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GIG WORKERS: WALKING A TIGHTROPE WITHOUT A SAFETY NET

By Joshua M. Javits¹ and Matthew L. Luby^{23*}

I. INTRODUCTION

Annually every spring—until the COVID-19 pandemic which began in March 2020, professional sports teams turn to their own budding prospects. Rookie drafts garner media attention and propel the possibility of staggering salaries into the headlines.³ Undrafted free agents, for their part, begin searching for jobs.

With a lesser celebrity profile, many American workers have themselves become free agents in an economy transformed by technology. The static newspaper classified ads of the past have been joined by vast online platforms, such as TaskRabbit and Freelancer.com, that allow jobseekers to connect with individuals seeking a diverse range of services—from graphic design and data entry to home furniture assembly.⁴ Yet, this flexibility comes with a flipside, potentially placing workers on a path to economic insecurity and at the crossroads of a complicated legal debate about what rights and benefits they are due.

A. The Growth of Gig Workers

Although precise numbers and definitions are elusive, roughly 15.8% of U.S. workers are engaged in alternative work arrangements.⁵ Economics plays a part in the popularity of freelancing and contracting, as full-time opportunities remain out of reach for many workers or are insufficient to meet basic needs if they are even available.⁶ A desire for work-life balance drives others to pursue a flexible work arrangement.⁷ Moreover, there are

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³ See e.g., Frank Pallotta, *NFL Draft nabs second biggest viewership for ESPN and NFL Network*, CNN (May 1, 2017), <http://money.cnn.com/2017/05/01/media/nfl-draft-ratings/>; Jason Belzer, *2017 NFL Draft 1st Round Rookie Salary Projections: What Garrett, Trubisky And Fournette Will Make*, FORBES (Apr. 28, 2017), <https://www.forbes.com/sites/jasonbelzer/2017/04/28/2017-nfl-draft-1st-round-rookie-salary-projections/#457dd5bc6f04>.

⁴ Susan Lund, *What the Rise of the Freelance Economy Means for the Future of Work*, HUFFPOST (Dec. 6, 2017), http://www.huffingtonpost.com/susan-lund/freelance-economy-future-work_b_8420866.html.

⁵ Neil Irwin, *With 'Gigs' Instead of Jobs, Workers Bear New Burdens*, N.Y. TIMES, Mar. 31, 2016, at A3.

⁶ See Tammy Erickson, *The Rise of the New Contract Worker*, HARV. BUS. REV. (Sept. 7, 2012), <https://hbr.org/2012/09/the-rise-of-the-new-contract-worker>; see also *Flexibility and the On-Demand Economy*, NAT'L EMP. L. PROJECT 1, 3 (June 2016), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Flexibility-On-Demand-Economy.pdf>.

⁷ Erickson, *supra* note 6.

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real work benefits to gig workers of being independent contractors -- e.g., flexibility, independence, and being within limits able to make more by working more to make more.

The COVID-19 pandemic—with its stay-at-home orders and the consequent economic dislocation—together with worker’s personal predilections have undoubtedly accelerated the movement toward dispersed and project-based employment. The pandemic has given an enormous push to the already existing trend away from traditional employment attributes such as office work and regular work hours. Businesses are seeing the potential for huge cost savings by reducing office space and other overhead. Workers are attracted by work-at-home scenarios that eliminate commuting, reduce child-care costs, and result in less expensive housing because of the ability to live further away from city or even suburban workplaces.⁸

The impact of this trend away from the workplace is the loss of connections among employees. However, the trend towards a fragmented workforce may have its limits for businesses themselves as common corporate goals, cohesiveness, and culture are jeopardized. In addition to this, the loss of employee connections may create greater obstacles to pursuing collective activities, such as union organizing or even more informal pursuit of shared safety or scheduling concerns.

B. The Legal Regime

The extent to which this economic and cultural movement away from traditional employment grows depends on the legal structure of the employer-employee relationship. Federal labor law distinguishes between two categories of workers: employees and independent contractors. Employees can access multiple benefits and protections, including collective bargaining rights, health insurance, medical leave, workers’ compensation, and retirement plans. Independent contractors cannot access these same benefits and protections by operation of law. Absent these supports, independent contractors take on the risk of gravely unpredictable life circumstances in an uncertain economy.

As will be discussed, recent interpretations of the National Labor Relations Act and the Fair Labor Standards Act by government agencies have broadened the definition of independent contractor and denied worker employment rights. In California, the passage of what is known as Proposition 22 will make it significantly tougher to reclassify gig workers involved in the rideshare industry as employees. As a result it will be harder to achieve workplace protections such as base pay, workers compensation, and meaningful health insurance coverage, particularly if this approach is adopted in other states under pressure from Uber and Lyft.

C. Individual versus Collective Protections in the Sports and Entertainment Industries

The fluid relationship between individuals and their work in today’s economy creates opportunities to clarify relationships through negotiation and creative problem solving to ensure everyone’s needs are met. Importantly, though “gig” workers such as actors and professional athletes earn their living in ways distinct from the office and factory work on

⁸ Gil Press, *The Future of Work Post-Covid-19*, FORBES (July 15, 2020, 9:00 AM), <https://www.forbes.com/sites/gilpress/2020/07/15/the-future-of-work-post-covid-19/?sh=2c48bc884baf>.

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which current labor law is based, they share with all workers a common desire for financial security and well-being.⁹ The entertainment and professional sports industries boast decades of experience navigating the risks and rewards of nontraditional working settings and arrangements. Sports and entertainment employment relationships are a unique balance of flexible individual and protective collective concerns. These industries may offer tools and strategies that can be used with flexibility to develop contracts, policies, and practices for the gig workers of today and the future.

Similarly, professional associations, such as those of pilots and nurses, bring together professionals who share common concerns. Many of these associations have developed into unions but, at the same time, have retained their focus on occupational and public policy issues. Viewed through this lens, the diverse relationships typical of today's flexible workforce may inform the creation of an inclusive, rather than exclusive, national labor policy. Such a policy should recognize the benefits to the economy of flexible employment relationships while promoting fairness and economic security for all who work.

The combination of collective and individual negotiation, which has emerged in the sports and entertainment industry, is premised on the bargaining power of individuals with unique and valuable talents, as well as the understanding that their bargaining power can erode substantially over time. This model may apply imperfectly to gig workers without unique talents and whose leverage may be based only on their availability to undertake an assignment when needed. However, it seems increasingly likely that such workers will coalesce to improve their conditions, either through political action, application of economic pressure, and work towards a combination of individual and collective negotiation to protect their interests. The form this effort takes will depend on how established law is interpreted and the extent to which new laws are passed to protect their interests. If this occurs, such workers will occupy a new middle ground - shared with sports and entertainment figures - between pure collective bargaining in which individual negotiation is prohibited, and the purely individual negotiations that occur between genuine independent contractors and their customers.¹⁰

The legal framework for the debate about independent contractors and employee status is discussed in Part II of this article. The laws and working relationships of the sports and entertainment industries are discussed in Part III, and the challenges confronting workers in these sectors are compared with those faced by other nontraditional workers. Tools and strategies that have been used with success in sports and entertainment and that could be applied to the U.S. gig economy will be considered later in the article. Part IV examines the California experience in addressing the independent contractor/employee dichotomy which has been a highly politicized process. Part V focuses on the potential for the sports and entertainment industry hybrid model to satisfactorily balance the interests involved.

⁹ See generally INDY WORKER GUILD, <http://www.indyworkerguild.org/> [<https://web.archive.org/web/20180401235007/https://indyworkerguild.org/>].

¹⁰ See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (prohibiting individual negotiations when a union is the certified bargaining agent for employees).

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II. THE LEGAL FRAMEWORK

The 1935 National Labor Relations Act (NLRA), chief among the nation's labor laws, regulates collective bargaining in the private sector and the relationship between employers and employees.¹¹

The NLRA does not, however, cover all workers. The law excludes from its protections several groups, among them public employees, managers and supervisors, agricultural workers, domestic workers, and- significantly for our purposes- independent contractors.¹² With important workers' rights in the balance, disputes about employee classification are common.¹³ Classification as an employee affords individuals the right to join a union that will collectively bargain on their behalf. Designation as an independent contractor makes one ineligible for the NLRA's protections and offers potential advantages to employers in the form of reduced expenditures on taxes, wages, benefits, and workers' compensation insurance.¹⁴ The line between covered employees and excluded independent contractors is increasingly imprecise in the age of nontraditional workplaces and arrangements.¹⁵

This evolution of the workplace has complicated and raised the stakes of the decades long debate between unions and employers over the status and definition of independent contractors. Employers embrace the application of independent-contractor status as an efficient means of cutting payroll costs and responding to fluctuating market needs.¹⁶ Unions and advocates, for their part, fear that such classifications are being used to erode workers' rights to organize unions; access state workers' compensation and wage and hour requirements; and access critical labor and employment laws dealing with wage protection, economic security, and health and safety. These rights and protections are embodied in the National Labor Relations Act, the Railway Labor Act (RLA), the Employee Retirement Income Security Act (ERISA), the Occupational Safety and Health Act (OSHA), the Mine Safety and Health Act (MSHA), the Fair Labor Standards Act (FLSA), and Social Security.¹⁷

Identifying workers as independent contractors reduces employer costs and gives them a competitive advantage. The former Acting Secretary of Labor Seth Harris noted a compelling economic reason for employers to classify workers as independent contractors:

¹¹ See generally WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 27 (Cambridge Univ. Press, 4th ed. 2004).

