Tech REG CHRONICLE

GIG ECONOMY

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CPI COMPETITION POLICY INTERNATIONAL

Competition Policy International, a What's Next Media and Analytics Company

LETTER FROM THE EDITOR

Dear Readers,

The "gig economy" refers to a free market system in which temporary positions are increasingly common; and organizations hire independent workers for short-term commitments. Traditionally, the term "gig" was used by musicians to define a performance engagement. Today, it has become a more general term to refer to a form of employment relationship.

Examples of gig workers include freelancers, independent contractors, project-based workers and temporary or part-time hires. Mobile applications and other digital technologies are often used to connect customers with gig workers (as anyone who has ordered a mobile take-out order will attest). The use of such technology has served as a catalyst for the rise of this growing common practice.

Obviously, such a fundamental shift in employment relationships will raise certain regulatory concerns. The pieces in this Chronicle deal with these issues.

Terri Gerstein & LiJia Gong note that as the the gig economy has expanded, New York, and Seattle have become leaders in regulating working conditions in the platform economy in recent years. Other localities have also brought enforcement actions to enforce platform workers' rights, recovering millions of dollars for workers. Within the federalist system of the United States, cities and localities may be well-suited to advance protections for platform workers. City action may be well-suited because a high concentration of platform workers live and work in urban areas, and such communities are often disproportionately affected by traffic and congestion caused by platform work.

Michael H. LeRoy notes that technologies are rapidly evolving. However, there is growing potential to deskill or obsolesce the work performed by professionals and managers. Basic laws such as the Fair Labor Standards Act and National Labor Relations Act— passed in the

1930s — are founded on traditional conceptions of individual discretion and supervision. As artificially intelligent technologies limit the need for having employees direct the work of others or use their expertise, there is growing potential for these employees to fall outside the boundaries of these laws. Technologists should consider these displacing and disruptive effects; and lawmakers should begin to anticipate significant dislocations caused by AI, bionic, and humanoid technologies.

Elspeth Hansen reviews the Antitrust Division of the Department of Justice's amicus brief in an appeal before the National Labor Relations Board; and weighs in on a potential NLRB decision regarding who is an "employee" or an "independent contractor" under the National Labor Relations Act, a ruling that may have significant implications for the gig economy. Although the Antitrust Division did not take a position on the criteria that should be applied to determine if a worker is an employee or an independent contractor, the brief reflects that the Division considered a broader definition of an "employee" to generally be pro-competitive. The article examines the implications of the Division's arguments and considers how the Division may proceed with respect to the gig economy.

Scott Nelson & Michael Reed note that the number of Americans taking on freelance work has been on a constant rise since 2019. The COVID-19 pandemic and the ensuing so-called Great Resignation that followed seem to have hastened the pace, as many workers who once held traditional jobs began freelancing. As more workers join the gig economy, a question that has lingered since the beginning — whether gig workers should be classified as independent contractors or employees — is taking on a growing level of importance. The article further discussion impacts on independent contractors, implications from the NLRB, federal and state laws, and important state legal decisions.

From a European perspective, **Despoina Georgiou** notes that the European Commission recently published draft Guidelines on collective bargaining for solo self-employed persons. These Guidelines aim to remove existing competition law restrictions to collective bargaining for vulnerable solo self-employed people. The piece provides an overview and an initial, critical, assessment of these draft Guidelines.

Finally, from an Australian perspective, **Tess Hardy, Anthony Forsyth & Shae McCrystal** survey two recent regulatory developments which highlight the critical role of competition law and voluntary industry standards in regulating gig work. In particular, the class exemption for small business collective bargaining that was recently introduced by the federal Australian Competition and Consumer Commission presents important opportunities for workers to enhance working conditions via collectively bargaining with platform companies.

These pieces will provide ample food for thought as the regulation of the gig economy grows in relevance and importance in years to come.

As always, many thanks to our great panel of authors.

Sincerely,
CPI Team

TABLE OF CONTENTS

CPI COMPETITION POLICY™ INTERNATIONAL

GIG ECONOMY

JULY 2022

SUMMARIES

THE GROWING ROLE OF LOCALITIES IN THE UNITED STATES IN ENACTING AND ENFORCING PROTECTIONS FOR GIG ECONOMY WORKERS

By Terri Gerstein & LiJia Gong

As the gig economy has expanded, New York City, and Seattle, two progressive cities in the United States, have become leaders in regulating working conditions in the platform economy in recent years through legislation and enforcement. Other localities have also brought enforcement actions to enforce platform workers' rights, recovering millions of dollars for workers. Within the federalist system of the United States, cities and localities may be well-suited to advance protections for platform workers. Localities are new actors in the worker protection space and are innovating to meet the evolving needs of constituents, community and advocacy organizations, and local economies. To some extent, localities also have been able to sidestep the broader worker classification issues faced by states and the federal government by simply mandating labor standards regardless of classification. City action may be well-suited because a high concentration of platform workers live and work in urban areas, and because such communities are often disproportionately affected by traffic and congestion caused by platform work. Localities in the United States and beyond may be a source of untapped potential for advancing and protecting platform workers' rights in a variety of ways.

AN ASSESSMENT OF THE EU'S DRAFT GUIDELINES ON THE APPLICATION OF EU COMPETITION LAW TO COLLECTIVE AGREEMENTS OF THE SOLO SELF-EMPLOYED

By Despoina Georgiou

On December 9, 2021, the European Commission published its draft Guidelines on collective bargaining for solo self-employed persons. The Guidelines aim to remove existing competition law restrictions to collective bargaining for vulnerable solo self-employed people. This article provides an overview and initial assessment of the draft Guidelines. After demonstrating the reasons that led to the adoption of the new instrument (part 1), the article analyses its protective provisions (part 2) and assesses its potential impact (part 3). As it is explained, even though the draft Guidelines go a long way in providing protection to a large category of self-employed persons, they (i) do not capture all those who are in need of protection; (ii) do not address issues regarding the application of Article 101 to decisions of associations of self-employed persons-undertakings or agreements between self-employed persons-undertakings concluded outside the context of collective bargaining negotiations that concern the improvement of their working conditions; and (iii) do not address the possible application of Article 102 to collective agreements by self-employed persons-undertakings.

WILL EMPLOYMENT LAWS KEEP UP WITH AI WORK?

By Michael H. LeRoy

Technologies are rapidly evolving to enhance human productivity; however, there is growing potential to deskill or obsolesce the work performed by professionals and managers. Basic laws such as the Fair Labor Standards Act ("FLSA") and National Labor Relations Act ("NLRA") — passed in the 1930s — are founded on traditional conceptions of individual discretion and supervision. As artificially intelligent technologies limit the need for having employees direct the work of others or use their expertise, there is growing potential for these employees to fall outside the boundaries of these laws. As a consequence, professional employees who are exempt under the FLSA could make valid claims for overtime pay; managers who are exempt under the NLRA could make valid claims for forming a union and bargaining with employers; or these employees could become gig workers, untethered from employment. More distant possibilities include humanoids, hybridized persons whose minds and bodies are improved for performance with genetic and bionic interventions. Such developments would raise fundamental public policy questions about regulating the competitive effects of artificially-enhanced labor. Technologists should consider these displacing and disruptive effects; and lawmakers should begin to anticipate significant dislocations caused by AI, bionic, and humanoid technologies.

REGULATING GIG WORK IN AUSTRALIA: THE ROLE OF COMPETITION REGULATION AND VOLUNTARY INDUSTRY STANDARDS

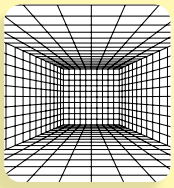
By Tess Hardy, Anthony Forsyth & Shae McCrystal

This article surveys two recent Australian regulatory developments which highlight the critical role of competition law and voluntary industry standards in regulating gig work. In particular, the class exemption for small business collective bargaining that was recently introduced by the federal Australian Competition and Consumer Commission ("ACCC") presents important opportunities for platform workers to enhance working conditions via collectively bargaining with platform companies. Complementing this development, the state government of Victoria is planning to introduce a set of Fair Conduct and Accountability Standards for the platform economy, which include provisions to encourage platforms to engage collectively with workers. We consider how the introduction of these voluntary industry standards may interact with federal competition laws and reflect on the impact these standards may have for gig workers on the ground.

THE ANTITRUST DIVISION AND THE POTENTIAL IMPLICATIONS OF A LABOR RULING FOR GIG WORKER ORGANIZING: A LOOK AT THE *ATLANTA OPERA* AMICUS BRIEF

By Elspeth Hansen

The Antitrust Division of the Department of Justice's amicus brief in an appeal before the National Labor Relations Board (the "NLRB" or the "Board") weighs in on a potential NLRB decision regarding who is an "employee" or an "independent contractor" under the National Labor Relations Act, a ruling that may have significant implications for the gig economy. Although the Antitrust Division did not take a position on the criteria that should be applied to determine if a worker is an employee or an independent contractor, the brief reflects that the Division considered a broader definition of an "employee" to generally be pro-competitive. This article examines the implications of the Division's arguments regarding the reach of federal antitrust law with respect to worker organizing, the impact of alleged misclassification on competition, actions that might be brought against workers or companies, and the potential need for "modernization." Looking forward, the article considers how the Division may proceed with respect to the gig economy.



LABOR AND EMPLOYMENT PERSPECTIVES ON THE GIG ECONOMY – HOW THE PRO ACT AND A NEW LABOR BOARD MIGHT IMPACT GIG WORKERS AND THEIR "EMPLOYERS"

By Scott Nelson & Michael Reed

The "gig" economy is on the rise. According to the U.S. Chamber of Commerce, the number of gig economy workers — independent contractors or freelancers who do short-term project-based, hourly, or part-time work for multiple clients — has grown in recent years, with 57 million Americans taking on freelance work in 2019. The COVID-19 pandemic and the ensuing Great Resignation that followed seem to have hastened the pace, as many workers who once held traditional jobs began freelancing. As more workers join the ranks of the gig economy, a question that has lingered since the beginning — whether gig workers should be classified as independent contractors or employees — is taking on a growing level of importance. The article further discussion impacts on independent contractors, implications from the NLRB, federal and state laws, and important state legal decisions.

THE GROWING ROLE OF LOCALITIES IN THE UNITED STATES IN ENACTING AND ENFORCING PROTECTIONS FOR GIG ECONOMY WORKERS

BY
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Governments around the world have struggled with the question of how to regulate work procured through apps, or platforms. In a wide range of political and legal systems, companies have sought to evade the responsibilities of employers and instead taken the position that platform workers are independent contractors, all running their own small businesses. Such companies engage workers in a range of industries; although transportation and food delivery are the most common, there are also platform companies that use this

model to engage home care, health care, hospitality, house cleaning, and other kinds of workers. In the United States, transportation and delivery are generally dominated by a few companies: Uber and Lyft in transportation, and DoorDash, Instacart, UberEats, Grubhub, and Postmates in the delivery space.

In the United States, almost all federal and state laws governing the workplace protect those classified as employees and not independent contractors. Labor and employment matters are generally addressed at the federal or state level, or both. Certain laws, like the National Labor Relations Act, occupy the field and preempt state action, while others, like anti-discrimination laws or the Fair Labor Standards Act, serve as a floor and allow subfederal units, generally states, to legislate and enforce greater protections. Other programs are a product of joint federal-state legislation and administration, such as unemployment insurance programs and workplace safety and health regulation in some states. Generally, each law has its own definition of the term "employee" for the purposes of coverage; these definitions often look to similar or overlapping sets of factors, but they are not identical. Overall, battles related to proper classification of workers, including platform workers, have generally been fought at the federal[2] and state[3] levels in the United States.

> ***In the United States, almost all federal and state laws governing the workplace protect those classified as employees and not independent contractors***

Historically, cities and localities have not had a significant role in regulating the workplace in the United States; it simply wasn't thought of as included in the universe of what localities did for their residents. But this has changed considerably in recent years, particularly in the past decade. Progressive cities and localities have passed cutting edge worker protection laws, created and funded dedicated labor enforcement agencies, established worker councils for stakeholder participation, conducted investigations and brought lawsuits about violations of municipal workplace laws, and more.[4] In some instances, policymaking that started at the local level has catalyzed action at the state level; localities were the first to answer the call of the Fight for 15 campaign to raise minimum wages to $15 per hour, and they have also led on requiring employers to provide paid sick leave. This surge of activity has added a new layer to the federalist system. (One less positive development has been state preemption of local worker protection laws, particularly in conservative regions of the country).

It is within this broader context that a handful of localities have begun to take action to address the working conditions of platform workers, through new laws and enforcement. While such action has generally been limited to a few leading cities, they provide an example of meaningful local action, and also provide proof of concept regarding the role localities can play more broadly in this space.

To some extent, localities may be well-suited to legislate and enforce certain laws related to platform workers, for several reasons. They typically do not administer social insurance programs, like unemployment insurance or workers compensation systems, which require a determination of classification for workers to qualify. For matters under their jurisdiction, localities may be able to sidestep the question of classification and simply mandate core working conditions regardless of employee status. The higher concentration of

2 With regard to wage and hour issues, the U.S. Department of Labor has not directly resolved the question of platform worker classification, although it has issued and rescinded guidance and regulations on broader worker classification, as a general matter, as administrations have changed. Similarly, the National Labor Relations Board ("NLRB") issued a decision — now being revisited — about proper classification of Super Shuttle airport van drivers, but the NLRB has not directly addressed platform worker classification head-on.

3 States have passed legislation on misclassification, including California's AB5 (adopting the more worker-protective ABC test to determine employee status) and the subsequent Proposition 22 ballot initiative, exempting platform workers from AB5's protection. Legislation has also been passed in many states carving platform workers out of employment status and employee protections. *Rights at Risk: Gig Companies' Campaign to Upend Employment As We Know It*, NATIONAL EMPLOYMENT LAW PROJECT (April 2019), https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2019.pdf. Meanwhile, there have been court cases and enforcement in relation to these matters: in 2020, the California and Massachusetts Attorneys General sued Uber and Lyft, and that same year, New York's highest court upheld a state labor department decision that a Postmates worker was an employee entitled to unemployment benefits. See *Vega v. Postmates,* 162 A.D.3d 1337 (N.Y. App. Div. 2018); Terri Gerstein, *Workers' Rights and Protection by State Attorneys General*, ECONOMIC POLICY INSTITUTE and HARVARD LABOR AND WORKLIFE PROGRAM (Aug. 27, 2020), https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/.

4 Terri Gerstein and LiJia Gong, *The Role of Local Government in Protecting Workers' Rights,* ECONOMIC POLICY INSTITUTE, HARVARD LABOR AND WORKLIFE PROGRAM, LOCAL PROGRESS (June 13, 2022), https://www.epi.org/publication/the-role-of-local-government-in-protecting-workers-rights-a-comprehensive-overview-of-the-ways-that-cities-counties-and-other-localities-are-taking-action-on-behalf-of-working-people/.

transportation network company ("TNC") drivers in cities[5] — which is likely to be the case for other platform workers as well — means that city laws can reach a large number of affected workers. In addition, this concentration of platform work in cities gives rise to particularly urban problems, such as concerns about traffic and congestion. In addition, many urban areas have high costs of living, necessitating even more urgent measures to address low worker pay. One challenge facing localities aiming to regulate platform workers, however, is that classification disputes at the state level can result in preemption of local action.

> ***To some extent, localities may be well-suited to legislate and enforce certain laws related to platform workers, for several reasons***

Two cities–New York City and Seattle–have taken the lead in passing legislation aimed at protecting platform workers and expanding their rights. In 2018, New York City passed legislation empowering the Taxi and Limousine Commission ("TLC"), the city's agency that regulates taxis and for-hire vehicles, to set minimum pay rates for app-based drivers.[6] Accordingly, later that year, the TLC issued a rule setting a minimum pay standard[7] based on a study it had previously commissioned.[8] In 2022, New York City announced a 5.3 percent increase to the driver pay rate.[9] In 2021, New York City passed several policies to protect delivery workers[10] whose precarity was made clear during the COVID-19 pandemic.[11] An organization of bicycle delivery workers, Los Deliveristas Unidos, played a significant role in advocating for the new laws.[12] The policies[13] include a requirement that restaurants allow delivery workers to use their restrooms as long as they're picking up an order, transparency for customers and workers about tips (whether the tip goes to workers, in what form, and on what timeline),[14] a prohibition on fees for receiving payment and a requirement that payments are made weekly including at least one option that does not require a bank account, a prohibition on charging workers for insulated delivery bags, and permission for workers to limit their personal delivery zones. The new laws also include a requirement that the city's Department of Consumer and Worker Protection conduct a study on worker pay and

5 Aditi Shikrant, Transportation experts see Uber and Lyft as the future. But rural communities still don't use them, VOX (Jan. 11, 2019), https://www.vox.com/the-goods/2019/1/11/18179036/uber-lyft-rural-areas-subscription-model.

6 *Establishing minimum payments to for-hire vehicle drivers and authorizing the establishment of minimum rates of fare*, NEW YORK CITY COUNCIL (Aug. 14, 2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?From=RSS&ID=3487613&GUID=E47BF280-2CAC-45AE-800F-ED5BE846EFF4.

7 *Notice of Promulgation*, NEW YORK CITY TAXI AND LIMOUSINE COMMISSION (Dec. 4, 2018), https://www1.nyc.gov/assets/tlc/downloads/pdf/driver_income_rules_12_04_2018.pdf.

8 James A. Parrott and Michael Reich, *An Earnings Standard for New York City's App-based Drivers: July 2018 Economic Analysis and Policy Assessment*, THE NEW SCHOOL CENTER FOR URBAN AFFAIRS and CENTER ON WAGE AND EMPLOYMENT DYNAMICS (July 2018), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3a946d2a73a677f855b9/1530542742060/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf.

