et seq.

94. *Economy at a Glance: Michigan*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/eag/eag.mi.htm#eag_mi.f.1 [http://web.archive.org/web/20201113171504/https://www.bls.gov/eag/eag.mi.htm] (last visited Nov. 13, 2020).

95. *See* MICH. COMP. LAWS § 37.2101 et seq. (1976); *Michigan Legal Milestones 37. The Elliott-Larsen Civil Rights Act*, STATE BAR OF MICHIGAN, https://www.michbar.org/programs/milestone/milestones_elliott-larsencivilrightsact [http://web.archive.org/web/20210129153029/https://www.michbar.org/programs/milestone/milestones_elliott-larsencivilrightsact] (last visited Oct. 10, 2020) [hereinafter *Michigan Legal Milestones*].

accommodations, and public services based on "religion, race, color, national origin, age, sex, height, weight, familial status or marital status."[96] The employment discrimination provision of the Act[97] allows for claims against an employer and prohibits employers from discriminating against workers.[98] Section 37.2202(1)(a) states:

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96. MICH. COMP. LAWS § 37.2102; *see Michigan Legal Milestones*, *supra* note 95. There was a campaign by Fair and Equal Michigan to amend the Elliott-Larsen Civil Rights Act, which would add "gender identity" and "sexual orientation" to the protected classes under the statute. Taylor DesOrmeau, *LGBT Anti-discrimination Campaign Turns in Nearly 500,000 Signatures for 2022 Ballot Proposal*, MLIVE (Oct. 13, 2020, 10:13 PM), https://www.mlive.com/public-interest/2020/10/lgbt-anti-discrimination-campaign-turns-in-nearly-500000-signatures-for-2022-ballot-proposal.html [http://web.archive.org/web/20210129153142/https://www.mlive.com/public-interest/2020/10/lgbt-anti-discrimination-campaign-turns-in-nearly-500000-signatures-for-2022-ballot-proposal.html]. If the required number of signatures were verified by the state, the Michigan Legislature would have forty days to pass this amendment or allow it to go to November 2022 as a ballot initiative for voters. *See* John Riley, *Campaign Pushing for Pro-LGBTQ Ballot Initiative in Michigan Turns in More Than 480,000 Signatures*, METRO WEEKLY (Oct. 19, 2020), https://www.metroweekly.com/2020/10/campaign-pushing-for-pro-lgbtq-ballot-initiative-in-michigan-turns-in-more-than-480000-signatures/ [http://web.archive.org/web/20210129153223/https://www.metroweekly.com/2020/10/campaign-pushing-for-pro-lgbtq-ballot-initiative-in-michigan-turns-in-more-than-480000-signatures/].

However, the Michigan Board of State Canvassers determined that the campaign did not collect enough signatures, and in a November 21 order, the Michigan Supreme Court refused to grant relief to the group. *See* Craig Mauger, *Michigan Supreme Court Ruling Effectively Kills LGBTQ Ballot Campaign*, THE DETROIT NEWS (Nov. 2, 2021, 1:38 PM), https://www.detroitnews.com/story/news/politics/2021/11/02/michigan-supreme-court-rejects-suit-civil-rights-ballot-campaign/6249405001/ [https://web.archive.org/web/20220110003306/https://www.detroitnews.com/story/news/politics/2021/11/02/michigan-supreme-court-rejects-suit-civil-rights-ballot-campaign/6249405001/].

Despite that ruling, Michigan's Attorney General Dana Nessel is set to challenge a Michigan Court of Claims decision "ruling that the Elliott-Larsen Civil Rights Act (ELCRA) does not prohibit discrimination because of an individual's sexual orientation" in the Michigan Supreme Court in *Rouch World LLC, et al. v. Michigan Department of Civil Rights et al*. *AG Nessel, Department of Civil Rights File to Protect Citizens from Sexual Orientation Discrimination Before Michigan Supreme Court*, MICHIGAN.GOV: DEP'T ATT'Y GEN. (Oct. 25, 2021), https://www.michigan.gov/ag/0,4534,7-359-92297_47203-571296--,00.html [https://web.archive.org/web/20220110003407/https://www.michigan.gov/ag/0,4534,7-359-92297_47203-571296--,00.html]. The Michigan Supreme Court granted leave to appeal to determine "whether the prohibition on discrimination 'because of . . . sex' in the Elliott-Larsen Civil Rights Act (ELCRA), MCL § 37.2101 et seq., applies to discrimination based on sexual orientation." Rouch World, LLC v. Dep't of C.R., 507 Mich. 999, 961 N.W.2d 153 (2021). As of January 9, 2022, the Michigan Supreme Court has not yet announced the date for oral arguments. *Schedule of Oral Arguments*, MICH. CTS., https://www.courts.michigan.gov/courts/supreme-court/schedule-of-oral-arguments/ [https://web.archive.org/web/20220110003809/https://www.courts.michigan.gov/courts/supreme-court/schedule-of-oral-arguments/].

97. *See* MICH. COMP. LAWS § 37.2202.

98. 5 MICH. CIV. JUR. *Civil Rights* § 24.

(1) An employer shall not do any of the following:

> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.[99]

Under ELCRA, an employer is "a person who has [one] or more employees and includes an agent of that person."[100] A person is an "individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity."[101]

When interpreting ELCRA, "Michigan courts often turn to federal law."[102] Discrimination claims under ELCRA "have similarly worded provisions and are analyzed under the same evidentiary framework as similar claims brought under Title VII."[103] Federal precedent from interpretations of the federal statutes is persuasive authority, but this federal precedent is not binding on Michigan state courts.[104] Similar to Title VII, courts have interpreted ELCRA as prohibiting "a discriminatory preference for any group," and thus ELCRA applies to both majority and minority members of protected classes.[105]

"[T]o establish a prima facie case of discrimination under [ELCRA]," a plaintiff must show they: (1) were "a member of a protected class;" (2) "suffered an adverse employment decision;" (3) were "qualified for the job;" and (4) were "replaced by a person outside the protected class or treated differently from similarly situated non-protected employees."[106]

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99. MICH. COMP. LAWS § 37.2202(1)(a).
100. *See* MICH. COMP. LAWS § 37.2201(a); 5 MICH. CIV. JUR. *Civil Rights* § 24.
101. *See* MICH. COMP. LAWS § 37.2103(g); 5 MICH. CIV. JUR. *Civil Rights* § 24.
102. 5 MICH. CIV. JUR. *Civil Rights* § 26.
103. *Id.*
104. *Id.*
105. *See* 5 MICH. CIV. JUR. *Civil Rights* § 16; Farmington Educ. Ass'n v. Farmington, 576, 351 N.W.2d 242, 247 (1984) (the Supreme Court's determination that "[d]iscriminatory preference, for any group, majority or minority, is precisely and only what Congress has proscribed" is "equally applicable to the Elliott-Larsen Civil Rights Act").
106. 15 MICH. CIV. JUR. *Labor* § 67.

2. Does ELCRA Apply to Both Employees and Independent Contractors?

Under the interpretation of some state and federal cases, ELCRA only applies to "employees." In *Ebelt v. County of Ogemaw*, the United States District Court for the Eastern District of Michigan found that ELCRA and the Michigan Whistleblower Protection Act do not apply to independent contractors.[107] In *Badiee v. Brighton Area Schools*, the Michigan Court of Appeals held that claims under ELCRA section 37.2202 are only available to employees.[108] The *Badiee* court stated that independent contractors are not employees "and may not bring a claim against an employer under [the] employment discrimination provision."[109]

To determine whether a worker is an employee, Michigan courts apply the economic reality test.[110] Under this test, courts consider (1) control of a worker's duties, (2) payment of wages, (3) right to hire, fire, and discipline; and (4) performances of the duties as an integral part of the employer's business toward the accomplishment of a common goal.[111] This test examines "the totality of the circumstances surrounding the work" and no single factor is determinative.[112]

However, a recent unpublished Michigan Court of Appeals case indicates that independent contractors may bring claims under ELCRA.[113] The *Cook* court determined that the plaintiff was not precluded from

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107. *See* Ebelt v. County of Ogemaw, 231 F. Supp. 2d 563, 576 (E.D. Mich. 2002); s*ee also* STATE EMPLOYMENT LAW DEVELOPMENTS, SS032 ALI-ABA 1283, 1402.