¹² *Jurisdictional Standards*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/jurisdictional-standards> (last visited Mar. 10, 2022).

¹³ Jennifer Pinosof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 343 (2016).

¹⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006).

¹⁵ See *id.*

¹⁶ Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it*, NAT'L EMP. L. PROJECT (May 2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>.

¹⁷ 29 U.S.C. §§ 151-169, 203, 651-678, 1001-1461; 30 U.S.C. §§ 801- 966; 45 U.S.C. §§ 151-188.

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[E]mployees bring meaningfully higher labor costs than independent contractors...¹⁸ industries where labor represents a substantial share of production costs and competitive bidding for contracts is common, the cost differential between employees and independent contractors can be the difference between winning or losing contract...¹⁹ newer industries like the online platform economy, lower labor costs derived from business models where workers are classified as independent contractors can increase both profit projections and EBIDTA [Earnings Before Interest, Taxes, Depreciation, and Amortization]. This savings in labor costs] provides a valuable competitive edge in capital markets.²⁰

Harris cites one study that has estimated that online platform companies are able to save labor costs of up to 30% by classifying workers as independent contractors.²¹

The economic consequences of the distinction between independent contractor and employee status for both employers and workers are undoubtedly, the fundamental motive to repeatedly change the definition of “independent contractor” based on the political and ideological perspectives of those who hold power. The Obama National Labor Relations Board narrowed the application of the independent contractor exemption from NLRA coverage with respect to gig workers in *FedEx Home Delivery, Sisters’ Camelot, Christopher Allison and IWW Sisters’ Camelot Canvassers Union*.²² However, the NLRB under the Trump administration rejected the *FedEx Home Delivery and Sisters’ Camelot* analysis in *SuperShuttle DFW, Inc. and Amalgamated Transit Union 1338*,²³ arguing that the Obama Board had “fundamentally shifted the independent contractor analysis, for implicit, policy-based reasons.”²⁴ It restored a more expansive application of independent contractor status in which a finding of entrepreneurial elements in the rendition of service was enough to take a worker out of NLRA coverage. While *SuperShuttle DFW* is the prevailing precedent on the factors which define a worker as an independent contractor, it is quite possible, and perhaps likely, that the approach to the independent contractor exemption articulated in *FedEx Home Delivery and Sisters Camelot* will be revived when Biden appointees become a Board majority, thereby extending the debate until a legislative solution is imposed.

Finding such a solution is, of course, easier said than done. States which have developed legislation to protect employment status have run into the same ideological and political divisions that are exhibited in the application of the NLRA. In 2019, California enacted AB-5, which applied a presumption in favor of employment status and a simplified

¹⁸ Seth D. Harris, *Workers, Protections, and Benefits in the U.S. Gig Economy*, GLOB. L. REV. 1, 1 (Sept. 2018).

¹⁹ *Id.* at 13 n. 39 (citing a GAO study “collecting studies of construction industry miscalculation.”).

²⁰ EBITDA is one measure of net income and, therefore, of a company’s financial performance that is sometimes used to determine the valuation of companies that are not publicly traded. *Id.* at 13 n. 40.

²¹ *Id.* at 13 (citing Karla Walker & Kate Bahn, *Raising Pay and Providing Benefits for Workers in a Disruptive Economy*, CTR. FOR AM. PROGRESS (Oct. 13, 2017), <https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-payproviding-benefits-workers-disruptive-economy/>).

²² See *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014); *Sisters’ Camelot*, 363 N.L.R.B. No. 13, at 2 (Sept. 25, 2015).

²³ *Super Shuttle*, 367 N.L.R.B. No. 75, at 13 (2019).

²⁴ *Id.* at 11.

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three-part test to establish independent contractor status.²⁵ This criterion was validated in court with respect to rideshare drivers.²⁶ However, as discussed, *infra*, during the 2020 election, California voters approved Proposition 22, which exempted drivers using App based on line platforms supplied by firms such as Uber and Lyft to accept driving assignments from being classified as employees.²⁷ This victory was not easily won. Rideshare companies invested more than two hundred million dollars in advertising in support of passage and committed to provide certain new protections for their drivers such as a wage floor and provision of a benefits fund (while continuing to exempt them from workers compensation coverage and eligibility for collective bargaining), an investment which underscores the economic significance of the distinction between employee and independent contractor.²⁸ Not surprisingly, the passage of the proposition did not end the controversy – unions have pursued litigation arguing that depriving gig workers of workers compensation coverage and collective bargaining rights violates the California state constitution.²⁹

As nontraditional work arrangements emerge, the relationships between allies and adversaries are changing too. Traditional opponents of regulation of the employment relationship are expressing concern over the long term ramifications of substitution of employment by independent contractor or “gig” status, particularly with respect to maintaining an accessible pool of qualified workers in an era where labor shortages are increasingly commonplace.³⁰ The existence of a vast flexible workforce with very limited workplace protection poses potentially troubling consequences for the economic security of

²⁵ Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5. The Act was based on the decision of the California Supreme Court in *Dynamex Operations W., Inc. v Super. Ct. of L.A.*, 4 Cal 5th 903, 963 (2018).

²⁶ See *People v. Uber Tech., Inc.*, No. CGC-20-584402, 2020 WL 5440308, at *1 (Cal. Super. Aug. 10, 2020) (Order on People’s Motion for Preliminary Injunction and Related Motions), *aff’d*, *People v. Uber Tech., et al.*, 56 Cal. App. 5th 266 (2020).

²⁷ Proposition 22, App-Based Drivers as Contractors and Labor Policy Initiative. (Cal. 2020).

²⁸ Suhauna Hussain et al., *How Uber and Lyft Persuaded California to Vote Their Way*, L.A. TIMES (Nov. 13, 2020, 6:00 AM), <https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22/>. On February 3, 2021, the California Supreme Court declined to hear an emergency appeal brought by drivers and the Service Employees International Union that the proposition violated the California state constitution, although the decision was without prejudice to pursuit of the case in a lower court. *Castellanos v. State*, S266551 (Feb. 3, 2021), https://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=0&doc_id=2338840&doc_no=S266551&request_token=NiIwLSEmPkw8W1BVSSFdSE9JFQ0UDxTJSM%2BUz9TICAqCg%3D%3D.

²⁹ Kate Conger, *California’s Gig Worker Law Is Unconstitutional, Judge Rules*, N. Y. TIMES (Aug. 23, 2021), <https://www.nytimes.com/2021/08/20/technology/prop-22-california-ruling.html>.

³⁰ Lydia DePillis, *Tech Companies, Labor Advocates, and Think Tankers of All Stripes Call for Sweeping Reforms to the Social Safety Net*, WASH. POST (Nov. 12, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/12/tech-companies-labor-advocates-and-think-tankers-of-all-stripes-call-for-sweeping-reforms-to-the-social-safety-net/> (highlighting the strange bedfellows story of unions and free market advocates working collaboratively to address the insecurity of independent contractors). See also Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 53 (2017) (“The move to insecure, irregular jobs represents the most profound economic change of the past four decades.”) (quoting Robert Kuttner, *The Task Rabbit Economy*, THE AM. PROSPECT (Oct. 10, 2013), <https://prospect.org/power/task-rabbit-economy/>).

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U.S. workers since they would not enjoy the legal and economic protections noted above—a reality that demands collaborative solutions from workers, employers, and advocates.³¹

Individuals who have a unique skill may have leverage, but those without specialized skills or talents have little left in today's economy. Traditionally, joining together in a union provided workers with fewer unique skills with greater bargaining power in negotiations with companies over wages hours and working conditions. However, absent traditional union vehicles, individuals with relatively little power to obtain or retain work because they lack highly marketable talents also lack bargaining power to acquire decent compensation, benefits, or work rules.