9 Amrita Khalid, *NYC to raise minimum pay for Uber and Lyft drivers*, ENGADGET (Feb. 15, 2022), https://www.engadget.com/nyc-gig-drivers-pay-increase-012304976.html.

10 Press Release, New York City Council, Council Votes on Bills to Protect Delivery Workers (Sept. 23, 2021), https://council.nyc.gov/press/2021/09/23/2106/; Claudia Irizarry Aponte and Josefa Velasquez, *New York City Passes Landmark New Protections for Food Delivery Workers* (Sept. 23, 2021), https://www.thecity.nyc/2021/9/23/22690509/new-york-city-landmark-food-delivery-worker-law.

11 Maria Figueroa et. al., Essential but Unprotected: App-based Food Couriers in New York City, LOS DELIVERISTAS UNIDOS (Sept. 2021), https://losdeliveristasunidos.org/ldu-report.

12 Claudia Irizarry Aponte et. al., *The Deliveristas' Long Journey to Justice*, THE CITY (Oct. 13, 2021), https://www.thecity.nyc/2021/9/23/22690318/nyc-landmark-law-food-delivery-workers-deliveristas.

13 Rachel Sugar, *What You Need to Know About NYC's New Delivery-App Laws*, GRUB STREET (Sept. 23, 2021), https://www.grubstreet.com/2021/09/new-delivery-app-laws-nyc.html.

14 *A Local Law to amend the administrative code of the city of New York, in relation to the disclosure of gratuity policies for food delivery workers*, NEW YORK CITY COUNCIL (Oct. 24, 2021), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4296908&GUID=678592C0-D7F3-410A-9D1A-4418397D3F07&Options=ID%7cText%7c&Search=third+party.

enact rules creating minimum per-trip payments by a set date.[15]

Seattle has also been a leader in raising standards for gig workers.[16] In 2020, the city passed an ordinance setting minimum pay for transportation network company drivers,[17] as well as a Transportation Network Company Driver Deactivation Rights Ordinance,[18] which grants drivers the right to challenge unwarranted deactivations before a neutral arbitrator and creates a Driver Resolution Center to provide representation for drivers. In response to the impact of the pandemic on app-based workers, Seattle extended paid sick leave to food delivery and transportation gig workers[19] and also passed an ordinance providing food delivery gig workers premium pay on a per pick-up and drop-off basis.[20] Unfortunately, the ordinances that regulate transportation network company drivers are now preempted by a law passed at the state level that codifies the classification of app-based drivers as independent contractors.[21] Despite this setback, Seattle has continued to set minimum standards for gig workers that are not covered by the state law. For example, in May 2022, the Seattle City Council passed an ordinance establishing minimum payments for app-based delivery workers, requires companies to be transparent about worker pay and tips, and bans companies from punishing workers for rejecting jobs.[22]

Seattle has also been a leader in raising standards for gig workers

Cities have also regulated gig economy companies in ways that do not directly impact workers but have indirect impacts on them. For example, since the beginning of the pandemic at least 69 localities have passed fee caps targeting delivery apps, with the most common fee cap set at 15 percent.[23] Although most of these fee caps were temporary measures tied to public health declarations, some cities have made their caps permanent.[24] These fee caps aim to protect restaurants from abusive fees by the big four delivery platforms that dominate the industry.[25] The impact of such regulations on delivery workers is unclear–for example, does limiting commissions drive down delivery worker compensation, or do abusive fees reduce the number of delivery worker jobs by driving restaurants out of business? In any case, it is notable that despite record-breaking profits by the big four delivery platforms during the pandemic, localities have nonetheless had to set minimum compensation for delivery workers.

15 *A Local Law to amend the administrative code of the city of New York, in relation to establishing minimum per trip payments to third-party food delivery service and third-party courier service workers*, NEW YORK CITY COUNCIL (Oct. 24, 2021), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4927204&GUID=FCEA3CE8-8F00-4C8C-9AF1-588EA076E797&Options=ID%7CText%7C&Search=delivery.

16 In one of the earliest local efforts to improve the working conditions of gig workers, Seattle passed an ordinance in 2015 authorizing a collective bargaining process between drivers and transportation network companies through an "exclusive driver representative." The ordinance was ultimately found to be preempted by federal antitrust laws.

17 *Transportation Network Company Driver Minimum Compensation*, Seattle Mun. Code Chapter 14.33, https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.33TRNECODRMICO.

18 *Transportation Network Company Driver Deactivation Rights Ordinance*, SEATTLE OFFICE OF LABOR STANDARDS (July 1, 2021), https://www.seattle.gov/laborstandards/ordinances/tnc-legislation/driver-deactivation-rights-ordinance.

19 *AN ORDINANCE relating to gig workers in Seattle; establishing labor standards requirements for paid sick and paid safe time for gig workers working in Seattle; and amending Sections 3.02.125 and 6.208.020 of the Seattle Municipal Code*, SEATTLE OFFICE OF THE CITY CLERK (June 12, 2020), https://seattle.legistar.com/LegislationDetail.aspx?ID=4538824&GUID=D6D81875-E8F2-4C8D-B9B1-4B623D196828&Options=ID%7cText%7c&Search=paid+sick+time.

20 *Gig Worker Premium Pay Ordinance*, SEATTLE OFFICE OF LABOR STANDARDS (June 26, 2020), https://www.seattle.gov/laborstandards/ordinances/covid-19-gig-worker-protections-/gig-worker-premium-pay-ordinance.

21 *Certification of Enrollment Engrossed Substitute House Bill 2076*, 67th Legislature, 2022 Regular Session (March 7, 2022), https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/House%20Passed%20Legislature/2076-S.PL.pdf?q=20220415084122.

22 Sarah Grace Taylor, *Seattle City Council passes 'Pay Up' bill, raising wages for certain gig workers,* SEATTLE TIMES (May 31, 2022), https://www.seattletimes.com/seattle-news/politics/seattle-city-council-passes-pay-up-bill-raising-wages-for-certain-gig-workers/.

23 *State and Local Fee Caps for Dominant Delivery Apps*, PROTECT OUR RESTAURANTS, http://protectourrestaurants.com/fee-caps.

24 Joe Guszkowski, NYC Approves Permanent Cap on Delivery Commissions, RESTAURANT BUSINESS (Aug. 26, 2021), https://www.restaurantbusinessonline.com/technology/nyc-approves-permanent-cap-delivery-commissions.

25 *Why Investigate Delivery Apps*, PROTECT OUR RESTAURANTS, https://www.protectourrestaurants.com/research.

In addition to passing legislation, several localities have taken enforcement actions against platform companies to protect workers' rights.

Seattle's Office of Labor Standards, for example, was especially active in enforcing Covid-related protections for platform workers, particularly the city's Gig Worker Paid Sick and Safe Time law, passed in June 2020. By the end of 2021, Seattle enforcers had obtained a $3.4 million settlement with Uber,[26] a nearly $1 million settlement with PostMates,[27] and a $160,000 settlement with DoorDash,[28] as well as recovery of more than $100,000 from Go Puff.[29]

San Francisco enforcers also took action. In 2021, the City Attorney, San Francisco Office of Labor Standards and Enforcement ("OLSE") and a City Supervisor announced a $5.3 million settlement with DoorDash,[30] the largest in the OLSE's history, following an investigation into potential violations of the city's paid sick leave law as well as its Health Care Security Ordinance,[31] which creates an employer spending requirement to fund health care benefits for their employees. In addition, OLSE reached a settlement of nearly $750,000 with grocery delivery company Instacart in 2020 under the ordinance.[32]

> ***Cities have also regulated gig economy companies in ways that do not directly impact workers but have indirect impacts on them***

In California, there has been enforcement by city and–in some cases–district attorneys ("DAs").[33] In 2019, the San Diego city attorney sued Instacart for misclassification; a month later, the court granted a preliminary injunction, although enforcement of the injunction was temporarily stayed.[34] In 2020, the city attorneys of Los Angeles, San Diego, and San Francisco joined the State Attorney General in suing Uber and Lyft.[35] The San Francisco DA that year also filed a civil lawsuit against DoorDash,[36] and in 2021, the San

26 Press Release, City of Seattle, Office of Labor Standards (OLS) Reaches Settlement of over $3.4 Million Dollars with Uber for Alleged Violations of Seattle's Gig Worker Paid Sick and Safe Time Ordinance Impacting Over 15 Thousand Workers (June 24, 2021), https://news.seattle.gov/2021/06/24/449490/.

27 Press Release, City of Seattle, Office of Labor Standards Reaches a Nearly One Million Dollar Settlement with Postmates for Alleged Violations of Seattle's Gig Worker Paid Sick and Safe Time Ordinance Impacting Over 1600 Workers (Aug. 4, 2021), https://news.seattle.gov/2021/08/04/office-of-labor-standards-reaches-a-nearly-one-million-dollar-settlement-with-postmates-for-alleged-violations-of-seattles-gig-worker-paid-sick-and-safe-time-ordinance-impacting-over-1600-wor/.

28 Press Release, City of Seattle, Seattle Office of Labor Standards Celebrates May Day 2021 with App-Based Workers Appreciation Month (May 2, 2021), https://news.seattle.gov/2021/05/03/seattle-office-of-labor-standards-celebrates-may-day-2021-with-app-based-workers-appreciation-month/.

29 October - December 2020 Resolved Investigations, SEATTLE OFFICE OF LABOR STANDARDS, https://www.seattle.gov/laborstandards/investigations/resolved-investigations/october-december-2020.

30 Press Release, City Attorney of San Francisco, San Francisco secures over $5 million settlement for DoorDash workers (Nov. 22, 2021), https://www.sfcityattorney.org/2021/11/22/san-francisco-secures-over-5-million-settlement-for-doordash-workers/.

31 City and County of San Francisco Health Care Security Ordinance, CITY AND COUNTY OF SAN FRANCISCO (2022), https://sfgov.org/olse/sites/default/files/Document/HCSO%20Files/2022%20HCSO%20poster.pdf.

32 Carolyn Said, Instacart settles with San Francisco over health care benefits for gig workers, SAN FRANCISCO CHRONICLE (Aug. 24, 2020), https://www.sfchronicle.com/business/article/Instacart-agrees-to-pay-health-care-and-sick-15511338.php.

33 While district attorneys nationwide are best known as criminal prosecutors, district attorneys in California and several other states have authority to bring both civil and criminal enforcement cases. 2 Cal. Bus. & Prof. Code § 17200.

34 Cyrus Farivar, *Judge blocks Instacart from misclassifying its California workers*, NBC NEWS (Feb. 25, 2020), https://www.nbcnews.com/tech/tech-news/first-judge-rules-instacart-has-misclassified-its-california-workers-n1142286.

35 Press Release, State of California Department of Justice, Attorney General Becerra and City Attorneys of Los Angeles, San Diego, and San Francisco Sue Uber and Lyft Alleging Worker Misclassification (May 5, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-city-attorneys-los-angeles-san-diego-and-san.

36 Andrew J. Hawkins, *San Francisco's district attorney sues DoorDash for alleged unfair business practices*, THE VERGE (June 16, 2020), https://www.theverge.com/2020/6/16/21293474/doordash-sf-district-attorney-lawsuit-worker-misclassification.

Francisco and Los Angeles DAs together sued the cleaning company Handy for misclassification.[37] Shortly thereafter, three city labor offices (Chicago, Seattle, and Philadelphia) sent a letter inquiry regarding Handy's potential misclassification.[38] These cases are ongoing.

Finally, two cities have taken action to protect platform workers' right to their tips: Chicago and the District of Columbia. (Although it operates more like a state with regard to some legal matters, D.C. is unfortunately still a city, and therefore included in this discussion). In 2019, the D.C. Attorney General filed a lawsuit against the food delivery company DoorDash for retaining tips meant for workers.[39] His office ultimately recovered $2.5 million in a 2020 settlement with the company, $1.5 million of which was dedicated to worker restitution.[40] The company used consumers' tips to offset the guaranteed amount it promised workers, so in effect a portion of customer tips were being used to subsidize the company's own obligation to workers instead of increasing workers' pay. The lawsuit was brought as an action to protect consumers from fraud, because consumers intended tips to go to the workers. In 2022, the city of Chicago sued DoorDash and Grubhub for allegedly deceptive and unfair business practices; that lawsuit largely focused on issues related to the company's conduct in relation to restaurants themselves, but it also contained allegations that the company illegally retained workers' tips.[41]

Unfortunately, in some instances, state-level laws have preempted cities from taking action on labor issues in general, or in relation to platform work issues in particular. Particularly in traditionally conservative regions of the country, states like Texas and Florida have passed laws preventing more progressive localities from setting wages, passing paid sick leave laws, or enacting other measures to improve the conditions of workers within their jurisdictions.[42] While such broad preemption is uncommon in more progressive locales, even in liberal states, harmful preemption laws have been enacted to prevent local regulation of certain platform companies. Most notably, California's Proposition 22, a successful 2020 state ballot initiative that carved TNC and delivery workers out of state law employment protections, also preempted local action in relation to these industries.[43] More recently, a law passed in Washington state in 2022 that preempts local regulation of TNCs in any way, a particularly harmful development given Seattle's national leadership in this area.

Finally, two cities have taken action to protect platform workers' right to their tips: Chicago and the District of Columbia

Ultimately, platform worker issues in the United States will have to be resolved at the state and federal levels. But localities can make a meaningful difference in workers' lives in the meantime, and some have done so. As noted above, because they do not administer large scale benefit programs, and because their involvement in workplace matters is relatively nascent, localities may have some leeway to sidestep classification and take direct action to protect workers. They can also shape laws to the particular needs of a given industry, prohibiting arbitrary deactivation of platform workers, or requiring bathroom access for bicycle delivery workers. (The latter was a major victory, although it's distressing that meeting such a basic human need must be addressed through legislation). Cities can pilot innovations in relation to workers' rights, like

37 Press Release, San Francisco District Attorney, District Attorney Boudin and Los Angeles District Attorney George Gascón Announce Worker Protection Action Against Handy for Misclassifying Its Workers (March 17, 2021), https://www.sfdistrictattorney.org/press-release/district-attorney-boudin-and-los-angeles-district-attorney-george-gascon-announce-worker-protection-action-against-handy-for-misclassifying-its-workers/.

38 A Letter to Handy CEO Oisin Hanranhan Re: Treatment of Workers, MEDIUM (May 21, 2021), https://publicrightsproject.medium.com/a-letter-to-handy-ceo-oisin-hanranhan-re-treatment-of-workers-f778e4673f42.

39 District of Columbia v. DoorDash, Inc. (Super. Ct. D.C. 2019), Complaint for Violations of the Consumer Protection Procedures Act, https://oag.dc.gov/sites/default/files/2019-11/DoorDash-Complaint.pdf.

40 Press Release, Office of the Attorney General for the District of Columbia, AG Racine Reaches $2.5 Million Agreement with DoorDash for Misrepresenting that Consumer Tips Would Go to Food Delivery Drivers (Nov. 24, 2020), https://oag.dc.gov/release/ag-racine-reaches-25-million-agreement-doordash.

41 Press Release, City of Chicago Business Affairs and Consumer Protection, City of Chicago Files Consumer Protection Lawsuits Against DoorDash And Grubhub For Engaging In Deceptive And Unfair Business Practices (Aug. 27, 2021), https://www.chicago.gov/city/en/depts/bacp/provdrs/business_support_tools/news/2021/august/lawsuitgrubhundoordash.html.

42 Julia Wolfe et. al., Preempting progress in the heartland, ECONOMIC POLICY INSTITUTE (Oct. 14, 2021), https://www.epi.org/publication/preemption-in-the-midwest/#:~:text=Preemption%20laws%20in%20the%20Midwest,in%20these%20cities%20are%20Black.

43 Text of Proposed Laws- Proposition 22, CALIFORNIA SECRETARY OF STATE (2020), https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop22.pdf.

