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## Ride-Hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!

Ronald C. Brown

*University of Hawaii Law School*, [ronaldc@hawaii.edu](mailto:ronaldc@hawaii.edu)

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# **RIDE-HAILING DRIVERS AS AUTONOMOUS INDEPENDENT CONTRACTORS: LET THEM BARGAIN!**

**Ronald C. Brown<sup>†</sup>**

*Abstract:* “Autonomous” workers include most gig-platform drivers, like those working globally for Uber and Lyft, who are usually classified as independent contractors and are ineligible for labor protections and benefits. The “new economy” and its business model, with its fissurization and increased use of contingent and outsourced workers hired as independent contractors, provide employers flexibility and lower costs by shifting labor costs to the workers. Many of these workers operate more as employees rather than genuine independent contractors or self-employed entrepreneurs, causing lost employee labor benefits and costing the government billions of lost tax dollars. Legal attempts continue to classify these workers as employees by means of adjudication or legislation interpreting the legal test of “control” to have them fit into the traditional employment relationship. California recently passed a law using a three-prong test to allow drivers who are dependent on a primary hiring company to be presumed as employees with full rights and benefits. Still, there are many drivers who will be independent contractors. However, the City of Seattle is trying an approach different from expanding the “employee” definition and has embraced the market practice of the employers’ use of independent contractors, and has legislatively provided the drivers, as independent contractors, with a voice through collective bargaining, wherein they could gain labor rights and benefits. Issues of federal preemption and antitrust limitations are discussed, and future legislation at the state or local level looks possible. The choice provided employers is that labor rights are provided to their workers as employees or as independent contractors. This Article proposes a model of granting labor rights to the ride hailing drivers by legislation at the state or local government level that stays under the legal radar of federal preemption and meets the requirements of the antitrust law. Comparisons will be made with global trends and experiences in the EU and in China to place the proposed Seattle model in greater context. Selected states in the EU show their bottom line in legal developments is to maintain the employer-employee dichotomy, sometimes using the “dependent employee” doctrine; whereas, China does not recognize “independent contractors,” but allows business contracts for services that can provide some advantages.

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<sup>†</sup> Professor Ron Brown, University of Hawaii Law School. This Article is to be presented October 2020, conditions permitting, at the Seventeenth International Conference in Commemoration of Professor Marco Biagi, entitled “The Collective Dimension(s) of Employment Relations. Organizational and Regulatory Challenges in a World of Work in Transformation.” Professor Biagi worked on transitioning Italian labor laws to comply with EU law before he was assassinated for his work. The Marco Biagi Foundation was created to honor him and hosts numerous events, including an annual conference in Modena, Italy, and carries out research activities on cutting-edge labor law issues.

## I. INTRODUCTION

*“The algorithm is our boss.”*<sup>1</sup>

This Article introduces the concept of a “Catch 22” for employers of platform drivers: let them bargain as “employees,” but if you say they are not, let them bargain as “independent contractors.”

“Autonomous” workers include most gig-platform drivers, like those working for Uber and Lyft, who are usually classified as independent contractors and are ineligible for labor protections and benefits. The “new economy” and its business model, with its *fissurization*<sup>2</sup> and increased use of contingent and outsourced workers hired as independent contractors, provides employers with flexibility and lower costs by shifting labor costs to the workers. Many of these workers operate more as employees, who are entitled to statutory rights and benefits, rather than genuine independent contractors or self-employed entrepreneurs, who are not entitled to statutory rights and benefits. This misclassification has cost the government billions of lost tax dollars<sup>3</sup> and, more importantly, deprives these possible employees, as well as genuine independent contractors, of legal labor rights and a voice in their working conditions.

Legal attempts are occurring which seek to re-classify these workers as employees by means of adjudication or legislation interpreting the legal test of “control” to fit autonomous workers into the traditional employment relationship.<sup>4</sup> California’s recent case law and legislation use a three-prong

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<sup>1</sup> Annie Nova, *Uber Drivers Block Traffic in Manhattan, Protesting Low Pay and Poor Working Conditions*, CNBC (Sept. 17, 2019, 1:05 PM), <https://www.cnbc.com/2019/09/17/uber-drivers-are-protesting-again-heres-what-the-job-is-really-like.html> (statement by part-time Uber driver in New York City, Sonam Lama, protesting his working conditions).

<sup>2</sup> See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (Harvard Univ. Press 2017).

<sup>3</sup> Alexia Fernandez Campbell, *California Is Cracking Down on the Gig Economy*, VOX (May 30, 2019, 1:10 PM), <https://www.vox.com/policy-and-politics/2019/5/30/18642535/california-ab5-misclassify-employees-contractors> (citing a 2017 Government Accountability Office report which analyzed IRS audit findings of 15.7 million tax returns from 2008 to 2010, revealing that about three million returns involved some worker status misclassification, adding up to about \$44.3 billion in unpaid federal taxes that were later adjusted).

<sup>4</sup> See, e.g., Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors’ in the Gig Economy: A Comparative Approach*, 66 AM. UNIV. L. REV. 635, 642, 651, 656 (2017); Brett Owens, *Senator Bernie Sanders Introduces Bill To Overhaul The Gig Economy*, FISHER PHILLIPS (May 10, 2018), <https://www.fisherphillips.com/gig-employer/senator-bernie-sanders-introduces-bill-to-overhaul> (discussing the Workplace Democracy Act, a 2019 bill that would authorize dependent “employees”—but not “independent contractors”—to collectively bargain).

test that includes drivers who are dependent on a primary hiring company to be presumed as employees with full rights and benefits.<sup>5</sup> Still, there are many drivers who will be independent contractors. In fact, there is evidence of increasing state legislation “carving out” Uber-type drivers and classifying them as independent businesses and not employees at transportation network companies (“TNCs”) like Uber and Lyft.<sup>6</sup> At the same time, Seattle is trying an approach different from California’s expansion of the definition of “employee” to provide labor rights to ride-hailing drivers. Seattle has embraced the market practice of the employers’ use of independent contractors but has legislatively provided the drivers, as independent contractors, with a voice through collective bargaining, wherein they could gain labor rights and benefits.<sup>7</sup> To lessen antitrust challenges, Seattle has removed “payments”<sup>8</sup> from its subjects for bargaining (though they are now protected by a minimum wage law), while otherwise including hours and conditions of work. As this is a new concept in legislation, the question will be whether it is a first-step model or, with the exclusion of bargaining for wage payments, merely a paper tiger.<sup>9</sup> However, the Ninth

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<sup>5</sup> A.B. 5, 2019–20 Leg., Reg. Sess. (Cal. 2019) (effective Jan. 1, 2020); *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (2018).

<sup>6</sup> Sarah Kessler, *Handy is Quietly Lobbying State Lawmakers to Declare its Workers Aren’t Employees*, QUARTZ (Mar. 30, 2018), <https://work.qz.com/1240997/handy-is-trying-to-change-labor-law-in-eight-states/>. As of April 26, 2018, bills have been passed in Arizona, Florida, Indiana, Iowa, Kentucky, Tennessee and Utah. Rebecca Smith, “Marketplace Platforms” and “Employers” Under State Law—Why We Should Reject Corporate Solutions and Support Worker-Led Innovation, NATIONAL EMPLOYMENT LAW PROJECT (May 18, 2018), <https://www.nelp.org/publication/marketplace-platforms-employers-state-law-reject-corporate-solutions-support-worker-led-innovation/>. Some of these laws restrict the TNC from certain activities that would otherwise permit a determination of “employee” status. *Business License, Transportation Network Drivers*, ALASKA DEP’T OF COMMERCE, <https://www.commerce.alaska.gov/web/cbpl/BusinessLicensing/TransportationNetworkDrivers.aspx> (“On June 15, 2017, Alaska Governor Walker signed HB 132, ‘An Act relating to transportation network companies and transportation network company drivers; and providing for an effective date,’ otherwise known as the Let’s Ride Alaska Act, or the Uber/Lyft bill.”). The Let’s Ride Alaska Act went into effect on June 16, 2017. *Id.*

<sup>7</sup> See SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2017) (the “carved out” workers would be eligible under this ordinance); *For-Hire Driver Collective Bargaining Director’s Rules*, SEATTLE FINANCE & ADMINISTRATIVE SERVICES, <http://www.seattle.gov/finance-and-administrative-services/directors-rules#rules-forhirebargaining> (last accessed Apr. 18, 2020) [hereinafter *Seattle Director’s Rules*].

<sup>8</sup> Thereby limiting or eliminating arguments that its laws are allowing wage competition. See discussion *infra* Part III and notes 104–19.

<sup>9</sup> SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2017) (more specifically, the ordinance, as amended in 2019, reads, “1. Upon certification of the EDR by the Director, the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director, including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; minimum hours of work, conditions of work, and applicable

Circuit appears to have laid out a legal path to gain state action immunity from the antitrust laws; so, future legislation at the state or local level looks possible.<sup>10</sup>

This article explores the approach used in Seattle and its viability as a plan that sets useable guidelines for state and local governments and provides a drafting agenda that identifies the issues and addresses the obstacles to helpful regulation. Seattle's plan also presents employers and TNCs with a business choice: Does it make more sense to classify their workers as employees with statutory labor rights and benefits or bargain with the workers for contractual terms and conditions, though not for payments? Either way, workers benefit.

Legal obstacles of federal preemption and antitrust issues caused by allowing independent contractors to band together are now in litigation in *Chamber of Commerce v. City of Seattle* in the Ninth Circuit<sup>11</sup> and will clarify how local or state governments may proceed in accordance with legal requirements. Former Chairman of the National Labor Relations Board (“NLRB”) and Stanford Law Professor William Gould IV observed:

The most important practical upshot of this aspect of [the] Chamber of Commerce [case] is that states willing to enact legislation providing for collective bargaining for independent contractors now have a roadmap to do so.<sup>12</sup>

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rules. The subjects to be specified in rules or regulations promulgated by the Director shall not include the nature or amount of payments to be made by, or withheld from, a driver coordinator to or by its drivers. If the driver coordinator and the EDR reach agreement on terms, their agreement shall be reduced to a written agreement. The term of such an agreement shall be agreed upon by the EDR and the driver coordinator, but in no case shall the term of such an agreement exceed four years.”). Another example of municipal attempts to provide benefits to the gig-platform drivers is found in a trial approach in New York City. “New York City’s new minimum payments rule for drivers in the ride-hailing sector . . . is to ensure that drivers’ net pay is at least \$17.22 [per] hour. As written, the rule computes per-mile and per-minute pay rates (both components of the amounts ultimately due drivers) on the basis of each company’s ‘utilization rate,’ which is determined ‘by dividing the total amount of time drivers spend transporting passengers on trips dispatched by the [firm] by the total amount of time drivers are available to accept dispatches from the [firm].’” Sanjukuta Paul, *The Legal Challenge to NYC’s Minimum Payments Law: Do Lyft and Juno Have a Point?*, ONLABOR (Feb. 7, 2019), <https://onlabor.org/the-legal-challenge-to-nycs-minimum-payments-law-do-lyft-and-juno-have-a-point/>.

<sup>10</sup> *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769, 788–89 (9th Cir. 2018).

<sup>11</sup> See generally *id.*

<sup>12</sup> William B. Gould, IV, *Dynamex Is Dynamite, but Epic Systems Is Its Foil – Chamber of Commerce: The Sleeper in the Trilogy*, 83 MO. L. REV. 989, 992 (2018).

Practical issues of identifying and ascertaining the scope and enforcement of the collective bargaining regulation and the question of an appropriate constituency and representation will be discussed. This Article proposes legislation at the state or local government level that stays under the legal radar of federal preemption and meets the requirements of antitrust laws.<sup>13</sup> A state law, perhaps with local options, could present a broader, more uniform and efficient solution than state-authorized, city-by-city ordinances, and would likely be more successful than pursuing amendments to numerous federal statutes.<sup>14</sup> It will also more easily meet antitrust requirements. Further, Seattle's model will be compared with global trends and experiences in the European Union ("EU"), where some countries' legal developments are strengthening the employer-employee dichotomy (sometimes using the "dependent employee" doctrine), and in China, where independent contractors are not recognized but worker-friendly business contracts for services are allowed.

Part II of this Article addresses the evolving worker classifications in the platform economy, the alternative modes of regulation, and foreign experiences; Part III discusses the legal challenges of regulating and of drafting independent contractors' bargaining legislation; Part IV provides analysis of the state-model legislative proposal; and Part V concludes with a call for the law to move from traditional master-servant law into the modern realities of the platform workplace and accord workers fair treatment under the law.

## II. CURRENT STATUS

By way of background, the traditional employment relationships are discussed, highlighting the master-servant relationship of workers and judicial and legislative approaches in determining employee status. This is contrasted with the new business model in the gig economy of having entrepreneurs work under online platforms as independent contractors.

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<sup>13</sup> See OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAWS 99–128 (5th ed. 2019) (for a discussion of how the "home-rule" may or may not impact this approach, see chapter six, *Limits on State Control of Municipalities: Constitutional and Statutory Home Rule*). If a state law were adopted, consideration would need to be given to the "home rule" prerogatives of local governments.

<sup>14</sup> See SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 15 (2015), available at [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf) (a federal law solution requiring formidable *federal* political action to overcome clear legal barriers was proposed in the 1990s).