The question of how to protect the gig worker is arising in the context of the diminishing presence of unions as a representative of private sector employees.³² Not coincidentally, the gap between the pay of hourly workers and executives has dramatically increased during the past 40 years as union penetration has ebbed.³³ Many reasons help explain these developments, including automation of industrial work that at one time paid well and multinational operations that allow for movement of production work overseas. The diminution of the unionized sector and collective bargaining and is clearly a factor. The increasing imbalance of the return to capital as opposed to labor is not tenable over the long term in an economy that heavily depends on consumer consumption. The question is whether traditional organizing and collective bargaining are adequate to deal with the specific problems of workers in the gig economy and the general problem of growing inequality of wealth and resources. Beyond the absence of a “safety net” for independent contractors, the accelerating economic divide and shrinking middle class will have adverse consequences for America's consumer-based economy.³⁴

³¹ Lobel, *supra* note 30, at 73. (“The future of employment and labor law depends on policymakers responding to the ongoing changes in the job market, technology advances, and shifting economic realities.”).

³² *Union Members Summary*, U.S. BUREAU OF LAB. STAT., (Jan. 19, 2018, 10:00 AM), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://web.archive.org/web/20180906051405/https://www.bls.gov/news.release/union2.nr0.htm>].

In light of the recent election successes of Amazon and Starbucks workers, labor has expressed a new optimism and impetus towards organizing workers in the new economy. <https://www.latimes.com/opinion/story/2022-05-23/starbucks-amazon-apple-union-campaigns-history>.

³³ In 1965 the ratio of executive to worker pay was 20:1, in 1978 the ratio increased to 30:1, by 1989 it increased to 58:1, and by 2000 it was 368:1. The bottom line is that CEO compensation has grown 940% since the first increase in the ratio in 1978, while compensation of hourly workers has risen only 12% in the same time frame. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019), <https://www.epi.org/publication/ceo-compensation-2018/>. Since 1983 the number of union members has declined by 2.9 million, dropping the rate of union membership from 20.1% of the overall workforce in 1983 to 11.1% in 2015. Megan Dunn & James Walker, *Spotlight on Statistics: Union Membership in the United States*, U.S. BUREAU OF LAB. STAT. 1, 2 (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf>. Additionally, private-sector unionization has declined from 16.8% in 1983 to 6.7% in 2015. The inference that the decline in private-sector union membership has run parallel to the rising wage gap between CEOs and ordinary workers is not hard to justify. Lawrence Mishel et al., *Explaining the Erosion of Private-Sector Unions*, ECON. POL'Y INSTITUTE (Nov. 18, 2020), <https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/>.

³⁴ Alison Taylor, *COVID-19 Has Ushered in the Age of the 'Intangible Company'. Here Are 4 Ways It Will Change Business*, WORLD ECON. F. (June 16, 2020), <https://www.weforum.org/agenda/2020/06/covid-19-intangible-company-leadership-remote-working/>.

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The traditional focus on employees as beneficiaries in economic relief packages was upended in the Covid recent relief laws passed by Congress, which put gig workers on an equal footing with employees. The economic impact of excluding them from any level of protection was acknowledged in the economic stimulus package known as the CARES [Coronavirus Aid, Relief, and Economic Security Act] which afforded gig workers certain new, but temporary, protections. The Pandemic Unemployment Assistance Program (PUA) extended unemployment benefit assistance to independent contractors who have lost work due to the COVID-19 pandemic and provided gig workers with as much as \$600 per week in unemployment insurance through July 2020.³⁵ Despite the ambiguity of the legal status of gig workers the program extended them rights to unemployment insurance even though it did not classify them as employees. Gig workers were given a small piece of the social safety net, but only when the federal government subsidized the assistance.³⁶

In sum, despite a developing consensus that gig workers have special problems and vulnerabilities that should be addressed, there is still significant resistance to fashioning solutions which provide this category of workers with meaningful rights and a voice in the workplace. However, the sports and entertainment industries constitute a model for combining individual and collective negotiation in a way which may point towards a better system with more security for this highly vulnerable classification.

³⁵ The CARES Act defines 11 different categories of individuals who qualify for benefits under the Pandemic Unemployment Assistance (PUA), including if “the individual meets any additional criteria established by the Secretary for unemployment assistance under this section . . .” Coronavirus Aid, Relief, and Economic Security Act Pub. L. No. 116-136, § 2102(a)(3)(A)(ii)(I), 134 Stat. 281, 313-14 (2020); The Secretary of Labor has issued guidance stating that “an individual who works as an independent contractor with reportable income may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities, and has thereby forced the individual to suspend such activities.” Pandemic Unemployment Assistance Implementation and Operating Instructions, Attachment I to UIPL No. 16-20, pp. 1–6.

³⁶ Similar issues have emerged at Silicon Valley giant Google, and its parent company Alphabet, where a group of more than 400 engineers and other white-collar employees and contractors have formed what has become known as the Alphabet Workers Union (AWU) with the help of the Communications Workers of America (CWA). However, the AWU is different than a traditional union which is certified under the NLRA to seek and enforce a collective bargaining agreement with standard workplace protections and benefits. Instead, the AWU is a minority union whose membership comprises only a fraction of the company’s more than 260,000 full time employees. Employees who organized the union said that its formation was part of a larger effort to give structure and longevity to activism at Google as opposed to a platform to negotiate for a collective bargaining agreement. The focus is on issues such as pay discrimination, diversity, and sexual harassment. It is not clear how much of an impact the formation of such an organization will have on the workplace at a company such as Google or in Silicon Valley as a whole, which has long been resistant to unionization in any form, has insisted on individual dealing with its employees and contractors, and will be under no legal obligation to negotiate with an organization that has not been elected to represent its workers. The organization’s leverage will have to be based on its ability to provide a persuasive voice for Silicon Valley workers, thereby bringing public relations and political pressure on the Company to deal with collective concerns. Kate Conger, *Hundreds of Google Employees Unionize, Culminating Years of Activism*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2021/01/04/technology/google-employees-union.html>.

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III. LABOR RELATIONS IN THE SPORTS AND ENTERTAINMENT INDUSTRIES

For many decades, two industries have reflected the tandem individual and group nature of workers' relationships with providers of work: the sports industry and the entertainment industry. Both industries are heavily unionized with comprehensive collective bargaining agreements, but they also allow represented workers to enter into their own individual agreements using the leverage created by their individual talents. These long-established arrangements combining collective and individual bargaining may shed light on opportunities for new forms of worker status and collective activity.

A. Collective Bargaining in Professional Sports

The labor relations of all the major professional sports fall within the purview of the NLRA.³⁷ In accordance with Section 7, players may select an exclusive bargaining agent to negotiate on their behalf.³⁸ The major sports engage in a bargaining variation known as "multi-employer collective bargaining."³⁹ In this model, team owners bargain collectively as a single unit (the league) to negotiate a collective bargaining agreement (CBA) with a players association. The CBA typically sets a salary floor and ceiling for all players and addresses other benefits and conditions, including health care and retirement benefits, travel expenses, seasons, and schedules.⁴⁰ These provisions include a Uniform Player Contract establishing basic and common requirements for all players that enable fair treatment of players across teams and the ongoing viability of the league.⁴¹ In addition to reducing uneven competition between teams on the basis of compensation and work rules, uniform contracts also reduce the number of subjects players individually negotiate, such as health insurance.

Although antitrust law prohibits combinations and restraints on competition, explicit statutory exceptions have been carved out for collective activity by unions in the exercise of their rights under the NLRA.⁴² Restraints on competition agreed to as part of collective bargaining agreements between owners and players associations are likewise immune from antitrust enforcement based on the non-statutory labor exemption.⁴³ The exemption applies to collective bargaining terms reached through arms-length bargaining on mandatory subjects,

³⁷ WALTER T. CHAMPION, JR., *SPORTS LAW IN A NUTSHELL*, 70–71 (2017).

³⁸ 29 U.S.C. § 157.

³⁹ Jan Vetter, *Commentary on "Multiemployer Bargaining Rules": Searching for the Right Questions*, 75 VA. L. REV. 285, 286 (1989) ("[M]ultiemployer bargaining exists where there are two or more competing employers whose employees are represented by the same union.").

⁴⁰ See, e.g., NBA Collective Bargaining Agreement (Jan. 19, 2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>; NFL Collective Bargaining Agreement (Aug. 4, 2011), <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf>; MLB 2017-2021 Basic Agreement, https://www.mlbplayers.com/_files/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf.

⁴¹ CHAMPION, JR., *supra* note 37, at 6–7.