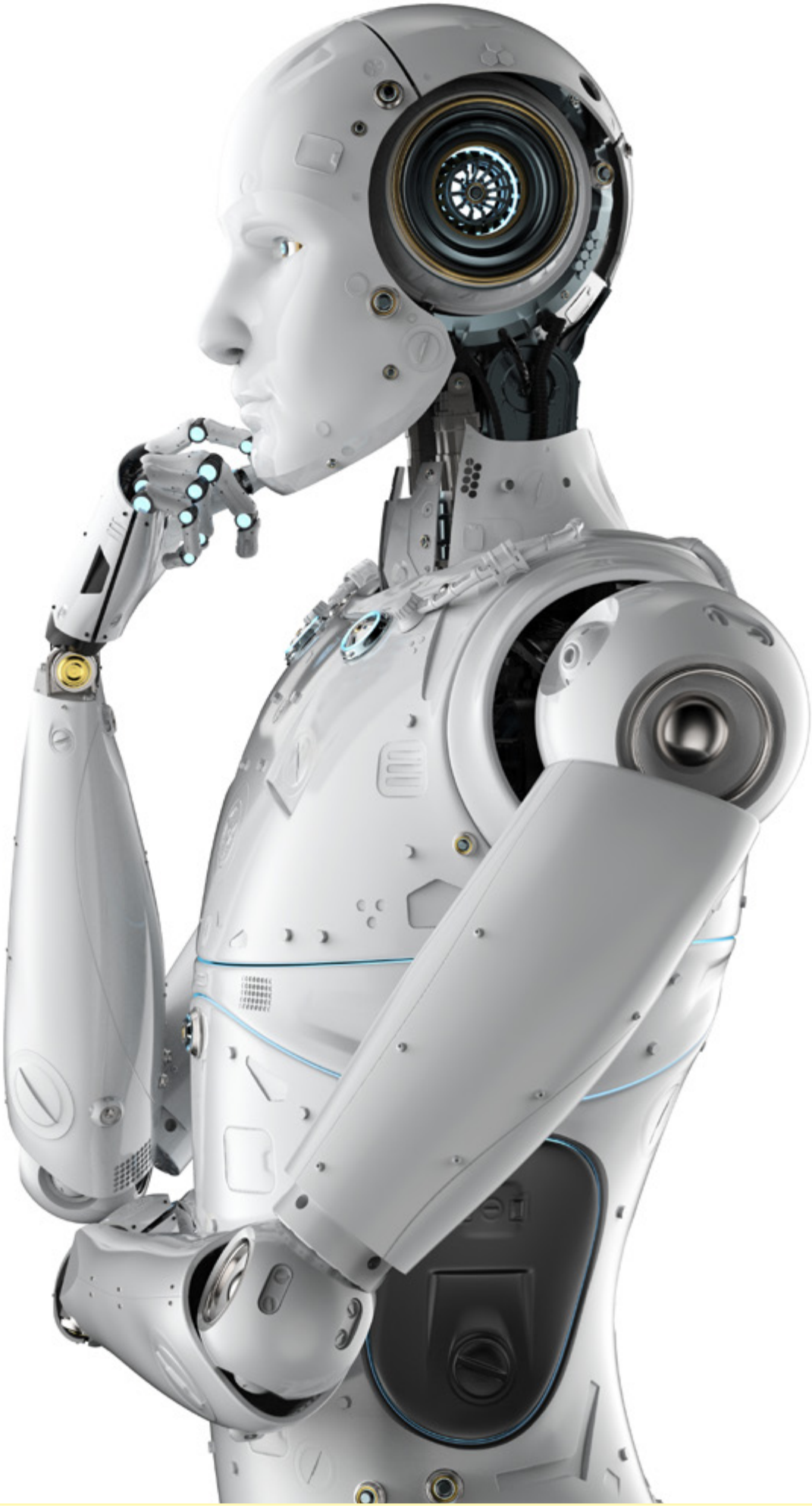
creation of the driver resource center in Seattle. Localities can also commission and author reports that shed light on the genuine working conditions of platform workers, as New York City's Taxi and Limousine Commission did before creating the city's pay standard for such workers. And where localities regulate in relation to a particular industry, such as TNCs, they can consider the broad impact of company practices, not just on workers, but on traffic and the environment as well, as occurred in relation to formula for driver pay in New York City and Seattle, where the pay formula discourages dead time in which TNC drivers are driving without passengers.

In addition, there is a tradition with the U.S. federalist system of states acting as "laboratories of experimentation"[44] that innovate and pilot new approaches, which then can be expanded to other jurisdictions or at the federal level. Cities and localities are increasingly playing this role in the area of worker protection generally; this may be a useful role in relation to gig worker protections in particular.

In short, cities and localities may be a promising untapped source of rights and protections for platform workers, certainly within the United States, and potentially elsewhere as well. More local leaders should consider whether there are ways they can help to improve conditions for this vulnerable and often exploited workforce.

> ***Ultimately, platform worker issues in the United States will have to be resolved at the state and federal levels***

44 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis J, dissenting opinion).



WILL EMPLOYMENT LAWS **KEEP UP WITH AI WORK?**

BY
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01 INTRODUCTION

Casey Stengel, Sparky Anderson, and Tommy Lasorda applied decades of baseball wisdom to achieve Hall of Fame success. Today, many major league managers rely on data analytics. Algorithms increasingly drive their situational decisions[2] — selecting a pitcher to get a particular out, using an infield shift to match the hitting tendencies of a batter, ordering a batter to take a pitch, and the like.

2 Kaan Koseler & Matthew Stephan, *Machine Learning Applications in Baseball: A Systematic Literature Review*, 31 Applied Artificial Intelligence 745 (2018) (baseball is well suited for machine learning technologies, and innovations include the PITCHf/x system3, which tracks large amounts of data for each pitched ball).

Baseball is just beginning to substitute artificial intelligence for human judgment to manage teams over a 162-game season. This future is foretold in *Norsetter v. Minnesota Twins LLC*,[3] a court case from 2021. A 33-year-old executive with an analytics background replaced a 59-year-old baseball scouting coordinator. The court dismissed Norstetter's age discrimination lawsuit, stating that the court could not "evaluate the merits of the Twins' decisions to change its scouting philosophy and eliminate Norsetter's position."[4] The case reflects a turning point in how teams manage talent.

Will employment laws keep up with AI work? Probably not. Minimum wage and overtime laws, and union organizing laws, are based on outdated assumptions and definitions. Professionals and supervisors use discretion to direct the work of subordinates.[5] They have authority to hire or fire other employees.[6] Generally speaking, they are not owed overtime pay nor a minimum hourly wage. They do not qualify for union representation.

Under certain other conditions, they may be treated as independent contractors.[7] Not only does this classification negate minimum wage requirements and access to unions — it excludes these workers from discrimination laws, worker's compensation, unemployment insurance, and other protective labor laws.

This baseball scenario suggests the future of gig work for many managers and professional employees. A baseball manager's expertise will continue to erode as teams search for competitive advantages driven by artificially intelligent technologies. In the near-term, a data analytics guru might advise or even direct the manager in a dugout on a pitch-by-pitch basis. But over time, even the data wonk will obsolesce as teams incorporate cutting edge, artificially intelligent computer programs.

Apart from baseball managers, millions of other managerial and professional employees will find their expertise, education, training, and discretionary judgment infused by artificially intelligent adjuncts to their work.[8] Some will find that AI enhances their work with productivity gains. However, other people will work in tandem with computer programs that usurp their intellectual contribution to their occupation. However, there will be employees whose craft or profession obsolesces to extinction.

Up to now, employment laws in the U.S. have failed to protect low skill workers who labor on app-driven platforms that pay piece rates.[9] This failure of employment laws will likely expand to AI-driven changes that impact a higher skilled segment of the workforce. Broad swaths of professional and managerial employees whose work will be subjected to an increasingly data-governed future will find their jobs are also on a slippery slope toward gigification. No one — perhaps not even an AI program — can predict the scope of this failure of employment laws. Nor does the future doom professions and skilled jobs. But just as gigification of labor has affected workers in various ride-share, courier, and home service occupations, the maturation of AI applications is on a path to put professional and managerial employees at risk for increasing gigification.

"Up to now, employment laws in the U.S. have failed to protect low skill workers

3 2021 WL 5173764, at *3 (quoting lower court).

4 *Id*. at *3 (quoting lower court).

5 U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*.

6 *Id*.

7 *Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, A Rule by the Wage and Hour Division*, 86 Fed. Reg. 24303 (May 6, 2021), withdrawing the Trump administration's more expansive definition of independent contractor in favor of a five-part test that emphasizes whether an entity controls the work of an individual, and whether the individual has an opportunity for profit or loss in their labor. *Id*. at 24306.

8 Jeremias Adams-Prassl, *What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work*, 41 Comp. Lab. L. Pol'y 123 (2019), at 132 (some software providers offer programs that "support and potentially automate management decision-making across all dimensions of work, including the full socioeconomic spectrum of workplaces").

9 Michael H. LeRoy, *Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment Relationships*, 2017 Univ. Chi. Legal Forum 327, 344-45 (2017) ("Before gig work is celebrated as the wave of the future, there are serious questions to answer about ensuring living wages for workers and obligating gig companies to bear societal costs associated with work that currently burden employers."). Also see Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 Yale L.J. 254, 295 (2018) ("Especially at the bottom of the labor market, raising the floor on wages, benefits, and working conditions strengthens the business case for automation of technically automatable jobs.").

02

ARTIFICIAL INTELLIGENCE INFUSES PROFESSIONAL AND SUPERVISORY WORK

For centuries, new technology has posed threats to displace labor. William Lee, a hopeful inventor of a mechanical knitting loom who sought a patent from Queen Elizabeth I in 1589, was disappointed when the Queen denied his petition on grounds that the new device would throw hand-knitters out of work.[10] More recently, a comprehensive study of machine learning estimated that in the near-term "most workers in transportation and logistics occupations, together with the bulk of office and administrative support workers" were likely to be displaced by computerized technologies.[11]

AI technologies also affect professional work. This trend includes medical imaging by gastroenterologists, cardiologists, and ophthalmologists.[12] Beyond the work of medical professionals, the work of lawyers is increasingly performed by AI programs.[13] Journalists compete with computer programs to write news stories.[14] AI applications have led to "neurofinance," a new discipline that explores the intersections of psychology, neuroscience, and finance.[15]

AI technologies are deployed for various reasons. They may improve a professional employee's productivity and performance. But they have potential to deskill work by substituting machine-learned expertise for human training and experience. They are no less threatening to professional occupations than William Lee's mechanical knitting machine for hand-knitters.

03

LEGAL EFFECTS OF MANAGING WORK WITH ALGORITHMS

Managers direct and supervise the work of subordinates, whether in baseball or other industries. This implicates how managers are paid. When a manager uses discretion and judgment in making decisions for an employer, federal labor and employment laws are implicated.

The National Labor Relations Act ("NLRA") excludes certain supervisors from union representation.[16] A person who manages the work of others often has more experience, education, and training than a subordinate. However, by being excluded from collective bargaining, workplace managers likely miss out negotiating with other supervisors for better pay, hours, and benefits.

The Fair Labor Standards Act ("FLSA") similarly classifies this person as "exempt," meaning their employers are not required to record their time at work, nor pay minimum wag-

10 Daron Acemoglu & James Robinson, Why Nations Fail 182-83 (2012), quoting Queen Elizabeth I: "Thou aimest high, Master Lee. Consider thou what the invention could do to my poor subjects. It would assuredly bring to them ruin by depriving them of employment, thus making them beggars."

11 Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?* 114 Technological Forecasting and Social Change 254 (2017), at 265.

12 *Artificial Intelligence Cuts Miss Rate for Colonoscopies*, Physicians Weekly (May 2, 2022) (research published in Gastroenterology shows that artificial intelligence reduces the miss rate of colorectal neoplasia nearly in half); Louise Flintoft, *Is AI the Future of Healthcare?* Med-Tech (April 29, 2022) (AI imaging technology can also identify heart structure and function issues with 40% more accuracy than the human eye); and Rose McNulty, *AI-Based Anomaly Detection Holds Promise in Screening for Retinal Diseases*, AJMC (Jan. 16, 2022) (research on AI technologies for retinal screening show promising results).

13 Caroline Hill, *Deloitte Insight: Over 100,000 Legal Roles To Be Automated*, Legal Insider (March 16, 2016), available in https://legaltechnology.com/2016/03/16/deloitte-insight-over-100000-legal-roles-to-be-automated/; and Steve Lohr, A*I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet*., N.Y. Times (March 19, 2017) (reporting that the McKinsey Global Institute estimates that 23 percent of a lawyer's job can be automated).

14 Steven Johnson, *A.I. Is Mastering Language. Should We Trust What It Says?* N.T. Times (April 15, 2022) (GPT-3 and other neural nets can now write original prose).

15 Oleksandr Melnychenko, *Is Artificial Intelligence Ready to Assess an Enterprise's Financial Security?*, 13 J. Risk & Financial Manag. 191 (2020).

16 National Labor Relations Act, 29 U.S.C. §164.

es or overtime.[17] Instead, the law allows for payment of a salary, if it is above a threshold set by the Department of Labor. Currently, that pay is $684 a week ($35,568 a year).[18]

Thus, an employee who is classified under FLSA as an executive, administrative assistant, or professional, and who earns this minimum pay, is not legally owed overtime. To illustrate, an executive secretary who works 60 hours in a week and is paid $684 would earn $11.40 with no overtime under federal wage law. Contrast this with a professional employee, someone with an advanced degree. If their work is so routine that it involves little or no use of professional discretion or judgment— in other words, if their professional label does not match their labor, such as a lawyer who searches documents to match words— they may be able to sue for unpaid overtime.[19] This is the type of work that AI programs can do efficiently.

Enacted in the 1930s, the FLSA and NLRA were built on the idea that managers enjoy high status in their organizations and are paid commensurately. But infusion of AI in the managerial direction of employees may undercut this assumption. Take baseball managers as an example. The average annual salary for a baseball player is $4 million.[20] However, pay for baseball managers — which once kept pace with player salaries — has fallen dramatically.[21] Devaluation of the manager's pay may reflect the substitution of analytics for his baseball acumen.

In response to eroding pay and control over their work, some managerial and professional employees are seeking union representation. School principals supervise and direct teachers. However, like baseball managers, their ability to manage their work conditions and district policies is shrinking. Now, these front-line managers in Chicago Public Schools are seeking a change in labor laws to allow them to form and join a union.[22]

In March, tech workers at *The New York Times* voted 404-88 to join a union.[23] More than half of this group consists of product engineers and supervisors. While the newspaper is challenging the outcome of the election, the National Labor Relations Board held the vote because the newspaper did not offer enough evidence to exclude workers with managerial or supervisory functions. In other words, job titles that implied that some employees were excludable as supervisors may not have reflected how little these employees directed the work of colleagues.

Whatever becomes of the union organizing ambitions of Chicago school principals and *New York Times* tech workers, their efforts show that people who oversee their workplace actually feel a need for a voice in determining their own pay, hours, and working conditions. Their experiences are more blue-collar than white-collar. And even if they don't get their hands dirty at work, these college educated front-line managers of schools and a prestigious newspaper feel disempowered enough to want a union to speak for them. The role that technologies play in their marginalization is not easy to tease out, but these mid-level professionals may be reacting to computerized work processes and devalued job content, somewhat like baseball managers.

04

WEARABLE TECHNOLOGIES AND TRANSHUMANISM: A FUTURE FOR HUMANOIDS?

Wearable technologies record biological functions, providing data not only for personal use but for managing work performance. Some pro athletes are outfitted with wearable technologies that enable sophisticated and instant quanti-

17 U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*.

18 *Id*.

19 *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP,* No. 14-3845-cv, 2015 WL 4476828, at *2 (2d Cir. 2015) ruled that an attorney sufficiently alleged he did not engage in the practice of law, and therefore could state a claim against his employer for not paying overtime under the Fair Labor Standards Act. The work he performed — looking at documents for search terms; marking those documents in predetermined categories; and drawing black boxes to redact text — are functions that an AI program could probably do.

20 James Wagner, *Play Ball! Lockout Ends as M.L.B. and Union Strike a Deal*, N.Y. Times (March 10, 2022).

21 Bob Nightengale, *MLB Power Shift Has Managers' Salaries in Free Fall*, USA Today (Aug. 27, 2018) (Mike Scioscia's ten-year contract paying $50 million, and Joe Torre's contract paying $7.5 million a year, had given way by 2018 to a labor market where 21 out of 30 major league managers earned $1.5 million or less).

22 Rich Miller, *Chicago School Principals Revive Unionization Bill, Push for Higher Pay*, CapitolFax.com (Feb. 17, 2022), available in https://capitolfax.com/2022/02/17/chicago-school-principals-revive-unionization-bill-push-for-higher-pay/.

23 Daniel Wiessner, *New York Times Tech Workers Vote to Join Union*, Reuters (March 4, 2022).

fication in team sports, including individual and team-tactical behavior.'[24] These highly miniaturized data-capturing devices suggest "the support or eventual substitution of qualitative performance measurements with quantitative methods."[25]

Futurists have envisioned a transhuman being capable of superior performance.[26] This future is arriving incrementally. For example, a versatile and strong bionic hand, enabled with Bluetooth technology for gripping, is in development.[27] While no bionic human has been created, three examples from sports sketch this future. At the low-end of altered physiology, there are pitchers with Tommy John surgery to repair a torn ulnar collateral ligament inside the elbow. Some evidence shows this surgery has improved a pitcher's performance.[28] At a higher level of altered physiology, Lia Thomas, a transgender NCAA swimmer for the University of Pennsylvania, has stirred questions over athletic competition. She won a national championship, but cisgender competitors complained that she raced on unfair terms.[29] Oscar Pistorius — the double-amputee track star from South Africa — presents a third example of altered physiology. He made history in the Summer Olympics of 2012 by competing and performing well-enough to be in the mix for a medal.[30] However, competitors complained that he enjoyed an unfair advantage.[31]

Tommy John surgery is not shrouded in controversy, but whether Thomas and Pistorius should have been allowed even to compete for championships is more complicated. These deep and multi-layered controversies could carry-over to intellectual endeavors.

> ***Futurists have envisioned a transhuman being capable of superior performance***

Suppose a graduating Ph.D. from an elite school was genetically engineered at conception to excel in STEM fields. She lists her in vitro conceptual history on her resume while applying for a prestigious faculty position. Would her engineered pedigree provide an ancillary advantage? On the other hand, societal unease with altering and selecting human beings at conception could work against her. This hypothetical recontextualizes Francis Galton's theory of eugenics, which at the turn of the Twentieth Century was embraced by academics and professionals before its fusion with Nazi ideology discredited it.[32]

24 Jonas Lutz, et al., *Wearables for Integrative Performance and Tactic Analyses: Opportunities, Challenges, and Future Directions*, Int. 17 J. Environ. Res. Public Health 59, 61 (2020).

25 *Id*. at 78.

26 For an overview of the transhuman movement and its opponents, *see* Stephen Lilley, Transhumanism and Society: The Social Debate Over Human Enhancement 2 (2013) ("transhumanists" advocate all human enhancements, while "conservationists" seek to preserve a time-honored conception of human life, available in https://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?article=1006&context=sociol_fac. Also see Daniel Lyons, *Ray Kurzweil Wants to Be a Robot*, Newsweek (May 16, 2009) ("Ray Kurzweil's wildest dream is to be turned into a cyborg—a flesh-and-blood human enhanced with tiny, embedded computers, a man-machine hybrid with billions of microscopic nanobots coursing through his bloodstream.").