### A. *Definitions and Parties to Collective Bargaining*

There is much ambiguity on who is an employee and whether a growing number of workers in the gig economy could properly be called employees under the following definitional approaches. These workers are asking to have the rights and benefits of employees. This overview is followed by a view of judicial and legislative approaches in defining employee status and excluding categories of workers that fall outside of that interpretation, often resulting in misclassifications and attempts at broadening the definition through presumptions.

#### 1. *Definitions and Numbers*

The term “autonomous worker” is an ambiguous, all-encompassing term that includes many self-employed workers<sup>15</sup> and independent contractors,<sup>16</sup> who are genuinely entrepreneurs established in their own businesses and not reliant on a particular enterprise. Independent contractors include many “gig-platform” workers, but the category is much broader, including freelance writers, consultants, and many others.<sup>17</sup>

Looking at ride-hail and rideshare companies (e.g., Lyft and Uber), both are growing and hiring more drivers. It is reported that Lyft has 1.4 million drivers in the United States and Toronto, while Uber has 750,000 drivers in the United States.<sup>18</sup> Although Uber has less drivers in the United

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<sup>15</sup> *Three-in-Ten U.S. Jobs Are Held by the Self-Employed and the Workers They Hire*, PEW RESEARCH CENTER (Oct. 22, 2015), <https://www.pewsocialtrends.org/2015/10/22/three-in-ten-u-s-jobs-are-held-by-the-self-employed-and-the-workers-they-hire/> (“The self-employed, 14.6 million in all, represented 10% of the nation’s 146 million workers”). See generally SARAH KESSLER, *GIGGED: THE END OF THE JOB AND THE FUTURE OF WORK* (2018).

<sup>16</sup> Jay Shambaugh, Ryan Nunn, and Lauren Bauer, *Independent Workers and the Modern Labor Market*, BROOKINGS INST. (June 7, 2018), <https://brook.gs/2Huc8Db> (“According to the newly released data, an estimated 15.5 million U.S. workers have alternative arrangements for their primary employment—this includes independent contractors, on-call workers, temporary help agency workers, and workers provided by contract firms. Notably, this does not include workers who have a traditional main job but engage in some alternative work on the side (e.g., a Lyft driver who works occasionally on weekends but has a fulltime job during the week).”).

<sup>17</sup> Antonio Aloisi & Elena Gramano, *Workers Without Workplaces and Unions Without Unity: Non-Standard Forms of Employment, Platform Work and Collective Bargaining*, 107 BULL. COMP. LAB. REL. (2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3363185](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3363185) (describing worker categories, workers without workplaces, unions without unity, non-standard forms of employment, platform work, and collective bargaining).

<sup>18</sup> Dara Kerr, *Lyft Grows Gangbusters in 2017, Bringing Competition to Uber*, <https://www.cnet.com/news/lyft-sees-massive-growth-brings-uber-competition/> (“Lyft went from Uber’s smaller and less-familiar rival to solid competitor in the US last year. Growing at a rapid rate, the San Francisco-based ride-hailing company provided passengers with 375.5 million trips in 2017. . . . Compared

States, the company has 2.25 million drivers outside of the United States in 78 countries. It is also true that some countries and cities are placing limits on the use of ridesharing. For example, London and Japan have prohibited Uber's ride-hailing business.<sup>19</sup> The question of the status of drivers' wages and working conditions can vary, but many drivers are seeking improvements.<sup>20</sup>

## 2. *Parties to Collective Bargaining*

### a. *Employers and TNCs*

In the traditional application of labor laws, the employer is the hiring entity that controls the employment relationship with employees.<sup>21</sup> Ride-hailing and ridesharing drivers are most often outside the typical employment relationship. In fact, the Uber-type drivers usually work for a TNC, sometimes known as a mobility service provider ("MSP"), that matches passengers with vehicles via websites and mobile apps.<sup>22</sup> TNCs for automobiles are commonly referred to as ride-hailing or ridesharing services.<sup>23</sup> State statutes often distinguish TNCs from "common carriers."<sup>24</sup>

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to Uber, Lyft has long been a small fry of the ride-hailing world. For example, the company has received \$4.1 billion in venture funding and is valued at \$11.5 billion, whereas Uber has received \$12.9 billion and is valued at \$68 billion." See generally *Occupational Employment Statistics*, U.S. DEP'T OF LABOR, <https://www.bls.gov/oes/current/oes533041.htm> (last visited Mar. 31, 2020).

<sup>19</sup> *Which Countries Have Banned the Controversial Taxi App*, KHODROCAR (Apr. 9, 2018, 2:46 PM), <http://khodrocar.com/en/news/2307/which-countries-have-banned-the-controversial-taxi-app>; see also *Japan to Pull a U-Turn on Ride-Sharing Ban in Bid to Fill Transport Gaps in Rural Areas*, JAPAN TIMES (Mar. 8, 2019), <https://www.japantimes.co.jp/news/2019/03/08/business/japan-pull-u-turn-ride-sharing-ban-bid-fill-transport-gaps-rural-areas-abe-says/#.XbO4vuhKgdU>; Amy Thomson, et al., *Uber's London Ban Marks Global Backlash for Ride-Hailing Giants*, FORTUNE (Nov. 27, 2019, 6:30 AM), <https://www.bloomberg.com/news/articles/2019-11-27/uber-s-london-ban-marks-global-backlash-for-ride-hailing-giants>.

<sup>20</sup> Nova, *supra* note 1.

<sup>21</sup> *Employee*, BLACK'S LAW DICTIONARY (9th ed. 2010).

<sup>22</sup> See *Ridesharing Company*, WIKIPEDIA, [https://en.wikipedia.org/wiki/ridesharing\\_company](https://en.wikipedia.org/wiki/ridesharing_company) (last visited May 16, 2020); *Uber*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Uber> (last visited May 15, 2020), ("Uber Technologies, Inc. is an American multinational transportation network company (TNC) offering services that include peer-to-peer ridesharing, ride service hailing, food delivery, and a bicycle-sharing system." Illustrative examples are found in Michigan and Hawaii: Michigan Act No. 345, Transportation network company means a person operating in this state that uses a digital network to connect transportation network company riders to transportation network company drivers who provide transportation network company prearranged rides. Transportation network company does not include a taxi service, transportation service arranged through a transportation broker, ridesharing arrangement, or transportation service using fixed routes at regular intervals.); see also HAW. CODE R. § 19-20.1-54 (2018) ("The special provisions set forth in this subchapter shall apply to prearranged ground transportation services at public airports.").

<sup>23</sup> *Ride-Hailing vs. Ride-Sharing: The Key Difference and Why It Matters*, ECOLANE (Oct. 18, 2018), <https://www.ecolane.com/blog/ride-hailing-vs.-ride-sharing-the-key-difference-and-why-it-matters> (noting



A useful study delineating how TNCs are regulated in California and in other jurisdictions reports on the variety of approaches.<sup>25</sup>

*b. Employees – By Adjudication or Legislation*

In the United States, at the federal level, the primary adjudications to determine employee status focus on the type and amount of control the employer has over the worker and arise under the National Labor Relations Act (“NLRA”) and Fair Labor Standards Act (“FLSA”).<sup>26</sup> Section 2(3) of the NLRA provides that the term “employee” should not include “any individual having the status of independent contractor.”<sup>27</sup> In *NLRB v. United Insurance Co. of America*, the U.S. Supreme Court stated that the common-law agency test should be applied in distinguishing an employee from an independent contractor.<sup>28</sup>

On May 14, 2019, the Associate General Counsel of NLRB determined in an Advice Memorandum that UberX and UberBLACK drivers

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the difference between ride-sharing and ride-hailing services, and that “majority of trips provided are actually ride-hailing trips.”); *see also* Abigail Zenner, *The AP Bans the Term “Ride-Sharing” for Uber & Lyft*, Greater Washington (Jan. 14, 2015), <https://ggwash.org/view/36979/the-ap-bans-the-term-ride-sharing-for-uber-lyft> (companies like Uber and Lyft have often referred to their services as “ride-sharing,” however, the Associated Press now uses “ride-hailing” Uber-like services in its widely-used style guide).

<sup>24</sup> *E.g.*, IND. CODE § 8-2.1-19.1-4 (2015) (“A TNC or a TNC driver is not: (1) a common carrier; (2) a contract carrier; or (3) a motor carrier.”); Michael Brestovansky, *Bills Would Establish Statewide Regulations for “Transportation Network Companies” – Including Uber and Lyft*, HAW. HERALD TRIBUNE (Feb. 26, 2019) <https://www.hawaiitribune-herald.com/2019/02/26/hawaii-news/bills-would-establish-statewide-regulations-for-transportation-network-companies-including-uber-and-lyft/> (“A pair of bills in the [Hawaii] state legislature would codify the state’s management of ride-sharing networks such as Uber and Lyft. Senate Bill 1161 and its companion, House Bill 1093, would establish a series of rules for “transportation network companies” — in particular popular ride-sharing applications such as Uber and Lyft — to operate within the state.”). Hawaii’s Senate bill reads: “Solely for the purposes of this chapter, neither a transportation network company nor a transportation network company driver shall be deemed to be a common carrier by motor vehicle, a contract carrier by motor vehicle, a motor carrier as defined in section 271-4, a taxicab, or a for-hire vehicle service. No transportation network company driver shall be required to register a transportation network company vehicle as a commercial or for-hire vehicle.” S.B. 1161, 2019 Leg., Reg. Sess. (Hi. 2019); *see also* MAARIT MORAN, ET AL., TEXAS A&M TRANSPORTATION INST., POLICY IMPLICATIONS OF TRANSPORTATION NETWORK COMPANIES FINAL REPORT, TEXAS HOUSE BILL 100. 2017 (2017), *available at* <https://static.tti.tamu.edu/tti.tamu.edu/documents/PRC-17-70-F.pdf>

<sup>25</sup> SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, THE TNC REGULATORY LANDSCAPE – AN OVERVIEW OF CURRENT TNC REGULATION IN CALIFORNIA AND ACROSS THE COUNTRY 1 (2017), *available at* [https://www.sfcta.org/sites/default/files/2019-03/TNC\\_regulatory\\_020218.pdf](https://www.sfcta.org/sites/default/files/2019-03/TNC_regulatory_020218.pdf) (as of June 2017, 48 states and the District of Columbia have passed legislation regulating TNCs statewide in some form, most of them primarily concerned with safety, insurance, and fares).

<sup>26</sup> 29 U.S.C. § 203.

<sup>27</sup> 29 U.S.C. 2(3).

<sup>28</sup> *NLRB v. United Ins. Co.*, 340 U.S. 254, 256 (1968) (applying agency test).

are independent contractors, not employees, of Uber.<sup>29</sup> The Memorandum applies the NLRB's recent decision in SuperShuttle DFW, Inc., holding that, in deciding whether an individual is an independent contractor or an employee, the focus is "on the extent to which the arrangement between the ostensible employer and the alleged employee provided an 'entrepreneurial opportunity' to the individual,"<sup>30</sup> a factor downplayed in an earlier decision.<sup>31</sup> The drivers therefore are not employees within the meaning of the NLRA and are not eligible for NLRB-certified union representation or the protections of the NLRA.<sup>32</sup>

On April 29, 2019, the Wage and Hour Division of the Department of Labor issued an opinion advising that under the FLSA, the service providers of a "virtual marketplace company" ("VMC") were independent contractors and not employees because they were "economically independent and not dependent."<sup>33</sup> In a case of first impression, a federal district court ruled that limousine drivers for Uber are independent contractors and not the company's employees under the FLSA.<sup>34</sup>

There is also carve-out legislation at the state level beginning to appear that categorically classifies gig and ride-hail drivers as independent contractors and not employees, affecting state law (but likely preempted under federal law).<sup>35</sup>

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<sup>29</sup> Jayme L. Sophir, Associate General Counsel, National Labor Relations Board, Advice Memorandum, Apr. 16, 2019 (released on May 14, 2019).

<sup>30</sup> *Id.* at 13.

<sup>31</sup> See Ivo J. Becica, *UBER Update: NLRB Advice Memo Reaffirms the "Entrepreneurial Opportunity" Test for Independent Contractors*, OBERMAYER, (JUNE 5, 2019), <https://www.hrlegalist.com/2019/06/uber-update-nlr-b-advice-memo-reaffirms-the-entrepreneurial-opportunity-test-for-independent-contractors/>.

<sup>32</sup> See Keahn Morris & John Bolesta, Sheppard Mullin LLP, *Which Are They? Independent Contractors or Employees? Navigating the Conflicts Between State and Federal Law*, LABOR & EMPLOYMENT LAW BLOG (Jul. 2, 2019), <https://www.laboremploymentlawblog.com/2019/07/articles/national-labor-relations-act/drivers-independent-contractors-employees/>.

<sup>33</sup> U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Apr. 29, 2019).

<sup>34</sup> See *Razak v. Uber Techs., Inc.*, CV 16-573, 2018 WL 1744467, at \*19 (E.D. Pa. Apr. 11, 2018), *vacated and remanded*, 951 F.3d 137 (3d Cir. 2020); see also *The Employment Status of Uber Drivers*, (Oct. 2017), OXFORD PRO BONO PUBLICO (Oct. 2017), <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2018/02/5.-Uber.pdf>.