⁴² See Clayton Act, 15 U.S.C. § 17; 29 U.S.C. § 52; see also Norris-La Guardia Act, 29 U.S.C. §§ 104, 105, 113.

⁴³ Lacie L. Kaiser, *The Flight from Single-Entity Structured Sport Leagues*, 2 DePaul J. Sports L. & Contemp. Probs. 1, 26 (2004); see also *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 711 (1965).

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including “wages, hours, and other terms and conditions of employment.”⁴⁴ Courts have interpreted the non-statutory exemption broadly to prevent antitrust liability for terms incorporated by reference in collective bargaining agreements as well as those that appear in earlier, expired agreements.⁴⁵

Unique considerations naturally arise based on a player’s experience, success, and personal needs, and CBAs typically specify which contract provisions and subjects may be modified through individual bargaining.⁴⁶ For example, in the National Basketball Association (NBA), each player must sign the Uniform Player Contract with his team, with variations generally limited to those related to compensation (within limits) and compensation protection, bonuses, and promotional appearances.⁴⁷ Professional players associations have turned to sports agents to negotiate modifications to the Uniform Player Contract by individual players because the associations have recognized the ethical and logistical limitations of individual representation.⁴⁸ Thus, for example, LeBron James’ record-setting salary—roughly \$100 million over three years⁴⁹—derives from two distinct bargaining relationships: between the league and the National Basketball Players Association and between James’ agent and the team owner.

Depicted with larger-than-life personalities in movies and television, sports agents occupy a sizeable and controversial role in the day-to-day business of sports.⁵⁰ With typical earnings between 2% and 5% of a player’s contracted salary and up to 30% of negotiated endorsement deals, agents raise the financial stakes of an already lucrative industry.⁵¹ For example, Scott Boras, professional baseball’s top agent, has negotiated an astounding \$2.2 billion in contracts, with roughly \$132 million in future commissions.⁵² Lucrative earning potential has attracted scores to the field, with as many as 1,800 certified agents competing to represent the 4,300 professional athletes in the four major sports.⁵³

Sports agents play a dynamic role in the collective bargaining process. By focusing on the needs and strengths of their individual clients, they offer players a measure of autonomy in a bargaining process that generally prioritizes the collective well-being of leagues and teams. Additionally, agents may serve as friends, confidantes, financial advisors, and business managers who help clients navigate offers and opportunities.⁵⁴

⁴⁴ 29 U.S.C. § 158(d).

⁴⁵ See *Clarett v. Nat’l Football League*, 36 F.3d 124 (2d Cir. 2004); see also *Powell v. Nat’l Football League*, 930 F.2d 1293 (8th Cir. 1989).

⁴⁶ GOULD IV, *supra* note 11, at 39.

⁴⁷ *Id.* at 40.

⁴⁸ *Id.*

⁴⁹ *LeBron James Signs New Multiyear Contract with Cavaliers*, ESPN (Aug. 12, 2016), https://www.espn.in/nba/story/_/id/17287762/lebron-james-signs-cleveland-cavaliers-new-multiyear-contract.

⁵⁰ Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries*, 17 JEFFREY S. MOORAD SPORTS L. J. 91, 91–93 (2010).

⁵¹ *Id.* at 92.

⁵² Jason Belzer, *The World’s Most Powerful Sports Agents 2016*, FORBES (Sept. 21, 2016, 9:46 AM), <https://www.forbes.com/sites/jasonbelzer/2016/09/21/the-worlds-most-powerful-sports-agents-2016..>

⁵³ James Masteralexis et al., *Enough is Enough: The Case for Federal Regulation of Sports Agents*, 20 JEFFREY S. MOORAD SPORTS L.J. 69, 70 (2013).

⁵⁴ Evans, *supra* note 50, at 91–92.

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B. Collective Bargaining in the Entertainment Industry

Long before the development of the present-day collective bargaining system in major league sports, Hollywood guilds developed an NLRA-based representation system much different than the one that exists for normal hourly workers. This system allowed for writers and actors to take advantage of their special talents and marketability in individual bargaining while setting a floor for wages, hours, and benefits applicable to the whole profession. It also allowed these categories of employees to deal with unique issues such as creative control and residual use of their work.

Close to two decades ago, in *Bargaining: Hollywood Style*, Archie Kleingartner described the basic features of bargaining conducted by guilds and above-the-line unions (i.e., unions representing employees with creative functions).⁵⁵ Those features are:

- A schedule of minimum pay rates. The schedule ensures that members are covered on an egalitarian basis. It provides a floor below which no employer can pay without special dispensation. Typically, the only workers paid entirely at the minimum are neophyte or entry workers. The basis for the minimum is typically time spent on the work or product delivered, and it varies somewhat among above-the-line unions.

- A framework. The framework permits members to negotiate individual “personal services contracts.” This allows members whose individual bargaining power exceeds that of the collectively negotiated minimum to receive individually money payments and other benefits that exceed what the union has obtained for the membership as a whole.

- Residuals or deferred compensation. Residuals are additional payments to eligible workers for exhibition of an entertainment product in media other than the one for which it was originally created, or for its reuse within the same medium.⁵⁶

Professor Catherine Fisk describes in-depth the collective bargaining history of one of the major Hollywood guilds, the Writers Guild of America (WGA).⁵⁷ The bargaining structure is rooted in producers’ insistence, from the outset of the motion picture industry, on complete control over what is put forward to the public in their movies and the screenwriter’s surrender of the copyright to producers. These provisions distinguished Hollywood screenwriters from Broadway playwrights, where playwrights retain their copyright and ultimate say over their work but are treated as entrepreneurs or independent contractors rather than employees.

However, the Hollywood producers wanted it both ways. They wanted full control over the work and the copyright while at the same time denying that screenwriters were their employees to avoid being subject to unionization and collective bargaining. The newly

⁵⁵ Archie Kleingartner, *Collective Bargaining: Hollywood Style*, 9 NEW LAB. F. 113, 113 (2001).

⁵⁶ *Id.* at 117–18.

⁵⁷ Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. 177, 178 (2018).

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established NLRB had little trouble finding this position untenable and ruled that screenwriters were employees covered by the Wagner Act.⁵⁸

This issue arose again after the predominantly anti-labor provisions of the Taft-Hartley Act enacted in 1947 excluded independent contractors from NLRA protection.⁵⁹ At that time, various ad agencies argued that the writers of their shows were either employees of their sponsors or independent contractors. The issue was ultimately negotiated rather than litigated. Initially, the Radio Writers Guild (RWG) proposed “that a writer would be an employee and covered by the collective bargaining agreement if ‘the company has the right by contract to require him to perform personal services in making revisions, modifications or changes,’ and that independent contractors were those who sell or license rights to material ‘without contracting to perform personal services with respect to revision, modification or change.’” The ad agencies would not agree to the proposal, however, because they insisted on the right to demand revisions from any writer.⁶⁰

The WGA ultimately secured a far simpler definition of the employees it represented in radio, film, and television:

In the end, the definition of employee writers covered by all Writers Guild agreements focused on the employer’s power to require writers to make revisions to scripts. Employees under the MBA [Minimum Basic Agreement] are those who “write literary material . . . where the Company has the right by contract to direct the performances of personal services in writing or preparing such material or in making revisions, modifications, or changes therein. . . . It was the power of the employer to force the writer to make revisions—the right of control—that defined who was an employee.⁶¹

Under the bargaining framework that emerged, the union negotiates a floor for new writers to be paid a reasonable starting wage and minimum benefits.⁶² The union also negotiates matters of collective concern to all writers, such as pension and health care benefits, through the MBA. However, established writers can bargain additional individual terms based on recognized skill and success in the industry. Professional agents typically

⁵⁸ See *Metro-Goldwyn-Mayer Studios*, 7 N.L.R.B. 662, 688 (1938).

⁵⁹ Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 152(3).

⁶⁰ Fisk, *supra*, note 57, at 192.

⁶¹ *Id.* at 192–93. Over the years the WGA has secured significant restrictions on the employer’s power to demand revisions of original work, or to withhold payment based on whether it deems the work acceptable. *Understanding Separated Rights*, WRITERS GUILD OF AM. W., <https://www.wga.org/contracts/know-your-rights/understanding-separated-rights> (last visited Apr. 11, 2022). Likewise, the Guild has bargained to limit the Company’s power over a writer’s work through control of the copyright. The “separated rights” negotiated by the Guild and retained by the writer provide him or her with a measure of control the downstream use of work when, for example, it is published or performed in a different medium (i.e. film converted to a stage play). *Protect Yourself Against Free Rewrites – Know Your Rights*, WRITERS GUILD OF AM. W., <https://www.wga.org/contracts/enforcement/free-rewrite-help> (last visited Apr. 11, 2022). In the above instances the studio’s control over its writers’ output has been eroded as the Guild has negotiated to secure the creative and economic authority of its members over their work.