108. *See* Badiee v. Brighton Area Schools, 265 Mich. App. 343, 361, 695 N.W.2d 521, 536 (2005); *see also* 5 MICH. CIV. JUR. *Civil Rights* § 24.

109. *See, e.g.*, *Badiee*, 265 Mich. App. 361, 695 N.W.2d 536.

110. *See* 5 MICH. CIV. JUR. *Civil Rights* § 24; Varlesi v. Wayne State Univ., 909 F. Supp. 2d 827, 844 (E.D. Mich. 2012).

111. *See* Hacker v. City of Mount Clemens, No. 267403, 2006 WL 2739342, at *1–2, (Mich. Ct. App. Sept. 26, 2006); *see also* Foster v. Judnic, 963 F. Supp. 2d 735, 764 (E.D. Mich. 2013) (applying the economic realities test to find that a City Attorney was an independent contractor, not an employee, and "could not maintain an action under MCL § 37.2202.").

112. *Varlesi*, 909 F. Supp. 2d at 845.

113. *See* Jason Shinn, *Michigan Anti-Employment Discrimination Statute Extends to Independent Contractors*, MICH. EMP. L. ADVISOR (Apr. 22, 2019), https://www.michiganemploymentlawadvisor.com/discrimination/michigan-anti-employment-discrimination-statute-extends-to-independent-contractors/ [http://web.archive.org/web/20201011203011/https://www.michiganemploymentlawadvisor.com/discrimination/michigan-anti-employment-discrimination-statute-extends-to-independent-contractors/] (discussing the *Cook v. Farm Bureau Life Ins. Co. of Mich.* court's conclusion that the trial court erred in determining that the plaintiff's status as an independent contractor prevented him from invoking ELCRA "without first inquiring into the amount of control Farm Bureau asserted over the terms, conditions, and privileges of plaintiff's work.").

bringing a discrimination claim under ELCRA even though his status was that of independent contractor.[114] In that case, the plaintiff was an independent contractor for the defendant, was terminated, and filed an age discrimination suit.[115] The plaintiff did not dispute that he was an independent contractor, but argued that this status did not prevent him from bringing an ELCRA claim.[116] The court determined that ELCRA does not only prohibit an employer from discriminating against its own employees.[117] Rather, a worker may bring an ELCRA action against an employer if "the individual can establish that an employer affected or controlled a term, condition, or privilege of his or her employment."[118]

The *Cook* decision relied heavily on a 2005 Michigan Supreme Court opinion, *McClements v. Ford Motor Co*.[119] In *McClements*, the Michigan Supreme Court held that "a worker is entitled to bring an action against a nonemployer defendant if the worker can establish that the defendant affected or controlled a term, condition, or privilege of the worker's employment."[120] The plaintiff was a cashier, whose employer, AVI, was hired by Ford to operate three cafeterias at an assembly plant.[121] The plaintiff alleged that she was sexually harassed by a superintendent at the plant and brought claims that Ford negligently retained the superintendent and "breached its obligation under [ELCRA] to prevent" the superintendent from sexually harassing the plaintiff.[122] The court determined that to limit suits under ELCRA to only provide recourse to an employee against their employer "is not consistent with the statute" in part because ELCRA "forbids *any* employer from engaging in" discriminatory acts.[123] The text of the statute does not provide that employers are only precluded from discriminating against their own employees.[124] The Michigan Supreme Court said ELCRA "clearly envision[s] claims by nonemployees," including claims for failure to hire or recruit, improperly

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114. *See* Cook v. Farm Bureau Life Ins. Co. of Mich., No. 341330, 2019 WL 1460163, at *2 (Mich. Ct. App. Apr. 2, 2019), *appeal denied*, 504 Mich. 972, 933 N.W.2d 273 (2019) (mem.).

115. *Id.* at *1.

116. *Id.* at *2.

117. *Id.*

118. *Id.*

119. *See id.*

120. *See* McClements v. Ford Motor Co., 473 Mich. 373, 389, 702 N.W.2d 166, 174–75 (2005). *See generally* Patricia Nemeth & Deborah Brouwer, *Employment and Labor Law, Ann. Survey of Mich. Law June 1, 2004–May 31, 2005*, 52 WAYNE L. REV. 565, 596–99 (2006) (discussing the *McClements* court's reasoning and decision generally).

121. *McClements*, 473 Mich. at 376, 702 N.W.2d at 168.

122. *Id.* at 376–79, 702 N.W.2d at 168–69.

123. *Id.* at 386, 702 N.W.2d at 173 (emphasis in original).

124. *Id.* at 386, 702 N.W.2d at 173.

classifying applicants, and discrimination against former employees with regard to a benefit plan.[125]

Ultimately, the *McClements* court concluded that the statute does require some "nexus or connection between the employer and . . . nonemployee."[126] Liability under ELCRA is not simply based on a worker's status as employee or independent contractor, rather it is based on the employer affecting or controlling the individual's work.[127] An employer may be liable "under [ELCRA] for discriminatory acts against a nonemployee if the nonemployee can demonstrate that the employer affected or controlled a term, condition, or privilege of the nonemployees' employment."[128] The court determined that in the case before it, however, the plaintiff did not establish that the defendant controlled the plaintiff's employment so she could not maintain a cause of action under ELCRA.[129]

The *Cook* court, in looking at the independent contractor agreement, concluded the agreement established that the employer controlled a term of the plaintiff's employment, specifically compensation.[130] The court determined that the plaintiff was not precluded from bringing an ELCRA claim if he could establish a prima facie case.[131] The court ultimately determined that the "plaintiff failed to meet his evidentiary burden," and therefore could not bring an unlawful age discrimination claim.[132]

The *Cook* case had a concurring opinion by one of the three deciding judges. Judge Boonstra concurred in the result, but argued that the plaintiff, as an independent contractor, could not pursue a claim under ELCRA.[133] Looking at the plain language of the statute, Judge Boonstra argued that ELCRA proscribes conduct which relates to "employees" and "'applicants' for 'employment.'"[134] So, Judge Boonstra argued that

125. *Id.* at 386, 702 N.W.2d at 173.
126. *See id.* at 386–87, 702 N.W.2d at 173.
127. *Id.*
128. *Id.*
129. *Id.* at 389, 702 N.W.2d at 175.
130. Cook v. Farm Bureau Life Ins. Co. of Mich., No. 341330, 2019 WL 1460163, at *4 (Mich. Ct. App. Apr. 2, 2019), *appeal denied*, 504 Mich. 972, 933 N.W.2d 273 (2019) (mem.).
131. *Id.*
132. *Id.* at *8.
133. *See id.* (Boonstra, J., concurring).
134. *See id.* (providing sections 2202(a) and (b) of ELCRA) ("[A]n employer shall not: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

ELCRA only relates to "an existing or prospective employment relationship between an employer and employee."[135] Judge Boonstra reasoned that there is no employment relationship between an independent contractor and employer, and instead the independent contractor "contracts to do work without being subject to the right of control by the employer."[136]

Furthermore, the concurrence argued that the *Badiee* decision controlled in the case and that the Michigan Supreme Court in *McClements* did not implicitly overrule *Badiee*.[137] The court in *McClements* did not mention *Badiee*, and according to Judge Boonstra, *McClements* "does not speak" to the issue faced in *Cook*.[138] *McClements* instead provided that in certain situations, a plaintiff may maintain a cause of action without a direct employer-employee relationship, as long as the defendant "affect[s] or control[s] a term, condition, or privilege of an individual's employment" and does take discriminatory action adversely affecting or controlling employment.[139] The concurrence states *McClements* still requires some employment relationship, so the plaintiff in *Cook*, who admitted to his status as an independent contractor, was not an employee, and therefore *McClements* did not apply.[140]

In November 2021, the U.S. District Court for the Eastern District of Michigan decided *Jamoua v. Michigan Farm Bureau*, a federal case which applied *Cook* to an employment discrimination claim under ELCRA.[141] The plaintiff in this case was an agent for Michigan Farm Bureau.[142] He was Chaldean and most of his clients were Chaldean or Arab, and his supervisors directed him to stop selling insurance policies to "people of

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(b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status."). MCL 37.2202(a)–(b).