<sup>35</sup> See Sarah Kessler, *Handy is Quietly Lobbying State Lawmakers to Declare its Workers Aren't Employees*, QUARTZ AT WORK (Mar. 30, 2018), <https://work.qz.com/1240997/handy-is-trying-to-change-labor-law-in-eight-states/>. Over the 2018 legislative session, nearly identical bills have been introduced in states including Alabama, California, Colorado, Florida, Georgia, Indiana, Iowa, Kentucky, Tennessee and Utah that deem all workers on so-called "marketplace platforms" (such as Uber and Handy) independent businesses, and not the employees of the companies. The bills have passed in Arizona (2017), Florida,

Under NLRA decisions over the years, there have been some cases where workers are found to be an employee and not an independent contractor due to their “economic dependence” on a primary employer for whom they are working, notwithstanding the fact that they are otherwise classified as independent contractors.<sup>36</sup> But the NLRB has most often found Uber drivers to be independent contractors.<sup>37</sup>

At the federal level, there have been proposals for a third category of “employee,” a hybrid category between employee and independent contractor titled “dependent contractor.”<sup>38</sup> A proposal for an “independent worker” category, in the excellent Hamilton Project Report, urges that all gig economy workers would default into this independent worker status.<sup>39</sup> Under the Hamilton Project proposal, such “independent workers” would gain rights to organize and bargain collectively under the NLRA.<sup>40</sup> Former NLRB Chairman and Stanford law professor William Gould IV counters by observing:

Though some have argued that the legislative answer lies in the creation of a new or third classification for “independent workers” in the gig economy, . . . the better view is that . . . a third category should not be created given the inevitable litigation about these boundaries and given the fact that doing so would “result in downgrading employees to intermediate status, [which] would do nothing to eliminate the problem of bogus contractor status.”<sup>41</sup>

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Indiana, Iowa, Kentucky, Tennessee, and Utah (2018). They were defeated in Alabama, California, Colorado and Georgia. As of April 26, 2018, the bills had passed in Arizona (2017), Florida, Indiana, Iowa, Kentucky, Tennessee and Utah.

<sup>36</sup> See *NLRB Finds FedEx Home Delivery Drivers Employees Under New Independent Contractor Test, Rejects DC Circuit Independent Contractor Finding on Same Facts*, PRACTICAL LAW LABOR & EMPLOYMENT, <https://us.practicalaw.thomsonreuters.com/3-583-6277> (last visited May 1, 2020).

<sup>37</sup> *The Employment Status of Uber Drivers*, *supra* note 34.

<sup>38</sup> Cherry & Aloisi, *supra* note 4, 647 (describing the unsatisfactory pace of litigation that leads to legislatures considering adding a third group of workers); see Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 *FORDHAM URB. L.J.* 31, 61–62 (2016).

<sup>39</sup> HARRIS & KRUEGER, *supra* note 14, at 22; Cherry & Aloisi, *supra* note 4, at 651 (“Rather than litigate the issue of whether a particular worker or group of workers deserves employee status, gig-platform drivers would automatically be sorted into the hybrid “dependent contractor” category.”). Cherry & Aloisi also describe the Canadian experience, as well as those in Italy and Spain. See *id.* at 651–55. “Ultimately, in Canada the third category of “dependent contractor” has essentially resulted in an expansion of the definition of employee.” *Id.* at 655.

<sup>40</sup> *Id.* (citing HARRIS & KRUEGER, *supra* note 14).

<sup>41</sup> Gould, IV, *supra* note 12, at 1026 n.256.

At the state level, the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* embraced a newly adopted “ABC test” of presuming workers to be employees when they are primarily economically dependent on an employer.<sup>42</sup> The ABC doctrine presumes that all workers are employees and places the burden on any entity classifying an individual as an independent contractor in establishing that such classification is proper.<sup>43</sup> The ABC test has been unsuccessfully challenged as being preempted by federal statutes.<sup>44</sup> This case subsequently

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<sup>42</sup> See *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P. 3d 1 (2018). Under the ABC test, a worker will be deemed to have been “suffered or permitted to work,” and thus, an employee for wage order purposes, unless the putative employer proves:

(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) that the worker performs work that is outside the usual course of the hiring entity’s business; and

(C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

<sup>43</sup> *Id.*; See generally Gould, IV, *supra* note 12. Only weeks after *Dynamex*, the California appellate court applied the ABC test. *Curry v. Equilon Enterprises, LLC*, 22 Cal.App.5th 772 (2018). For a breakdown of the *Curry* court’s application of the ABC test, see William Hays Weissman, Esq., *The Implications of Dynamex Operations West v. Superior Court: California’s Adoption of the ABC Test for Purposes of the Wage Orders*, LITTLER MENDELSON PC (2018), [https://www.littler.com/files/the\\_implications\\_of\\_dynamex\\_operations\\_west.pdf](https://www.littler.com/files/the_implications_of_dynamex_operations_west.pdf).

<sup>44</sup> A recent case challenged *Dynamex* in federal court alleging FAAAA preemption. Truckers lost and appealed to the Ninth Circuit. Truckers voluntarily dismissed their own appeal this September. See *W. States Trucking Ass’n v. Schoolr*, 377 F. Supp. 3d 1056, 1063 (E.D. Cal. 2019). In a Third Circuit case, *Bedoya v. Am. Eagle Express*, 914 F.3d 812 (3d Cir. 2019), the plaintiffs worked as drivers for defendant American Eagle Express, Inc., a logistics company that provides delivery services to medical organizations. Under the state law, a worker is considered an employee unless the hiring entity can demonstrate each prong of the New Jersey ABC test established in 2015. Western States’ Complaint made three primary claims. First, it contended that the ABC test adopted by *Dynamex* directly impacts the price, routes, and services of its motor carrier members, and is therefore preempted by federal law in the form of the FAAAA. Second, Western States claims that the ABC test “on its face discriminates against out-of-state and interstate trucking companies,” thereby violating the dormant Commerce Clause of the United States Constitution. Third and finally, Western States maintains that the ABC test is preempted in any event for the Federal Motor Carrier Safety Regulations as enacted at 49 C.F.R. §§ 300–99. The Third Circuit concluded that New Jersey’s ABC classification test is not preempted as it has neither a direct, nor an indirect, nor a significant effect on carrier prices, routes, or services. “The Third Circuit was careful to distinguish the New Jersey test from the Massachusetts version of the ABC test, which the First Circuit previously held *was* preempted by the FAAAA. Unlike the more stringent Massachusetts test, which ‘bound the carrier to provide its services using employees’ because it ‘essentially foreclosed the independent contractor classification of any of the carrier’s workers,’ the Third Circuit concluded that the New Jersey test does not “categorically prevent carriers from using independent contractors.” See Alexander M. Chemers & Ryan T. Warden, *Third Circuit Rules That FAAAA Does Not Preempt New Jersey’s ABC Test for Determining Independent Contractor Status*, OGLETREE DEAKINS: NEW JERSEY, STATE DEVELOPMENTS (Feb. 11, 2019), <https://ogletree.com/insights/2019-02-11/third-circuit-rules-that-faaaa-does-not-preempt-new-jerseys-abc-test-for-determining-independent-contractor-status/>; see also Mara D. Curtis & Michael R. Kleinmann, *9th Circuit to consider whether the FAAAA preempts California’s ABC test for independent contractor truck drivers*, LEXOLOGY: EMPLOYMENT LAW WATCH

incorporated the ABC test into California legislation, the AB 5 statute.<sup>45</sup> The law was effective January 1, 2020, but forty-eight hours before that a lawsuit was filed and pending, challenging it on Equal Protection grounds.<sup>46</sup> An issue that might arise in this challenge is that drivers often sign arbitration clauses that preclude such lawsuits.<sup>47</sup>

New Jersey's Labor Department recently determined Uber drivers are employees and assessed Uber a \$650 million tax bill for misclassifying its drivers as independent contractors.<sup>48</sup> By contrast, some states have codified that TNC drivers are independent contractors.<sup>49</sup>

### B. *Independent Contract Collective Bargaining Regulation*

This Section describes a new approach that allows the business model of using *independent contractors* under an online platform, but at the same time grants them the right to be represented and collectively bargain for

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BLOG, <https://www.lexology.com/library/detail.aspx?g=40117acb-cd1c-4db7-b089-5c6f87c7d243>. For a thoughtful and comprehensive report on the legal authority of the City of Los Angeles to implement a registration and permit program for drivers employed as "Transportation Charter Party Carriers" ("TCP") and TNCs, and to identify any State legislation needed for the City to fully implement such a regulatory program, see, City of Los Angeles Inter-Departmental Memorandum. *See* SELETA J. REYNOLDS, ENFORCE REGISTRATION AND PERMIT PROGRAMS/ CHARTER PARTY CARRIERS/ NETWORK TRANSPORTATION COMPANIES/ ENSURE PUBLIC SAFETY (COUNCIL FILE 18-0449), 3 (Apr. 4, 2019), [http://clkrep.lacity.org/onlinedocs/2018/18-0449\\_rpt\\_DOT\\_04-04-2019.pdf](http://clkrep.lacity.org/onlinedocs/2018/18-0449_rpt_DOT_04-04-2019.pdf)

<sup>45</sup> A.B. 5. 2019-20 Leg., Reg. Sess. (Cal. 2019) (effective Jan. 1, 2020) (An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor) (this test will be applied more broadly to cover wage orders, labor code, unemployment insurance code, and, effective 7/01/2020, workers' compensation laws). Aarian Marshall, *Now the Courts Will Decide Whether Uber Drivers Are Employees*, WIRED (Jan. 3, 2020, 1:43 PM), <https://www.wired.com/story/courts-decide-uber-drivers-employees> ("The tech platforms are prepping for another alternative, one that could sidestep the flurry of court action. Uber, Lyft, DoorDash, Instacart, and Postmates have collectively sunk \$110 million in a ballot initiative that will ask California voters to create an exception to the law for app-based drivers. The initiative also proposes a "compromise" for drivers, including a healthcare subsidy, new minimum earnings guarantees, occupational accident insurance, and compensation for vehicle expenses.") Uber, Lyft, and DoorDash have initiated a program to grant drivers even more autonomy to escape the presumption of AB 5.

<sup>46</sup> *See* Marshall, *supra* note 45; Lilah Sutphen, *California's New Arbitration and Independent Contractor Laws Stayed, Conditionally and Temporarily for Now*, NAT'L L. REV., <https://www.natlawreview.com/article/california-s-new-arbitration-and-independent-contractor-laws-stayed-conditionally> (Jan. 7, 2020).

<sup>47</sup> *See* SUTPHEN, *supra* note 46 ("AB 51 [The Anti-Arbitration Law] would make it unlawful for employers to impose arbitration agreements on employees as a condition of employment, even if employees are permitted to opt out.")

<sup>48</sup> Chris Opfer, *Uber Hit With \$650 Million Employment Tax Bill in New Jersey*, BLOOMBERG L. (Nov. 14, 2019), <https://news.bloomberglaw.com/daily-labor-report/uber-hit-with-650-million-employment-tax-bill-in-new-jersey> (Nov. 14, 2019).

<sup>49</sup> *E.g.*, IND. CODE § 8-2.1-19.1-4 (2015).

better working conditions. This presents platform entities with the decision of how to classify workers—as employees with rights and benefits; or as independent contractors with the right to organize, be represented, and negotiate improved rights and benefits in the workplace. This is the next step after California’s ABC law to expand the labor rights of ride-hailing drivers in the new gig economy. This Section is organized to both explain and provide a guideline or model for those in other jurisdictions to follow if they are so disposed.

### 1. *Seattle Ordinance*

In 2015, the City of Seattle, Washington, adopted an unprecedented ordinance<sup>50</sup> that grants collective bargaining rights to independent contractor for-hire drivers performing services for taxicab companies and TNCs. Cabbies and drivers for app-based TNC companies like Uber and Lyft did not have any previously recognized legal right to bargain collectively with their employers regarding the terms and conditions of their employment.<sup>51</sup> The ordinance is further clarified through Director’s Rules.<sup>52</sup> Generally, the ordinance grants independent contractor for-hire drivers working in Seattle the right to collective bargain, select an exclusive bargaining representative, bargain for a contract covering the terms and conditions of their employment, and, if needed, obtain an agreement through binding interest arbitration.<sup>53</sup> The purpose of the ordinance is to promote commercial safety

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<sup>50</sup> SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2017), [https://library.municode.com/wa/seattle/codes/municipal\\_code](https://library.municode.com/wa/seattle/codes/municipal_code).

<sup>51</sup> Charlotte Garden, *The Seattle Solution: Collective Bargaining by For-Hire Drivers and Prospects for Pro-Labor Federalism*, 12 HARV. L. & POL’Y REV. 1, 2 (2017) (“The ordinance was the product of lobbying by Uber and Lyft drivers who were frustrated by capricious treatment by the transportation network companies (TNCs) and taxi dispatchers on which they depended for income. The drivers—many of whom were from Somali and Sikh immigrant communities—were supported by Teamsters Local 117, which already had experience supporting collective action by drivers classified as independent contractors, including both taxi and TNC drivers.”).

<sup>52</sup> *For-hire Driver Collective Bargaining Director’s Rules*, SEATTLE DEP’T FIN. & ADMIN. SERVS., <http://www.seattle.gov/finance-and-administrative-services/directors-rules#rules-forhirebargaining> (last visited Apr. 30, 2020).