⁶² *TV Writer Pay: Losing Ground*, WRITERS GUILD AM. W., <https://www.wga.org/members/membership-information/agency-agreement/tv-writer-pay-losing-ground> (last visited Apr. 11, 2022).

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perform the individual bargaining, just as occurs in major league sports. The WGA regulates these negotiations, to a limited degree, through the Artists' Manager Basic Agreement (AMBA), a franchise agreement incorporating a code of conduct that talent agencies must commit to as a condition of representing WGA members. Conversely, WGA members cannot use talent agencies that are not parties to the AMBA as a condition of membership.⁶³ As a general matter, if there is a dispute over compliance with an agreement between a writer and a producer, it is subject to arbitration under the MBA, and the WGA, rather than the agent, will represent the writer.

At the outset of Wagner Act coverage, the studios argued that collective bargaining was inappropriate for “creative professionals” such as screenwriters. Nonetheless, the writers have chosen to maintain this model for four primary reasons:

- First, they recognize the importance for all writers of maintaining solidarity.
- Second, even the most powerful and successful feel vulnerable to studio cost-cutting and to being fired, and they value the collectively-bargained pension and health insurance programs.
- Third, they feel that unionization is necessary to preserve writers' claims to residuals and separated rights, which are all that writers get of the intellectual property rights in their work.
- Fourth, they recognize that studios and networks have the real power over content, and so they position themselves as labor to maintain a sense of artistic integrity and autonomy and to distance themselves from the bad judgments made in corporate suites.⁶⁴

In short, unionization allows writers to generate the necessary political and economic clout to deal with an industry that is constantly restructuring. Unionization also helps ensure that their professionalism and creative power is respected and fairly compensated in one of the most highly competitive environments in the U.S. economy.⁶⁵

⁶³ See Writers Guild Am. W., C. Working R. 23 (1986) (Relations between the Guild and the talent agencies are frequently contentious, and the parties have been in litigation for more than a year over the methodology by which the agencies extract fees for their services and over the Guild's alleged attempt to put unlawful economic pressure on the agencies to modify the AMBA and the fee system); William Morris Endeavor Ent., LLC v. Writers Guild Am., W., Inc., 432 F. Supp. 3d 1127 (C.D. Cal. 2020) (While the litigation is still pending, the WGA appears to be reaching modified franchise agreements with the major talent agencies); Wendy Lee & Anousha Sakoui, *UTA drops lawsuit, signs deal with WGA as agency fight thaws*, L.A. TIMES (July 15, 2020, 11:51 AM), <https://www.latimes.com/entertainment-arts/business/story/2020-07-14/wga-nears-deal-with-united-talent-agency>.

⁶⁴ Fisk, *supra* note 57, at 193.

⁶⁵ The challenges of negotiating contractual minimums on pay and health care while protecting the entrepreneurial rights of writers were illustrated in the WGA strike against the Alliance of Motion Picture and Television Producers (AMPTP), which occurred from late 2007 until early 2008. The strike was not over the traditional fare of collective bargaining—such as pay, hours, and benefits—but rather over issues of control and financial interest in the use of screenwriters' work in the future. These issues included the right to residuals

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The below-the-line workers in Hollywood are mostly skilled employees and technicians, such as sound engineers, electrical technicians, and camera operators. They are generally treated differently in collective bargaining than above-the-line workers, such as actors, writers, directors, and producers.

The below-the-line-workers are predominantly represented by the International Alliance of Theatrical Stage Employees and Moving Picture Technicians Artists and Allied Crafts of the United States and Canada, AFL-CIO (IATSE), and must deal with more standard union challenges such as outsourcing and foreign competition.⁶⁶ However, even below the line workers engage in individual bargaining. Higher-end categories, such as camera operators, set and costume designers, and special effects personnel whose skills are both scarce and in demand, typically negotiate higher rates than the contractual scale, and most major talent agencies have departments devoted to below-the-line representation.⁶⁷ In some cases, the job category is covered by the contract for all purposes but provides that the weekly salary is subject to individual negotiations.⁶⁸ Thus, below-the-line workers receive collective bargaining benefits such as pension and health benefits, discharge for cause protections, and other benefits while still exercising individual bargaining clout.

Above-the-line workers who are in strong demand have the leverage to negotiate lucrative deals as independent contractors. Those who are not as in demand would do better

derived from higher revenues from home video sales and new media (e.g., the internet) as well as more creative control over reality television and prime time animated television series and studios' distribution rights. AMPTP was not willing to acquiesce to many of the Guild's demands because, in its view, some of them related to nonbargainable subjects or conflicted with another union's jurisdiction. Beyond this, the structure of the industry with the rise of new media was still difficult to foretell. Regarding new media, the WGA's specific requests were that writers receive an increase of .30% in the percentage of DVD residuals above what was current at the time for the first \$1 million in sales and .36% for anything sold above that amount, which amounted to 5 cents for each DVD sale. However, AMPTP disagreed on the grounds DVD sales helped pay for the rising marketing and production costs of films that fail to perform at the box office; in any case, once more streaming was available via the internet, DVD sales would inevitably decline. The WGA also requested that the television minimums be used for internet writing and other digital technologies. The Guild believed the internet was fast becoming the equivalent of television in terms of the amount of access and viewership, and it wanted to ensure the writers were on an equal footing. AMPTP balked at this, arguing it was premature to establish a payment formula for online work given the rapidly changing nature of this medium. The writers began the strike in November 2007. In January AMPTP reached an agreement on compensation for online work with the Directors Guild of America (DGA), setting the stage for a similar resolution with the Writers Guild. On February 12, 2008, the writers approved—by a margin of 92.5%—a new contract that did not improve on the formula for sharing in DVD receipts but did include compensation for content distributed through the new media, among other improvements. The WGA's focus on the new media has been validated by the internet's dramatic expansion, which has clearly dwarfed the importance of DVD sales. The fact that the WGA and the DGA dealt with the issue of new media early in the rapidly expanding streaming platform enabled them to secure and build on the ability to retain profit from the streaming of their work in the ensuing years.

⁶⁶ Gail Frommer, *Hooray for...Toronto? Hollywood, Collective Bargaining, and Extraterritorial Union Rules in an Era of Globalization*, 6 U. PA. J. BUS. L. 55, 73 (2003).

⁶⁷ Peter Caranicas, *APA Jumps Into the Thick of the Busy Below-the-Line Business*, VARIETY (July 29, 2014, 3:55 PM), <https://variety.com/2014/artisans/news/apa-gets-into-the-below-the-line-business-1201271182/>.

⁶⁸ Many below-the-line collective bargaining agreements have a “better conditions” clause stating: “Nothing in this Agreement shall prevent any individual from negotiating and obtaining from the Producer better conditions and terms of employment than those herein provided.” Agreement, Producer and International Alliances of the Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States, its Territories and Canada-Studio Electrical Lighting Technicians Local #728, Aug. 1, 2015.

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taking advantage of the group leverage of the union in collective bargaining. The union's role is to reconcile these different interests and to maximize their members' interests.

A central condition of the majority of above-the-line workers' work lives is their nearly total lack of job security. In a traditional collective bargaining setting, such as at an auto or a steel plant, as workers build seniority, they enhance their job security. In the entertainment industry, a writer in film or television has no guarantee of work beyond his or her current project and no guarantee of recognition even for work performed.⁶⁹ A Writer's Guild member may only work once, but his or her work may generate profits for decades to come. Hence, the traditional demand for residuals for writers based on the popularity and redistribution of their work over many years has now morphed into concern about the advent of streaming services and redistribution of Guild members' work on the internet.⁷⁰

Collective bargaining with employees who work on or support stage productions has similarities to, but also important differences with, their counterparts employed in Hollywood. IATSE also represents most below-the-line workers on Broadway shows, including technicians and stage workers. IATSE negotiates collective bargaining agreements comparable to those for other hourly employees; the agreements cover group issues such as working conditions, hourly wages, health care insurance, and other benefits. In contrast to Hollywood, individually bargained compensation is not generally added onto the collectively bargained floor.