27 *The Bionic Man was Science Fiction; The Bionic Hand Is Not*, Mind Matters News (September 29, 2021), available in https://mindmatters.ai/2021/09/the-bionic-man-was-science-fiction-the-bionic-hand-is-not/.

28 Scott Jenkins, *Does Tommy John Surgery Give MLB Pitchers an Advantage?* Sportscasting (July 29, 2020), at https://www.sportscasting.com/does-tommy-john-surgery-give-mlb-pitchers-an-advantage/, captures the debate surrounding the effects of this surgery, citing studies of improved performance by MLB pitchers and no effects. *Also see* Alva Noë, *Is It Fair For Baseball To Reject Drugs But Embrace Surgery?* NPR (July 26, 2013) at https://www.npr.org/sections/13.7/2013/07/25/205513618/is-it-fair-for-baseball-to-reject-drugs-but-embrace-surgery.

29 Alan Blinder, *Lia Thomas Wins an N.C.A.A. Swimming Title*, N.Y. Times (March 17, 2022) (also reporting that a hurdler, CeCe Telfer, became the first transgender athlete to capture an N.C.A.A. championship). Nancy Hogshead-Makar, winner of three Olympic gold medals in swimming in the 1980s, joined dozens of other women swimmers who protested to the university that Thomas had "an unfair advantage over competition in the women's category." *Id*.

30 Bill Chappell, *Oscar Pistorius Makes Olympic History In 400 Meters, And Moves On To Semifinal*, NPR (Aug. 4, 2012) (double-amptee runner finished second in a heat with five contestants).

31 *Promising New Developments in AI Prostheses Raise Stark Questions*, Mind Matters News (March 22, 2022), available in https://mindmatters.ai/2022/03/promising-new-developments-in-ai-prostheses-raise-stark-questions/, also reporting on AI advances that improve the interface between a prosthesis and rest of an amputee's limb).

32 Daniel Wikler, *Can We Learn from Eugenics?* 25 J. of Med. Ethics 183, 184-185 (1999).

Is there a future for artificially superior humans? Suppose a biochemical injectable speeds up mathematical reasoning in the human brain. Another injectable levels the range of human emotion for more efficient reasoning. To add one more layer of intrigue, suppose that these mind-altering agents are synched to mimic neural learning in potent AI programs, so that a human and machine learn in tandem with accelerated speed. In sum, imagine a STEM researcher who is engineered as a Spock-like Vulcan symbiotically tethered to a parallel AI technology — a humanoid.

Humanoid labor would accentuate inequality, creating a new upper crust of "haves" who could outcompete professionals and managers who excel today with natural talent. Employment laws are ill-equipped to deal with inequality, notwithstanding their tempering policy goals. Some laws have dealt with work arrangements that are either morally repugnant or unfair. Laws against involuntary servitude, including slavery but also peonage, address morally repugnant labor that, in some contexts such as manual agricultural labor, were defended on efficiency grounds.[33] Child labor laws address the unfairness to adults in competing for wages with an exploited part of the labor force.

Would the creation of a Spock-like knowledge worker lead to a new age of employment law that defined and protected unaltered human labor? Some engineers are striving to define ethical constraints on the use of technologies to reflect humanist values. One possibility, modelled after laws against slavery and child labor, is a blanket prohibition against humanoid labor. However, another possibility is to use GMO food regulations as a model for GMH labor — genetically modified human labor. While the EPA and FDA regulate GMO food safety, perhaps the Department of Labor would regulate types of work that can — and cannot — be performed by humanoids, with the aim of protecting "unmodified" humans from being harmed in labor markets. Or a lighter hand of regulation could require labeling of "humanoid" labor to allow the market to tailor purchasing according to humanist or humanoid values.

Society might take an entirely different approach: Allow humanoid labor to generate so much productivity and wealth that this labor is taxed, with proceeds set aside for a basic income. There are rudiments for such a wealth-spreading approach. Social Security is funded by employment taxes, effectively using payroll contributions of the current workforce to pay benefits to retirees. Unemployment insurance relies on employment taxes to fund short-term benefits for people who have lost their jobs. The Affordable Care Act is another example of a federal law that expands a benefit to provide what some people label a human right — a right to basic health care. Some European nations provide their citizens a basic income, a floor to ensure a minimum living standard and to guard against homelessness and hunger.

In sum, there is no shortage of employment law models to accommodate society's dual aims of maximizing productivity — even with humanoid labor — while safeguarding the rest of the labor force from a competitive disadvantage.

05
CONCLUSION

The advent of the Internet in the late 20th Century was greeted with naïve anticipation. There was a broad consensus to leave this technology unregulated to foster innovation. Hindsight shows that a light regulatory hand unleashed one nightmare after another: the proliferation of hate speech and re-emergence of armed extremist groups extolling the virtues of free speech; the subversion of American democracy with Russian interference in 2016 and a nearly successful attempt to halt a transfer of presidential power in 2021; the rise of deadly disinformation about COVID-19 vaccines and the apocalyptic potential of QAnon; and more.

Do artificially intelligent enhancements to human labor pose similarly massive dislocations for the institution of employment? Only time will tell. However, it is important to realize that protective employment and labor laws were not enacted until long-after abuses had taken a great toll on the nation. Slavery endured more than 75 years after the United States Constitution was ratified in 1787, until ratification of the Thirteenth Amendment.[34] Peonage lasted well into the early 1900s.[35] Child labor was tolerated until the FLSA was

33 See Robert Fogel & Stanley L. Engerman, Time on the Cross: The Economics of American Negro Slavery (1974), using data to argue that slaveowners were more rational and tempered than previously supposed because they had financial incentives to treat their slaves as productive assets.

34 Nat'l Archives, *13th Amendment to the U.S. Constitution: Abolition of Slavery* (1865) (passed by Congress on January 31, 1865, and ratified on December 6, 1865).

35 *Pollock v. Williams*, 322 U.S. 4 (1944) (Florida criminal fraud statute violated the Thirteenth Amendment and the Anti-Peonage Act of 1867). More generally, see William Wirt Howe, *The Peonage Cases*, 4 Colum. L. Rev. (279) (1904).

enacted in 1938.[36] Racial segregation in the workplace was common until enactment of Title VII of the 1964 Civil Rights Act.[37] LGBTQ discrimination was not forcefully rejected until the Supreme Court ruled in 2020 that the nation's sex discrimination law protects these sometimes vulnerable people.[38] Disability discrimination was the norm until the Americans with Disabilities Act was passed in 1990.[39]

This much is clear: Before new employment laws and regulations can be imagined with clarity, there is still time for engineers, technologists, technology companies, and humanists to design work-enhancements that mitigate the possibilities of dehumanizing labor. The more thought that goes into defining humanistic AI systems, the less need there will be for employment laws that mitigate harmful technologies.

> ***Do artificially intelligent enhancements to human labor pose similarly massive dislocations for the institution of employment?***

36 Fair Labor Standards Act of 1938, June 25, 1938, ch. 676, § 12, 52 Stat. 1067, codified at 29 U.S. Code § 212 (2018).

37 Civil Rights Act of 1964 § 7, Pub. L. 88–352, title VII, § 701, July 2, 1964, 78 Stat. 253; codified at 42 U.S.C. § 2000e et seq (1964).

38 *Bostock v. Clayton County*, __ U.S. __, 140 S.Ct. 1731 (2020).

39 Americans with Disabilities Act of 1990 (ADA), Pub. L. 101–336, § 2, July 26, 1990, 104 Stat. 328; codified at 42 U.S.C. §§ 12101-12213 (2018).

AN ASSESSMENT OF THE EU'S DRAFT GUIDELINES ON THE APPLICATION OF EU COMPETITION LAW TO COLLECTIVE AGREEMENTS OF THE "SOLO SELF-EMPLOYED"

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01 BACKGROUND

On December 9, 2021, the European Commission published its draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons. The draft

Guidelines are part of a package which includes a proposal for a Directive on improving the working conditions in platform work[2] and a Communication on harnessing the full benefits of digitalisation for the future of work.[3]

The aim of the draft Guidelines is to remove existing competition law restrictions to collective bargaining for self-employed people who are in need of protection. Under EU competition law, only 'associations of workers' are allowed to bargain collectively for the amelioration of their working conditions. This was decided by the European Court of Justice (hereafter 'ECJ' or 'the Court') in the seminal case of *Albany*.[4] The case concerned the compatibility with competition law provisions of a sectoral pension scheme created after a collective agreement between management and labor. Using a teleological approach,[5] the Court found that, under "an interpretation of the provisions of the Treaty as a whole which is both effective and consistent, agreements concluded in the context of collective negotiations between management and labor […] must, by virtue of their nature and purpose, be regarded as falling outside the scope of [Article 101(1)] of the Treaty."[6] This way, a "limited antitrust immunity"[7] was created for associations of workers to bargain collectively for their rights.

The *Albany* rubric, however, was not applied in a subsequent case concerning a collective agreement concluded by an association of self-employed medical specialists and their counterparts.[8] Emphasizing that the Treaty "contains no provisions […] encouraging the members of the liberal professions to conclude collective agreements,"[9] the ECJ said that the collective agreement in question could not "by reason of its nature and purpose, fall outside the scope of [Article 101(1) of the Treaty]."[10]

> ***The aim of the draft Guidelines is to remove existing competition law restrictions to collective bargaining for self-employed people who are in need of protection***

The limits of the *Albany* formula were tested in *FNV Kunsten*.[11] FNV was a mixed Dutch trade association representing both employed and self-employed orchestra musicians. After concluding a collective agreement with the respective association of employers, a question arose regarding whether its self-employed members could take advantage of the agreed worker-protective measures. The Court noted that, as far as the employed musicians were concerned, the *Albany* exception applied, and the agreement was not caught by Article 101 TFEU. However, "in so far as [the] organization carried out negotiations acting in the name, and on behalf, of those self-employed persons who were its members, it [did] not act as a trade union association and therefore as a social partner, but, in reality, [acted] as an association of undertakings."[12] Since the provisions regarding the self-employed members "did not constitute the result of a collective negotiation between employers and [workers]," the Court decided that they "could not be excluded, by reason of their nature, from the scope of Article 101(1) TFEU."[13]

The only exception the Court was ready to make regarded "false self-employed" musicians. Following settled case law, the ECJ noted that "a service provider can lose his sta-

2 European Commission, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work COM(2021) 762 final. Available here: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605 .

3 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Better working conditions for a stronger social Europe: Harnessing the full benefits of digitalisation for the future of work COM(2021) 761 final.

4 C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751.

5 M. Lorenz, *An Introduction to EU Competition Law* (CUP 2013) 64. See also R. van den Bergh & P. Camesasca, "Irreconcilable principles? The Court of Justice exempts collective labour agreements from the wrath of antitrust" [2000] 25(5) ELRev 492.

6 *Albany* (n 4) para 60.

7 Opinion of AG Jacobs in *Albany* (n 4) para 183.

8 C-180 to 184/98, *Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-06451.

9 *Ibid*. para 70.

10 *Ibid*.

11 C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden* [2014] Electronic Reports of Cases

12 *Ibid*. para 28.

13 *Ibid*. para 30.

tus of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market but is entirely dependent on his principal."[14] False self-employed musicians thus could take advantage of the favorable measures concluded by the FNV union if they were not 'undertakings' but 'workers' for the purposes of EU provisions. It was left to domestic courts to examine the *de facto* working relationship between the parties and classify them accordingly.

From the above, it becomes clear that EU competition law poses restrictions on the self-employed persons' right to bargain collectively for the amelioration of their working conditions. While collective bargaining agreements concluded between associations of workers and employers are not captured by Article 101(1) TFEU, the same is not true for agreements concluded between associations of employers and self-employed persons-undertakings. If these appreciably restrict competition between Member States by object or effect, they are caught by Article 101(1) TFEU. This means that, if the agreement cannot be granted an individual exception under paragraph 3 of that article, the association will be exposed to large fines.

The competition law restraints imposed on the right of self-employed persons to bargain collectively is problematic. As various academics have pointed out, the right to collective bargaining is so pivotal[15] that it should be enjoyed by both employed and self-employed individuals.[16] The problem becomes even more acute if we consider the number of working persons who are currently classified as 'self-employed' albeit being under the control of their principal(s) and economically dependent upon them. Not only are these persons disenfranchised, most of the time, from EU labor and social protection legislation, but they are also unable – because of competition law restraints – to bargain collectively for their rights.

With these issues in mind, the European Commission launched on 30 June 2020 a first-stage consultation of the social partners on collective bargaining for the self-employed. As Executive Vice-President Margrethe Vestager, in charge of competition policy, said:

> *"today we are launching a process to ensure that those who need to can participate in collective bargaining without the fear of breaking EU competition rules. As already stressed on previous occasions the competition rules are not there to stop workers forming a union but in today's labour market the concept 'worker' and 'self-employed' have become blurred. As a result, many individuals have no other choice than to accept a contract as self-employed. We therefore need to provide clarity to those who need to negotiate collectively in order to improve their working conditions."*[17]

The consultations concluded with the publication by the European Commission of draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons.

02 THE DRAFT GUIDELINES

The draft Guidelines set out principles for assessing the compatibility of agreements concluded between associations of solo self-employed persons and their counterparties with Article 101 TFEU. More particularly, the draft Guidelines (i) clarify that certain categories of collective agreements concluded with solo self-employed people fall outside the scope of Article 101 TFEU and (ii) specify that the Commission will not intervene against certain other categories of collective agreements concluded with the solo self-employed.

In respect of the first category, the draft Guidelines stipulate that agreements will fall outside the scope of Article 101 TFEU if they (a) are concluded after collective negotiations between associations of solo self-employed persons who are "in a situation comparable to that of workers" and their counterparts and (b) concern their working conditions. The term 'solo self-employed' refers to "persons who do not have an employment contract or who are not in an employ-

14 *Ibid*. para 33 and references therein.

15 On the importance of collective bargaining for reducing inequality and ameliorating working standards see Keith Ewing & John Hendy, "New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining" (2017) 46(1) ILJ 33.

16 Valerio de Stefano & Antonio Aloisi, "Fundamental Labour Rights, Platform Work and Human-rights Protection of Non-standard Workers" (2018) Bocconi Legal Studies Research Paper No. 3125866; Mark Freedland & Nicola Kountouris, "Some Reflections on the "Personal Scope" of Collective Labour Law" (2017) 46(1) ILJ 67.

17 European Commission, "Competition: The European Commission Launches a Process to Address the Issue of Collective Bargaining for the Self-Employed" (30.05.2020) European Commission <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237> (accessed 31.12.2021).

ment relationship and who rely primarily on their own personal labour for the provision of the services concerned."[18] Hence, persons who employ staff and who do not rely primarily on their own personal labor are not covered by the draft Guidelines. Persons are considered not to rely on their own personal labor when their economic activity consists in the sharing or exploitation of goods or assets (i.e. rental of housing), or the resale of goods or services (i.e. resale of automotive parts). Persons can, however, make certain investments in goods or assets in order to be able to provide their services. Hence, a cleaner can invest in cleaning materials and a musician can invest in the purchase of a musical instrument without falling outside this category. As it stipulated, "in these instances, the goods are used as an ancillary means to provide the final service"[19] and so, the person will still be considered to be "solo self-employed."

From all solo self-employed persons, the Guidelines specify that Article 101 TFEU will not capture the collective agreements of those who are in a "situation comparable to that of workers."[20] Three categories of solo self-employed persons are identified as being in a situation comparable to workers: (a) those who are economically dependent; (b) those who work "side-by-side" with workers; and (c) those who provide their services through digital labor platforms.[21]

The first category (i.e. economically dependent solo self-employed persons) includes those who provide their services exclusively or predominantly to one principal.[22] More particularly, the draft Guidelines stipulate that a solo self-employed person will be considered to be in a situation of economic dependence if he or she "earns at least 50% of his or her total annual work-related income from a single counterparty."[23]

The second category captures solo self-employed persons who perform the same or similar tasks 'side-by-side' with workers for the same counterparty. The persons are considered to work 'side-by-side' with workers when "they provide their services under the direction of their counterparty and do not bear the commercial risks of the counterparty's activity or enjoy any independence as regards the performance of the economic activity concerned."[24]

The third category relates to solo self-employed persons who provide services through digital labor platforms. The term "digital labor platform" is defined in the same way in the draft Guidelines as in the Commission's proposal for a Directive on improving working conditions in platform work.[25] Individuals who cannot benefit from the legal presumption of "worker" status established in Article 4 of the proposed Directive or whose status as "workers" has been successfully rebutted (Article 5), will fall under the category of "solo self-employed persons who are in a situation comparable to that of workers" for the purposes of the draft Guidelines.

> ***"The second category captures solo self-employed persons who perform the same or similar tasks 'side-by-side' with workers for the same counterparty***

In general, solo self-employed persons who fall under one of the aforementioned three categories are considered to be in a situation comparable to that of workers. This means that their collective agreements with their counterparties will not be captured by Article 101 TFEU, provided the other preconditions set in the draft Guidelines apply. More particularly, for the exclusion to apply, the agreements need to be concluded with a counterparty and (need) to relate to the solo self-employed persons' working conditions. These include matters such as remuneration, working time and working patterns, holiday, leave, physical spaces where work takes place, health and safety, insurance and social

18 Draft Guidelines (n 1) para 19.

19 *Ibid*.

20 *Ibid*. para 23.

21 *Ibid*. chapter 3.

22 *Ibid*. para 24.

23 *Ibid*. para 25.

24 *Ibid*. para 26.