135. *See id.* (Boonstra, J., concurring).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (Judge Boonstra stating that under MCR 7.215(J)(1) the Michigan Court of Appeals is bound to prior published Michigan Court of Appeals' decisions issued after November 1, 1990, unless that decision has been reversed or modified by the Michigan Supreme Court or a special panel of the Michigan Court of Appeals. Boonstra also argues that, unlike the majority's conclusion, *McClements* does not overrule or modify *Badiee* because *McClements* does not even mention *Badiee* and deals with different issues, *McClements* cannot be extended to overrule *Badiee* and the *Badiee* case still controls as binding precedent).

141. Jamoua v. Mich. Farm Bureau, No. 20-CV-10206, 2021 WL 5177472, at *12 (E.D. Mich. Nov. 8, 2021).

142. *Id.* at *1.

his culture."[143] The plaintiff also argued that the company charged higher rates in Southeastern Michigan, an area with a significant population of people of Middle Eastern descent, and the plaintiff filed a discrimination lawsuit against the company. [144]

The court determined that *Cook* was persuasive as "Jamoua's agent agreement is the same as Cook's in every material way."[145] Under the agreement "Michigan Farm Bureau had the right to 'accept[ ] or reject[ ]' any application for insurance and to prescribe all 'premiums, fees, and charges for insurance.'"[146] Thus, Michigan Farm Bureau could affect the plaintiff's ability to bind policies, which also directly impacted the plaintiff's pay which is a "term, condition, or privilege of the nonemployee's employment."[147] The court rejected the defendant's argument that *Cook*, as an unpublished decision, was contrary to three other published, binding decisions.[148] The court stated that the three cases cited all were decided before *McClements*, which determined that "whether the plaintiff was an employee of the defendant is not dispositive of his ability to pursue an ELCRA claim against the defendant."[149] Based on these factors, the court found that since the defendant affected or controlled significant terms of Jamoua's employment, Jamoua could pursue an ELCRA claim even though he was an independent contractor.[150]

As noted by the *Jamoua* court, *Cook* is an unpublished Michigan Court of Appeals case.[151] Under the Michigan Court Rules, an unpublished opinion is not precedentially binding, although it can be used as persuasive authority.[152] In a party's brief before the court, unpublished opinions should not be cited if there is published authority on that area of law.[153] Because of the clear precedent in *Badiee*, the conflicting application of

143. *Id.*
144. *Id.* at *2.
145. *Id.* at *13.
146. *Id.*
147. *Id.* (quoting McClements v. Ford Motor Co., 473 Mich. 373, 390, 702 N.W.2d 166, 173 (2005)).
148. *Id.*
149. *Id.* (citing *McClements*, 473 Mich. at 390, 702 N.W.2d at 173).
150. *Id.*
151. *Id.*
152. Paris Meadows, LLC v. City of Kentwood, 287 Mich. App. 136, 145 n.3, 783 N.W.2d 133, 139 n.3 (2010) (stating that unpublished decisions of the Michigan Court of Appeals are not precedentially binding but can be considered as persuasive authority). *See also* MCR 7.215(C)(1). The Michigan Court Rules state that "[u]npublished opinions should not be cited for propositions of law for which there is published authority." MCR 7.215(C)(1). When a party cites an unpublished decision, it must explain why this case is cited and "how it is relevant to the issues presented." *Id.* Additionally, that party must provide a copy of that unpublished opinion to both the court and opposing parties. *Id.*
153. MCR 7.215(C)(1).

McClements in the *Cook* majority and concurring opinions, and that only one court has applied *Cook* as of publication of this Note, it remains to be seen how *Cook* could change the interpretation of ELCRA in Michigan courts.[154] Although *Jamoua* indicates that courts may begin to follow *McClements* and *Cook*, allowing independent contractors to bring ELCRA claims, Michigan courts may decide not to follow the federal court's lead.

3. Cases Applying McClements *Have Resulted in Mixed Outcomes for Plaintiffs*

Although *McClements* opened the door for nonemployee plaintiffs to bring a claim under ELCRA, the plaintiff in that case was still unsuccessful in establishing her claim.[155] Other courts applying *McClements* have shown plaintiffs have received mixed results in establishing a claim under ELCRA.[156]

In *Esquivel v. Windsor Machine & Stamping, Ltd.,* the U.S. District Court for the Eastern District of Michigan referenced *McClements* in stating that ELCRA "does not require the existence of an actual employer-employee relationship."[157] In *Esquivel*, the plaintiff brought claims under ELCRA, alleging a sexually-hostile work environment and retaliatory discharge.[158] The defendant removed the case to federal court claiming the plaintiff fraudulently joined the defendant to the case to defeat federal jurisdiction.[159] The plaintiff then filed a motion to remand, arguing she did

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154. *Cook* was decided in 2019. As of January 10, 2022, *Jamoua v. Mich. Farm Bureau*, a United States District Court opinion from the Eastern District of Michigan, was its only citing reference on Westlaw. *Jamoua*, 2021 WL 5177472.

155. McClements v. Ford Motor Co., 473 Mich. 373, 390, 702 N.W.2d 166, 175 (Mich. 2005).

156. *See* Cook v. Farm Bureau Life Ins. Co. of Mich., No. 341330, 2019 WL 1460163, at *2 (Mich. Ct. App. Apr. 2, 2019), *appeal denied*, 504 Mich. 972, 933 N.W.2d 273 (2019) (mem.) (finding the plaintiff showed the defendant affected a term of employment but failed to meet the evidentiary burden to proceed with a discrimination case and granting summary judgment on that basis); Esquivel v. Windsor Machine & Stamping, Ltd., No. 08-11232, 2008 WL 11355058, at *3–4 (E.D. Mich. Aug. 12, 2008) (granting a motion to remand in favor of the plaintiff because defendant was not fraudulently joined to the ELCRA claim because an issue of fact remained as to whether defendant affected plaintiff's employment); Barton-Spencer v. Farm Bureau Life Ins. Co. of Michigan, Nos. 324661, 325153, 2016 WL 1125968, at *8–9 (Mich. Ct. App. Mar. 22, 2016) (affirming summary disposition against plaintiff because although plaintiff was not precluded from bringing an ELCRA claim on the basis of being an independent contractor, plaintiff failed to establish a prima facie case).

157. *Esquivel*, 2008 WL 11355058, at *3 (citing *McClements*, 473 Mich. at 385, 702 N.W.2d at 172)

158. *Id.* at *1.