<sup>53</sup> See Dmitri Iglitzin & Jennifer L. Robbins, *The City of Seattle’s Ordinance Providing Collective Bargaining Rights to Independent Contractor for-Hire Drivers: An Analysis of the Major Legal Hurdles*, 38 BERKELEY J. EMP. & LAB. L. 49, 50 (2017). In January 2019, the Ordinance was amended to remove wages from the bargainable subjects. See SEATTLE, WASH., MUN. CODE § 6.310 (2017). Monica Nickelsburg, *With New Tax and Minimum Wage, Seattle Is Latest Battleground in Uber and Lyft’s Feud with Regulators*, GEEKWIRE (Nov. 27, 2019), <https://www.geekwire.com/2019/new-tax-minimum-wage-seattle-latest-battleground-uber-lyfts-feud-regulators/> (noting in November 2019 a new minimum wage ordinance was passed, effective July 1, 2010, which covers the drivers and raises their wages to \$16 per hour).

and stability in the transportation industry, as well as to promote worker rights.<sup>54</sup>

*a. Parties*

*i) Transportation Network Companies*

TNCs are also sometimes known as mobility service providers, which match passengers with vehicles using websites and mobile apps. TNCs for automobiles are commonly referred to as ride-hailing services. The Seattle Ordinance defines a TNC as:

An organization whether a corporation, partnership, sole proprietor, or other form, licensed under this chapter and operating in the City of Seattle that offers prearranged transportation services for compensation using an online-enabled TNC application or platform to connect passengers with drivers using their personal vehicles and that meets the licensing requirements of Section 6.310.130 and any other requirements under this chapter.<sup>55</sup>

*ii) “Employer” Representative: Driver Coordinator*

A driver coordinator is a company that hires, contracts with, or partners with drivers to provide for-hire transportation services using an app or dispatch system.<sup>56</sup> Driver coordinators include, but are not limited to, taxicab associations, for-hire vehicle companies and TNCs.<sup>57</sup>

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<sup>54</sup> SEATTLE, WASH., MUN. CODE § 6.310.100 (2017).

<sup>55</sup> *Id.* (the TNC must also have a representative to formally receive government documents); *see also* MICH. COMP. LAWS § 257.2102 (2016) (“Transportation network company means a person operating in this state that uses a digital network to connect transportation network company riders to transportation network company drivers who provide transportation network company prearranged rides. Transportation network company does not include a taxi service, transportation service arranged through a transportation broker, ridesharing arrangement, or transportation service using fixed routes at regular intervals”); HAW. CODE R. § 19-20.1-55 (defining TNC as “a person or an entity that uses a digital network or software application service to connect passengers to transportation network company drivers and uses a digital network or software application service to confirm the commercial activity and gross receipts of that activity; provided that the person or entity (1) does not own, control, operate, or manage the personal vehicles used by transportation network company drivers and (2) is not a taxicab company or a for-hire vehicle owner.”).

<sup>56</sup> SEATTLE, WASH., MUN. CODE § 6.310.100 (2017).

<sup>57</sup> *Id.*

*iii) Independent TNC Drivers*

A TNC driver is defined as a “licensed for-hire driver affiliated with and accepting dispatched trips from a licensed transportation network company. For purposes of this chapter, at any time while a driver is active on the TNC dispatch system, the driver is considered a TNC driver.”<sup>58</sup>

*iv) Workers’ Representative: Qualified Driver Representative*

A qualified driver representative (“QDR”) is an organization like a labor union or nonprofit that meets the City’s criteria and will try to gather support from drivers (for a particular driver coordinator) to represent their issues with the driver coordinator.<sup>59</sup> The ordinance authorizes a QDR to become an “exclusive driver representative” (“ERD”).<sup>60</sup> There was one application from Teamsters Local 117, and the union has been seeking to organize drivers.<sup>61</sup> In 2016, taxicab operators in the Western Washington Taxicab Operators Association (“WWTCOA”) voted unanimously to join Teamsters Local 117 as full-fledged union members. It marks the first time that taxicab operators in the United States have been able to join a union as independent contractors.

Last winter, WWTCOA members were instrumental to passing the Seattle law giving collective bargaining rights to drivers classified as independent contractors. This law laid the groundwork to joining Local 117. These new union members have access to all the Teamsters benefits, such as life with dues,

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<sup>58</sup> *Id.* (the ordinance includes a definition of “qualifying drivers”)

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* The QDR may qualify as the exclusive bargaining representative. EDR must be “certified by the Director to be the sole and exclusive representative of all for-hire drivers operating within the City for a particular driver coordinator, and authorized to negotiate, obtain and enter into a contract that sets forth terms and conditions of work applicable to all of the for-hire drivers employed by that driver coordinator.” *Id.*

<sup>61</sup> Sarah Kessler, *Uber Has Produced 18 Episodes of a Podcast Warning Drivers About the Dangers of Joining a Union*, QUARTZ (Mar. 13, 2017), <https://qz.com/927777/the-teamsters-have-finally-begun-to-organize-uber-drivers-in-seattle/>; see also *Uber Driver Wins Reinstatement, Credits Community*, PR NEWSWIRE, <https://www.prnewswire.com/news-releases/seattle-uber-driver-wins-reinstatement-credits-community-teamsters-300226434.html>. For information about the Teamsters, see INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CONSTITUTION (2002), [http://www.pennfedbmwe.org/Docs/constitution/IBT\\_Constitution.pdf](http://www.pennfedbmwe.org/Docs/constitution/IBT_Constitution.pdf).



full representation, and the collective power to influence public policy.<sup>62</sup>

*b. Duties, Review, and Interest Arbitration*<sup>63</sup>

This Section presents an introductory guideline or model for those other jurisdictions that may wish to develop such a law for independent contractors.

*Duties:* The Parties shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director,<sup>64</sup> including minimum hours of work and conditions of work. A driver coordinator shall not retaliate, interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this section.

*Review:* The Director shall review the agreement for compliance with the provisions of the law and have the right to gather and consider any necessary additional evidence, including by conducting public hearings. If the Director finds it fails to comply, the Director shall remand it to the parties with a written explanation of the failure(s) and, at the Director's discretion, with recommendations to remedy the failure(s). If the Director finds the agreement compliant, the agreement is final and binding on all parties.<sup>65</sup>

*Interest Arbitration:* If the Parties fail to reach an agreement within ninety days of the certification by the Director, either party must submit to interest arbitration upon the request of the other.<sup>66</sup>

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<sup>62</sup> *WWTCOA Members Join Local 117*, [https://www.teamsters117.org/wwtcoa\\_members\\_join\\_local\\_117](https://www.teamsters117.org/wwtcoa_members_join_local_117) (last visited Apr. 30, 2020).

<sup>63</sup> This Section's potential guidelines are based on Seattle's municipal code. See SEATTLE, WASH., MUN. CODE § 6.310.110, .735 (2017); *Seattle Director's Rules*, *supra* note 7.

<sup>64</sup> Negotiation of payments was removed from Seattle's ordinance in 2019 as a subject for bargaining to lessen risks of antitrust violation. Heidi Groover, *Seattle City Council OKs New 57-cent Tax on Uber, Lyft Rides*, SEATTLE TIMES (Nov. 25, 2019), <https://www.seattletimes.com/seattle-news/transportation/seattle-city-council-oks-new-57-cent-tax-on-uber-lyft-rides/> (city leaders have promised to "ensure Uber and Lyft drivers make Seattle's \$16 minimum wage" starting in the summer of 2020).

<sup>65</sup> *Seattle Director's Rules*, *supra* note 7 (Rule FHDR-6: Approval of an Agreement, Changes to an Existing Agreement and Withdrawal of an Existing Agreement).

<sup>66</sup> *Id.* (Rule FHDR-5: Interest Arbitration).

### C. *Foreign Experience: EU and China*

To provide context for the Seattle approach, a brief description of developments on similar issues on an international level—by looking at activity by the International Labour Organization (“ILO”)—and in the EU and China is provided below.

#### 1. *ILO*

Under the conventions of the ILO, most workers, including employees who are misclassified as independent contractors, are guaranteed the right to associate and collectively bargain.<sup>67</sup> The ILO’s Conventions on Fundamental Principles and Rights at Work are universal and, thus, apply to all workers.<sup>68</sup> The illustration below points out that dependent workers, such as gig-platform workers working for only one primary employer, when denied employee status are also denied the rights of association and collective bargaining.

In 2018, the ILO issued an Observation (CEACR) regarding observations by International Trade Union Confederation (ITUC) and the Single Confederation of Workers (CUT), that a new law by Brazil, included a provision that created a “status of exclusive autonomous worker,” which allowed the status of dependent workers “to be excluded even when the *autonomous worker* is engaged exclusively and permanently for an enterprise.” The ILO found the law denies this category of worker the freedom of association and collective bargaining rights recognized by the ILO.”<sup>69</sup>

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<sup>67</sup> See generally *Conventions and Recommendations*, INT’L LABOUR ORG., <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited April 10, 2020) (defining conventions and recommendations set forth by the ILO). Conventions (or Protocols) are legally binding international treaties regarding workplace rights that may be ratified by member states. Recommendations are non-binding guidelines. In many cases, a Convention lays down the basic principles to be implemented by ratifying countries, while a related Recommendation supplies more detailed guidelines on the Convention’s application. Recommendations can also be stand-alone guidance. *See id.*

<sup>68</sup> See Aloisi & Gramano *supra* note 17; *ILO Supervisory System/Mechanism*, INT’L LABOUR ORGANIZATION, <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> (last accessed Apr. 30, 2020) (the supervisory system ensures that countries implement the Conventions that they have ratified through regular examinations of standards’ applications in member states).

<sup>69</sup> See Comments, *Observation (CEACR) – adopted 2017, published 107th ILC session*, ILO (2018), [https://www.ilo.org/dyn/normlex/en/F?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3523855](https://www.ilo.org/dyn/normlex/en/F?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3523855).

Perhaps further clarification is needed as to whether the ILO edicts refer to misclassified dependent “employees” only or can be reasonably applied to other autonomous independent contractors.

## 2. *EU*

### a. *Employment Status of Rideshare Drivers*

The freedom of association has been extended to self-employed workers by the European Court of Human Rights under the European Convention on Human Rights (“ECHR”),<sup>70</sup> the European Social Charter (“ESC”),<sup>71</sup> and the European Committee of Social Rights (“ECSR”),<sup>72</sup> and the right has been further clarified to ensure self-employed workers are protected under Article 6(2) of the ESC.<sup>73</sup> However, it has been observed that their rights to collective bargaining “will most certainly be exposed to the harsh realities of EU competition law.”<sup>74</sup>

In 2017, the EU Commission published a “Pillar of Social Rights,” which sets forth twenty proposals for improving worker social protections.<sup>75</sup> One is for building better social protections for gig-economy workers who are hired on a task-by-task basis. It has been observed that while the Commission may recognize the issue, it has not produced a remedy.

Some of these new forms of work, like the “tripartite relationship between the platform, the customer and service

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<sup>70</sup> See generally Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, E.T.S. 177.

<sup>71</sup> See generally European Social Charter (Revised), May 3, 1996, E.T.S. 163.

<sup>72</sup> European Social Charter art. 25, Feb. 2, 1965, E.T.S. 35.

<sup>73</sup> See Aloisi & Gramano *supra* note 17. The ECSR has clarified that self-employed workers are protected under Article 6(2) of the European Social Charter. “The European Court of Human Rights extended protection of freedom of association to self-employed persons and the Grand Chamber held that the right to bargain collectively and to enter into collective agreements does constitute an essential element of Article 11. Article 5 of the European Social Charter (Revised) (ESC) (adopted in 1996) sets out the right to form, join, and actively participate in associations designed to protect their members’ professional interests. Article 28 of the Charter of the Fundamental Rights of the European Union protects the right to collective bargaining, by specifically referring to ‘national laws and practices.’” Nicola Countouris & Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment*, EURO. TRADE UNION CONFEDERATION (2019), [https://www.etuc.org/sites/default/files/document/file/2019/04/2019\\_new%20trade%20union%20strategies%20for%20new%20forms%20of%20employment\\_0.pdf](https://www.etuc.org/sites/default/files/document/file/2019/04/2019_new%20trade%20union%20strategies%20for%20new%20forms%20of%20employment_0.pdf).

<sup>74</sup> Aloisi & Gramano, *supra* note 17.

<sup>75</sup> *Pillar of Social Rights*, EUR. COMM’N, [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en) (last accessed April 10, 2020).

provider,” or the “economically dependent contractor” may lead to the use of self-employed status in situations where de facto a subordinate employment relationship exists.<sup>76</sup>

On April 16, 2019, the European Parliament approved the Directive on Transparent and Predictable Working Conditions in the European Union, which is the first legally binding instrument that has been fleshed out from the European Pillar of Social Rights (“EPSR”) and provides for all workers having more transparency about their work.<sup>77</sup> The directive provides workers with the right to be informed in writing at the start of employment about their rights and obligations arising from the employment relationship.<sup>78</sup>

All legal systems in the EU premise their national labor law systems on a fundamental binary division between subordinate or dependent employment on the one hand and autonomous or independent self-employment on the other. In a recent comprehensive study, the various approaches in classifying gig-platform workers in selected EU countries are delineated.<sup>79</sup>

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<sup>76</sup> Sarah Kessler, *The EU Commission Called Out the Gig Economy for Its Lack of Social Protections*, QUARTZ (Apr. 27, 2017), <https://qz.com/969762/>. (“About 15% of the workforce in EU member states are self-employed, with another 20 to 25% working in ‘non-standard employment,’ which includes the gig economy.”). While commenting on the issue of gig workers, the document does not present a plan to address it. The EU Commission stated, “[M]aking the European Pillar of Social Rights a reality for citizens is a joint responsibility. While most of the tools to deliver on the Pillar are in the hands of Member States, as well as social partners and civil society, the European Union institutions—and the European Commission in particular—can help by setting the framework and giving the direction.” *Pillar of Social Rights*, *supra* note 75.