25 Proposal for a Directive on improving working conditions in platform work (n 2), Article 1(1). For an assessment of the potential loopholes in the personal scope of the proposed Directive see Despoina Georgiou, "Some Thoughts on Potential Loopholes in the Personal Scope of the Commission's Proposed Directive on Platform Work," available at: https://www.researchgate.net/publication/356971811_Some_Thoughts_on_Potential_Loopholes_in_the_Personal_Scope_of_the_Commission's_Proposed_Directive_on_Platform_Work and Antonio Aloisi & Despoina Georgiou, "Two steps forward, one step back: The EU's plans for improving gig working conditions" (07.04.2022) Ada Lovelace Institute https://www.adalovelaceinstitute.org/blog/eu-gig-economy.

security, and conditions under which the solo self-employed person is entitled to cease providing his/her services, for example, in response to breaches of the agreement relating to working conditions.[26] Collective agreements which go beyond the regulation of working conditions by determining the conditions (in particular, the prices) under which services are offered by the solo self-employed persons or by the counterparty to consumers, or which limit the freedom of employers to hire the labor providers that they need are not covered by the draft Guidelines.[27] The same applies to decisions by associations of self-employed persons-undertakings and unilateral agreements concluded between self-employed persons-undertakings (not with a counterparty). These do not fall within the scope of the draft Guidelines and are captured by Article 101 TFEU.

Apart from solo self-employed persons who are in a "situation comparable to workers," the draft Guidelines also cover the solo self-employed who are in an "imbalanced negotiating position towards their counterparty." However, unlike collective agreements with the former category (solo self-employed persons who are in a "situation comparable to workers") which are not captured by Article 101 TFEU, collective agreements with the latter category (i.e. solo self-employed who are in an imbalanced negotiating position towards their counterparty) could still fall under the scope of Article 101. Nevertheless, the Commission commits in the draft Guidelines not to take action against them.

Two categories of solo self-employed persons are considered to be in an "imbalanced negotiating position": (a) those who are facing an imbalance in bargaining power due to negotiation with counterparties of a certain strength and (b) those who are entitled to bargain collectively pursuant to national or EU legislation.

To identify the persons who fall within the first category (i.e. 'solo self-employed persons who are facing an imbalance in bargaining power due to negotiation with counterparties of a certain strength'), the Commission sets two quantitative criteria. As it is stipulated, such an imbalance exists (i) when the solo self-employed negotiate or conclude collective agreements with one or more counterparties which represent the whole sector or industry or (ii) when the solo self-employed negotiate or conclude collective agreements with a counterparty whose annual aggregate turnover exceeds 2 million euro or whose staff headcount exceeds 10 workers (individually or jointly).[28]

The second category includes persons who are entitled to bargain collectively pursuant to national or EU legislation. The Commission notes that, in some instances, national legislators have recognized the imbalance in the bargaining power between the parties and have taken measures to address it either by explicitly granting solo self-employed persons in certain professions the right to collective bargaining or by excluding their collective agreements from the scope of national competition law.[29] In a similar vein, at the EU level, the Copyright Directive[30] has set the principle that authors and performers shall be entitled to receive appropriate and proportionate remuneration when they license or transfer their exclusive rights for the exploitation of their works and any other subject matter protected by copyright and related rights.[31] In the draft Guidelines, the Commission commits not to intervene against collective agreements that have been negotiated and concluded by solo self-employed persons in pursuance to national or EU legislation adopted in order to redress the imbalance in the bargaining power between the parties.

To better explain how the Commission will apply Article 101 to collective agreements between solo self-employed persons and their counterparties, the draft Guidelines provide several examples that demonstrate the Commission's approach.

03 ASSESSMENT

The draft Guidelines should be welcomed as a big accomplishment. Together with the Commission's proposed Directive on improving the working conditions in platform work, they demonstrate the EU's strong commitment to delivering on the European Pillar of Social Rights. The draft instrument removes competition law restrictions to collective bargaining for vulnerable solo self-employed persons,

26 Draft Guidelines (n 1) para 16.

27 *Ibid*. para 18.

28 *Ibid*. para 35.

29 *Ibid*. para 36.

30 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 OJ L 130, 17.5.2019, p. 92–125.

31 Draft Guidelines (n 1) paras 37-38.

allowing them to unionize and bargain collectively for the improvement of their working conditions. With the adoption of the new instrument, trade unions and other associations will be able to represent, negotiate, and conclude collective agreements for solo self-employed persons who fall within the ambit of the draft Guidelines without the fear of being found liable for breaching Article 101; something that would expose them to large fines.

An important element of the proposed Guidelines is that they cover persons working both online and offline. Hence, unlike the proposed Directive on improving the working conditions in platform work – that applies only to persons providing services through digital labor platforms – the draft Guidelines cover individuals who are engaged in all types of work.

At the same time, there is still room for improvement. Some categories of self-employed persons are not covered by the draft Guidelines despite being in need of protection. More particularly, the following aspects can prove problematic.

> ***An important element of the proposed Guidelines is that they cover persons working both online and offline***

The draft Guidelines center around the concept of "personal work." This concept has been advanced in the competition law context by Lianos, Countouris & De Stefano[32] and has also been supported by Rainone[33] & Biasi.[34] The Directive covers 'solo self-employed' persons defined as "persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labor for the provision of the services concerned."[35] This means that self-employed persons who employ one or more individuals are not covered by the draft Guidelines, even if they have little influence over their working conditions because they are in a situation comparable to workers (for example, because they are dependent on one or two principals/clients for subsistence) or because they are in an imbalanced negotiating position towards their counterparty.

Furthermore, the requirement that the economic activity of persons must not rely on the exploitation of goods or assets might prove restrictive for persons who have to make substantial investments in tools, machinery, or software in order to be able to provide their services. While it is stipulated that individuals can invest in certain goods or assets in order to be able to provide their services (i.e. a cleaner can invest in cleaning materials or a musician can invest in a musical instrument), it is not clear *how much* a person can invest before losing his or her 'solo self-employed' status.

Moreover, the category of "economically dependent solo self-employed persons" is narrowly defined. In order for a solo self-employed person to be considered to be "economically dependent," he or she must derive more than 50 percent of his or her work-related income from one principal. Arguably, this threshold is set high, especially considering that many persons, nowadays, work for multiple principals. It is not an uncommon phenomenon, for instance, for academics or persons in the liberal professions to be engaged in numerous, short -term contracts with multiple principals/clients. For these persons, the 50 percent threshold will be difficult to ascertain. Hence, they will not be considered to be "economically dependent" for the purposes of the draft Guidelines and will not be provided protection,[36] even though they might, in reality, be reliant on all their principals for subsistence.

The category of solo self-employed persons working "side-by-side" with workers might prove to be equally restrictive. For solo self-employed persons to fall within this category they must work under the same conditions as "workers" employed by the counterparty. In many areas, however, there is not a permanent employee that works under the same conditions as the self-employed and with whom a comparison can be made. Furthermore, employers can alter their business model so that they do not engage em-

32 Nicola Countouris, Valerio De Stefano, & Ioannis Lianos, "The EU, Competition and Workers' Rights" CELS Research Paper Series 2/2021; Ioannis Lianos, Nicola Countouris, & Valerio De Stefano, "Rethinking the competition law/labour law interaction: Promoting a fairer labour market" (2019) 10(3) ELLJ 291-333; Nicola Countouris & Valerio De Stefano, "The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively." in Bernd Waas & Christina HieBl (eds.), *Collective Bargaining for Self-Employed Workers in Europe* (Kluwer Law International B.V. 2021) 9.

33 Silvia Rainone & Nicola Countouris, "Collective Bargaining and Self-Employed Workers: The Need for a Paradigm Shift" (2021) ETUI Policy Brief 2021.11.

34 Marco Biasi, "'We will all laugh at gilded butterflies.' The shadow of antitrust law on the collective negotiation of fair fees for self-employed workers" (2018) 9(4) ELLJ 354-373.

35 Draft Guidelines (n 1) para 19.

36 These persons will be provided protection if they fall under one of the other categories of solo self-employed persons covered by the Directive.

ployed and self-employed persons under the same or similar conditions. This point is also raised by De Stefano who argues that "working side-by-side with workers can be too easily circumvented."[37]

Furthermore, paragraph 26 provides that solo self-employed persons work side-by-side, and hence are in a comparable position, with workers when they "provide their services under the direction of their counterparty and do not bear the commercial risks of the counterparty's activity or enjoy any independence as regards the performance of the economic activity concerned."[38] Under many modern-day contracts for services, however, solo self-employed persons assume various financial and commercial risks (i.e. payment-related risks, material and human capital investment and maintenance risks, redeployment risks, health and safety risks, third-party liability risks etc.).[39] Moreover, many solo self-employed persons enjoy some level of independence in the performance of their tasks. Arguably, those solo self-employed who assume business risks and have a level of autonomy as regards the performance of their economic activity will not be considered to work 'side-by-side' with workers and will not be afforded protection under the draft Guidelines.

Finally, even though the Commission commits, in the draft Guidelines, not to act against collective agreements concluded by solo self-employed authors or performers in pursuance to the Copyright Directive to ensure their fair and appropriate remuneration for the exploitation of their works; it is not clear how the Commission will act vis-à-vis collective agreements concluded by the same persons (i.e. authors or performs) that regard working conditions other than remuneration. Collective agreements, for instance, concluded by solo self-employed authors, journalists, artists, musicians, singers, actors etc. might not be afforded protection under the draft Guidelines if they concern matters other than the remuneration for the exploitation of their works. Considering that these persons (i) usually work for multiple principals (so they do not derive more than 50 percent of their income from one source) and (ii) are usually made to assume a certain level of business risks while having some independence in regards to the performance of their tasks, it is unlikely that they will be considered to be "economically dependent" or working "side-by-side" with workers. Hence, if they do not provide their services via digital labor platforms or they do not satisfy the quantitative criteria set out in paragraph 35, they might not be covered by the draft Guidelines.[40]

From the above it becomes clear that, even though the draft Guidelines go a long way in removing competition law restraints to collective bargaining for many solo self-employed people, they will not cover all those who are in need of protection. As De Stefano notes, "the Guidelines are still not entirely sufficient to provide collective bargaining protection to all workers who need it and have a right to collective bargaining under ILO's and Council of Europe's Standards."[41]

> ***The category of solo self-employed persons working "side-by-side" with workers might prove to be equally restrictivee***

It should also be noted that the draft Guidelines set out the Commission's approach vis-à-vis collective agreements concluded by or for certain categories of solo self-employed persons and their counterparts under Article 101 TFEU. As such, they do not provide guidance on the Commission's approach to other contentious issues concerning the relationship between EU labor and competition law. More particularly, the draft Guidelines do not cover decisions by associations of self-employed persons-undertakings or agreements concluded between self-employed persons-undertakings with one another (i.e. not with counterparties in the context of collective bargaining negotiations), even if they concern the improvement of their working conditions.

These can still be captured by Article 101 and have to be assessed for their object and effects on inter-State trade. Hence, an association of solo self-employed persons cannot adopt a decision urging its members not to engage with a platform that does not abide by certain standards or take decisions on worker-protective behavior (i.e. set minimum prices for the services of self-employed members) without the risk of attracting the attention of competition law au-

37 https://twitter.com/valeriodeste/status/1468907829306212359.

38 Draft Guidelines (n 1) para 26.

39 Despoina Georgiou, "'Business Risk-Assumption' as a Criterion for the Determination of EU Employment Status: A Critical Evaluation" (2022) 50(1) ILJ 109-137. Available here: https://academic.oup.com/ilj/advance-article/doi/10.1093/indlaw/dwaa031/6104500?login=true.

40 The same applies to other categories of solo self-employed persons. As De Stefano notes, "domestic workers who often are misclassified as self-employed, don't work side by side with other workers, and often don't receive 50% of their income from a single household are excluded if they don't work for a platform." See https://twitter.com/valeriodeste/status/1468907830807773184.

41 https://twitter.com/valeriodeste/status/1468907832296755200.

thorities. In *Consiglio nazionale dei geologi*,[42] for instance, an Italian professional organization of geologists was fined for suggesting the introduction of minimum fees for its self-employed members. Similar decisions or guidelines issued by associations of self-employed persons-undertakings that set, for instance, minimum charges for services or encourage the adoption of worker-protective behavior, can be found to infringe Article 101, provided that the rest of the preconditions of that Article are met.

The same applies to agreements concluded between solo self-employed persons (or decisions of their associations) to boycott certain employers who refuse to enter into collective bargaining negotiations. As paragraph 16 of the draft Guidelines provides, "agreements under which solo self-employed persons collectively decide not to provide services to particular counterparties, for example because the counterparty is not willing to enter into an agreement on working conditions require an individual assessment. Such agreements restrict the supply of labor and may therefore raise competition concerns."[43]

"The same applies to agreements concluded between solo self-employed persons (or decisions of their associations) to boycott certain employers who refuse to enter into collective bargaining negotiations

Decisions by associations of self-employed undertakings and agreements between self-employed persons-undertakings can also be found to infringe Article 102 if they constitute an abuse of the undertakings' collective dominant market position.[44] As Lianos, Countouris & De Stefano observe, the activities of associations of self-employed persons-undertakings "may be found to constitute an abuse of a dominant position (e.g. excessive pricing), even if the arrangement does not fall under Article 101 TFEU, for instance because of the *Albany* exception."[45]

Finally, it should be noted that regardless of whether the collectively agreed scheme is captured by Article 101 TFEU, the social security institution that provides it can be found to infringe Article 102 if it holds a dominant market position which it abuses. In *Pavlov*,[46] for instance, the agreed pension scheme was found to be dominant but "survived the day"[47] because it was not considered to abuse its dominant market position.[48] In other cases, collectively agreed schemes were exempted under Article 106(2) TFEU as services of general economic interest.[49] As Schiek & Gideon argue, the important thing here is that, for collectively agreed schemes, there is not "an exclusion from Article 102 TFEU *per se* such as the '*Albany* exclusion' from Article 101 TFEU. Depending on the specific schemes, institutions set up by collective agreement could thus still potentially infringe Article 102 TFEU, irrespectively of whether or not the agreement itself fell under Article 101 TFEU or not."[50]

Hence, even though the draft Guidelines go a long way in providing protection to a large category of self-employed persons, they (i) do not capture all those who are in need of protection; (ii) do not address issues regarding the application of Article 101 to decisions of associations of self-employed persons-undertakings or agreements between self-employed persons-undertakings concluded outside the context of collective bargaining negotiations that concern the improvement of their working conditions; and (iii) do not address the possible application of Article 102 to collective agreements by self-employed persons-undertakings.

42 C-136/12, *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato and Autorità garante della concorrenza e del mercato v. Consiglio nazionale dei geologi* [2013] Electronic Reports of Cases.

43 Such agreements can be exempted if it can be shown that such a coordinated refusal to supply labor is necessary and proportionate for the negotiation or conclusion of the collective agreement, it will be treated for the purposes of these Guidelines in the same way as the collective agreement to which it is linked (or would have been linked in the case of unsuccessful negotiations).

44 For collective dominant position see C-395/96, *P Compagnie Maritime Belge* [2000] ECR I-1365, paras 41-42; T-193/02, *Laurent Piau v. Commission* [2005] ECR II-209, para 111.

45 Ioannis Lianos, Nicola Countouris, & Valerio De Stefano, "Rethinking the competition law/labour law interaction: Promoting a fairer labour market" (2019) 10(3) ELLJ 303.

46 *Pavlov* (n 8) paras 120-130.

47 Mark Freedland & Nicola Kountouris, "Some Reflections on the 'Personal Scope' of Collective Labour Law" (2017) 46(1) ILJ 61.

48 *Pavlov* (n 8) paras 120-130.

49 Dagmar Schiek & Andrea Gideon, "Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier?" (2018) CETLS Online Paper Series 6, 7.

50 *Ibid*.

The Commission has invited interested parties to submit their comments on the draft Guidelines. As it has announced, it aims to publish the final version of the Guidelines in the second quarter of 2022. It remains to be seen whether the text will be amended to provide protection from competition law supervision to a larger category of vulnerable self-employed persons.

The Commission has invited interested parties to submit their comments on the draft Guidelines

REGULATING GIG WORK IN AUSTRALIA: THE ROLE OF COMPETITION REGULATION AND VOLUNTARY INDUSTRY STANDARDS

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01 INTRODUCTION

In many countries, regulatory reforms directed at gig work have been focused on widening the definition of employment and clamping down on misclassification.[2] In Australia, however,

2 Jason Moyer-Lee and Nicola Kountouris, *The "Gig Economy": Litigating the Cause of Labour*, in TAKEN FOR A RIDE: LITIGATING THE DIGITAL PLATFORM MODEL (International Lawyers Assisting Workers Network, Issue Brief, 2021).

regulatory initiatives directed at the gig economy have taken a somewhat unexpected turn. Earlier this year, the High Court of Australia – the apex court in this country – handed down two judgments which have contracted, rather than expanded, the common law definition of employment.[3] This approach, which gives primacy in determining work status to the formal written terms agreed by the parties at the commencement of their relationship, has buttressed the efforts of many platforms to place gig workers outside the main statutory framework governing labor relations. As a result, gig workers are largely excluded from the unfair dismissal regime, deprived of minimum wage protections, cut off from sick leave entitlements and denied access to collective bargaining under traditional channels.[4] At the same time that employment protections for platform workers have shrunk, rights and responsibilities under competition and consumer law have grown.

Gig work is a small, albeit growing, part of the Australian economy and labor market. In 2020, it was estimated that around 250,000 people nationally were providing "on-demand services" through digital platforms mediating transactions with consumers[5] (out of a total national labor force of approximately 13 million people). Mostly, on-demand work is performed for platforms operating in the transport/rideshare and food delivery sectors, along with professional and personal services, maintenance work, and increasingly the aged, disability and childcare sectors.[6] Notwithstanding its relatively modest size, gig work has prompted a wave of regulatory concern and a surge in policy experimentation.