159. *Id.* at *2.

not fraudulently join the defendant.[160] The *Esquivel* court stated that for the defendant to succeed in its claim of fraudulent joinder, it must show that the plaintiff had no reasonable basis for her claim that the defendant "affected or controlled a term, condition or privilege of her employment."[161] The court rejected the defendant's argument that it was fraudulently joined because it was not the plaintiff's employer since "liability under the ELCRA does not depend on an employer-employee relationship."[162] The court noted that based on the allegations, there were disputed issues of fact as to whether the defendant controlled or affected the plaintiff's employment.[163] The court determined the defendant had not successfully demonstrated it was fraudulently joined and the court granted the plaintiff's motion to remand.[164]

In *Barton-Spencer v. Farm Bureau Life Insurance Co. of Michigan*, the Michigan Court of Appeals relied on *McClements* in stating that "the existence of an employer-employee relationship is not a prerequisite to recovery under the ELCRA."[165] The court of appeals determined that the trial court erred by deciding that the plaintiff's ELCRA age discrimination claim was not viable because the plaintiff was an independent contractor.[166] Because relevant agreements established that the defendant "affected or controlled a term, condition, or privilege of [the plaintiff's] employment," she was not precluded from pursuing an ELCRA claim as a matter of law.[167] The Michigan Court of Appeals did allow for summary disposition of the plaintiff's claims because she did not establish the fourth element of a prima facie age discrimination claim, that is she failed to provide evidence that age was a factor in the defendant's decision to terminate her.[168] Although the Michigan Supreme Court did overturn part of the court of appeal's opinion in 2017, the supreme court did not overturn the section discussing the *McClements* decision and the age discrimination claim.[169]

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160. *Id.*

161. *Id.* at *3.

162. *Id.* at *4 (citing *McClements*, 473 Mich. at 385, 702 N.W.2d at 172; Chiles v. Mach. Shop Inc., 238 Mich. App. 462, 468, 606 N.W.2d 398, 403 (Mich. Ct. App. 1999).

163. *Id.*

164. *Id.*

165. *See* Barton-Spencer v. Farm Bureau Life Ins. Co. of Michigan, Nos. 324661, 325153, 2016 WL 1125968, at *8 (Mich. Ct. App. March 22, 2016) (citing *McClements*, 473 Mich. at 386–87, 702 N.W.2d at 166).

166. *Id.* at *7–8.

167. *Id.* at *8 (quoting *McClements*, 473 Mich. at 386–87, 702 N.W.2d at 166).

168. *See id.* at *9.

169. *See Barton-Spencer*, 500 Mich. at 34, 892 N.W.2d at 795–96 (vacating Part III(C)(4) of the court of appeals decision but denying the application and cross-application

As noted in Section II.C.2, the plaintiff in *Cook* was unable to establish a successful age discrimination claim under ELCRA.[170] Because the plaintiff's independent contractor agreement established that the employer "affected or controlled a term, condition, or privilege of [plaintiff's] employment," specifically compensation, the plaintiff was not precluded from bringing an ELCRA claim.[171] However, the court ultimately determined that the plaintiff failed to meet his evidentiary burden to survive summary judgment because the defendant had a legitimate, nondiscriminatory reason for the plaintiff's termination and the plaintiff was unable to show a genuine issue of material fact that the defendant's proffered reason for termination was pretext.[172]

In *Jamoua v. Michigan Farm Bureau*, the plaintiff was successful in defeating the defendant's arguments for summary disposition.[173] First, the federal court determined that *Cook* and *McClements* controlled, so although the plaintiff was an independent contractor, this alone did not preclude his ELCRA claim.[174] Because Jamoua's agent agreement was materially the same as the *Cook* plaintiff's and the company could affect Jamoua's ability to enter into insurance policies, thus impacting his pay, Michigan Farm Bureau did affect a "term, condition, or privilege of the

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for leave to appeal, thus leaving in place the remainder of the court of appeals' opinion, which includes Part III(B) discussing *McClements* and the ELCRA claim).

170. *See supra* Section II.C.2; Cook v. Farm Bureau Life Ins. Co. of Mich., No. 341330, 2019 WL 1460163, at *8 (Mich. Ct. App. Apr. 2, 2019), *appeal denied*, 504 Mich. 972, 933 N.W.2d 273 (2019) (mem.).

171. *Cook*, 2019 WL 1460163, at *4.

172. *See id.* The *Cook* court noted that in ELCRA claims where there is no direct evidence of bias, Michigan courts analyze claims under the United States Supreme Court's *McDonnell-Douglas* framework. *Id.* at *4. If the plaintiff can establish an ELCRA claim, according to *Cook*, the plaintiff is not precluded from pursuing the claim even if he is not an employee. *Id.* Under the *McDonnell* test, the plaintiff must first present evidence of a prima facie case, which requires a showing that the plaintiff: "(1) . . . belongs to a protected class, (2) . . . suffered an adverse employment action, (3) . . . was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." *Id.* (citing Hazle v. Ford Motor Co., 464 Mich. 456, 463, 628 N.W.2d 515, 521 (2001)). When a plaintiff establishes the prima facie case, a presumption of discrimination arises and the defendant can rebut that presumption by showing evidence that "its employment decision was made for a legitimate, nondiscriminatory reason." *Id.* (citing *Hazle*, 464 Mich. at 464, 628 N.W.2d at 521). If the defendant can produce such evidence, the presumption of discrimination falls away, and the plaintiff must demonstrate that the reason proffered by the defendant is pretext and "discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id.* (quoting *Hazle*, 464 Mich. at 465, 628 N.W.2d at 522).

173. Jamoua v. Mich. Farm Bureau, No. 20-CV-10206, 2021 WL 5177472, at *13 (E.D. Mich. Nov. 8, 2021).

174. *Id.*

nonemployee's employment" under *McClements*.[175] Additionally, under the merits of the claim the court determined that the plaintiff did meet his burden to establish a prima facie claim for discrimination, thus summary disposition was inappropriate.[176]

D. Other States Providing Explicit Statutory Protections to Independent Contractors

Both New York State and New York City have amended their anti-discrimination laws to provide protections to "nonemployees," including independent contractors.[177] As a result, independent contractors can now use the New York State Human Rights Law to bring claims of workplace discrimination.[178] The State Human Rights Law[179] prohibits discrimination based on "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, with respect to the opportunity to obtain employment" and in other situations.[180] The change provides that it is unlawful "for an employer to permit unlawful discrimination against non-employees in its workplace" and that employers may be liable to a worker who is a "contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace."[181] Guidance from the state's Division of Human Rights notes that as of October 11, 2019 this expansion protects nonemployees from "all discrimination" in the workplace.[182]

The New York City Council amended the New York City Human Rights Law to explicitly ensure that independent contractors are covered

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175. *Id.* (quoting McClements v. Ford Motor Co., 473 Mich. 373, 386, 702 N.W.2d 166, 173 (2005)).

176. *Id.* at *15–16.

177. *See* Mark S. Goldstein & Alexandra Manfredi, *New York State and City Expand Human Rights Law Protections to Freelancers and Independent Contractors*, EMP. L. WATCH (Jan. 24, 2020), https://www.employmentlawwatch.com/2020/01/articles/employment-us/new-york-state-and-city-expand-human-rights-law-protections-to-freelancers-and-independent-contractors/ [http://web.archive.org/web/20210129154313/https://www.employmentlawwatch.com/2020/01/articles/employment-us/new-york-state-and-city-expand-human-rights-law-protections-to-freelancers-and-independent-contractors/]; N.Y. EXEC. LAW § 296-d (McKinney 2019).