<sup>77</sup> Bartłomiej Bednarowicz, *Workers’ Rights in the Gig Economy*, EU LAW ANALYSIS (Apr. 24, 2019), <http://eulawanalysis.blogspot.com/2019/04/workers-rights-in-gig-economy-is-new-eu.html> (“The Directive guarantees that all workers . . . should be provided with more thorough and complete information regarding the essential aspects of their work, which are to be received by the worker—depending on the nature of the information, either within first 7 days or within a month since the employment commences.”).

<sup>78</sup> Commission Directive 2019/1152 art. 3, on Transparent and Predictable Working Conditions in the European Union, 2019 O.J. (L 186) 105 (EC). (“[W]orkers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship.”).

<sup>79</sup> Countouris & De Stefano, *supra* note 73, at 23. Poland recently passed a law which appears to confirm this conclusion. On January 1, 2019, the Government of Poland extended the application of the Trade Union Act to both own-account non-employees. The new law lands in the middle of regulatory debate concerning access of non-standard workers—and self-employed workers in particular—to fundamental labor rights to organize and bargain collectively. It is not clear that this extends beyond the right to unionize or includes the right to collectively bargain. Collective bargaining appears blocked by the EU competition law. “An exception to that rule is only possible if the service providers in the name and on behalf of whom the trade union negotiated are in fact false[ly] self-employed, that is, service providers in a situation comparable [but not identical] to that of employees. Accordingly, the current specific notion of workers for competition law, as forged by CJEU in the landmark 2014 case FNV Kunsten, continues to make reference to subordination as the criterion traditionally used to establish worker status in labor law.”

[I]n the countries reviewed in this study, these policies did not create an autonomous legal type that would break the binary divide between employment and self-employment. Rather, the intermediate “category” of quasi-subordinate or economically dependent workers is broadly understood as constituting a subgroup of self-employment. Austria, Germany, Italy, Ireland, Spain, and the United Kingdom all fit this “modified binary divide” model. However, it is also worthwhile mentioning that other countries, notably France, Sweden and, in several ways, Belgium, have resisted the emergence of intermediate categories of quasi-subordinate employment, and the prevalent approach has been, instead, to include economically dependent workers, and other typologies of semi-autonomous workers, within the scope of employment regulation by extending to them all relevant labor law protections.<sup>80</sup>

The Danish union 3F claimed to have concluded the world’s first-ever collective agreement in the “platform economy” with Hilfr.dk, an online platform for cleaning services in private homes.<sup>81</sup> The workers were classified as employees and the agreement introduces a minimum wage, sick pay, holiday allowance and pension contributions for those working regularly for the platform, i.e., more than 100 hours.<sup>82</sup>

*b. Collective Bargaining and Antitrust Considerations*<sup>83</sup>

As noted in the recent study of EU approaches and legal statuses regarding collective bargaining, there several issues emerging.

First, anti-trust and competition regulation might stand in the way of collective bargaining, as introducing minimum employment terms and conditions can be interpreted as ‘price-

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Zuzanna Muskat-Gorska, *Dispatch No. 22 - Poland – “Polish Legislative Reform Tests a More Principled Approach to Collective Rights of Self-Employed Workers,”* Comparative Labor Law & Policy Journal (Apr. 2020), <https://cllpj.law.illinois.edu/dispatches>.

<sup>80</sup> Countouris & De Stefano, *supra* note 73, at 23.

<sup>81</sup> *3F Reaches Groundbreaking Collective Agreement with Platform Company Hilfr*, UNI GLOBAL UNION (Sept. 18, 2018), <https://www.uniglobalunion.org/news/3f-reaches-groundbreaking-collective-agreement-platform-company-hilfr>.

<sup>82</sup> Kurt Vandaele, *Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers’ Collective Voice and Representation in Europe* 22 (Eur. Trade Union Inst., Working Paper No. 5, 2018).

<sup>83</sup> *Id.*

fixing.’ Second, in countries where industry-level collective bargaining prevails, this implies that either the digital labor platforms join existing employers’ associations or that they establish their own associations. . . . Nevertheless, unions in, for instance, Belgium, Sweden, or Switzerland are attempting to conduct direct negotiations with the platforms. Moreover, a growing number of longstanding unions are chalking up successes in bringing digital labor platforms into the realm of genuine employment relations, with collective representation and collective bargaining.<sup>84</sup>

In the case against Uber, the Court of Justice of the European Union (“CJEU”) determined that Uber acts as a transportation service provider rather than a mere technological intermediary between customers and independent service providers; thus, its drivers are dependent employees.<sup>85</sup> In reaching its conclusion, the Court observed that Uber determines at least the maximum fare riders pay, the fare is first deposited with Uber before any payment is remitted to the driver, and Uber retains significant control aspects of the employment, including “the quality of the vehicles [and] the drivers and their conduct, which can, in some circumstances, result in their exclusion.”<sup>86</sup> In relation to antitrust considerations, the Court’s finding of these workers to be employees should arguably transcend national definitions. The decision to exempt from antitrust law not only applies in instances of employment misclassification but “encompasses many workers that are dependent on their principals, even if they do not fully meet the tests of employment status under the relevant national legislations.”<sup>87</sup>

Ireland recently addressed the issue of “dependent self-employed” and “false self-employed” workers by authorizing carve outs from antitrust limitations.

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<sup>84</sup> Countouris & De Stefano, *supra* note 73.

<sup>85</sup> S.Juz.Prim., Dec. 20, 2017 (R.J., No. 434) (Spain).; Countouris & De Stefano, *supra* note 73, at 49 (“In a situation like this, it is clear that Uber drivers—as many (bogus or genuine) self-employed workers do—only operate as an auxiliary within the principal’s undertaking and therefore, in FNV Kunsten’s terms, do not determine independently their own conduct on the market, but are entirely dependent on their principal. They are, therefore, an integral part of the employer’s undertaking, so forming an economic unit with that undertaking. As such, they fall into the definition of ‘worker’ sanctioned by FNV Kunsten and should, among other things, be allowed to bargain collectively under EU competition law.”).

<sup>86</sup> *Id.*

<sup>87</sup> Countouris & De Stefano, *supra* note 73.

Irish freelance workers will be allowed the right to collective bargaining. . . . [The] Irish Parliament adopted the Labour Party proposed Competition Amendment Bill 2016, which aims to introduce exemptions from competition law for certain self-employed workers. Since a competition ruling was handed down thirteen years ago, agreements negotiated with artists unions on minimum tariffs have been considered as breaches of competition law.<sup>88</sup>

### 3. *China*

The shared economy in China has grown just as it has in the rest of the world,<sup>89</sup> but the legal discussion over unionization of gig-platform drivers as independent contractors (i.e., not the type of employment entitled to a labor contract) appears not to have arisen.<sup>90</sup>

China's State Information Center has estimated that the value of China's sharing economy in 2015 reached nearly RMB 1.956 trillion (about \$300 billion), with just 500 million users. Further, the total number of workers participating in China's share economy represented just over five percent of the country's total workforce. These numbers were and are expected to grow at an average rate of forty percent each year between 2015 and 2020, and with the share economy likely to exceed ten percent of China's GDP by 2020.<sup>91</sup>

Under Chinese law, workers classified as "workers with a labor contract" are entitled to the rights and benefits of the labor laws.<sup>92</sup> However,

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<sup>88</sup> *Ireland: Unions Celebrate Victory Over Competition Authority*, EUROPEAN FEDERATION OF JOURNALISTS (June 13, 2017), <https://europeanjournalists.org/blog/2017/06/13/ireland-unions-celebrate-victory-over-competition-authority/>; Competition (Amendment) Act 2017 (Act No. 12/2017) (Ir.), <http://www.irishstatutebook.ie/eli/2017/act/12/enacted/en/html>.

<sup>89</sup> See generally Yide Ma & Haoran Zhang, *Development of the Sharing Economy in China: Challenges and Lessons*, in INNOVATION, ECONOMIC DEVELOPMENT, AND INTELLECTUAL PROPERTY IN INDIA AND CHINA 467–84 (Kung-Chung Liu & Uday Racherla eds., 2019).

<sup>90</sup> See Mimi Zou, *The Regulatory Challenges of "Uberization" in China: Classifying Ride-Hailing Drivers*, 33 INT'L J. COMP. LAB. L. & INDUS. REL. 269, 270 (2017) (estimating seventy million network workers by 2018).

<sup>91</sup> *Id.* (citing State Information Centre, *Report on the Development of the Chinese Sharing Economy* 1, Feb. 2016).; see also Masha Borak, *Before Uber, Didi Drivers Had Their Own Strikes*, ABACUS (May 10, 2019), <https://www.abacusnews.com/big-guns/uber-didi-drivers-had-their-own-strikes/article/3009646>; *Report on China's Collaborative Economy Development*, CHINESE ST. INFO. CTR. & CHINA INTERNET ASS'N SHARING ECON. WORK COMM. (2016), <http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Htmleditor/201602/20160229121154612.pdf>. [in Chinese]

<sup>92</sup> See RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 36–43 (2010).

questions arise whether a worker should be issued a labor contract. For example, a driver raised the issue, asking “[if] I do the work arranged on the platform, [and] I get a salary every month, how am I not the platform’s employee? If it’s not a labor relationship, what is it?”<sup>93</sup>

Ridesharing drivers that litigate their rights often claim to be employees entitled to a labor contract, but the trend in the Chinese courts is to find them outside that classification.<sup>94</sup> Chinese specialists have noted,

[I]t certainly appears that China is loosening the employer-employee strings and its courts are no longer treating all situations where employee-like individuals had independence and flexibility as traditional employees. Do note that the courts did not use the concept ‘independent contractor’ as we commonly see in the U.S.<sup>95</sup>

In China, the issue of independent gig-platform drivers forming a union appears not to have arisen, nor has China’s solitary union, the All-China Federation of Trade Unions (“ACFTU”), expressed interest in organizing them. Therefore, the issues of antitrust have not arisen in that context. However, China does have an Anti-Monopoly Law (“AML”) and an anti-competition law.<sup>96</sup> Some issues arise under the anti-competition law but

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<sup>93</sup> “*Network Appointments*” Are Not Easy to be True “*Dongjia*” is Not Easy to Find, GUANGZHOU DAILY (Mar. 5, 2019), [http://www.xinhuanet.com/info/2019-05/03/c\\_138030757.htm](http://www.xinhuanet.com/info/2019-05/03/c_138030757.htm).

<sup>94</sup> “In a series of cases concerning ride-hailing service drivers (think Uber or Lyft or Didi), China’s courts have held that the drivers were not employees. In each case, the driver and the company entered into an e-ride-hailing driver cooperation agreement.” Grace Yang, *China Employees and Independent Contractors: The O2O Business Carve-Out*, CHINA L. BLOG: CHINA L. FOR BUS. (Sept. 25, 2016), <https://www.chinalawblog.com/2016/09/china-employees-and-independent-contractors-the-o2o-business-carve-out.html>. It is reported that the Beijing Intermediate Court held the plaintiff driver failed to prove an employment relationship existed; and in reaching that conclusion the Court considered: “(1) whether the employer and the employee qualified as employer and employee for purposes of the Chinese labor and employment laws; (2) whether the employee was subject to the employer’s rules and regulations and the labor management of the employer and undertook work arrangements from the employer for remuneration; and (3) the employee’s services constituted a part of employer’s business.” *Id.* Often there is a “business cooperation agreement” wherein the driver says he is not in an employment relationship.

<sup>95</sup> *Id.*; see also *How to Solve the Biggest Problems with Independent Contractors in China?*, HRONE (Sept. 13, 2017), <https://www.hrone.com/solve-biggest-problems-independent-contractors-china/>; Eunice Ku & Adam Livermore, *Independent Contractors in China and Available Alternative Options*, CHINA BRIEFING (July 18, 2013), <https://www.china-briefing.com/news/independent-contractors-in-china-and-available-alternative-options/> (regarding possible use of dispatch workers, not necessarily in the ride-sharing industry).

<sup>96</sup> Wei Huang et al., *The Competition and Regulation Issues of the Sharing Economy – An Analysis Based on China’s Ride-hailing Service Regulations*, COMPETITION POL’Y INT’L (Apr. 20, 2017), <https://www.competitionpolicyinternational.com/the-competition-and-regulation-issues-of-the-sharing->



seem to be found under arguments akin to preemption. China's system of legislation issues a national law that is general in nature, with detailed implementing regulations left for local regulation.<sup>97</sup> In that regard, there are reports that some local governments have passed legislation favoring taxi drivers over platform drivers, which arguably violates the national anti-competition law.<sup>98</sup>

In contrast to the bold regulatory approach taken by Seattle to provide independent ride-hailing drivers with rights to address their workplace concerns, approaches to this issue in the EU result in legal interpretations of workers as either an employee or not. China contrasts both former approaches by not having an independent contractor classification while still allowing individual business contracts.