In this article, we briefly survey two recent competition law developments which are relevant to workers in the gig economy. First, we look at the class exemption for small business collective bargaining that was recently introduced by the federal Australian Competition and Consumer Commission ("ACCC"). This exemption – which applies well beyond the gig economy – presents important opportunities for enhancing working conditions for platform workers. We then turn to examine a state-based initiative of the Victorian Government, which was prompted by an extensive inquiry into on-demand work commencing in 2018.[7] The Final Report recommended, amongst other things, that the state government in Victoria introduce a set of Fair Conduct and Accountability Standards for the platform economy. We consider how the introduction of state-based standards may interact with federal competition laws in this space. We also reflect on what impact these standards may have for gig workers on the ground.

02

CLASS EXEMPTION FOR SMALL BUSINESS COLLECTIVE BARGAINING

Historically, the right to engage in collective bargaining in Australia has been confined to those in an employment relationship. This is reinforced by a specific employment exemption under the *Competition and Consumer Act 2010* (Cth) ("CC Act"), which provides employees with the capacity to engage in collective bargaining without fear of facing legal liability under the common law or competition legislation.[8]

These rights and protections are largely out of the reach of most gig workers, who are commonly categorized as independent contractors by the platforms which engage them.[9] More specifically, competition laws have traditionally deemed collective bargaining activity by self-employed workers, small businesses, and franchisees to be "cartel conduct" and therefore unlawful. Practices such as price fixing, bid rigging, territorial allocation, boycotts and "concerted practices" encompassing anti-compet-

3 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

4 Anthony Forsyth, *Playing Catch Up But Falling Short: Regulating Work in the Gig Economy in Australia*, 31 KING'S LAW J. 287-300 (2020), at 288.

5 Institute of Actuaries of Australia, *The Rise of the Gig Economy and its Impact on the Australian Workforce* (Green Paper, 2020) 5, 9-11.

6 Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (Victorian Government, Melbourne, 2020) at 24, 34. See further The Senate, Select Committee on Job Security, *First Interim Report: On Demand Platform Work in Australia* (Commonwealth of Australia, Canberra, 2021); Fiona Macdonald, *Individualising Risk: Paid Care Work in the New Gig Economy* (Palgrave Macmillan, Cham, 2021).

7 James, *supra* note 6.

8 However, secondary boycott action remains unlawful. See Shae McCrystal, *Why is it so hard to take lawful strike action in Australia?*, 61 J. OF IND. RELATIONS 129-144 (2019).

9 In several cases, this categorization has been upheld: see e.g. *Gupta v. Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* (2020) 296 IR 246; although compare *Franco v. Deliveroo Australia Pty Ltd* [2021] FWC 2818 (now under appeal).

itive information sharing are all outlawed under the CC Act. There is no requirement to show that this conduct has an anti-competitive effect in practice. A strict prohibition on "cartel conduct" under the CC Act is very much in line with the dominant narrative of modern competition law policy – that is, collusion between would-be competitors in the same market is broadly assumed to generate economic efficiencies leading to higher prices, delivering lower quality services, and producing poorer consumer outcomes.

Since the 1970s, there has been a limited capacity for collective bargaining to take place between commercial actors via the "notification" and "authorisation" procedures set out in the CC Act. However, these processes are generally perceived as cumbersome and resource intensive. They have been little used in practice.[10] Partly in response to these issues, the ACCC introduced a class exemption for small business collective bargaining in mid-2021.[11] In essence, this block exemption permits small economic players, such as franchisees, fuel retailers, and small businesses with an aggregated, annual turnover of less than $10 million,[12] to form a bargaining group and engage in collective bargaining with the relevant target (i.e. franchisors in the case of franchisees, fuel wholesalers in the case of fuel retailers and suppliers or customers in the case of small businesses). Eligible businesses that meet the statutory thresholds, and comply with a set of relevant preconditions, are provided with legal immunity from the cartel provisions and shielded from civil or criminal penalties available under the CC Act.[13]

To avail itself of this exemption, the business wishing to bargain must lodge a formal notice with the ACCC and provide this notice to any potential targets. The notice must identify a relevant class to which the bargaining group belongs (e.g. Uber drivers in Australia), but the members of the bargaining group or the targets of bargaining do not need to be specifically named. The notice may be lodged by a single member of the bargaining group, or a representative of the group, but cannot be lodged by a trade union. Under the exemption, there is no need to explicitly seek or receive permission from the ACCC in order to proceed with bargaining.

In introducing this class exemption, the ACCC appears to have accepted that horizontal coordination by small firms in the same market may generate a "net public benefit",[14] which not only neutralizes any negative anti-competitive effects, but delivers a positive outcome for the market more generally. In explaining the exemption and justifying its position, the ACCC has pointed out that small business collective bargaining can reduce information asymmetry, minimize barriers to entry and achieve enhanced contractual outcomes. The pooling of resources and the sharing of negotiation costs is also said to produce overall economic gains.[15]

"Since the 1970s, there has been a limited capacity for collective bargaining to take place between commercial actors via the "notification" and "authorisation" procedures set out in the CC Act

Beyond the notification procedure, the class exemption imposed very few constraints on the content of the agreement, the level of bargaining and the conduct of the parties throughout the negotiation process. Parties are effectively free to set their own rules about how to engage in bargaining and enforce any concluded agreement. In theory, this new mechanism opens up the capacity for gig workers (and their representatives) to "negotiate with platforms over pay rates, rest periods, safety standards

10 Tess Hardy and Shae McCrystal, *Bargaining in a Vacuum: An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses*, 42 SYD. L. REV. 311-342 (2020); Shae McCrystal, *Collective Bargaining by Self-Employed Workers in Australia and the Concept of Public Benefit*, 42 COMP. LAB. L. & POL. J. 101.

11 The class exemption is given legal force by the Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2020 (the "Determination"), which has been made pursuant to CC Act s 95AA and Competition Code s 95AA.

12 While there is an annual turnover cap which applies to small businesses generally, this turnover cap does not apply to franchisees or fuel retailers.

13 However, statutory prohibitions against primary and secondary boycotts still apply to eligible parties, notwithstanding the class exemption.

14 *Re Queensland Co-Op Milling Association Ltd* (1976) 25 FLR 169.

15 Australian Competition and Consumer Commission, *Collective Bargaining Class Exemption – Discussion Paper*, (2018) https://www.accc.gov.au/system/files/public-registers/documents/ACCC%20Discussion%20Paper%20-%20Collective%20Bargaining%20Class%20Exemption%20-%2023.08.18..pdf .

and managerial control through algorithms."[16] However, in practice, the class exemption may fail to reach these lofty heights.

While the class exemption permits small businesses to engage in bargaining with a particular target, this can only be done on a voluntary and consensual basis. Unless parties seek to navigate the burdensome notification and authorization procedures under the CC Act, they are precluded from utilizing economic coercion to bring reluctant targets to the bargaining table or restart stalled negotiations.[17] Without any real capacity to take strike action or engage in primary or secondary boycotts in support of bargaining demands, the bargaining framework may be severely compromised.[18]

In addition, there is a notable absence of legislative supports for collective bargaining processes, including the obligation to bargain in good faith. There is no individual statutory protection afforded to the member, or representative, seeking to advance the interests of the collective. This means that key individuals remain at risk of prejudicial or retaliatory conduct on the part of an aggravated or frustrated target (for example, a Deliveroo rider who is negotiating on behalf of other riders may have their account deactivated for engaging in this activity and the platform would not be exposed to any sanction or penalty). Further, there are no statutory enforcement mechanisms for ensuring compliance with the terms of any concluded agreement, although some common law channels for the enforcement of multi-party contracts may still be available.[19] This means that even if a final consensus is reached, either party may simply walk away from their commitments without facing any legal consequences. There also exist ambiguities about the scope and application of the exemption at the margins. For example, information-sharing is only covered by the class exemption where the parties believe that it is "reasonably necessary to share or use that information to facilitate engagement in the conduct."[20] Two of the present authors have noted elsewhere that any representative organization involved in collective bargaining for more than one group must "be careful not to share any sensitive information between different groups, to avoid potentially breaching the CC Act in the process."[21] This may prove to be a particular challenge for trade unions – such as the Transport Workers' Union – who have been very active in seeking to represent gig workers and agitating for reform in the gig economy generally.[22] The class exemption has now been in effect for just under 12 months. In this time, there have been at least 45 notices lodged with the ACCC by franchisees, doctors and medical professionals, cartage contractors and chicken growers. As yet, no notices appear to have been submitted by gig workers wishing to collectively bargain with the relevant platform. However, it would be surprising if this does not change in the near future.

"While the class exemption permits small businesses to engage in bargaining with a particular target, this can only be done on a voluntary and consensual basis

16 Anthony Forsyth, THE FUTURE OF UNIONS AND WORKER REPRESENTATION: THE DIGITAL PICKET LINE (Hart Publishing, 2022), at 223.

17 Australian Competition and Consumer Commission, *Small Business Collective Bargaining Guidelines* (2018) https://www.accc.gov.au/publications/small-business-collective-bargaining-guidelines, at 10.

18 The lack of essential structural supports for bargaining suggests that Australia has failed to comply with its international obligations in this regard. See Shae McCrystal and Tess Hardy, *Filling the Void? A Critical Analysis of Competition Regulation of Collective Bargaining Amongst Non-employees*, 37 INT. J. OF COMP. LABOUR LAW AND IR. 355-384 (2021).

19 Enforcement of multi-party contracts at common law is possible, but generally difficult. See, e.g., *Ryan v. Textile Clothing and Footwear Union of Australia* [1996] 2 VR 235. See also Shae McCrystal, *Collective Bargaining by Independent Contractors: Challenges from Labour Law* 20(1) AUST. J OF LAB. L 1, 15–17 (2007).

20 Determination, *supra* note 11, cl 13.

21 Tess Hardy and Shae McCrystal, *The Importance of Competition and Consumer Law in Regulating Gig Work and Beyond*, J.I.R. (forthcoming 2022).

22 Forsyth, *supra* note 16, at 152-154, 183-185.

03

FAIR CONDUCT AND ACCOUNTABILITY STANDARDS

As noted earlier, the Final Report of the 2020 inquiry into on-demand work recommended that the state government in Victoria establish a set of principle-based "Fair Conduct and Accountability Standards" for platforms to follow in their dealings with non-employee workforces.[23] This recommendation for an industry-driven (and voluntary) approach to gig work regulation recognized that some of the inquiry's more interventionist proposals – such as the adoption of a uniform definition of work status across all employment, industrial and safety laws[24] – cannot be implemented by the state government due to limitations on its constitutional powers.[25] In late 2021, the Victorian Government released a Consultation Paper on the proposed Standards for input from stakeholders.[26] It outlined the following six areas which would be covered by the proposed Standards:[27]

· consulting and negotiating with non-employee on-demand workers and their representatives on work status, contract terms and other work-related issues;

· establishing processes for workers to raise questions about their work contracts by reference to factors such as fairness and bargaining power;

· setting up clear and accessible dispute resolution systems through which workers can challenge unfair contracts and suspension/deactivation from platforms;

· providing fair/decent minimum working conditions, and removing discriminatory algorithms, policies, and work practices;

· implementing systems, policies, training, and consultation to reduce safety risks and improve health and safety outcomes for non-employee on-demand workers;

· enabling workers to freely associate to pursue better terms and conditions, and recognizing workers/their representatives collectively.

"As noted earlier, the Final Report of the 2020 inquiry into on-demand work recommended that the state government in Victoria establish a set of principle-based "Fair Conduct and Accountability Standards" for platforms to follow in their dealings with non-employee workforces

In relation to the last of these points, the Consultation Paper observed that (as discussed earlier in this article) collective organization and negotiation by non-employee on-demand workers would ordinarily bring them in breach of the CC Act, subject to the application of the new class exemption for small business collective bargaining. The Victorian Government also notes (as we pointed out above) that the exemption only provides relief from CC Act liability. It does not compel a platform to bargain with gig workers or allow them to take industrial action in support of their demands.[28] Therefore, the purpose of the relevant proposed Standard is "to *encour-*

23 James, *supra* note 6, at 199-201.

24 *Ibid*. at 191-194.

25 Regulation of employment/industrial relations is principally the preserve of the federal government in Australia, while states and territories have greater constitutional capacity to regulate workplace health and safety. See Andrew Stewart, Anthony Forsyth, Mark Irving, Shae McCrystal and Richard Johnstone, CREIGHTON AND STEWART'S LABOUR LAW (6th edition, Federation Press, 2016), chapters 5 and 6.

26 Industrial Relations Victoria, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce: Consultation Paper* (2021).

27 *Ibid*. at 18-38.

28 *Ibid*. at 32-33.

age platforms to collectively bargain with non-employee on-demand workers, when lawfully possible."[29] However, this is unlikely on its own to prompt platforms to engage in collective negotiation with workers under the ACCC class exemption process, given the proven record of gig companies in resisting new regulation globally.[30] The proposed Victorian Standards would not be legally enforceable. However, the state Government is considering options "to increase take up of [the Standards] across platforms, subject to constitutional limits," including business incentives and a public record of platforms committing to the Standards (to promote consumer awareness).[31] In our view, even within the constitutional constraints on state law-making capacity, harder-edged measures to achieve compliance with the Standards could be implemented by the Victorian Government. These include procurement policies (that is, compliance with the Standards being made a condition of platforms being awarded government contracts) and business licensing (compliance being made a condition of operating as a business in the state).[32] It is unclear whether the Government would be prepared to go that far. At the very least, it should provide gig workers (and their representatives) with advice, information, and training to assist them in utilizing the ACCC class exemption process to engage in collective negotiations with platforms over pay rates, working conditions and issues unique to gig work like algorithmic management control and surveillance. Without this support, or the more definitive compliance measures we have suggested, the Standards are unlikely to make any appreciable difference to the reality of working life for those in the gig economy.[33]

04
CONCLUSION

In this short article, we have surveyed two important, and novel, competition law initiatives that are relevant to the regulation of gig work in Australia. The collective bargaining class exemption – introduced by the ACCC in mid-2021 – is significant in that it shows tacit acceptance of the net public benefit that may be gained through collective activity. This reform is notable in a number of respects, including the loose boundaries that have been set around the content, level, and scope of bargaining. However, it also lacks critical features and essential supports that would allow for meaningful collective bargaining on the ground. There is no obligation to bargain in good faith, no real capacity to engage in primary or secondary boycotts, no protection from victimization or retaliatory conduct and no obvious way in which to enforce a concluded agreement. Outside of the formal consultation process, the ACCC has done very little to provide information or raise awareness of this new exemption. This may be one reason for its slow uptake in the platform economy. The absence of advice and guidance on the part of the federal competition regulator uncovers opportunities for state Governments to intervene in this space. As discussed in the second part of this article, the Victorian Government has a clear appetite for more far-reaching reforms with respect to the platform economy, including the introduction of a voluntary set of Fair Conduct and Accountability Standards. While the implementation of these standards will need to navigate thorny constitutional issues, we have argued that there are multiple points of leverage available to the state Government if it is serious about promoting compliance with such standards. These include business incentives, licensing requirements and procurement guidelines. On a more basic level, the state Government could provide gig workers and their representatives with essential information and support which would enable and embolden them to utilize the collective bargaining mechanism now available at the federal level under the ACCC class exemption. Finally, following the election of a federal Labor Government in Australia on 21 May 2022, it is also possible that the national Government will take up the regulatory mantle with respect to the fair and proper reg-

29 *Ibid*. at 33 (emphasis added).

30 See for example Miriam Cherry, *Proposition 22: A Vote on Gig Worker Status in California*, INT. J. OF COMP. LABOR LAW AND POLICY JNL. (DISPATCH NO. 31) (2021)

31 Industrial Relations Victoria, *supra* note 26, at 41.

32 This approach has been implemented in the labor hire industry: see *Labour Hire Licensing Act 2018* (Vic).

33 The Government indicated in late April 2022 that a "road map" for implementing the proposed Standards would soon be made public: "'Road map' for safer gig economy on way: Pallas," *Workplace Express* (29 April 2022).

ulation of platform work. This may include introducing a broader statutory definition of "employment" or "work" into the FW Act, which would bring many self-employed gig workers within the protective fold of the workplace relations regime.[34] In addition, or as an alternative, the federal Government may encourage or compel gig workers and platforms to embrace collective bargaining as a way of resolving differences and improving conditions in the gig economy.

> ***Outside of the formal consultation process, the ACCC has done very little to provide information or raise awareness of this new exemption***

34 While this approach is being urged by some unions and labor law academics, Labor's policy states that it will extend the powers of the federal industrial tribunal to set minimum standards for those in employee-like forms of work including gig workers: Australian Labor Party, *Labor's Secure Australian Jobs Plan* (2022).


FOX

THE ANTITRUST DIVISION AND THE POTENTIAL IMPLICATIONS OF A LABOR RULING FOR GIG WORKER ORGANIZING: A LOOK AT THE *ATLANTA OPERA* AMICUS BRIEF

BY
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01 INTRODUCTION

The Antitrust Division of the Department of Justice weighed in on a National Labor Relations Board (the "NLRB" or the "Board") appeal that may have significant implications for "gig economy" workers, as the NLRB considers changing its approach to determining which workers are entitled to collectively organize under federal labor law.[2] In its February 10, 2022 amicus brief in *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union,*

2 Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10-RC-276292 (NLRB Feb. 10, 2022) (hereinafter "Brief").

Local 798, IATSE, the Antitrust Division (the "Division") addressed the potential implications of the NLRB's decision on this issue for federal competition law and reflected concerns about labor market competition and potential harm to workers that the Biden Administration has placed front and center. President Biden's July 2021 Executive Order on Promoting Competition in the American Economy asserted it was the policy of his administration to "enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in," among other things, labor markets.[3] Indeed, shortly after his confirmation to head the Division, Assistant Attorney General Jonathan Kanter asserted that promoting competition in labor markets was "fundamental," and that he "couldn't imagine a more important priority for public antitrust enforcement."[4]

This article examines the implications for the gig economy of the Division's arguments in its *Atlanta Opera* brief regarding the reach of federal antitrust law with respect to worker organizing, the impact of alleged misclassification on competition, actions that might be brought against workers or companies, and the asserted need to "modernize." Looking forward, the brief may also signal how the Division could proceed with respect to the gig economy.