However, the situation is different for above-the-line workers engaged in other creative functions. Actors' Equity (AE) represents stage actors. AE is similar to the Screen Actors Guild and bargains on behalf of stage actors for salary and other benefits when performing in shows.⁷¹ Although some stage actors have expressed frustration with the requirement that they receive permission from AE before making live performance commitments, even for charity, the association has been largely beneficial in establishing base pay for stage performers while still allowing them the freedom to negotiate individually for higher pay.⁷² Unfortunately, for all but the most famous actors and absent residuals and other downstream compensation, leverage is limited and few are compensated above scale.⁷³

The situation is worse for the other above-the-line workers. Broadway playwrights do not have a union such as the WGA. They are classified as independent contractors under agency law and negotiate with producers individually.⁷⁴ Unlike screenwriters, playwrights retain the copyright to their work and have the freedom to grant a producer a specifically

⁶⁹ *Wellman v. Writers Guild Am., W., Inc.*, 146 F.3d 666, 667 (9th Cir. 1998).

⁷⁰ John Patrick Pullen, *5 Reasons Streaming is Making DVDs Extinct*, TIME (June 15, 2015, 8:37 AM), <https://time.com/3921019/streaming-dvds/>.

⁷¹ The Supreme Court, in reviewing Actors' Equity's role in regulating theatrical agents, described its work as follows: "Equity is a national union that has represented stage actors and actresses since early in this century. . . . [I]t has collective bargaining agreements with virtually all major theatrical producers in New York City, on and off Broadway, and with most other theatrical producers throughout the United States. The terms negotiated with producers are the minimum conditions of employment (called 'scale'); an actor or actress is free to negotiate wages or terms more favorable than the collectively bargained minima." *H. A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 706-07 (1981).

⁷² See generally Jeff Linamen, *Negotiating the Entertainment Industry Contract*, THEATRE FROM THE CTR. AISLE, (Feb. 21, 2011), <http://theatrecenteraisle.blogspot.com/2011/02/i-hope-i-get-it.html>.

⁷³ *Id.*

⁷⁴ Ashley Kelly, *Bargaining Power on Broadway: Why Congress Should Pass the Playwrights Licensing Antitrust Initiative Act in the Era of Hollywood on Broadway*, 16 J. L. & POL'Y 877, 880 (2008).

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tailored package of performance rights for a set time while retaining all other rights. However, beyond the ability to retain copyrights, playwrights have little leverage in individual negotiations with producers. The same is true of Broadway directors who, like playwrights—but unlike the Hollywood directors the Directors Guild represents—also have no collective bargaining rights. Not surprisingly, the associations representing the interests of both groups have sought legislative exemption from antitrust laws to allow these organizations to bargain collectively and function as actual unions.⁷⁵

Although troubling inequities remain, the multitier bargaining frameworks in the sports and entertainment industries afford basic benefits and protections secured by collective bargaining agreements and individual contracts. This hybrid model combines the advantages of the flexibility and entrepreneurship of the independent contractor with the economic and legal protections of employee status. Unquestionably, this arrangement works to the advantage of superstar players and entertainment personalities, but it also provides basic benefits and protections for those lower down the ladder. The upper tier pulls up the bottom tier as a result of its greater leverage. Internal disagreements about the balance of equities within these groups still exist, but the stars and the industries are doing well enough that such stresses seem manageable.⁷⁶

In the sports and entertainment industries, agents have developed the expertise to effectively negotiate individual contracts as part of a collectively bargained framework for negotiation. That approach may be less viable when workers without unique skills need representation and where there is a large supply of labor to meet demand. Yet, an entity that negotiates the basic security terms, such as a union, could also authorize agents to negotiate specific provisions for the short-duration gig workers, particularly if there is a pressing, time sensitive need for their labor. If the worker has enough individual bargaining power, he or she may be able to negotiate specialized pension, health care, and other benefits that are beyond the basic agreement. Thus, in exchange for providing skilled workers an organization of greater and lesser skilled workers could require that the employer provide benefits and compensation which meet certain basic standards. At the very least, such an entity could certify that the employers meet specified workplace standards.

Further, the negotiating entity may be able to use the leverage it has with employers in representing workers with greater expertise or experience to provide a floor of benefits and protections to less skilled workers. In a period of high demand for labor, entities that provide labor have the leverage to obtain benefits for lesser skilled workers because they are a source of needed labor and because they establish an ongoing connection between qualified workers and the enterprise. This has some similarity to the way hiring halls work in the construction industry.

⁷⁵ Congress has never voted on any of these proposals and, as a result, the Dramatists Guild, the professional association of playwrights, is largely powerless to protect its members' economic interests. *Id.* at 898.

⁷⁶ Ongoing tension exists in Major League Baseball between the young players, who under the collective bargaining agreement must wait to benefit from free agency, and the older players, who believe they are being pushed out of the league in favor of the less costly young players. Tyler Kepner, *M.L.B. and Players' Union Set to Begin Early Labor Talks*, N.Y. TIMES, (June 17, 2019), <https://www.nytimes.com/2019/06/17/sports/mlb-labor-talks.html>.

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IV. A PATH FORWARD (THE CALIFORNIA EXPERIENCE)

On August 12, 2020, a California state court granted a demand for an injunction compelling compliance with AB-5 by Uber, Lyft, and other rideshare operators, and ruled that the drivers who used the App based platforms supplied by the companies to be employees, rather than independent contractors, under the statute.⁷⁷ In issuing the injunction the court made the following observation:

Far from “merely incidental” to Defendants’ transportation network businesses, drivers’ work—the work of transporting customers for compensation—is an “integral part” of those businesses. [citation omitted] Defendants’ entire business is that of transporting passengers for compensation. Unlike an independent plumber or electrician who may visit a retail store on one occasion to perform a single, limited task such as repairing a leak or installing a new electrical line, Defendant’s drivers are part of their usual, everyday business operations, and their work falls squarely within the ordinary course of that business. [Footnote omitted]⁷⁸

The same day the injunction was granted, Uber CEO Dara Khosrowshahi published an op-ed in which he acknowledged that the current gig employment model is inadequate. Khosrowshahi advocated a “third way” between employee and independent status in which, “gig economy companies be required to establish benefits funds which... workers... can use for the benefits they want, like health insurance or paid time off... All gig companies would be required to participate, so that workers can build up benefits even if they switch between apps.”⁷⁹

He also stated his support for providing gig workers with protection against employment discrimination as well as medical and disability coverage, but his proposal did not include coverage under state workers compensation and minimum wage laws or provide an opportunity for third party representation.⁸⁰ The “third way” described in the op-ed mirrored Proposition 22, the resolution sponsored by Uber and Lyft to exempt their operations from AB-5, which was ultimately passed decisively by California voters in the November 2020 election.⁸¹

Proposition 22 carves out an exemption from California employment and transportation law to permit ride sharing services such as Uber and Lyft to continue classifying workers as independent contractors.⁸² While Proposition 22 allows for these workers to be classified as independent contractors, the platforms that employ them are now required to provide them with certain protections. It requires that they be paid an hourly wage

⁷⁷ *Uber Technologies, Inc.*, 2020 WL 5440308, at *18.

⁷⁸ *Id.* at *14 (citation and footnote omitted).

⁷⁹ Dara Khosrowshahi, *I am the C.E.O. of Uber. Gig Workers Deserve Better.*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html>.

⁸⁰ *Id.*

⁸¹ *See generally*, Proposition 22, *supra* note 27.

⁸² Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html>.

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for time spent driving equal to 120% of either a local or statewide minimum wage.⁸³ Additionally, firms sponsoring the platforms are required to provide drivers with a stipend for health insurance if they drive at least fifteen hours per week- an amount that will rise if the driving time is as high as 25 hours per week, although the full stipend is available only to drivers working close to full time, and work hours only include the time spent driving to, picking up, and carrying riders, not waiting time between trips.⁸⁴ Finally, the proposition requires that disability and death benefits coverage for on the job death or injury be made “available” to drivers.⁸⁵ However, as signaled in Khosrowshahi’s opinion piece, the drivers are excluded from social security, unemployment insurance, coverage under California workers compensation law, and California labor standards laws. This despite Khosrowshahi’s desire as part of his “third way” to “...improve the voice of the workers”, collective bargaining is not contemplated. Thus, while Proposition 22 requires certain benefits and protections be provided to rideshare drivers, the suite of benefits and protections is still quite weak, and substantially less than what the drivers would be entitled to if they were classified as employees under AB-5.⁸⁶ In fact, opponents of Proposition 22 are quite vociferous in denouncing its self-interested motivation for upending state law.⁸⁷

Given their history of activism, it is unlikely that drivers will accept even the limited promises of Proposition 22 on blind faith. The need to make sure these protections and benefits are actually made available may encourage the drivers to continue to coordinate even if they cannot unionize, and once this happens, they may also seek to add on to the suite of benefits. Moreover, the terms of the proposition provide no guidance on procedures for resolution of disputes over the benefits and pay guarantees it requires. Drivers may want to audit how the rideshare companies’ contributions to pay for the benefits mandated by Proposition 22 are calculated and administered or even to participate in the administration. Will a state agency handle such matters, will the driver(s) have to bring a lawsuit, will there be a system of private arbitration, or will the rideshare companies take the position that they have exclusive authority over administration of the rights and benefits provided by the proposition? It would make sense for drivers to try to organize in some way to assure they have a voice concerning such matters. Despite the passage of Proposition 22 and the barriers