178. *Id.*

179. EXEC. LAW §§ 290 et seq.

180. EXEC. LAW 296(1)(a); 18 N.Y. JUR. 2D *Civil Rights* § 8.

181. N.Y. EXEC. LAW § 296-d (McKinney 2019).

182. *Important Updates to the New York State Human Rights Law*, NEW YORK DIVISION OF HUMAN RIGHTS, https://dhr.ny.gov/sites/default/files/pdf/nysdhr-legal-updates-10112019.pdf [http://web.archive.org/web/20210129154346/https://dhr.ny.gov/sites/default/files/pdf/nysdhr-legal-updates-10112019.pdf] (last visited Jan. 23, 2021).

by the statute.[183] The relevant statute was amended to add Provision 23, which states that the "protections of this chapter relating to employees apply to interns, freelancers and independent contractors."[184] The New York City law protects independent contractors from employment discrimination, and these workers are entitled to the same protections under this law no matter what label the employer uses in referring to these workers.[185] Additionally, the NYC Commission on Human Rights notes that a worker who is not an employee is likely a freelancer or independent contractor, but these groups all have the same rights under the law.[186]

Similarly, Maryland passed legislation expanding the definition of employee in the state's anti-discrimination law to explicitly include independent contractors.[187] House Bill 679 was signed on April 30, 2019 and took effect on October 1, 2019.[188] Under the new law, in claims of employment discrimination and harassment the definition of employee now means "an individual employed by an employer" or "an individual working as an independent contractor for an employer."[189] Independent contractors are now able to bring claims for harassment and discrimination under Maryland law.[190] This law also expanded the definition of "employer" for harassment claims, and now covers those "with at least one employee for [twenty] or more calendar weeks" in the previous year.[191]

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183. *See id.*

184. N.Y.C. ADMIN. CODE § 8-107(23).

185. *See Protections for Independent Contractors & Freelancers from Discrimination and Harassment*, NYC COMM'N ON HUM. RTS. (Jan. 2020), https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/Independent_Contractor_One_Pager.pdf [http://web.archive.org/web/20210129154409/https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/Independent_Contractor_One_Pager.pdf].

186. *See id.*

187. *See* Racklin et al., *supra* note 63; MD. CODE ANN., STATE GOV'T § 20-601(c)(1)(ii).

188. Michael Robinson, *New Maryland Law Expands Harassment Claims for Employees and Independent Contractors*, KALIJARVI, CHUZI, NEWMAN & FITCH (May 23, 2019), https://kcnfdc.com/blog/new-maryland-law-expands-harassment-claims-for-employees-and-independent-contractors/ [http://web.archive.org/web/20210129154456/https://kcnfdc.com/blog/new-maryland-law-expands-harassment-claims-for-employees-and-independent-contractors/]; MD. CODE ANN., STATE GOV'T § 20-606 (West 2019).

189. MD. CODE ANN., STATE GOV'T § 20-601(c) ("'Employee' means: (i) an individual employed by an employer; or (ii) an individual working as an independent contractor for an employer.").

190. Craig Ballew, *New Maryland Employment Law Will Expand Employer Liability for Workplace Harassment*, FERGUSON, SCHETELICH & BALLEW (Sept. 3, 2019), https://www.fsb-law.com/new-maryland-employment-law-will-expand-employer-liablity-for-workplace-harrassment/ [http://web.archive.org/web/20210129154621/https://www.fsb-law.com/new-maryland-employment-law-will-expand-employer-liablity-for-workplace-harrassment/].

191. Robinson, *supra* note 188.

For other non-harassment discrimination claims employers must have fifteen or more employees to be covered.[192]

Illinois has also amended its anti-discrimination laws under the Illinois Human Rights Act to expand the scope of harassment violations, including extending the Act to protect nonemployees.[193] The amendments create a new definition of harassment and allow nonemployees to bring harassment claims for conduct occurring after January 1, 2020.[194] These changes provide that it is a violation "[f]or any employer . . . to engage in harassment of nonemployees in the workplace."[195] This section defines nonemployee as a person who is "not otherwise an employee of the employer and is directly performing services for the employer pursuant to a contract with that employer."[196] This explicitly includes "contractors and consultants."[197] The amendments also use similar language as above in prohibiting the sexual harassment of nonemployees.[198]

It is worth noting that legislation was introduced during the 116th Congress seeking to amend various federal statutes, including Title VII, to cover independent contractors.[199] Introduced on September 6, 2019, H.R. 4235 seeks to amend federal statutes to require that independent contractors are treated as employees.[200] Specifically, the resolution would amend section 701(f) of Title VII and insert "or an individual who provides work for an employer under the terms of an independent contract

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192. *Id.*

193. *See* Kristin Tauras, *Amendments to the Illinois Human Rights Act Expand the Scope of Harassment*, MCKENNA STORER: BLOG (Jan. 21, 2020), https://www.mckenna-law.com/blog/Illinois-human-rights-act-amendments-expand-scope-of-harassment [http://web.archive.org/web/20210129154655/https://www.mckenna-law.com/blog/Illinois-human-rights-act-amendments-expand-scope-of-harassment].

194. Patrick J. Rocks & Sarah J. Gasperini, *Illinois Enacts Workplace Harassment Law, Creating New and Expanded Obligations for Employers*, JACKSONLEWIS (Aug. 12, 2019), https://www.jacksonlewis.com/publication/illinois-enacts-workplace-harassment-law-creating-new-and-expanded-obligations-employers [http://web.archive.org/web/20210129154747/https://www.jacksonlewis.com/publication/illinois-enacts-workplace-harassment-law-creating-new-and-expanded-obligations-employers].

195. 775 ILL. COMP. STAT. ANN. 5/2-102 (A-10).

196. *Id.*

197. *Id.*

198. *See* 775 ILL. COMP. STAT. ANN. 5/2-102 (D-5) (stating "'nonemployee' means a person who is not otherwise an employee of the employer and is directly performing services for the employer pursuant to a contract with that employer. 'Nonemployee' includes contractors and consultants").

199. H.R. 4235, 116th Cong. (2019) (seeking to amend Title VII, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Americans with Disabilities Act, the Rehabilitation Act, and the Genetic Information Nondiscrimination Act).

200. *Id.*

with such employer" after the word "employer."[201] After being introduced, the resolution was referred to the House Committee on Education and Labor, but no further action has been taken.[202]

III. ANALYSIS

A. Cook v. Farm Bureau Life Insurance Co. of Michigan *Correctly Determined That ELCRA Extends to Cover Independent Contractors*

The *Cook* majority correctly applied the Michigan Supreme Court decision in *McClements* and its interpretation of ELCRA in holding that nonemployees may bring a claim under ELCRA.[203] ELCRA does not explicitly prohibit employers from discriminating against only its employees.[204] *McClements* determined that limiting claims under ELCRA "to those suits brought by an employee against his or her employer is not consistent with the statute."[205] The Michigan Supreme Court stated the "key" is that "liability is contingent upon the employer's affecting or controlling that individual's work status."[206] So, an employer can be held liable for discriminatory acts against a nonemployee.[207] An individual may bring an action under ELCRA if the "employer affected or controlled a term, condition, or privilege of the nonemployee's employment."[208]

The *Cook* concurrence, on the other hand, incorrectly concluded that an independent contractor cannot bring a claim under ELCRA.[209] Judge Boonstra reasoned that because the plaintiff conceded that he is an independent contractor, under *Badiee* he is not covered by ELCRA.[210] Judge Boonstra argued that the *Badiee* decision is binding because that decision has not been reversed by the Michigan Supreme Court or a special

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201. *Id.*

202. *H.R. 4234—Protecting Independent Contractors from Discrimination Act of 2019*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/4235/all-actions [http://web.archive.org/web/20210129154913/https://www.congress.gov/bill/116th-congress/house-bill/4235/all-actions] (last visited Jan. 28, 2021).

203. *See* Cook v. Farm Bureau Life Ins. Co. of Mich., No. 341330, 2019 WL 1460163 (Mich. Ct. App. Apr. 2, 2019), *appeal denied*, 504 Mich. 972, 933 N.W.2d 273 (2019) (mem.).

204. *See id.* at *2.

205. *See* McClements v. Ford Motor Co., 473 Mich. 373, 386, 702 N.W.2d 166, 173 (2005).

206. *Id.* at 386–87, 702 N.W.2d at 173–74.

207. *Id.* at 387, 702 N.W.2d at 173.

208. *Id.*

209. *See* Cook v. Farm Bureau Life Ins. Co. of Mich, No. 341330, 2019 WL 1460163, at *8 (Mich Ct. App. Apr. 2, 2019) (Boonstra, J., concurring).