> ***"This article examines the implications for the gig economy of the Division's arguments in its Atlanta Opera brief***

02 THE NLRB'S CRITERIA FOR IDENTIFYING INDEPENDENT CONTRACTORS AND THE *ATLANTA OPERA* APPEAL

The Division's brief expressed its views on an NLRB appeal that gives the NLRB an opportunity to change its interpretation of who qualifies as an "employee" under the National Labor Relations Act ("NLRA"), as opposed to an "independent contractor." "Employees" receive certain protections under the NLRA, including the right to organize and collectively bargain.[5]

The NLRB's articulation of the criteria for determining if a worker is an "employee" or an "independent contractor" under the NLRA has shifted in different directions over the last decade. In its 2014 *FedEx* decision, the NLRB stated that actual entrepreneurial opportunity for gain or loss was a "relevant consideration" in evaluating whether workers were independent contractors, but that it was one aspect of a relevant factor that asks if the evidence "tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." [6] Five years later, the NLRB issued an opinion in *SuperShuttle DRW, Inc.* that overruled the *FedEx* decision.[7] In part, the *SuperShuttle* opinion concluded that the *FedEx* decision improperly altered the "traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis."[8] After reviewing what it stated were the traditional common-law factors, the Board in *SuperShuttle* concluded that franchisees who operated shared-ride vans were independent contractors.[9] A dissent

3 Executive Order on Promoting Competition in the American Economy, Exec. Order 14036, 86 Fed. Reg. 36987 (2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

4 Assistant Attorney General Jonathan Kanter, Remarks at Federal Trade Comm'n – Dep't of Justice Workshop "Making Competition Work: Promoting Competition in Labor Markets," (Dec. 16, 2021), transcript available at https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf.

5 *National Labor Relations Act*, 29 U.S.C. § 151, *et seq.*

6 *FedEx Home Delivery*, 361 NLRB No. 55 at 619-620 (2014).

7 *SuperShuttle DRW, Inc.*, 367 NLRB No. 75 (2019).

8 *Id.* at *17.

9 *Id.* at *17-20 (discussing extent of control by the employer; method of payment; instrumentalities, tools, and place of work; supervision; the relationship the parties believed they created; engagement in a distinct business, work as part of the employer's regular business, and the principal's business; and skills required); see also *id.* at *2 (stating that Board's inquiry to determine if a worker is an employee or independent contractor involves application of nonexhaustive common-law factors from Restatement (Second) of Agency, § 220 (1958) and listing factors).

authored by the current NLRB chairman criticized the *SuperShuttle* majority's focus on "entrepreneurial opportunity" and its application of the test to the drivers.[10]

The appeal currently before the NLRB concerns makeup artists, wig artists, and hairstylists who did work for The Atlanta Opera.[11] An NLRB Acting Regional Director found that the workers were employees of The Atlanta Opera, Inc., and not independent contractors.[12] On December 27, 2021, the NLRB granted review and expressly invited the filing of amicus briefs regarding whether the Board should revisit the standard for determining the independent contractor status of workers from the *SuperShuttle* decision and, if it did, what standard should apply.[13] Although two dissenting Members asserted there was no reason to revisit the decision and argued that no party had asked the Board to do so, a three-Member majority asserted that the Board had previously revisited precedent *sua sponte* and in the absence of adverse judicial decisions.[14] Dozens of amicus briefs were filed with the NLRB.[15]

03

THE DIVISION'S AMICUS BRIEF

The Division's amicus brief was filed "in support of neither party" and did not state a position on exactly what criteria that should be applied to determine if a worker is an employee or independent contractor, or on whether the Atlanta Opera workers at issue should be considered employees. However, although much of the brief discussed potential issues with an ambiguous or uncertain standard, it left little doubt that the Division was concerned was that the existing definition was too narrow and that it considered a broader definition of an "employee" to generally be pro-competitive. As there has been vigorous debate over whether many gig economy workers are, or should be, treated as employees, a decision that meaningfully broadens who qualifies as an employee could lead to more gig workers receiving employee status under the NLRA.

04

EMPLOYEE STATUS AND INTERACTION WITH THE LABOR EXEMPTIONS IN FEDERAL ANTITRUST LAW

As explained by the Division, the understanding of who qualifies as an "employee" under the NLRA is significant because court have historically held that certain activity by employees and unions is exempt from federal antitrust laws, but that the protection of the exemption does not extend to independent contractors.[16] Critically, the Division's brief did not assert that the labor exemptions do, in fact, *only* apply to workers properly classified as "employees" under the NLRA. Instead, it left open the opportunity to assert that the antitrust exemptions should be interpreted more broadly, and can cover gig economy workers even if they do not meet the NLRB's criteria to be "employees." Indeed, the amicus brief previewed potential arguments for an expansive reading of the exemptions.

"Substantially all, if not all of the normal peaceful activities of labor unions" are exempted from the Sherman Act, even if they interrupt trade.[17] The statutes "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the

10 *Id.* at *21-25 (McFerran, dissenting).

11 Order Granting Review and Notice and Invitation to File Briefs, *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10-RC-276292, 371 NLRB No. 45 (NLRB Dec. 27, 2021).

12 *Id.*

13 *Id.*

14 *Id.*

15 National Labor Relation Board, The Atlanta Opera, Inc., https://www.nlrb.gov/case/10-RC-276292 (last accessed June 13, 2022).

16 See Brief, *supra* note 2, at 4.

17 *Allen Bradley Co. v. Local Union No. 3, Int'l Bros. of Elec. Workers*, 325 U.S. 797, 810 (1945).

antitrust laws."[18] Beyond this statutory exemption, however, courts have recognized a "nonstatutory" exemption. Noting that "[u]nion success in organizing workers and standardizing wages ultimately will affect price competition among employers," the U.S. Supreme Court has "acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions."[19] The nonstatutory exemption's allowance of certain collective bargaining agreements, however, does not lend protection when a union and a "nonlabor party agree to restrain competition in a business market."[20] The Division particularly highlighted that the nonstatutory exemption did not protect agreements on how much consumers will pay for a product, or agreements among competing employers to fix prices or allocate markets.[21]

The Division's account of the enactment and recognition of the labor exemptions suggests that the Division believes that Congress did not intend the Sherman Act to cover labor organizing and that this was "affirm[ed]" by the subsequent enactment of the statutory exemptions.[22] The Division stated that the Clayton Act's provision that "[t]he labor of a human being is not a commodity or article of commerce" "helped to ensure that the antitrust laws would be interpreted in a way that allowed workers to collectively organize for better wages and working conditions."[23] It asserted that this principle was "further affirmed" by the Norris-LaGuardia Act of 1932's express exemption of certain worker-organizing activities from antitrust injunctions and that this legislation "reaffirmed Congress's intent for worker organizing to help equalize bargaining power between workers and their employers."[24] The Division further contended that this history "makes clear" that Congress intended the antitrust laws to be interpreted in harmony with labor laws, and that courts have recognized the statutory and nonstatutory labor exemptions to "harmonize" those two bodies of law.[25]

> ***Beyond this statutory exemption, however, courts have recognized a "nonstatutory" exemption***

The Division's discussion of how the NLRB's definition of "employee" relates to the scope of the labor exemptions indicated that the definition has been used to determine the scope of the exemption, but it did not concede that the definition actually limits its reach. It noted that courts have "historically held that these exemptions only protect *employees* and their unions, not independent contractors," and that "traditionally," concerted action by independent contractors has been subject to antitrust scrutiny.[26] It further asserted that courts have a "tendency" to construe the labor exemptions narrowly, indicating that workers who may have been employees under the NLRB's old *FedEx* standard but not the current *SuperShuttle* standard might be subject to antitrust liability.[27] It stated that there therefore "may be potential benefits" to extending labor protections to gig economy workers who seek to bargain with a single employer, including "digital platforms."[28]

The possibility of recognizing a category of workers who are not considered employees covered by the NLRA but who have a greater ability to organize than traditional independent contractors in some ways echoes efforts at the state and local level to grant gig economy workers some additional rights or benefits without classifying them as employees. Of course, gig economy companies and localities have sometimes vigorously disagreed over the rights and restrictions applicable to gig workers. For example, a dispute arose be-

18 *Connell Const. Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975) (citations omitted).

19 *Id.* at 622.

20 *Id.* at 622-23 (citations omitted).

21 Brief, *supra* note 2, at 3-4; see also *Connell*, *supra* note 18, at 618-619 (no immunity from federal antitrust statutes where union organizing subcontractors picketed general contractors to compel them to deal only with parties to union's collective bargaining agreement).

22 Brief, *supra* note 2, at 2.

23 *Id.*

24 *Id.* at 2-3 (citing 29 U.S.C. §§ 102, 104-05).

25 *Id.* at 3.

26 *Id.* at 4 (emphasis in Brief).

27 *Id.*

28 *Id.* at 4-5.

tween ride-sharing companies and the City of Seattle when Seattle passed an ordinance that required the companies to bargain collectively with a certified driver representative.[29] In California, after passage of a state law that required some gig economy companies to employ their workers, companies supported a ballot measure to make some gig workers independent contractors with special benefits.[30] While this measure passed, a California state court judge found that it was unconstitutional under the state constitution and the case is pending on appeal.[31] These disputes about whether and on what terms to treat gig workers as a special category appear likely to continue, as seen in a recent legal battle over a potential Massachusetts ballot proposition that would have guaranteed some gig workers a minimum wage without making them full employees.[32]

The Division's position thus appears to encourage the NLRB to issue a ruling that could bolster the case for finding that gig worker organizing is exempt from federal antitrust law, but leaves room to reject an all-or-nothing approach in which workers are either 1) employees within the scope of NLRA provisions and labor exemptions who can organize, or 2) independent contractors who are much more limited in acting collectively. Even if the NLRB chooses not to address the approach for identifying employees and independent contractors for purposes of the NLRA, or issues a decision that is too fact bound or ambiguous to provide clear guidance on classifying many gig economy workers, the Division may argue that federal antitrust law should not apply to workers who are, or might be, independent contractors under NLRB's standard. This may prove important for companies and workers where workers may still be independent contractors following any change by the NLRB.

05 POTENTIAL IMPACT OF CHANGING THE CLASSIFICATION STANDARD ON COMPETITION

Separately, the Division expressed concern that an "ambiguous" definition of who is considered an "employee" under the NLRA could be used anticompetitively in both labor and product markets. It contended that recent scholarship "suggests that an ambiguous NLRB definition of employment may lead to competitive harm by encouraging employers to misclassify their workers as non-employees."[33] Notably, although the Division framed its arguments as addressing the harms of an "ambiguous" definition, elements of its discussion appear to indicate the Division sees potential competitive harm from a *narrower* standard, clear or not.

First, in discussing the potential impact of misclassification on the labor market, the Division suggested that worker organizing is procompetitive, and that classifying more workers as employees may prevent employers from taking anticompetitive actions. It asserts that misclassification "reduces or eliminates workers' ability to bargain collectively for better terms," and contends that employers can "take advantage" of workers' relative lack of bargaining power to coordinate unlawfully with other employers on classification and other "terms of employment."[34] This concern with employer collusion appears consistent with the Division's recent active pursuit of multiple cases against companies and individuals who it alleged conspired to fix wages and terms of employment, or agreed to restrictions on hiring each other's workers.[35]

29 *Chamber of Commerce of the United States of Am. v. City of Seattle*, 890 F.3d 769, 775-79 (9th Cir. 2018).

30 Kate Conger & Kellen Browning, *A Judge Declared California's Gig Worker Law Unconstitutional. Now What?*, The New York Times, Aug. 23, 2021.

31 *Id.*; see also Kellen Browning, *The Next Battleground for Gig Worker Labor Laws: Massachusetts*, The New York Times, June 1, 2022, available at: https://www.nytimes.com/2022/06/01/business/massachusetts-gig-workers-ballot.html.

32 Browning, *supra* note 31; Kellen Browning, *Massachusetts Court Throws Out Gig Worker Ballot Measure*, The New York Times, June 14, 2022, available at: https://www.nytimes.com/2022/06/14/technology/massachusetts-gig-workers.html.

33 Brief, *supra* note 2, at 6.

34 *Id.*

35 *E.g.*, Indictment, *United States v. Da Vita*, Case No.1: 21-cr-00229 (D. Colo. Nov. 3, 2021) (accusing defendants of conspiracy to suppress wages and restrict solicitation and hiring of workers); Criminal Indictment, *United States v. Hee*, Case No. 2:21-cr-00098 (D. Nev. March 30, 2021) (accusing defendants of conspiracy not to raise wages or hire another company's workers); Indictment, *United States v. Patel*, Case No. 3:21-cr-00220 (D. Conn. Dec. 15, 2021) (accusing defendants of conspiracy to allocate employees and to restrict hiring and recruitment); Indictment, *United States v. Manahe*, Case No. 2:22-cr-00013 (D. Maine Jan. 27, 2022) (accusing defendants of conspiracy to fix rates and not hire each other's workers).

Second, the Division asserted that employers are more likely to impose one-sided contract provisions against misclassified workers, specifically calling out "blanket non-competes or restrictions on employee information sharing regarding wages or terms of employment."[36] It contends that such contract terms may "further restrain competition in the labor market," and prompt a "self-reinforcing cycle" because those terms "may become more pervasive" if workers cannot resist them without the rights and protections of the NLRA.[37] Concern about potential harm from non-competes was raised by President Biden's July 2021 Executive Order on Promoting Competition in the American Economy, which asserted that "[p]owerful companies require workers to sign non-compete agreements that restrict their ability to change jobs" and "encouraged" the Federal Trade Commission ("FTC") Chair to exercise the FTC's rulemaking authority to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[38]

> *"Concern about potential harm from non-competes was raised by President Biden's July 2021 Executive Order on Promoting Competition in the American Economy*

Third, the Division highlighted what it believed to be a potential unfair competitive advantage for companies that cut their costs by allegedly misclassifying their workers. It argued that, unless addressed by NLRB or other agencies, this could lead to a "race to the bottom" that forces rivals to join in allegedly misclassifying their workers or cede the marketplace.[39]

Notably, the Division's reasoning centered on the impact on the worker, rather than detailing its view of the impact on consumers. While this approach may have been well-suited for a worker-focused NLRB, it is also consistent with Kanter's recent criticism of the "consumer welfare" standard traditionally used to evaluate conduct and mergers, as he asserts that it, among other things, "has a blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy."[40] Of course, some have argued that gig economy models have benefits for workers, such as flexibility and control over their schedules, and for consumers, such as lower cost and more convenient services.[41]

06 POTENTIAL FOR ANTITRUST ACTIONS AGAINST WORKERS OR EMPLOYERS

The amicus brief also signaled that the Division is concerned about other actors who may assert antitrust claims against organizing workers. Although the Division said that it may exercise its discretion "not to pursue action against workers whose status as employees is unclear," it noted that other actors may file such lawsuits, particularly citing the possibility that the specter of private antitrust suits and treble damages would "substantially chill worker organizing."[42] Left

36 Brief, *supra* note 2, at 6.

37 *Id.* at 6-7 (citations omitted).

38 Executive Order, *supra* note 3.

39 Brief, *supra* note 2, at 7.

40 Assistant Attorney General Jonathan Kanter, Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), available at: https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

41 E.g. Brian Underwood, *Why More People Are Choosing the Gig Economy*, USA Today, Sept. 1, 2021, available at: https://www.usatoday.com/story/sponsor-story/ascend-agency/2021/09/01/why-more-people-choosing-gig-economy/5650195001/ (stating "this alternate way to work empowers people to take control of their time, workflow, compensation and growth" and asserting that one reason the number of gig workers has surged after the pandemic is the lifestyle and additional freedom a traditional job does not provide); James Sherk, Heritage Found., *The Gig Economy: Good for Workers and Consumers*, Oct. 7, 2016, available at https://www.heritage.org/jobs-and-labor/report/the-rise-the-gig-economy-good-workers-and-consumers (arguing gig workers value flexibility and control and consumers benefit because, among other things, services can be lower cost and more convenient); Marina Lao, *Workers in the "Gig" Economy*: *The Case for Extending the Antitrust Labor Exemption*, 51 UC Davis L. Rev. 1543, 1551, 1586 (asserting that consumers are the "clear winners" in the gig economy and that innovations introduced by platforms increase consumer welfare by improving the consumer experience and offering more options, and arguing that benefits are "more mixed" for gig economy workers).

42 Brief, *supra* note 2, at 5.

unsaid, relying on the exercise of discretion could provide fleeting protection even from government enforcement, as a future change in leadership could alter the Division's approach and prompt action regarding conduct that the current Division would leave be.

The Division also argued that ambiguity in the NLRB's standard could subject both workers and employers to antitrust claims, with workers perhaps facing suits from employers and other parties, and employers perhaps accused of improperly coordinating the actions of independent contractors.[43]

The Division essentially suggested that the NLRB might actually help gig platforms that set prices to avoid antitrust liability by making it clear that their workers are not independent contractors, citing an antitrust case filed in New York that alleged that Uber established fare-fixing agreements among its drivers.[44] Similarly, one academic has suggested that antitrust liability could be used to create a "significant cost" to classifying workers as independent contractors, with employers having to either give workers the protections of employees (including the right to collective bargaining) or be subject to antitrust liability if they seek to impose vertical restraints on workers treated as independent contractors (such as setting prices they charge).[45] The amicus brief leaves unclear whether the Division merely raises the possibility of antitrust liability for gig economy companies coordinating the work of independent contractors to suggest that gig economy companies benefit from a broad understanding of "employee," or if it has interest in arguing that some gig economy companies must either treat workers as employees or run afoul of antitrust laws.