⁸³ Taryn Luna, *California Voters Approve Prop. 22, Allowing Uber and Lyft Drivers to Remain Independent Contractors*, L.A. TIMES (Nov. 3, 2020), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-tracking-prop-22>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Opponents of Proposition 22 Have called it a sham, and a “cynical circumvention of the legislative process.” Greg Bensinger, *Other States Should Worry About What Happened in California*, N.Y. TIMES (Nov. 6, 2020), <https://www.nytimes.com/2020/11/06/opinion/prop-22-california-labor-law.html>. It has further been described as codifying a system that denies workers full benefits and true minimum wage guarantees and stability. Former Labor Secretary Robert Reich has gone so far as to say that “this will encourage other companies to reclassify their workforce as independent contractors, and once they do, over a century of labor protections vanishes overnight.” *Id.* It remains to be seen whether Secretary Reich’s prediction will come to pass but, consistent with his concern, Uber and Lyft have indicated that they plan to pursue similar measures in those states considering legislation along the lines AB-5 in California. *Id.*

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it places to organizing App based drivers, it is also the case that Proposition 22's obstacles may incentivize drivers to pursue more effective collective activity.⁸⁸

Of course, the composition and dispositions of the individual drivers are quite diverse. Some are long-term dedicated drivers and others are part timers with other jobs and other career goals, so their inclinations towards collective activities as a group will inevitably vary. But, as with other gig workers in the newer high tech or "disruptive" industries, collective activity is a growing phenomenon and can be expected.

Collective action by Google, Uber and other gig workers has been shown to be an alternative approach towards achieving economic and political ends. It avoids the legal structure's current ambiguity and obstacles. Thus, notwithstanding the vote on Proposition 22 and the present classification of App based drivers as independent contractors by the NLRB, it is not hard to envision the development of a system of group or individual dealing with respect to scheduling and setting fares, and collective organization to handle working conditions and long-term benefits for App based drivers.⁸⁹ There is no question that this sort of informal system is not as comprehensive or effective as the formal NLRA based individual and collective bargaining format in sports and entertainment, but it may trigger collective action.

Informal organizing among gig workers is already taking hold. Workers have pooled together to gain access to benefits that remain elusive due to their nonemployee status. The Freelancers Union, with 350,000 members, offers various health care and retirement options to those without employer-based plans.⁹⁰ The organization's website points to its broad mission: "Independents. United."⁹¹

Like the Freelancers Union, the National Guestworker Alliance's Indy Worker Guild seeks to exert economic and political power through a collective of diverse workers. Drawing inspiration from the guild structure of the Middle Ages, the Guild aims to transform outdated labor policies based on the notion of work as one lifelong position in order to better reflect the reality of today's fluctuating and diverse jobs.⁹² The Guild envisions working relationships where security and flexibility coexist: "Whether we get gigs from apps, from personal networks, or from temp agencies we all deserve to have a safety net when we need it—and we don't have one now. We are joining together to demand that our work be recognized and rewarded by policy makers and the companies making money from our

⁸⁸ To be sure, any effort by rideshare drivers to enforce their Proposition 22 rights is complicated by the fact that, as discussed earlier, the NLRA only protects employees against reprisals for concerted activity for purposes of mutual aid and protection. 29 U.S.C. § 157; *see also* *Eastex Inc. v NLRB*, 437 U.S. 556 (1978).

⁸⁹ Advice Memorandum from the Office of the N.L.R.B General Counsel on Uber Technologies, Inc., Cases 13-CA-16302, 14-CA-158833, 29-CA-177483, N.L.R.B. (Apr.16, 2019), <https://www.laborrelationsupdate.com/wp-content/uploads/sites/20/2019/05/NLRB-Uber-memo.pdf>. (It would not be surprising if the classification of drivers using app based platforms as independent contractors is re-examined by a new Biden appointed General Counsel).

⁹⁰ Membership in the Freelancers Union "is open to independent workers—freelancers, consultants, independent contractors, temps, part-timers, contingent employees and the self-employed." *About Freelancers Union*, FREELANCERS UNION, www.freelancersunion.org/about/ (last visited Apr. 10, 2022).

⁹¹ FREELANCERS UNION, www.freelancersunion.org (last visited Apr. 10, 2022).

⁹² *About the Indy Worker Guild*, INDY WORKER GUILD, <https://indyworkerguild.wordpress.com/about/> (last visited Apr. 10, 2022).

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work.”⁹³ The organization’s articulated primary aims include access to benefits, the right to collectively bargain, financial security, and freedom from bias.⁹⁴

Nonetheless, the post-Proposition 22 environment has not inspired or generated acceptance of the above sort of informal organizing among drivers. In late 2020 both Uber and Lyft released their plans for benefits for drivers under Proposition 22. Uber offered a benefits program which calls for drivers to be paid at least 20 percent more than the city’s pickup minimum wage plus 30 cents per mile for expenses. Drivers who earn less than the guaranteed minimum over a two-week period will be paid the difference automatically.⁹⁵

Lyft claims it provides a quarterly health care subsidy for drivers who work an average of at least 15 hours per week, an important benefit for workers. In order to qualify for this benefit drivers will have to prove they are enrolled in a qualified healthcare plan.⁹⁶ Uber’s healthcare stipend also requires an average of 15 hours per week, and drivers must prove they are the primary policyholder on a qualifying health insurance plan. Uber drivers are supposed to receive 50 percent of the stipend if they average 15 active hours a week and 100 percent of the stipend when they average 25 active hours per week.⁹⁷ These benefits purportedly became available in January of 2021, although there does not appear to be an administrative or enforcement mechanism established by the companies or the state for checking whether this has actually happened or to assist drivers in accessing these benefits.

Predictably, problems have been noted accessing the benefits. For example, many gig workers have been unable to receive the health insurance stipend because they are either uninsured or get insurance through Medi-Cal and the stipend is only available to those who have insurance through Covered California, the state health exchange program.⁹⁸ Gig workers who were unable to qualify for the stipend assert that the advertisements for Proposition 22 were misleading.⁹⁹ This has led to more protests outside of Uber headquarters, with workers demanding to receive more rights and benefits.¹⁰⁰ One gig worker said “[d]uring the Prop. 22 campaign, they said if you’re working a minimum of 25 hours that they were going to give [the stipend]...They didn’t say it only applies to this or that.”¹⁰¹ A second worker said “[w]e are here today because we want our health care...They said we’d get health care, but they don’t give us anything.”¹⁰²

There does not appear to be any sort of appeal or complaint process to resolve such issues, nor is there any indication that workers have organized either informally or through established unions to address them, perhaps because, after having fought Proposition 22 tooth

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Kim Lyons, *Uber and Lyft Roll Out New Benefits for California Drivers Under Proposition 22*, THE VERGE (Dec. 14, 2020, 3:38 PM) <https://www.theverge.com/2020/12/14/22174600/uber-lyft-new-benefits-california-drivers-prop-22-gig-economy>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Megan Rose Dickey, *California Gig Workers Say Prop. 22 Isn’t Delivering Promised Benefits*, PROTOCOL (May 21, 2021), <https://www.protocol.com/policy/gig-workers-prop-22-benefits>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

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and nail, unions and other entities representing gig workers do not want to lend credibility to the new law.

Significantly, the battle over the legality of Proposition 22 has also not been resolved as gig workers, with the support of unions such as the SEIU, have brought suit against both the State of California and the rideshare companies, claiming that the law is unconstitutional. After the California Supreme Court refused to allow the parties challenging the law to bypass the lower courts, the Superior Court of California in Alameda County ruled that Proposition 22 was in fact, unconstitutional.¹⁰³ The Court held:

A prohibition on legislation authorizing collective bargaining by app-based drivers does not promote the right to work as an independent contractor, nor does it protect work flexibility, nor does it provide minimum workplace safety and pay standards for those workers. It appears only to protect the economic interests of the network companies in having a divided, non-unionized workforce, which is not a stated goal of the legislation...

...The Court finds that Section 7451 is unconstitutional because it limits the power of a future legislature to define app-based drivers as workers subject to workers' compensation law.