### III. LEGAL CHALLENGES FOR CITIES OR STATES GRANTING COLLECTIVE BARGAINING RIGHTS TO INDEPENDENT CONTRACTORS<sup>99</sup>

#### A. *Antitrust*

Under Seattle's ordinance, legal challenges may be raised as to whether the drivers, who are independent contractors and not employees, can band together under a union banner to improve their working conditions, or whether the ordinance (1) violates the Sherman Antitrust Act,<sup>100</sup> or (2) is preempted by the NLRA.<sup>101</sup>

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economy-an-analysis-based-on-chinas-ride-hailing-service-regulations/; Runhua Zhao, *Didi Is Under State Investigation of Monopoly*, TECHNODE (Nov. 16, 2018), <https://technode.com/2018/11/16/didi-investigation-monopoly/>.

<sup>97</sup> BROWN, *supra* note 92, at 5.

<sup>98</sup> Eva Dou, *China Ride-Hailing Rules Threaten Didi's Migrant Drivers*, WALL ST. J. (Dec. 22, 2016), <https://www.wsj.com/articles/china-ride-hailing-rules-threaten-didis-migrant-drivers-1482391152>; *see also* Zou, *supra* note 90, at 288; David Fleming et al., *Antitrust and Competition in China*, GLOB. COMPLIANCE NEWS, <https://globalcompliancencnews.com/antitrust-and-competition/antitrust-and-competition-in-china/> (last visited Apr. 20, 2020).

<sup>99</sup> *See* IGLITZIN & ROBBINS, *supra* note 53.

<sup>100</sup> Sherman Antitrust Act, 15 U.S.C. §§ 1–38 (2012).

<sup>101</sup> National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006); Paul Sanjukta, *Amicus Brief in Seattle Case: Antitrust and Worker Cooperation*, ONLABOR (Oct. 18, 2017), <https://onlabor.org/amicus-brief-in-seattle-case-antitrust-and-worker-cooperation/> (explaining an amicus brief was filed challenging the Chamber of Commerce's arguments). In support of the Chamber's arguments, the Federal Trade Commission has also filed an amicus brief jointly with the Department of Justice. It urges the court to reject the state action doctrine in this case, because the general Washington State statutes delegating authority to municipalities to regulate for-hire transportation services do not clearly express a legislative intention to displace competition in the markets at issue in the case. *See also* Press Release, Federal Trade Commission, FTC Files Amicus Brief in Appeals Court Case Involving for-Hire Drivers in Seattle (Nov. 6, 2017) (on file

In a legal challenge to this ordinance, the Ninth Circuit Court of Appeals affirmed there was no preemption and reversed and remanded the lower court's finding of no antitrust violation.<sup>102</sup> Under the Sherman Antitrust Act, a “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States” is unlawful. This provision prohibits companies, including independent contractors, from colluding on the prices they will accept for their services or otherwise engage in concerted action in the marketplace that will have an anticompetitive effect. It was argued that Seattle's ordinance violated the Sherman Antitrust Act:

by authorizing for-hire drivers to engage in concerted action by forming a cartel (under the aegis of a “qualified driver representative,” or QDR), speaking as a single unit through an “exclusive driver representative” (an EDR), and engaging in the horizontal fixing of prices and other terms of their contracts with the TNC or taxicab company with whom the EDR is negotiating. This would lead to the unlawful anticompetitive effect of shielding drivers from competition amongst themselves, which will ultimately harm consumers, who will pay more for personal transportation.<sup>103</sup>

In light of Seattle's Ninth Circuit decision, the City removed payments as a subject of bargaining under its ordinance to address the “price-fixing” argument.<sup>104</sup> Considering the pending litigation on this issue,

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with author) (“Competition is the lynchpin of the U.S. economy. Although states can displace competition with regulation, they must clearly articulate their intent to do so,” explained Acting Chairman Maureen K. Ohlhausen. “Because Seattle's action exceeded its authority from the state, the state action defense should be rejected.”).

<sup>102</sup> See *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769, 783–91 (9th Cir. 2018). For an excellent exposition of the Ninth Circuit case, see, *Chamber of Commerce v. City of Seattle, Ninth Circuit Holds Collective Bargaining Ordinance Not Entitled to State Action Immunity*, 132 HARV. L. REV. 2360 (2019) [hereinafter *Seattle Ordinance Not Entitled to Immunity*]; see also Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45, 59–60 (2019) (explaining the Chamber of Commerce's challenge of the ordinance focused on the City's novel approach); *Chamber of Commerce of United States of Am. v. City of Seattle*, U.S. CHAMBER LITIGATION CENTER (Apr. 10, 2020), <https://www.chamberlitigation.com/cases/chamber-commerce-v-city-seattle> (providing an example of current litigation at the District level to address anti-trust issue, showing U.S. Chamber renews lawsuit challenging Seattle drivers' union ordinance).

<sup>103</sup> Amended Complaint at 18–19, *U.S. Chamber of Commerce v. Seattle*, No. 17-cv-00370-RSL (W.D.Wash. May 11, 2017); see Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOYOLA UNIV. CHICAGO L. J. 969, 989, 1034–41 (2016).

<sup>104</sup> SEATTLE, WASH., MUN. CODE § 6.310.735(H)(1) (as amended Jan. 11, 2019).

rather than analyzing and speculating on the ultimate outcome of the issues, while the ruling is awaited, a brief description of the law, pending issues, and the status of litigation are presented in the footnote below.<sup>105</sup> In sum, Seattle may argue the ordinance is outside the antitrust limitation when the activities authorized by the ordinance are exempted by either, (1) the labor exemption or (2) the state action doctrine.<sup>106</sup>

### 1. *Labor exemption*

Under U.S. Supreme Court guidance, it is argued that “labor organization’s bargaining on behalf of for-hire drivers pursuant to local legislation will be immune from antitrust liability if there is wage competition between drivers operating as independent contractors for TNCs and drivers employed by traditional taxi companies who are represented by that labor organization.”<sup>107</sup>

### 2. *State Action Doctrine*

The U.S. Supreme Court has explained that federal antitrust law, under the state-action exemption provision, does not restrain a state, like Washington, or its officers and agents from carrying out activities directed by its state legislature. This exemption removes antitrust liability for “(1) the actions of state officers adopting and carrying out a regulatory scheme pursuant to a clearly-articulated state policy, and (2) the actions of regulated

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<sup>105</sup> Daniel Wiessner, *U.S. Court Revives Challenge to Seattle’s Uber, Lyft Union Law*, REUTERS (May 11, 2018), <https://www.reuters.com/article/us-uber-seattle-unions/u-s-court-revives-challenge-to-seattles-uber-lyft-union-law-idUSKBN11C27C> (providing a brief chronology of events is as follows. “Seattle’s law, passed in 2015, requires the city to select a union as the exclusive bargaining representative of the estimated 9,000 drivers in Seattle who work for Uber, Lyft and other services. The Ninth Circuit Court of Appeals remanded the case to the federal district court on the antitrust issue. And the law was put on hold pending the outcome of the plaintiff’s (Chamber of Commerce’s lawsuit. The Chamber argued that by allowing drivers to bargain over their pay, which is based on fares received from passengers, the city would permit them to essentially fix prices in violation of federal antitrust law. A federal judge in Seattle last year disagreed, saying the state of Washington had specifically authorized its cities to regulate the for-hire transportation industry. But the 9th Circuit on Friday said state law allows the city to regulate rates that companies charge to passengers, but not the fees that drivers pay to companies like Uber or Lyft in exchange for ride referrals. The court sent the case back to the judge in Seattle to reconsider the chamber’s antitrust claim. The city and supporters of the law, including labor unions, have said that allowing drivers to unionize would improve their working conditions, making ride-sharing services safer for passengers. The case is *U.S. Chamber of Commerce v. City of Seattle*, 9th U.S. Circuit Court of Appeals, No. 17-35640.”).

<sup>106</sup> 15 U.S.C. § 36 (1984).

<sup>107</sup> IGLITZIN & ROBBINS, *supra* note 53, at 60. *Cf. generally* Paul Sanjukta & Nathan Tankus, *The Firm Exemption and the Hierarchy of Finance in the Gig Economy*, 16 U. ST. THOMAS L.J. 44 (2019) (arguing that an incorporated drivers’ association would still find it difficult to avoid antitrust scrutiny).

private parties that are actively supervised by the municipality charged with implementing the regulatory scheme.”<sup>108</sup> The exemption’s application to private parties is therefore ostensibly available to drivers of Uber.<sup>109</sup> Under the standards set forth in the Ninth Circuit cases, if the above two-pronged test is met, then the exemption applies.<sup>110</sup> However, as stated, the Ninth Circuit held the Seattle collective bargaining ordinance was not entitled to state-action immunity because the *state* has not “clearly articulated and affirmatively expressed” a state policy authorizing the private parties to price-fix the fees for-hire drivers pay to companies like Uber or Lyft in exchange for ride-referral services.<sup>111</sup> However, once demonstrated, the immunity appears to be available under the first prong of the test.

Additionally, the Ninth Circuit held that the “active-supervision requirement was not met” because only a municipality—not a state—was involved.<sup>112</sup> Therefore, to gain the immunity, the state must be involved in its oversight.<sup>113</sup> After Seattle’s petition for rehearing *en banc* was denied,<sup>114</sup> the City Council amended the ordinance to remove driver payments from the collective bargaining topics, thus addressing antitrust concerns of price-fixing.<sup>115</sup>

Therefore, the Ninth Circuit has provided a roadmap for Seattle, California, and other states to enact bargaining rights legislation for

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<sup>108</sup> See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (deriving doctrine from *Parker v. Brown*, 317 U.S. 341, 350–51 (1943)).

<sup>109</sup> *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985).

<sup>110</sup> See IGLITZIN & ROBBINS, *supra* note 53.

<sup>111</sup> 890 F.3d at 788–89. See generally *Seattle Ordinance Not Entitled to Immunity*, *supra* note 102.

<sup>112</sup> 890 F.3d at 788–89 (“It is undisputed that the State of Washington plays no role in supervising or enforcing the terms of the City’s Ordinance. The City cites no controlling authority to support its argument that the Supreme Court uses the word ‘State’ simply as shorthand for the State and all its agents, including municipalities. The Supreme Court has stated repeatedly that active supervision must be by the State itself.”). See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (where the Supreme Court for the first time faced the question of whether local governments share *Parker* immunity). See Robert E. Bienstock, *Municipal Antitrust Liability: Beyond Immunity*, 73 CAL. L. REV. 1829, 1832–1837 (1985).

<sup>113</sup> *Town of Hallie v. City of Eau Claire*, 421 U.S. 34, 46, n. 10 (1985) *cited* by the Ninth Circuit, (stating where “state or municipal regulation by a private party is involved however, active state supervision must be shown, even where a clearly articulated state policy exists.”). Here, the State only authorized regulation of “rates, not fees.” *Id.* at 25.

<sup>114</sup> *Chamber of Commerce of the United States v. City of Seattle*, No. 17-35640, 2018 U.S. App. LEXIS 26156 (9th Cir. Sep. 14, 2018).

<sup>115</sup> SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2017); *Seattle Director’s Rules*, *supra* note 7.

independent ride-hail drivers that will gain state action immunity under the antitrust law.

*B. Preemption*

Federal laws, under the U.S. Constitution's Supremacy Clause, will preempt state and local laws where there is a conflict—i.e., federal law displaces state law.<sup>116</sup> Under the NLRA, there are two theories of preemption that could apply to a state or municipal law providing collective bargaining rights to for-hire drivers.<sup>117</sup> The first, which is known as the “*Garmon* preemption,”<sup>118</sup> prohibits states from regulating activity that the NLRA protects, prohibits, or “arguably” protects or prohibits. The second is known as “*Machinists* preemption.”<sup>119</sup> The *Machinists* preemption applies where “the NLRA neither protects nor prohibits the activity in question, but national labor policy requires that the activity should be wholly unregulated and left to the free play of economic forces.”<sup>120</sup>

Under these exemptions, courts hold that state laws providing collective bargaining rights to groups of workers excluded by the NLRA (e.g., agricultural, public, and domestic workers, and independent contractors) are not preempted “because the activities of workers who are expressly excluded from the NLRA cannot be, even arguably, protected or prohibited by the Act, and there is no indication in the text or legislative

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<sup>116</sup> See U.S. Const. art. VI, § 2. Some issues have been tangentially raised claiming preemption of state laws affecting common carriers and trucking under the Motor Carrier Act (“MCA”) and Federal Aviation Administration Authorization Act of 1994 (“FAAAA”) but have not been successful in the courts. See *W. States Trucking Ass’n v. School*, 377 F. Supp. 3d 1056, 1063 (E.D. Cal. 2019); *Bedoya v. American Eagle Express Inc.*, 914 F.3d 812 (3d Cir. 2019).

<sup>117</sup> See IGLITZIN & ROBBINS, *supra* note 53.

<sup>118</sup> See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Belknap, Inc. v. Hale*, 463 U.S. 491, 498–99 (1983) (“[S]tate regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. In such cases, the state’s interest in controlling or remedying the effects of the conduct is balanced against both the interference with the [National Labor Relations] Board’s ability to adjudicate controversies committed to it by the Act, and the risk that the state will sanction conduct that the Act protects.”).