210. *Id.*

panel of the Michigan Court of Appeals.[211] He also found that although the majority relied on *McClements,* that case does not overrule *Badiee*, and *McClements* did not speak to the issue in the *Cook* case as *McClements* did not present a claim by an independent contractor.[212] Rather, *McClements* still maintains the "statutory requirements that some employment relationship must be affected;" because the plaintiff was an independent contractor, there was no employment relationship.[213]

The *McClements* decision is clear: nonemployees can bring a claim if they can show the "employer affected or controlled a term, condition, or privilege of the nonemployee's employment."[214] The ability to bring a claim under ELCRA is not based on the status of the worker, but whether the employer can control some aspect of the plaintiff's work.[215] The *Cook* majority further noted that the Michigan Supreme Court in *McClements* did not appear to limit its analysis regarding the employer's level of control to "a traditional employer-employee relationship" or "where a worker is hired by a third-party employer to perform a task within another employer's facility" as the concurrence claims.[216]

McClements should be read broadly, as the *Cook* majority interpreted the case, to allow a wider range of workers to bring claims for discrimination under ELCRA.[217] The Michigan Supreme Court itself took an expansive position in *McClements* by refusing to simply limit ELCRA claims to employees, noting that such a stance is not consistent with the statute.[218] Additionally, the Michigan Supreme Court provided a hypothetical example that where a secretary who works for a temporary employment agency is assigned to an office, the employer would likely determine a term, condition, or privilege of employment with the agency.[219] Based on the Michigan Supreme Court's example it appears

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211. *Id. See also* MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.").

212. *Cook*, 2019 WL 1460163, at *8 (Boonstra, J., concurring).

213. *Id.*

214. McClements v. Ford Motor Co., 473 Mich. 373, 387, 702 N.W.2d 166, 173 (2005).

215. *See Cook*, 2019 WL 1460163, at *2.

216. *See id.* at *2 n.1.

217. *See generally id.*

218. *See McClements*, 473 Mich. at 386, 702 N.W.2d at 173.

219. *See id.* at 387 n.10, 702 N.W.2d at 173 n.10. The footnote states in full:

> For example, a secretary who works for a temporary employment agency might not be an "employee" at the office where she is sent to fill in. However, there is little question that the employer at that office would

that the court intended for this decision to apply beyond the specific facts in the case and to other situations where nonemployees may face discrimination.[220]

Therefore, under Michigan state court precedent, a strong case can be made that a nonemployee can bring an ELCRA claim. Yet, there appears to be uncertainty in the law, as the *Cook* decision illustrates, especially in light of *Badiee*.[221] As the *Cook* concurrence indicated, *Badiee* has not been explicitly overruled either by the Michigan Supreme Court or a special panel of the Michigan Court of Appeals.[222] And while *McClements* did not explicitly overrule *Badiee*, the *McClements* analysis indicated that *Badiee's* clear cut declaration that "[c]laims against an employer under § 202 may only be brought by employees"[223] no longer appears to be the state of the law.[224] Arguably *McClements* does modify the *Badiee* holding regarding the ability of independent contractors to bring an ELCRA claim and seems to open the door to allow potential arguments for plaintiffs who may be independent contractors, such as in *Cook*.[225]

As of publication of this Note, only one case has cited to *Cook* and relied on its reasoning to determine that ELCRA does apply to claims brought by independent contractors.[226] In *Jamoua v. Michigan Farm Bureau*, the federal district court for the Eastern District of Michigan relied extensively on *Cook* and *McClements* to find that ELCRA does apply to nonemployees, even in light of *Badiee* and other published Michigan cases.[227] Although this case does indicate that courts are likely to continue to rely on *Cook* and *McClements* to apply ELCRA to independent contractors, this case is in federal court and thus is not binding precedent on Michigan courts. However, *Jamoua* demonstrates how courts can use the extensive reasoning provided in *Cook* to expand the reach of ELCRA,

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dictate a term, condition, or privilege of her employment with the temporary employment agency, at least during the pendency of her temporary employment. *Id.*

220. *See id.*

221. *See generally Cook*, 2019 WL 1460163.

222. *See id.*; *see also* MCR 7.215(J). A special panel of the Michigan Court of Appeals may modify or overrule a previously published decision The Chief Judge will poll the Michigan Court of Appeals' judges to determine whether enough judges agree to reconsider the case. *Id.* If so, a special panel of seven judges not involved in the original case is convened, and the special panel may then overrule the first published decision. *Id.*

223. *See* Badiee v. Brighton Area Schs., 265 Mich. App. 343, 360, 695 N.W.2d 521, 535–36 (2005).

224. *See McClements*, 473 Mich. at 386, 702 N.W.2d at 173.

225. *See generally Cook*, 2019 WL 1460163.

226. Jamoua v. Mich. Farm Bureau, No. 20-CV-10206, 2021 WL 5177472 (E.D. Mich. Nov. 8, 2021).

227. *Id.* at *13.

and correctly concluded that previous Michigan court decisions prohibiting claims by independent contractors are no longer the law in the state.

B. Plaintiffs Have Faced Mixed Success in Their ELCRA Claims Under McClements

As discussed above, because *Cook* is a relatively recent decision, it remains unclear how other plaintiffs and Michigan courts will apply this decision in relation to claims by independent contractors under ELCRA.[228] Only one case in federal court in 2021 cited to *Cook* and recognized that an independent contractor can bring an ELCRA claim as of publication of this Note.[229] However, since *McClements* was decided, the Michigan Supreme Court's decision therein has been invoked in other cases where ELCRA claims have been brought, and it appears to show that both Michigan and federal courts have invoked *McClements* as relevant authority.[230]

The Michigan Court of Appeals in *Barton-Spencer* determined that although the plaintiff was not precluded from pursuing an ELCRA claim just because she was an employee, the plaintiff failed to establish her prima facie case because she did not produce evidence that age was a factor in her termination.[231] The plaintiff also failed to rebut the defendant's legitimate, nondiscriminatory reason for her termination.[232] The *Barton-Spencer* court invoked *McClements* as the controlling precedent, agreeing that "the existence of an employer-employee relationship is not a prerequisite to recovery under the ELCRA."[233]

The United States District Court for the Eastern District of Michigan in *Esquivel* v. *Windsor Machine & Stamping* similarly referenced *McClements* in finding that ELCRA "does not require the existence of an actual employer-employee relationship."[234] The court found that the plaintiff's complaint provided enough proof that the defendant was able to "affect and/or control the terms, conditions and privileges of her

228. *See supra* Section II.C.2.

229. *See supra* Section II.C.2; *Jamoua*, 2021 WL 5177472 at *13.

230. *See generally Cook*, 2019 WL 1460163; Esquivel v. Windsor Mach. & Stamping, Ltd., No 08-11232, 2008 WL 11355058, at *3 (E.D. Mich. Aug. 12, 2008); Barton-Spencer v. Farm Bureau Life Ins. Co. of Mich., Nos. 324661, 325153, 2016 WL 1125968, at *8 (Mich. Ct. App. March 22, 2016).

231. *See Barton-Spencer*, 2016 WL 1125968, at *9.

232. *See id.*

233. *Id.* at *8.

234. Esquivel, 2008 WL 11355058, at *3.

employment."[235] The court noted that a reasonable fact finder could determine that the defendant's plant manager had supervisory authority over the plaintiff, as the manager "controlled [the plaintiff's] work schedule and leave" and threatened disciplinary actions.[236] So, the court held the defendant could not show that the plaintiff was precluded from seeking relief under ELCRA.[237]

In *Cook*, while the plaintiff survived summary disposition even though he was an independent contractor, he still was unable to meet his evidentiary burden to survive summary judgment.[238] The court found that the defendant had a legitimate, nondiscriminatory reason for the plaintiff's termination and the plaintiff was unable to show a genuine issue of material fact that the defendant's proffered reason for termination was pretext.[239] The *McClements* plaintiff was also unable to bring a claim against the defendant because the plaintiff failed to show the defendant "affected or controlled a term, condition, or privilege of her employment."[240]

In *Jamoua*, the United States District Court for the Eastern District of Michigan applied *Cook* and found that although the plaintiff was an independent contractor, he could still bring a discrimination claim under ELCRA Section 37.2202(1)(a).[241] Notably, the court here found that the plaintiff did assert a successful prima facie claim for discrimination and denied the defendant's motion for summary judgment on that claim.[242]

While *McClements* and *Cook* indicate a potential opening for ELCRA claims by nonemployees, many of these claims still have failed in the courts because they lacked the nexus required by *McClements*[243] or the plaintiffs failed to prove their prima facie cases.[244] Although some cases have reflected success for plaintiffs, these two were in federal court, and while they may be persuasive authority, they ultimately are not binding on

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235. *Id.*

236. *Id.*

237. *Id.* at *4.