The Court finds that Section 7465, subdivision (c)(4) is unconstitutional because it defies unrelated legislation as an "amendment" and is not germane to Proposition 22's state "theme, purpose, or subject."¹⁰⁴

The status of the law is unclear after this ruling, although, the rideshare companies have made clear that they intend to appeal.¹⁰⁵

Other states have proposed legislation to provide limited employment rights to gig workers. However, many such workers and the union officials supporting them say that the proposals do not provide gig workers with the full rights they deserve.¹⁰⁶ In New York, there have been legislative proposals which would create a path for gig workers to unionize and collectively bargain, but stops short of defining them as employees and entitling them to employee protections such as minimum wage and anti-discrimination laws.¹⁰⁷ Organizations representing gig workers have been unwilling to support this approach which they believe makes them "second class" employees. The co-founder of the New York Taxi Workers Alliance, a union representing 15,000 taxi drivers, said of the proposed New York legislation "There's so much wrong with this legislation. What it fundamentally does is relegate drivers to be second class on every level of labor law, from wages to safety to bargaining rights. In

¹⁰³ *Castellanos v. State*, No. RG21088725, 2021 WL 3730951, at *5 (Cal. Super. Aug. 20, 2021).

¹⁰⁴ *Id.*

¹⁰⁵ Conger, *supra* note 29.

¹⁰⁶ Steven Greenhouse, *Unionized But Impotent? Row Erupts Over Gig Workers' Labor Proposal*, *GUARDIAN* (May 27, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/may/27/gig-workers-unionized-but-impotent-new-york-bill>.

¹⁰⁷ *Id.*

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fact, on wages and unemployment, it rolls back rights that we've painfully won."¹⁰⁸ The controversy over this legislation illustrates the difficulty in fashioning a compromise which attempts to provide employee protections but acknowledges the need for flexibility of firms which rely on the services of gig workers.

Thus, the absence of bright line definitions of "employees" and "independent contractors" has led to a hodgepodge of understandings in different states and agencies. It has resulted in unpredictability for businesses and ad hoc efforts by activists to secure gig workers' rights and benefits. A clear definition which balances the varying interests of gig workers and businesses could help both.

V. THE HYBRID MODEL

The sports and entertainment industries, though riddled with their own controversies, are a potential model for worker advancement in the gig economy and the broader economy. The mix of group and individual deal making in these industries shows how a flexible system of worker representation can be effective in today's economy. Moreover, professional associations—representing pilots, engineers, and other highly skilled workers—have used the professional pride of their members to expand their traditional role to improve member benefits and compensation.¹⁰⁹ Finally, new organizations that provide labor to the market, such as domestic workers and home health care workers, similar to construction union hiring halls or the new managed service providers, may also demand benefits and protections in exchange for the qualified workers they provide, such as health care, pensions and overtime pay. Yet these organizations cannot act as effective middlemen unless they provide value to both employees and companies, because the internet enables direct dealing between workers and firms.

The established rights and safety net guaranteed by law to "employees" are less effective when unions represent only 6% of private-sector workers because individual employees are less able to enforce or take advantage of those rights. Historically, labor law envisioned that organized employees would enhance their standard of living and security through union organization. It was generally the case when a substantial part of an industry was organized by a union that these enhancements would be mimicked by nonunion companies to stay competitive in recruiting labor or to avoid unionization themselves. Clearly, this paradigm is no longer the reality.

Similarly, the traditional expectation for unorganized employees was that a safety net of rights and support would be available. Yet for independent contractors, this safety net barely exists. When these protective laws, such as the NLRA, ERISA, workers compensation, unemployment insurance were passed, the percentage of workers who were independent contractors was minimal so coverage of these laws, which expressed a societal interest, were not extended to non "employees."

Labor law needs to provide a flexible structure to permit the most options for employee organization, safety net protections and corporate competitiveness. The intermediary entities—be they agents, hiring halls, MSPs, or associations—all have a place in

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., *What We Do*, AIR LINE PILOTS ASS'N, <https://www.alpa.org/about-alpa/what-we-do> (last visited Apr. 10, 2022).

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this new order. The dividing line between illegal employer domination of unions and new forms of effective employee groupings should be reexamined, especially in light of the explosion of information and worldwide opportunities to sell one's labor on the internet.¹¹⁰ At the same time, currently, these new types of intermediaries or employee groupings have limited chance to provide real value to workers who are not considered employees. Indeed, concerted activity on behalf of independent contractors risks exposure under antitrust laws. Hence, the contradiction which developed over the last few years between federal agency rulings and policies providing greater latitude for businesses to establish and preserve independent-contractor status and new state policies favoring or presuming employee status needs to be resolved on a basis that narrows the opportunity to circumvent employer obligations.

The sharp divisions between union and nonunion that are the foundation of much of the nation's labor law are less relevant to the current state of American business. Such a zero-sum approach denies workers needed protections, because neither the right to union representation nor public policy are today providing for the basic needs of most workers. New structures are warranted to secure and advance American workers' interests, which are increasingly unprotected. Experience shows that reliance on less formal nonunion intermediaries often leads to union representation, but the more important issue is that informal representation through intermediaries accepted as legitimate by employees may be all that is possible in the churn of the gig economy. If such representation adds value to these workers, it should be preserved.¹¹¹

All these approaches to advancing workers' interests need to be explored and developed. Meeting the challenges of rapidly advancing global, technical, and automated economies will require a workforce that is treated fairly and not exploited. That workforce, in turn, needs corporate competitiveness to survive. Effective relationships will determine the success of the U.S. economy and ensure that its benefits are shared and enjoyed by all workers. The administration of President Joe Biden is likely to be enmeshed in the advancement of this issue.¹¹²

¹¹⁰ The Dunlop Commission made a similar recommendation for loosening the restrictions of Section 8(a)(2) to allow informal employee groupings to engage in "discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs." DUNLOP COMM'N FUTURE OF WORKER-MGMT. REL., FINAL REPORT 8 (1994) (significantly, this proposal was part of a package of reforms for strengthening organizing and collective bargaining rights).

¹¹¹ It has been noted that these sorts of entities are sometimes "way stations" toward independent unions, citing the example of the United Steelworkers evolving out of informal employee representation committees in basic steel in the 1930s. George Strauss, *Is the New Deal System Collapsing? With What Might It Be Replaced?*, 34 INDUS. REL. 329, 339-40 (1995).

¹¹² During the 2020 Presidential Election campaign, candidate Joe Biden pledged to provide more support and rights to workers and union members, and he has nominated Boston Mayor Marty Walsh, a former union leader, for labor secretary. See Bill Conerly, *Labor Changes In The Biden Administration: Business Employment Implications*, FORBES (Nov. 13, 2020), <https://www.forbes.com/sites/billconerly/2020/11/13/labor-changes-in-the-biden-administration-business-employment-implications/?sh=279eacaa4634>. During the campaign Biden specifically stated that he would "check the abuse of corporate power over labor and hold corporate executives personally accountable for violations of labor laws; encourage and incentivize unionization and collective bargaining; and ensure that workers are treated with dignity and receive the pay, benefits, and workplace protections they deserve." *Id.* Any Biden appointees to the National Labor Relations Board will likely reimplement the Obama era "joint employer" rules which affect corporate contractors and franchisees. *Id.* For example, an employee that works

VI. CONCLUSION

There is a large and growing body of American workers who engage in individual project-based work but cannot be defined as entrepreneurs in any true sense. Their escalating numbers will no doubt endow them with political clout. These workers are likely to push for access to basic employment benefits such as set wage rates, healthcare, and properly invested pension savings to help prevent them from becoming an economic underclass. Should such an underclass emerge it could become a serious societal dilemma as tens of millions of workers could lose the security of retirement and healthcare benefits as well as the other statutory protections employees now enjoy. Labor policies which limit the number of workers who fall into this vulnerable grouping, but also enhance the benefits available to those that do, are in their interest, but also in the interest of the overall economy and society. There is now new potential for a fairer and more realistic application of employment status. Equally important, there is an emerging consensus that the welfare of “gig” or project-based workers requires protection and that formats for individual and group dealing to assure reasonable working conditions and a minimal level of benefits for this vulnerable group of workers must be established. Such an approach could build on the successful models of the sports and entertainment industries which have balanced the concerns of employers for labor costs with the movement towards contract work and the need for a safety net for workers.

at a fast-food restaurant is not technically an employee of the fast-food corporation but rather of the franchisee who owns the specific restaurant. *Id.* The “joint employer”, in certain cases, would define the corporation as a joint employer allowing the employee to pursue litigation against it. *Id.* Likewise, one would expect the dividing line between independent contractor and employee status to be re-examined, which may well result in workers like Uber drivers being reclassified as employees under federal labor. *Id.*