<sup>119</sup> See generally *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976) (holding that the Wisconsin Employment Relations Commission cannot designate a union’s refusal to force its members to work overtime as an unfair labor practice because Congress did not intend for states to regulate such conduct). The *Machinists* preemption forbids both the NLRB and states from regulating activities that Congress intended to be controlled by the “free play of economic forces.” *Id.* at 140.

<sup>120</sup> *Id.* (“[A] second line of preemption analysis has been developed in cases focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left to be controlled by the free play of economic forces.”).

history of the Act that Congress intended to leave such workers entirely unregulated by any law.<sup>121</sup> Significantly,

independent contractors are expressly excluded from the NLRA's definition of employee, and there is no clear expression in the text or legislative history of the Act suggesting that Congress intended to preempt local regulation regarding the collective bargaining rights of independent contractors. Accordingly, state and local laws regarding the collective bargaining rights of independent contractors like the Seattle Ordinance are not preempted by the NLRA under either a Garmon or a Machinists preemption analysis.<sup>122</sup>

Professor William Gould recently commented on the Seattle Ordinance and the Ninth Circuit ruling that the ordinance was not preempted:

[T]he court's treatment of Seattle's legislation under antitrust law is questionable but contends that the court's analysis has nonetheless established a roadmap for state legislation – an avenue opened more clearly by the court's conclusion that state and local governments are not preempted by federal law and have authority to legislate in this arena.<sup>123</sup>

C. *Drafting Agenda for Collective Bargaining Regulation of Independent Contractor for Ride-Hailing Drivers*

Drawing on the example of the comprehensive Seattle ordinance providing collective bargaining rights to independent contractor rideshare drivers, drafters of similar legislation might consider the Seattle model of government regulation of for-hire drivers in the transportation industry.<sup>124</sup> In drafting new regulations, consideration may be given to the following agenda items, highlighted in the Seattle ordinance, as discussed below.

Also, in view of issues raised in the pending Ninth Circuit litigation, especially over the state action exemption under the antitrust law, consideration might be given to having either state authorization for

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<sup>121</sup> See IGLITZIN & ROBBINS, *supra* note 53, at 67.

<sup>122</sup> *Id.* at 71.

<sup>123</sup> Gould, IV, *supra* note 12, at 992.

<sup>124</sup> SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735.

municipalities to act, or state regulation of the for-hire drivers. A possible middle ground might be to legislate model regulation, which permits municipalities to pass local ordinances not inconsistent with the state regulations.

1. *Purpose*

The purpose of this ordinance is to “ensure safe and reliable for-hire and taxicab transportation service,” and because “for-hire transportation service is a vital part of the transportation system within the state,” the safety, reliability, and stability of privately operated for-hire transportation services are matters of statewide importance. The regulation of privately operated for-hire transportation services is thus an essential governmental function.<sup>125</sup>

2. *Parties*<sup>126</sup>

The TNCs, sometimes known as MSPs, are companies “that [match] passengers with vehicles, via websites and mobile apps.” Under Seattle’s ordinance, a driver coordinator means any entity that hires, contracts with, or partners with for-hire drivers, including taxicab associations, for-hire vehicle companies, and transportation network companies.<sup>127</sup> Labor organizations that seek to represent drivers are called “qualified driver representatives” (“QDRs”) and a QDR that has been certified as the designated representative by a majority of the eligible drivers becomes an “exclusive driver representative” (“EDR”).<sup>128</sup> “Qualifying driver” means a for-hire driver, who drives within the city limits for a driver coordinator and who satisfies the eligibility conditions established by the Director.<sup>129</sup>

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<sup>125</sup> *Id.* § 6.310.735(C).

<sup>126</sup> *Id.* § 6.310.110.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* § 6.310.735(F) (as amended).

<sup>129</sup> *Id.* § 6.310.110 (explaining the Director shall consider factors such as the length, frequency, total number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, and any other factors that indicate that a driver’s work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation. A for-hire driver may be a qualifying driver for more than one driver coordinator).

### 3. *Selection of Representative, Exclusivity, and Bargaining Unit*

There is no election process for employee selection to choose the bargaining representative, but the driver coordinator must provide the names and contacts for the non-employee drivers so the QDR can solicit support.<sup>130</sup> Then, a real majority of eligible voters is required to designate the EDR within the ordinance-prescribed bargaining unit of the city limits and the designation shall be reviewed and approved by the Director.<sup>131</sup> Just as in the private sector, the parties are to deal exclusively with each other in negotiating and enforcing a binding collective bargaining contract. The Ordinance provides that EDRs are the “exclusive representative of all for-hire drivers operating within the City (bargaining unit) for a particular driver coordinator, and are authorized to negotiate, obtain and enter into a contract that sets forth terms and conditions of work applicable to all of the for-hire drivers employed by that driver coordinator.”<sup>132</sup>

### 4. *Good Faith Bargaining*

This requirement is to meet and negotiate in good faith over “certain subjects to be specified in rules or regulations promulgated by the Director, including working conditions, [etc.]; (but not payments) to reach an agreement not to exceed 4 years.”<sup>133</sup>

### 5. *Mandatory Subjects of Bargaining*

The Director promulgated rules that implement the statutory mandatory subjects of bargaining.<sup>134</sup> In 2019, the Ordinance was amended to

<sup>130</sup> *Id.* §§ 6.310.110, 6.310.735 (2017); see *Seattle Director’s Rules*, *supra* note 7.

<sup>131</sup> *Seattle Director’s Rules*, *supra* note 7 (Rule FHDR-3: Certification of an Exclusive Driver Representative states that “[r]epresentative (QDR) seeking certification as an EDR may petition and submit statements of interest to the Director, or to a governmental entity or independent third party designated by the Director (as explained in greater detail below) from at least a majority (i.e., 50% + 1) of qualifying drivers from the driver list. A QDR will notify the Driver Coordinator that contracts with the drivers that the QDR seeks to represent on the same day that it submits a request for certification.”).

<sup>132</sup> SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735(H)(1) (as amended 2019).

<sup>133</sup> *Id.* § 6.310.735(C), (F), and (H)(1).

<sup>134</sup> *Id.* § 6.310.735(H)(1) (“For purposes of this Rule, the City defines mandatory subjects of bargaining as those that directly affect whether for-hire drivers can perform their services in a safe, reliable and economically viable manner. The following subjects, as outlined in the SMC, will be mandatory subjects of bargaining during negotiations between a Driver Coordinator and an EDR: 1. Best practices regarding vehicle equipment standards; 2. Safe driving training and/or practices; 3. The manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; [Deleted January 2019] 5. Minimum hours of work; 6. Drivers’ conditions of work; 7. Rules that apply to drivers including discipline, termination, or deactivation. In addition, whether for-hire drivers will be required to become



remove item number 4: “The nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers.”<sup>135</sup> In late November 2019 the minimum wage ordinance (\$16 per hour) was signed and is effective July 1, 2020.<sup>136</sup>

#### 6. *Union Security*

Nothing in this law requires or precludes a driver coordinator from making an agreement to require membership of for-hire drivers in the EDR’s entity/organization within fourteen days of being hired, contracted with, or partnered with by the driver coordinator to provide for-hire transportation services to the public.<sup>137</sup>

#### 7. *Director Review*

The Director is authorized to review the final agreement per goals in the ordinance and if compliant, render it immediately final and binding.<sup>138</sup> Likewise, any amended agreement is reviewed by the Director.<sup>139</sup>

#### 8. *Failure to Agree*

If a driver coordinator and the EDR fail to reach an agreement within ninety days of the certification of the EDR by the Director, either party must submit to interest arbitration upon the request of the other.<sup>140</sup> This agreement

members of or make other payments to an EDR will be a mandatory subject. Other than contract provisions that would be illegal or unenforceable or not in compliance with the SMC, the City defines all other subjects not listed in this Rule as permissive subjects.”); *Seattle Director’s Rules*, *supra* note 7 (Rule FHDR-4: Subjects of Bargaining Between a Driver Coordinator and an Exclusive Driver Representative).

<sup>135</sup> Seattle, Wash., Mun. Ordinance 125752 (amending SEATTLE, WASH., MUN. CODE § 6.310.735(H)); Heidi Groover & Daniel Beekman, *Seattle Is Considering a Plan to Set Minimum Pay for Uber and Lyft Drivers*, SEATTLE TIMES (Sept. 19, 2019), <https://www.seattletimes.com/seattle-news/transportation/seattle-is-considering-a-plan-to-set-minimum-pay-for-uber-and-lyft-drivers/> (“[A]long with a potential tax on Uber and Lyft rides, Seattle Mayor Jenny Durkan’s office is considering legislation aimed at bolstering the rights of drivers who use the apps, including possibly setting minimum pay . . . .”); Meanwhile, the selected QDR, Teamsters Local 117, and Uber and Lyft drivers were actively organizing and working with Seattle City Council to increase pay for drivers, establish a minimum pay standard, and develop rules to limit unwarranted deactivations of drivers. Paul Zilly, *Emergency Financial Assistance for Uber and Lyft Drivers*, TEAMSTERS LOCAL 117 (Mar. 13, 2020), <https://www.teamsters117.org/tags/uber>.

<sup>136</sup> See NICKELSBURG, *supra* note 53 (Seattle joins New York City in passing on the cost (about 51 cents per ride) to riders).

<sup>137</sup> SEATTLE, WASH., MUN. CODE § 6.310.110.

<sup>138</sup> *Id.* § 6.310.735(H)(2)(a).

<sup>139</sup> *Seattle Director’s Rules*, *supra* note 7 (Rule FHDR-6: Approval of an Agreement, Changes to an Existing Agreement and Withdrawal of an Existing Agreement).

<sup>140</sup> SEATTLE, WASH., MUN. CODE § 6.310.735(I); see Barry Winograd, *An Introduction to The History of Interest Arbitration in the United States*, 61 LAB. L.J. 164, 168 (2010) (interest arbitration is seldom used

cannot exceed two years and the interest arbitrator must follow statutorily-enumerated criteria.<sup>141</sup>

### 9. *Unfair Practices*

In addition to duties of good faith bargaining, pursuant to the Ordinance and the Director's Rules, during the contract the parties cannot interfere, retaliate, or encourage/discourage right to participate or take adverse action, including but not limited to threatening, harassing, penalizing, or in any other manner discriminating or retaliating against a driver, because the driver has exercised the rights protected under this section.<sup>142</sup> Decertification is permitted.<sup>143</sup>

### 10. *Director's Rules*

The Director is authorized to provide rules to implement the Ordinance.<sup>144</sup>

### 11. *Administering Agency*

The Director of Finance and Administrative Services or the director of any successor department and the Director's authorized designee will administer this Ordinance, including the collective bargaining negotiations, parties conduct, the agreement, and any disputes.<sup>145</sup>

### 12. *Retention of Control and State Involvement*

The government maintains close supervisory and review authority over the administration of the Ordinance. The Director's powers of review are contained throughout the Ordinance, with enforcement powers listed separately.<sup>146</sup> To meet the above-described state action immunity to antitrust limitations, there may need to be a clearly articulated and affirmatively expressed state policy authorizing the price fixing if the removal of fees from the subjects of bargaining has not already eliminated that issue.

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in the private sector, although the Employee Free Choice Act of 2007 proposed its use in private sector first contracts when parties were unsuccessful in reaching a traditional, negotiated settlement).

<sup>141</sup> SEATTLE, WASH., MUN. CODE § 6.310.735(I)(2)(a)–(g).

<sup>142</sup> *Id.* § 6.310.735(K).

<sup>143</sup> *Id.* § 6.310.735(L).

<sup>144</sup> *Seattle Director's Rules*, *supra* note 7.

<sup>145</sup> SEATTLE, WASH., MUN. CODE § 6.310.110.

<sup>146</sup> *Id.* § 6.310.735(M).

Likewise, if the state action immunity is needed, there must be an active supervision by the state.<sup>147</sup>

#### IV. ANALYSIS

##### A. *Alternative Options*

The proposal of this Article is to go forward and innovate with laws that protect ride-hail drivers and allow them some measure of voice in their quest for decent work. Of course, business interests must be put into attempted solutions for fair work. But using the current business model of platform workers without some enforceable corporate responsibility for workers is not equitable.

Since state and local governments have great flexibility in protecting the welfare of workers in their jurisdictions who are not otherwise protected by federal labor laws, there is room for consideration of alternative approaches, many of which are currently unavailable under federal laws and have already been advocated over the years. In addition to California's ABC presumptive coverage test for dependent workers and the Seattle Ordinance approach, new alternative approaches could include bestowing labor rights to ride-hail drivers by authorizing sectoral unions, company unions, wage boards, and even Works Councils.<sup>148</sup>

Sectoral bargaining—a form of collective bargaining that provides contract coverage and establishes compensation floors for most workers in an occupation, industry, or region<sup>149</sup>—is not permitted in the United States.

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<sup>147</sup> Several states have comprehensive legislative and regulatory requirements for TNCs such that adding a collective bargaining section at the state level to address potential antitrust concerns is feasible. See, e.g., *Transportation Licensing and Analysis Branch (TLAB)*, CAL. PUBLIC UTILITIES COMM'N, <https://www.cpuc.ca.gov/transportationlicensing/> (last accessed Apr. 10, 2020) (California's TLAB is charged with granting or denying TNCs the authority to operate in state, ensuring regulatory compliance, and promoting fair competition).