238. *See* Cook v. Farm Bureau Life Ins. Co. of Mich., No. 341330, 2019 WL 1460163, at *7–8 (Mich. Ct. App. Apr. 2, 2019), *appeal denied*, 504 Mich. 972, 933 N.W.2d 273 (2019) (mem.).

239. *Id.*

240. *See* McClements v. Ford Motor Co., 473 Mich. 373, 389, 702 N.W.2d 166, 175 (Mich. 2005).

241. *See* Jamoua v. Mich. Farm Bureau, No. 20-CV-10206, 2021 WL 5177472, at *13 (E.D. Mich. Nov. 8, 2021).

242. *See id.* at *15–16.

243. *See McClements*, 473 Mich. at 389, 702 N.W.2d at 175.

244. *See, e.g.,* Barton-Spencer v. Farm Bureau Life Ins. Co. of Michigan, Nos. 324661, 325153, 2016 WL 1125968, at *9 (Mich. Ct. App. March 22, 2016); *Cook*, 2019 WL 1460163, at *7–8.

Michigan courts.[245] Ultimately, *McClements* and the *Cook* majority represent the correct approach in allowing ELCRA claims to be brought by nonemployees, including independent contractors. But because the current case law reflects challenges for independent contractors to receive recourse in court, especially in the discourse found in the *Cook* case, there is a compelling argument to amend the language of ELCRA to ensure that all nonemployees can bring their claims in court.

C. Policy Reasons Support Extension of the Elliott-Larsen Civil Rights Act Claims to Independent Contractors

The Michigan Legislature passed ELCRA in 1976, and the statute aims to provide for "broad protection against discrimination of any kind."[246] ELCRA was modeled on previous state civil rights laws, but extended the reach of these laws and broadened the types of discrimination prohibited by law.[247] One unique aspect of ELCRA's breadth is that it explicitly includes a prohibition on weight discrimination, making Michigan the only state providing anti-discrimination protection on that basis.[248]

ELCRA is based on a history of civil rights within the state of Michigan.[249] While not always strongly enforced, the state has a long history of legislative and judicial protection of civil rights.[250] In 1885, Michigan's public accommodation statute, called the Civil Rights Act, stated that "all persons within the jurisdiction of the state shall be entitled to full and equal accommodations and privileges of inns, restaurants, eating houses and all other places of public accommodations."[251] The

245. *See e.g.* Esquivel v. Windsor Mach. & Stamping, Ltd., No. 08-11232, 2008 WL 11355058, at *3 (E.D. Mich. Aug. 12, 2008); Jamoua v. Mich. Farm Bureau, No. 20-CV-10206, 2021 WL 5177472, at *13 (E.D. Mich. Nov. 8, 2021).

246. William H. Heritage, III, *Kassab v. Mich. Basic Prop. Ins. Ass'n: Contract Performance Not Within the Civil Rights Act*, 1993 DET C.L. REV. 1687, 1689 (1993).

247. *See* Aaron K. Bowron, *The Elliott-Larsen Civil Rights Act Celebrating the Progress of Michigan's Civil Rights Laws*, MICH. BAR J. 20 (Aug. 2012), http://www.michbar.org/file/journal/pdf/pdf4article2068.pdf [http://web.archive.org/web/20210129155524/http://www.michbar.org/file/journal/pdf/pdf4article2068.pdf].

248. *See* Catherine Pearson, *Employers are Discriminating Against Overweight Women—And It's Totally Legal*, HUFFPOST (Dec. 5, 2018, 5:45 AM), https://www.huffpost.com/entry/employer-weight-discrimination-women_n_5bd755d7e4b017e5bfd4a12a [http://web.archive.org/web/20210401210201/https://www.huffpost.com/entry/employer-weight-discrimination-women_n_5bd755d7e4b017e5bfd4a12a].

249. *See* Bowron, *supra* note 247, at 20.

250. *See id.*

251. *See* Roberta M. Gubbins, *Legal Milestone Honors Elliott-Larsen Civil Rights Act*, LEGALNEWS (Sept. 17, 2012), http://www.legalnews.com/oakland/1367237 [http://web.archive.org/web/20210129155731/http://www.legalnews.com/oakland/1367237].

Michigan Supreme Court also relied on the Civil Rights Act to hold the separate but equal doctrine in schools to be unconstitutional in 1890, sixty-four years before *Brown v. Board of Education*.[252] Michigan's current constitution, adopted in 1963, gave constitutional status to civil rights in the state.[253] The Elliott-Larsen Civil Rights Act was passed in 1976, and is the product of a bipartisan effort by Daisy Elliott, a Democrat and "a leader in the civil rights movement," and Mel Larsen, a Republican.[254] Since its passage, ELCRA has been amended to expand the coverage it offers; most recently a 2009 amendment expanded "anti-discrimination protections in the workplace for pregnancy, childbirth, or a related medical condition."[255]

Based on Michigan's history of increasingly providing broader protections in the area of civil rights, as well as ELCRA's broad stance, it is reasonable to believe the statute should be interpreted broadly in order to cover more groups of people, including independent contractors in the employment provisions.[256] In an op-ed, Mel Larsen, one of the authors of ELCRA, stated that the intent of the law "was to offer the broadest possible protections against discrimination of any kind."[257] Larsen states that ELCRA should be amended to specifically include protections for members of the LGBTQ community.[258] Although this op-ed does not specifically discuss independent contractors, the principles espoused by the ELCRA drafter demonstrates that ELCRA is intended to have a broad and comprehensive scope.[259]

In statutory construction, Michigan courts' purpose is to "discern and give effect to the Legislature's intent."[260] Courts will begin with the plain language of the statute, and if that language is unambiguous courts must

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252. *See* Bowron, *supra* note 247, at 20.

253. *See id.* (noting the Michigan Constitution states "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin"); MICH. CONST. 1963, art 1, § 2.

254. *See* Gubbins, *supra* note 251.

255. *See* Bowron, *supra* note 247, at 21.

256. *See id.* at 20.

257. *See* Mel Larsen, Opinion, *Larsen: Mich. Civil Rights Act was Meant to Include LGBTQ, I Know Because I Wrote it*, LANSING STATE J. (Jun. 15, 2020, 11:25 AM) https://www.lansingstatejournal.com/story/opinion/contributors/viewpoints/2020/05/20/elliott-larsen-civil-rights-act-should-include-lgbtq-viewpoint/5212644002/ [http://web.archive.org/web/20210129155900/https://www.lansingstatejournal.com/story/opinion/contributors/viewpoints/2020/05/20/elliott-larsen-civil-rights-act-should-include-lgbtq-viewpoint/5212644002/].

