Collective Bargaining Without the Protection of Labor Law

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Cynthia Estlund & Wilma Liebman, *Collective Bargaining Beyond Employment in the United States*, 42 **Comparative Labor Law & Policy Journal** __ (forthcoming, 2021), available at SSRN.

A conventional (and oversimplified) account describes U.S. work law as a mix of two regulatory structures: the labor law model and the employment law model. In the labor law model, law facilitates workers to act collectively to negotiate from a position of relative equality over any terms they and their employer consider important. The labor law model allows flexibility to address the different needs of different industries and minimizes judicial and agency intervention. In the employment law model, law imposes minimum conditions to protect workers regardless of whether they negotiate collectively. This model protects numerical minorities whose right to fair treatment will not be protected by the majority through collective bargaining; it protects those unable or unwilling to unionize; and it protects the interests of the public in ensuring that no individual or collective labor contract falls below certain minimum standards.

Companies determined to avoid both of these regulatory regimes have found a boon in classifying their work force to be nonemployees. Presto: no need to comply with the myriad employment laws, and no legal right to unionize! And, faced with the possibility that workers might unionize even without any legal protection, they invoke antitrust law – presto, collective action is not only unprotected, it is illegal! App-based ride hailing or delivery companies have been leaders in this strategy. Using technology, Uber, Lyft, DoorDash, and other companies have figured out they can have all of the benefits of a huge, centrally-managed, on-demand fleet of drivers and none of the costs. Without any employment protections or the power to bargain collectively, app-based drivers endure wages well below the federal minimum wage of $7.25 on hour, and no social insurance of any kind.[1]

In some blue states and cities, worker advocates turned to legislation to secure protection denied to independent contractors under federal law. When Seattle, through a combination of state and city legislation, created a system allowing collective representation for drivers, the Chamber of Commerce destroyed it through protracted antitrust litigation.[2] When the California Supreme Court and Legislature both extended many state employment protections to all workers, the app-based service companies spent over $200 million to secure adoption of a wildly misleading ballot initiative (Proposition 22) wiping out those protections.[3] A hidden term in that measure—one buried so deep in fine print that the nonpartisan legislative analyst failed to mention it in the voter information pamphlet—prevents the Legislature from authorizing any collective representation. The obvious and only purpose of that hidden provision is to enable the app companies to use federal antitrust litigation against any drivers or unions that might seek to organize and negotiate collectively. Litigation challenging the validity of various aspects of Proposition 22 is now in the California Court of Appeal, after worker advocates won a trial court ruling that the initiative violates California constitutional restrictions on the permissible use of legislative initiatives.[4]

Surveying the law that has led us to this situation and the welter of state and local efforts to address it, Cynthia Estlund and Wilma Liebman offer a crisply-written and clearly-argued analysis in *Collective Bargaining Beyond Employment in the United*. They explain how the field of work law in the United States has returned almost to where it was during the dark days of Jim Crow and the Gilded Age. Workers theoretically have legal rights, but companies use a combination of one-sided contracts, with class action waivers and arbitration agreements, and the threat of antitrust litigation to ensure that workers actually have no rights.

This article is an ideal source to use in a work law and policy seminar or as an overview for anyone curious about the state of the law and of political organizing to combat the deregulatory use of misclassification and the corporate turn to

antitrust to thwart state or local efforts to address misclassification.

The article begins with an admirably clear explanation of the use of antitrust law to prevent collective action by "self-employed" workers. They point out that workers "are reenacting on a much smaller scale the pre-New Deal history of organized labor in the United States" when corporations and sympathetic courts wielded antitrust law as a powerful weapon against worker organizing.[5]

Estlund and Liebman then explore three "safe harbors" from antitrust liability for self-employed workers. First, they briefly explain the so-called "labor exemption" from antitrust. This is the argument that both the 1914 Clayton Act, which amended antitrust law to exempt labor actions from antitrust liability, and the 1932 Norris-LaGuardia Act, which stripped federal courts of the power to enjoin "labor disputes," protected from liability *any* worker collective action over working conditions, not just the activities of "employees." Thus, as Estlund and Liebman explain, section 20 of the Clayton Act prohibits the application of antitrust law to "prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, *or from ceasing to perform any work or labor …*, or from recommending, advising, or persuading others by peaceful means to do so." And the Norris-LaGuardia Act strips jurisdiction from courts to issue injunctions or other relief in "any controversy concerning terms or conditions of employment, *or concerning the association or representation of persons* in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" They explain, relying in part on the Supreme Court's recent construction of the 1925 Federal Arbitration Act, that in the early twentieth century a clear distinction between employees and independent contractors did not yet exist, and the term employment was used "more or less as a synonym for work," and "[a]ll work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied."

The second antitrust safe harbor is the First Amendment. Although the Supreme Court has denied First Amendment protection for concerted labor activity that is "coercive" or motivated by financial self-interest, however those are defined, it has under the *Noerr-Pennington* doctrine sheltered from antitrust collective lobbying for government action.

Finally, the article brings much needed clarity to the state action exemption from antitrust liability. A state can authorize anticompetitive activity if its policy is clearly articulated and if the state "actively supervises" the regulatory framework that authorizes anticompetitive activity. This exemption has been at issue when, as in Seattle, state or local governments have created collective bargaining rights for workers excluded from federal labor law. And it is the threat that Proposition 22 hangs over incipient organizing.