07 LANGUAGE OF MODERNIZATION AND JUSTIFYING CHANGE

Notably, the Division framed the issue of potentially revising the standard for identifying independent contractors as one of "modernization," paralleling language used by Kanter and FTC Chair Lina Khan in connection with other initiatives where they have signaled that they are poised to make significant changes. The *Atlanta Opera* brief asserted that the "national economy has seen a dramatic change in the 'facts of industrial' life in recent years," and that millions of workers who "until recently, would have been properly classified as employees have seen their work recategorized as independent contracting," leading to the loss of "crucial protections" under federal labor law.[46] In particular, the Division contends that the "rapid rise of digital platform intermediaries, whose core business model often relies on coordinating the work of large numbers of workers while disclaiming the traditional responsibilities of an employer" has accelerated this trend.[47]

In adopting this framing, the Division appears to lay the groundwork to assert that new approaches are needed, but that it thinks that these approaches are not necessarily inconsistent with existing law and past practice because applying the same law and principles to different circumstances has different results. This message has been seen elsewhere, including in the request from the FTC and the Division earlier this year for public input on how to "modernize" merger enforcement, including ensuring that analytical techniques, practices, and enforcement policy "reflect current learning about competition based on modern market realities."[48] By contending that the NLRB has grounds to revise the independent contractor standard because of the "significant, recent changes in our national economy," despite the fact that the current standard was articulated in 2019, the Division offers a possible justification for changing course.[49]

43 *Id.* at 5-6.

44 *Id.* at 5-6 & n.25 (citing *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824 (S.D.N.Y. 2016)).

45 Martin Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & Contemp. Probs., 45, 62-63 (2019).

46 Brief, *supra* note 2, at 1.

47 *Id.*

48 U.S. DOJ and U.S. FTC, Request for Information on Merger Enforcement, Jan. 18, 2022, available at https://www.regulations.gov/document/FTC-2022-0003-0001.

49 Brief, *supra* note 2, at 2.

08
WHAT DOES IT MEAN?

Moving forward, the Division's brief may portend future efforts by the Division to attempt to use the antitrust laws to benefit gig workers. Any future advocacy or enforcement activity by the Division may take place alongside efforts by other federal agencies or departments. In particular, FTC Chair Khan has asserted she is "committed to considering" the FTC's "full range of tools," including rulemaking and enforcement, in order to address allegedly illegal employment contract provisions.[50] She has also advocated for legislation "clarifying" that labor organizing is outside of the scope of federal antitrust statutes even if the workers are not classified as employees, highlighting the potential far-reaching impact on gig economy companies that rely on non-employee workers.[51]

> ***"Moving forward, the Division's brief may portend future efforts by the Division to attempt to use the antitrust laws to benefit gig workers***

The Division's decision to weigh in on the *Atlanta Opera* case, and its discussion of the potential consequences of private litigation, suggest that the Division may seek to file amicus briefs in other administrative proceedings or litigation in an effort to shape the interpretation of the labor exemptions and the reach of the antitrust laws. Under Kanter's predecessor, Makan Delrahim, the Division was active in filing amicus briefs and weighed in on significant cases regarding, among other things, the application of the Sherman Act to gig economy workers and the scope of the labor exemptions.[52] Moreover, Chair Khan informed Congress in September 2021 that the FTC "will work with the DOJ to consider providing guidance to the courts on how the Clayton Act is designed to exempt worker organizing activities from antitrust" in private litigation against workers who collectively organize.[53] The Division's brief suggests that the FTC may find a willing collaborator.

Moreover, regardless of how the Division may act to try to expand or clarify the group of workers who can organize without violating federal antitrust laws, its recent activity on labor market antitrust issues suggests that it may increase investigations and enforcement efforts regarding what it believes to be anticompetitive conduct that harms gig economy employees. Of potential relevance, on March 10, 2022, the Division and the Labor Department announced that they signed a memorandum of understanding ("MOU") to "strengthen the partnership between the two agencies to protect workers from employer collusion, ensure compliance with the labor laws and promote competitive labor markets and worker mobility."[54] Although the announcement and memorandum did not expressly mention the gig economy, it referenced protecting workers harmed or at risk of being harmed "as a result of anticompetitive conduct, including through the use of business models designed to evade legal accountability, such as the misclassification of employees," language reminiscent of that sometimes used to accuse gig economy companies of improperly claiming their workers are independent contractors.[55] Among other things, the MOU stated that the agencies would establish procedures for consulting and coordinating enforcement (including sharing information) and that each agency would refer cases to the other agency when it detects possible violations of statutes enforced by the other agency.[56]

50 Letter of Lina M. Khan, Chair, Federal Trade Commission to the House Subcommittee on Antitrust, Commercial, and Administrative Law 2 (Sept. 28, 2021).

51 *Id.* at 3.

52 *Chamber of Commerce of the United States v. City of Seattle*, Brief for the United States and the Federal Trade Commission as Amicus Curiae in Support of Appellant and in Favor of Reversal, No. 17-35640 (9th Cir. Nov. 3, 2017); *William Morris Endeavor Entm't, LLC v. Writers Guild of Am., West, Inc.*, Statement of Interest of the United States, No. 2:19-cv-05465-AB (AFMx) (C.D. Cal. Nov. 26, 2019); see also The Federalist Society, FedSoc Blog, An Interview with Makan Delrahim, Former Assistant Attorney General for the Department of Justice Antitrust Division (Mar. 22, 2021), https://fedsoc.org/commentary/fedsoc-blog/an-interview-with-makan-delrahim-former-assistant-attorney-general-for-the-department-of-justice-antitrust-division (discussing asserted goals and results of amicus program).

53 Letter, *supra* note 50, at 2.

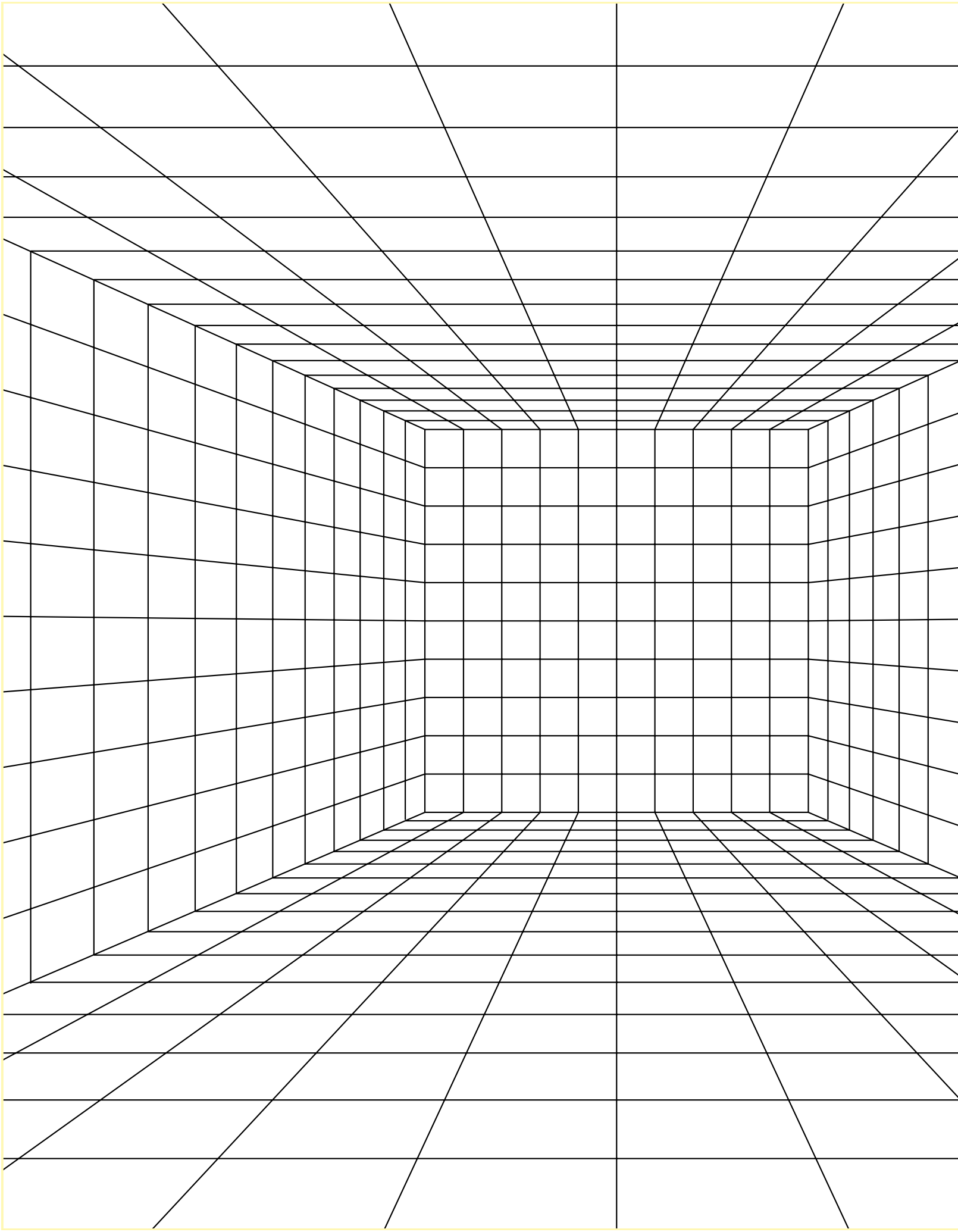
54 Press Release, U.S. Dep't of Justice, Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), available at https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers.

55 *Id.*; Memorandum of Understanding Between the U.S. Department of Justice and U.S. Department of Labor 1-2 (Mar. 10, 2022), available at https://www.justice.gov/opa/press-release/file/1481811/download.

56 Memorandum of Understanding, *supra* note 55, at 3-4.

Going forward, the Division's efforts regarding worker organization and the gig economy will merit careful watching to see if the Division take a leading or active role in shaping the application of federal antitrust laws to actors in the gig economy.

> *The Division's brief suggests that the FTC may find a willing collaborator*



LABOR AND EMPLOYMENT PERSPECTIVES ON THE GIG ECONOMY – HOW THE PRO ACT AND A NEW LABOR BOARD MIGHT IMPACT GIG WORKERS AND THEIR "EMPLOYERS"

BY SCOTT NELSON

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The "gig" economy is on the rise. According to the U.S. Chamber of Commerce, the number of gig economy workers — independent contractors or freelancers who do short-term project-based, hourly, or part-time work for multiple clients — has grown in recent years, with 57 million Americans taking on freelance work in 2019.[2] The COVID-19 pandemic and the ensuing Great Resignation that followed seem to have hastened the pace, as many

2 https://www.uschamber.com/co/run/human-resources/what-is-a-gig-worker.

workers who once held traditional jobs began freelancing.[3] As more workers join the ranks of the gig economy, a question that has lingered since the beginning — whether gig workers should be classified as independent contractors or employees — is taking on a growing level of importance.

Since the inception of the gig economy, gig workers have been classified as independent contractors. This has allowed companies such as Uber to grow their businesses without incurring the costs associated with hiring traditional employees, such as minimum wage, employment taxes, benefits, and insurance. In 2019, the National Labor Relations Board ("NLRB") issued an Advice Memorandum in which it concluded that drivers for UberX and UberBlack were independent contractors, not "employees." Gig employers were thus shielded, at least temporarily, from union petitions and unfair labor practice charges brought by gig workers. But that was under a markedly different administrative and cultural environment.

Gig employers knew that the 2019 Advice Memorandum, which does not carry the force of statutory law, was only a temporary reprieve. Accordingly, many of the key players in the gig economy began to lobby state and federal lawmakers to pass laws that would codify gig workers as independent contractors. So important to these companies is the independent contractor framework, that they successfully lobbied to get a ballot measure (Proposition 22) approved in California, where many of them are headquartered, which defined app-based transportation and delivery drivers as independent contractors. Proposition 22, however, was struck down in August 2021, when a California state judge ruled that it violated state constitutional law. That decision is now on appeal and the fight over how gig workers should be classified in California continues.

On June 14, 2022, the Massachusetts Supreme Judicial Court held that a similar ballot measure, slated to appear on ballots in the November election, could not move forward under state law. That measure, which was backed by major players in the rideshare industry and gig economy, would have provided gig workers with some benefits, such as healthcare stipends and minimum pay for time spent assigned to a task (as opposed to waiting for an assignment), but also would have codified gig workers' employment status as independent contractors under state law. Thus, the original question underlying the gig economy business model — how to classify workers — remains contentious as ever.

This year could bring new developments for gig employers and workers. In February 2021, U.S. Representative Robert Scott (D–VA) introduced H.R. 842, otherwise known as the "Protecting the Right to Organize Act of 2021" or the "PRO Act." As it currently reads, the PRO Act would, among other things, broaden the definition of "employee" under the National Labor Relations Act ("NLRA"), which addresses rights of employees and employers in collective bargaining, extend joint employer liability; codify a return to the "ambush" or "quickie" union election rules created under the Obama administration; invalidate state laws that prohibit employees from being forced to pay union dues as a condition of their employment; loosen rules regarding labor strikes, make it more difficult for employers to replace striking workers, and mandate initial collective bargaining agreements within as little as 120 days.

The PRO Act also would make it an unfair labor practice to require employees to attend employer meetings discouraging union membership (also known as "captive audience meetings") and would prohibit employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation. The bill would also provide employees the ability to vote in union elections remotely (i.e. by telephone or the internet).

"Gig employers knew that the 2019 Advice Memorandum, which does not carry the force of statutory law, was only a temporary reprieve

Most important for gig employers and workers, the PRO Act would implement the test outlined in California's 2019 Assembly Bill 5 (the "ABC Test"), to determine whether a worker is an independent contractor or an employee. The ABC Test considers (1) the level of control the company maintains over the worker, (2) whether the worker performs work that is outside the scope of the company's normal business operations, and (3) whether the worker conducts similar work independently and outside the context of the employer. It is generally believed that the ABC Test would almost certainly result in the classification of gig workers as employees for purposes of collective bargaining rights under the NLRA. Massachusetts uses a similar test for determining employment classification.

The PRO Act passed the House in March 2021 and went to the Senate, where hearings were held before the Committee on Small Business and Entrepreneurship in March 2022. Whether the bill clears the Senate is an open question, but what is clear is that it remains an important part of the Democratic Party and President Biden's platform. On Thursday, June 16, 2022, President Biden reiterated

3 *Id*.

his support for the PRO Act, calling on Congress to pass the bill:

President Biden's support for the PRO Act coincides with his strong emphasis on labor unions and the rights of workers to organize and collectively bargain with their employers. Indeed, he has been very vocal in his support of labor unions. On June 14, 2022, President Biden spoke at the AFL-CIO Quadrennial Constitutional Convention, where he thanked union workers for helping get him elected and touted the virtues and benefits of union membership.[4] He gave a similar speech in April 2022 to the Building Trades Unions Legislative Conference.[5]

Like the president who nominated her in February 2021, NLRB General Counsel Jennifer Abruzzo is an outspoken advocate for the proliferation of labor unions. In April, she issued a memorandum laying out her plan for ending mandatory "captive audience" meetings, a key component in employers' union election campaigns (which the PRO Act would also essentially abolish).[6] That same month, General Counsel Abruzzo's office filed a brief before the NLRB arguing that the Board should overturn long-standing precedent requiring employees to vote on whether to be represented by a union and instead require employers to recognize unions upon receiving signed authorization cards from a majority of the employees. In this administrative environment, it is likely no coincidence then that there is an ongoing increasing level of interest in labor unions and collective bargaining. The NLRB reported in April that during the first six months of Fiscal Year 2022, union representation petitions have increased 57 percent.[7]

Such is the environment in which a growing number of gig economy workers, and the companies that employ them, find themselves. A question of increasing concern for these companies and workers is how the PRO Act, if it is passed, might affect their workplace. Proponents of the PRO Act say that it will grant much needed benefits and job security to gig workers, while opponents say that it will only serve to reduce the flexibility that workers in the gig economy value above all else. To be clear, the PRO Act would only potentially reclassify workers as employees for purposes of forming a union under the NLRA. It would not require companies to reclassify workers for other purposes, such as minimum wage and overtime.

Still, opponents of the PRO Act are concerned that it is simply a first step towards the inevitable reclassification of gig workers as employees and it is tough to argue against them on that point. They also are understandably concerned that passing a law that would allow gig workers to organize and eventually, anticipated laws that would classify those workers as employees, will increase costs, which the companies will then have to pass on to consumers, resulting in reduced demand for services and fewer workers to provide those services. Perhaps somewhat counter-intuitively, not all gig workers are in favor of the PRO Act. While many (perhaps most) would welcome the right to organize under the NLRA, others are concerned that the PRO Act, and its anticipated consequences on employers, might drive the companies that hire them to look elsewhere (i.e. full time employees) for their services. As is the case with so much of the law in this area at this time, the landscape is shifting.

"Still, opponents of the PRO Act are concerned that it is simply a first step towards the inevitable reclassification of gig workers as employees and it is tough to argue against them on that point

4 https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/14/remarks-by-president-biden-at-the-29th-afl-cio-quadrennial-constitutional-convention/.

5 https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/06/remarks-by-president-biden-at-north-americas-building-trades-unions-legislative-conference/.

6 https://apps.nlrb.gov/link/document.aspx/09031d458372316b.

7 https://www.nlrb.gov/news-outreach/news-story/union-election-petitions-increase-57-in-first-half-of-fiscal-year-2022.

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