258. *See id.*

259. *See id.*

260. *See* Elezovic v. Bennett, 274 Mich. App. 1, 5, 732 N.W.2d 452, 456 (2007) (citing Echelon Homes, LLC v. Carter Lumber Co., 472 Mich. 192, 196, 694 N.W.2d 544 (2005).

enforce the statute as it is written.[261] ELCRA is a remedial statute and must be "liberally construed to suppress the evil and advance the remedy."[262] The Michigan Court of Appeals stated that one of ELCRA's purposes is to "eradicate particular forms of discrimination in the workplace."[263] Based on this language, indicating a liberal construction of ELCRA to "eradicate" discrimination, it is reasonable to read the statute as attempting to protect the widest class of people as possible.[264] As the *McClements* court noted, ELCRA does explicitly allow for some claims by nonemployees, for example a failure to hire or recruit an applicant for employment, and discrimination against former employees in the operation of a benefit plan.[265] The statute already envisions nonemployees' claims, and extending the statute to allow claims by independent contractors is consistent with the goal of the statute to end discrimination in the workplace. [266]

Although Michigan's ELCRA arguably extends to nonemployees when an employer "controls a term, condition, or privilege of employment,"[267] amending ELCRA to explicitly include independent contractors would best protect independent contractors as they would be "entitled to the full range of discrimination" remedies currently available to employees.[268] This would offer legal protections to a larger number of workers and remove incentives for employers to misclassify "workers as independent contractors to evade discrimination laws."[269]

Providing more protections to a wider variety of workers, beyond just those classified as employees is important because of changes in composition of the U.S. workforce.[270] Between 2005 to 2015, alternative work arrangements, which included independent contractors, constituted ninety-four percent of employment growth in the U.S.[271] There have also

261. *See id.*

262. *See id.* at 6, 732 N.W.2d at 456 (quoting Eide v. Kelsey-Hayes Co., 431 Mich. 26, 34, 427 N.W.2d 488, 491 (1988).

263. *See id.*

264. *See id.*

265. *See* McClements v. Ford Motor Co., 473 Mich. 373, 386, 702 N.W.2d 166, 173 (2005); *see also* M.C.L. § 37.2202(1)(b)–(c) (stating employers may not "[l]imit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity" or "[s]egregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.").

266. *See id.*

267. *See McClements*, 473 Mich. at 386, 702 N.W.2d at 173; *see also supra* Part III.A.

268. *See* Maltby & Yamada, *supra* note 59, at 266.

269. *Id.*

270. *See generally* Katz & Krueger, *supra* note 14, at 1.

271. *Id*. at 6–7.

been changes to the dynamics between employers and workers as the gig economy becomes more pervasive.[272] Although there are debates over whether to classify gig workers as either employees or independent contractors, the gig economy is no longer a small section of the workforce, as some estimates place it at thirty-four percent of the workforce.[273] Limiting anti-discrimination protections to only employees might be too narrow in light of the growing number of workers in the gig economy, especially since the classification of these workers remains undetermined in many cases.[274]

D. Regardless of the Cook *Decision, the Michigan Legislature Should Amend the Elliott-Larsen Civil Rights Act to Explicitly Protect Independent Contractors from Employment Discrimination*

As discussed, some states have taken steps to explicitly protect independent contractors under their laws.[275] New York state has changed its State Human Rights law so that it is unlawful "for an employer to permit unlawful discrimination against non-employees in its workplace" and imposes liability upon employers to a worker who is a "contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace."[276] New York City has taken similar steps in the New York City Human Rights Law with an amendment stating that "protections of this chapter [unlawful discriminatory practice] relating to employees apply to interns, freelancers and independent contractors."[277] Maryland passed an amendment changing the definition of employee to include independent contractors.[278] Thus, independent contractors are now able to bring claims for harassment and discrimination under Maryland law.[279]

While New York and Maryland take slightly different approaches, these states' actions appear to provide broad protections to nonemployees by placing independent contractors on the same level as employees under anti-discrimination laws.[280] Independent contractors are treated as employees under these statutes and are entitled to the same protections.[281]

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272. Shakfeh, *supra* note 64, at 9.
273. *See* GLYNN, *supra* note 1, at 34–35.
274. *See* GLYNN, *supra* note 1, at 35.
275. *See supra* Part II.D.
276. N.Y. EXEC. LAW § 296-d (McKinney 2019).
277. N.Y.C. ADMIN. CODE § 8-107(23).
278. *See* MD. CODE ANN., STATE GOV'T § 20-601(c)(1).
279. *See* Ballew, *supra* note 190.
280. *See* Racklin et al., *supra* note 63.
281. *Id.*

While providing explicit protection, New York appears to go further than Maryland, as New York prohibits discrimination against "non-employees," a broad term which may potentially cover more workers than just independent contractors.[282] Maryland, on the other hand, only expanded its definition of employee to cover independent contractors, meaning that workers who might be classified under another status could be left out of the protections provided under this statute.[283]

Illinois appears to take a different approach than New York and Maryland, focusing on extending protections against harassment to independent contractors.[284] Under the state's laws it is a violation "[f]or any employer . . . to engage in harassment of nonemployees in the workplace."[285] Illinois appears to provide protections only against discriminatory harassment and sexual harassment.[286] This potentially leaves independent contractors unable to seek redress for other forms of discrimination in the workplace.[287]

Both Maryland and New York provide the same protections to independent contractors and employees under their discrimination laws, providing broader coverage than Illinois which only focuses on harassment.[288] Because ELCRA was intended to provide the broadest protections as possible, amending ELCRA in a way similar to Maryland and New York's laws would best fit the goals of this statute. [289] And as discussed, limiting protections to just independent contractors, although they do make up the largest portion of the contingent workforce, could still leave many workers unprotected from discrimination in their places of work.[290] To provide protection to the largest amount of workers, a possible amendment to the ELCRA should follow the wording used by New York and provide protections to nonemployees.[291]

Section 2202(1)(a) of the ELCRA prohibits an employer from "otherwise discriminat[ing] against an individual with respect to employment, compensation, or a term, condition or privilege of employment."[292] The statute does not define "individual," and thus an amendment to ELCRA could add an expansive definition to this term to

282. N.Y. EXEC. LAW § 296-d (McKinney 2019).
283. *See* Racklin et al., *supra* note 63.
284. *See id.*
285. 775 ILL. COMP. STAT. ANN. 5/2-102.
286. *See* Racklin et al., *supra* note 63.
287. *See id.*
288. *See id.*
289. *See* discussion *supra* Part III.B.
290. Katz & Krueger, *supra* note 14, at 8.
291. *See* Racklin et al., *supra* note 63.
292. MICH. COMP. LAWS § 37.2202(1)(a).

ensure that independent contractors are covered by the statute.[293] A potential amendment could be added to section 2201[294] and read: "(e) 'Individual' includes employees and non-employees, including an independent contractor, or a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace." Such an amendment will explicitly ensure independent contractors and other nonemployees are protected by ELCRA. This will also relieve any confusion created by court decisions or challenges plaintiffs may have in proving a case under the *McClements* '"affecting a term or condition of employment" test.[295]

IV. CONCLUSION

The stakes of classification as an employee have far reaching consequences for workers in terms of their access to legal protections against discrimination, entitlement to minimum wages and overtime, and access to benefits such as family leave. As the number of workers in nonemployee roles continues to increase, especially considering the growth of the gig economy and increased employment opportunities for alternative work positions, an increasing number of workers are likely to be unprotected by federal employment laws. Until Congress takes action to ensure these federal laws protect all workers, states will need to step in to fill these gaps in protections.

The *Cook* case correctly extended *McClements* in finding that independent contractors may bring claims under ELCRA where they show their employer affected or controlled a term, condition, or privilege of the worker's employment. Although *McClements* extends to nonemployees, unlike workers classified as employees, nonemployees will need to prove the extra step that their employer affected or controlled their employment to prevail under ELCRA. The intent of ELCRA was to be an expansive piece of legislation providing extensive protections for those living in Michigan, and this goal supports the argument to amend the statute to provide protections for more workers. Finally, amending ELRCA to explicitly include nonemployees is an important option to ensure that independent contractors and other similarly situated workers are protected under Michigan law.

293. *See* MICH. COMP. LAWS § 37.2201.
294. MICH. COMP. LAWS § 37.2201.
295. *See* discussion *supra* part III.A.