The second part of the article ("Experiments in Collective Bargaining Beyond Employment") surveys the efforts (mainly on both coasts and in other blue areas) to find legal and organizing strategies for legislating and bargaining minimum labor standards for "non-employee" workers. A central choice worker organization leaders face is whether to accede to the companies' adamant insistence that any collective bargaining must accept the premise that the workers are independent contractors (as the Machinists did when agreeing to a limited form of collective representation of New York for-hire drivers in 2016), or whether to push for employee status (as labor did in California until Proposition 22 wiped away labor's win). This is an issue that has divided the labor community and, as Estlund and Liebman forthrightly show, there are good arguments on both sides of that debate within the house of labor.

One approach has been to push for state legislation creating a sectoral bargaining framework for drivers regardless of their employee status. The article describes legislative efforts in Connecticut and New York to achieve this. Although neither legislature has yet passed such a bill, it is clear that states can create collective bargaining rights for workers excluded from the NLRA. California did exactly that for farmworkers when it enacted the Agricultural Labor Relations Act in 1975, and other states did so too. Although agribusiness sued to invalidate the ALRA, and the United Farm Workers challenged Arizona's more anti-labor agricultural labor relations act, in both instances asserting that Congress intended, when excluding farmworkers from the NLRA, to prevent collective bargaining, state and federal courts rejected the challenges to the ability of states to regulate farmworkers excluded from the NLRA.[6]

Another approach that Estlund and Liebman consider is for states to create tripartite standards-setting boards composed of representatives of workers, employers, and the public. As Estlund and Liebman point out, tripartite negotiated labor standards-setting is common outside the U.S. and was used in the U.S. during both World War I and World War II. Tripartite negotiated regulation is also common in areas of law other than work. As Kate Andrias pointed out in her seminal work that has revived interest in tripartite sectoral bargaining, many states have tripartite boards in various sectors.[7] California has them for regulating energy, public utilities, water, and for the state's 840 miles of coastline, and is considering legislation that would adopt a tripartite board in the franchised fast-food sector.[8] Seattle created a tripartite sectoral bargaining framework in 2018 for in-home care and cleaning work.[9]

There is a bitter irony in reading an article by a leading scholar of labor law and the former Chair of the National Labor Relations Board that pays zero attention to the elegant structure of the federal labor law in which they have long worked. It's a sign of how broken our legal system is that federal labor law experts must turn their back on that law and dig deep into both antitrust law and state and local law to find a path to legal protection for some of the poorest and most exploited workers in the world's wealthiest country. As the authors acknowledge, millions of workers in the U.S. are designated as non-employees. Their article focuses on a single slice of them—those working for app-based driving and delivery services—because the handful of fantastically wealthy companies that dominate that space have acted as the most rapacious capitalists in driving down labor prices for their predominantly nonwhite and immigrant workforces, buying legislative dominance, and resorting to antitrust litigation to invalidate the few protective laws that manage to elude their legislative and litigation juggernaut. But the intriguing story told in this article is that there is a path forward.

1. *See* Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only $5.64 an Hour*, UC Berkeley Labor Centere and UC Berkeley Center of Wage and Employment Dynamics (2019); Veena Dubal, *The Drive to Precarity: A Political History of Work, Regulation, and Labor Advocacy in San Francisco's Taxi and Uber Economies*, 38 **Berkeley J. Emp. & Lab. L.** 73 (2017).
2. Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).
3. Dynamex v. Superior Court, 4 Cal. 5th 903 (2018).
4. Castellanos v. State of California (Cal. Super. Ct. Aug. 20, 2021), available at https://www.documentcloud.org/documents/21046832-castellanos-order; *Prop. 22 Backers Appeal Ruling Striking California Gig Work Law*, **Daily Lab. Rep.** Sept. 22, 2021, https://news.bloomberglaw.com/daily-labor-report/prop-22-backers-appeal-ruling-striking-california-gig-worker-law.
5. *See, e.g.,* Lawlor v. Loewe, 235 U.S. 522 (1915).
6. Agricultural Labor Relations Board v. Superior Court, 16 Cal. 3d 392 (1976); United Farm Workers of America, AFL-CIO v. Arizona Agricultural Employment Relations Board, 669 F.2d 1249 (9th Cir. 1982). *See generally* Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?* 48 **Emory L.J.** 489 (1999) (arguing that there is no policy reason to exclude farmworkers from NLRA).
7. Kate Andrias, An American Approach to Social Democracy: The Forgotton Promise of the Fair Labor Standards Act, 128 **Yale L.J.** 616 (2019); Kate Andrias, The New Labor Law, 126 **Yale L.J.** 2 (2016).
8. Catherine L. Fisk & Amy Reavis, Protecting Franchisees and Workers in Fast Food Work, American Constitution Society Issue Brief (December 2021).
9. Seattle Mun. Code §14.23 (2018). *See* Ken Jacobs, Rebecca Smith & Justin McBride, *State and Local Policies and Sectoral Labor Standards: from Individual Rights to Collective Power*, **ILR Review** (June 2021). Doi: 10.1177/00019793921102070 6.

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