<sup>148</sup> Dylan Matthews, "Unions for all": *The New Plan to Save the American Labor Movement*, VOX (Sept. 2, 2019, 11:00AM), <https://www.vox.com/policy-and-politics/2019/9/2/20838782/unions-for-all-seiu-sectoral-bargaining-labor-unions> ("Works councils, which are committees elected by workers in their workplaces meant to serve as a vehicle to register concerns and resolve disputes with management, even in workplaces that are not union organized."); Matthew Dimick, *Productive Unionism*, UNIV. CAL. IRVINE L. REV. 679, 688 (2014) ("Works councils often enjoy only the rights to be consulted by the employer, the right to be heard, and sometimes a right to veto particular employer decisions. But rarely do they impose a full right of negotiation or duty to bargain on employers.") (internal citation omitted).

<sup>149</sup> See David Madland & Malkie Wall, *What Is Sectoral Bargaining?*, CTR. FOR AMERICAN PROGRESS ACTION FUND (Mar. 2, 2020, 9:01 AM), <https://www.americanprogressaction.org/issues/economy/news/2020/03/02/176857/what-is-sectoral->

Thus, bargaining by unions must be achieved at the enterprise level. Most advanced western countries have sectoral bargaining. For example, in France and Austria, a minority of workers are in unions, but ninety-eight percent are covered by collective bargaining contracts.<sup>150</sup> This could be of some assistance to dependent employees being included. Sectoral bargaining in most other countries occur where union representatives negotiate with business owners and elected officials, and “the three groups . . . negotiate pay scales, schedules, working conditions, and so forth that will apply uniformly across an entire sector of the economy. Those sectors can be defined in various ways, from regional or geographic markets, to occupations across a country, to whole industries across a country.”<sup>151</sup>

Closely related is the suggested approach of “how states and localities can use tripartite commissions or wage boards to enable public sectoral bargaining.”<sup>152</sup> In that regard, New York offers a path to sectoral bargaining at the state level. Organizers in the state achieved a higher minimum wage for fast food workers by organizing a wage board. “Wage boards have the authority to mandate pay scales and benefits for whole industries, after consultation with businesses and unions.”<sup>153</sup>

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bargaining/ (extension laws in countries allowing this form of bargaining apply negotiated wage-and-benefit standards to all workers of the industry or region); see David Madland, *How to Protect Sectoral Bargaining in the United States*, CTR. FOR AM. PROGRESS ACTION FUND (July 10, 2019), <https://www.americanprogressaction.org/issues/economy/reports/2019/07/10/174385/promote-sectoral-bargaining-united-states/>.

<sup>150</sup> Matthews, *supra* note 148 (the downside is the free-rider problem: all workers receive the negotiated benefits whether or not they are union members). For a “model” proposal in Canada, see David Doorey, *The Model of Sectoral Collective Bargaining Everyone is Whispering About*, CANADIAN LAW OF WORK FORUM (May 6, 2016), <http://lawofwork.ca/the-model-of-sectoral-collective-bargaining-everyone-is-whispering-about/>.

<sup>151</sup> Jeff Spross, *Can Democrats Change the Game for Labor Organizing in America?*, THE WEEK (Sept. 20, 2019), <https://theweek.com/articles/866337/democrats-change-game-labor-organizing-america> (“Essentially, sectoral bargaining removes wages and working conditions from the menu of items that businesses can change to maximize their profits vis-a-vis their rivals. It sets a floor under wages and conditions for all businesses competing with each other in a particular market. That prevents ‘races to the bottom.’”).

<sup>152</sup> Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, 12 HARV. L & POL’Y REV. ONLINE 1, 6–7 (2017); see also David Madland & Alex Rowell, *How State and Local Governments Can Strengthen Worker Power and Raise Wages*, CTR. FOR AM. PROGRESS ACTION FUND (May 2, 2017, 5:00 AM), <https://www.americanprogressaction.org/issues/economy/reports/2017/05/02/166640/state-local-governments-can-strengthen-worker-power-raise-wages/>.

<sup>153</sup> “In 2016, the state legislature agreed to set a \$15 minimum across industries, but in doing so, it stripped the labor commissioner of the power to use wage boards to raise minimums for specific occupations in the future.” Matthews, *supra* note 148. “Other states are also reported to have this capacity. California’s works through an entity called the Industrial Welfare Commission (IWC), which still has wage

Some countries use contract extension laws, which basically take the terms and conditions negotiated by union contracts, and automatically apply them to an entire sector, once unions have organized a determined threshold of the sector.<sup>154</sup> The rules and uses of extension devices which allow the reach of collective agreements to extend beyond signing firms and union members are described in detail in a 2017 OECD report on collective bargaining.<sup>155</sup>

Professor Veena Dubal has recently described other developments in this field, such as “solidarity unionism,” which Professor Dubal describes as “concerted activity, which is informed, not necessarily by law, but by practices of democratically-informed mutual aid.”<sup>156</sup> This was illustrated recently by a group of ride-hail drivers in Los Angeles:

On May 8, 2019, a group of independent app-based drivers in Los Angeles called the LA Rideshare Drivers United organized and launched an unprecedented international picket and work stoppage against Uber and Lyft. Drivers’ groups from Boston, San Diego, Los Angeles, Chicago, New York City, and Washington, D.C. issued a joint statement calling their action a “strike” (not just a rally or protest) and announcing themselves “united as one joint council of grassroots driver labor

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orders setting industry-specific minimums on the books. The IWC has been defunded since 2004 and does not convene currently, but there’s nothing stopping California’s progressive majority in the legislature from refunding it and spurring it to adopt more modern wage minimums than the ones left in effect 15 years ago. New Jersey’s law actually requires a wage board to be empaneled if at least 50 workers in a given occupation petition for one. In all three states, wage board recommendations that are approved by state authorities and go through public review have the force of law.” *Id.* In California, the Division of Labor Standards Enforcement (“DLSE”) continues to enforce the provisions of the wage orders; see *Introduction to Industrial Welfare Commission*, CAL. DEP’T INDUS. REL., <https://www.dir.ca.gov/iwc/iwc.html> (last accessed Apr. 19, 2020).

<sup>154</sup> Madland, *supra* note 149.

<sup>155</sup> See *Collective Bargaining in a Changing World of Work*, THE ORG. FOR ECON. CO-OPERATION AND DEV. (OECD) (June 2017), <https://www.oecd.org/els/emp/EMO2017-CH4-Web-Annex.pdf> (Annex to Chapter 4 of the OECD Employment Outlook 2017 report); see also Spross, *supra* note 151.

<sup>156</sup> Veena Dubal, *Gig Worker Organizing for Solidarity Unions*, L. & POL. ECO. BLOG (June 19, 2019), <https://lpeblog.org/2019/06/19/gig-worker-organizing-for-solidarity-unions/>; see Sharon Block & Benjamin Sachs, *The Uber/Lyft Drivers’ Association, Unionization, and Labor Law Reform*, L. & POL. ECO. BLOG (Jul. 1, 2019), <https://lpeblog.org/2019/07/01/the-uber-lyft-drivers-association-unionization-and-labor-law-reform/#more-2608> (in response and continuing the dialogue) (“We agree with Dubal that winning union status and collective bargaining power at Uber and Lyft will depend critically on the continuation of the kind of solidarity actions that Dubal describes. But, in our view, a fundamental reshaping of labor law (at the state or federal level) will also be necessary.”); see also Benjamin Sachs, *The Uber/Lyft “Workers’ Association” Debate: A Response to Dubal*, L. & POL. ECO. BLOG (June 20, 2019), <https://lpeblog.org/2019/06/20/the-uber-lyft-workers-association-debate-a-response-to-dubal/#more-2552>.

organizations with the shared goal of winning job security, livable incomes, and respect for App drivers.”<sup>157</sup>

Whether this is a pathway to unionization is debatable, but she also discusses an arrangement in New York where a private contract with Uber created a company-funded “worker association.” A New York branch of the Machinists Union contracted with Uber for an undisclosed sum to fund a “Independent Drivers’ Guild” (“IDG”). “The IDG has not been elected by workers, and it was formulated amidst an upsurge of independent worker organizing. After the formation, the worker association agreed (for a period of five years) to not contest the status of drivers and to not go on strike.”<sup>158</sup>

Lastly, works councils in some European countries have been found useful in the administration of the collective bargaining relationship by representing worker interests.<sup>159</sup> Works councils, which are committees elected by workers in their workplaces, are meant to serve as a vehicle to register concerns and resolve disputes with management, even in workplaces that are not union organized.<sup>160</sup> In European labor-management relations, works councils may even have certain decision-making powers. “They take on a number of forms, but in general they are seen as democratic bodies that give voice to worker concerns and interests. Works councils are legally required to be formally independent of industrial labor unions, creating, symbolically at least, a dual system of labor representation.”<sup>161</sup>

As a final description of possible alternatives, though not likely to result in worker voice and inconsistent with this Article’s aim for real collective bargaining, is the company union or the “buy-in” for driver-paid company-proposed benefits. There are no reports of company unions

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<sup>157</sup> Dubal, *supra* note 156.

<sup>158</sup> *Id.*

<sup>159</sup> *Works Council*, REFERENCE FOR BUS., <https://www.referenceforbusiness.com/encyclopedia/Val-Z/Works-Council.html>.

<sup>160</sup> Matthews, *supra* note 148.

<sup>161</sup> *Works Council*, *supra* note 159 (“In theory, unions are supposed to deal with issues such as wages and working hours, while works councils take up issues such as working conditions, safety and health, and general policy communications. In practice, however, a high percentage (approaching three-quarters according to one study) of workers who are representatives in works councils are also active in trade unions, and the interests of the two labor organizations are closely aligned.”).

forming in the rideshare industry, and Uber has been reluctant to provide benefits packages for its drivers.<sup>162</sup>

In view of the alternatives, this Article encourages states and local governments in the U.S. to provide for-hire, ride-hail workers either employee status—where they are determined to be dependent on a primary employer, as under the ABC test in California’s AB5 law—or be given a voice through collective bargaining rights as in the Seattle Ordinance. Perhaps the Seattle approach is the best option for independent contract drivers. Although payments are now excluded from the Ordinance’s bargaining subjects, drivers are now provided a legally enforceable minimum wage. Payments may be restored as a bargaining subject in the future, and, if so, subsequent legal challenges for antitrust issues will need to be decided. However, in the meantime, drivers, even lacking the issue of payments on the bargaining table, have the opportunity of union representation and enforceable and fixed contractual rights to address their workplace concerns and an ever-present and legally enforceable voice in decisions affecting their workplace and decent work.

#### *B. Current Status and Beyond*

While there still are many workers who are gig-platform workers and employees who are misclassified as self-employed independent contractors, global changes are coming—perhaps particularly for the for-hire, ride-hail drivers. The traditional approaches of looking for sufficient employer control are receiving continued arguments to expand the scope to embrace dependent workers—sometimes referred to as disguised employees, such as those who are working primarily for a single employer and are part of the same enterprise, as opposed to being in a genuine independent business.

In the EU, the ECJ has embraced the dependent employee approach in a case involving Uber, but the court has not directly addressed the independent ride-hailing drivers’ right to collectively bargain. Interestingly,

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<sup>162</sup> Jen Wiczner, *Uber CEO: We Want to Give All Drivers Insurance, Benefits*, FORTUNE (Oct. 4, 2018, 5:51 AM), <https://fortune.com/2018/10/04/uber-driver-benefits-insurance/> (explaining the Uber CEO has not suggested a specific package of proposals, but in 2018 did mention that “Uber has recently begun providing its drivers in the European Union with health care and accident insurance, as well as maternity and paternity leave. Although European labor standards put more pressure on Uber to offer protections to its contractors there, [Uber’s CEO] Khosrowshahi expressed a desire to expand that coverage worldwide.”).

Ireland has carved out exemptions for certain categories of self-employed workers, which could be an alternative if politically feasible.<sup>163</sup>

In the United States, the changes are occurring through judicial adjudication and legislative efforts, although mostly at the state level rather than the federal level. In California, the result—first by adjudication and then by legislation—has been the creation of a presumption of inclusion of dependent workers, unless their true independence can be shown. In Seattle, the City’s ordinance embraced for-hire drivers as genuine independent contractors and provided them with collective bargaining rights. It will be educational to observe the involved parties’ progress on negotiating improvements of working conditions without covering the issue of payments, and whether such modified collective bargaining rights giving voice to the workers is meaningful, as Teamsters Local 117 in Seattle believes.<sup>164</sup>

Education and surprise came on Friday, April 9, 2020, when a federal district court accepted an agreed stipulation by the Chamber of Commerce, Uber Technologies, Inc.’s subsidiary, Rasier LLC, and the City of Seattle to dismiss without prejudice all remaining claims that the City’s 2015 law runs afoul of the federal Sherman Antitrust Act.

In a statement on Friday, the city said it was pleased the parties agreed to drop the lawsuit and that it would turn its focus to working with Uber, Lyft and other transportation network companies on the “Fare Share Plan”<sup>165</sup> that creates fair compensation standards and worker protections for drivers, while also investing in affordable housing and transit. Uber said in its own statement on Friday that it was committed to working with Seattle, organized labor and drivers to develop a safety net

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<sup>163</sup> See Competition (Amendment) Act 2017 (Act No. 12/2017) (Ir.), <http://www.irishstatutebook.ie/eli/2017/act/12/enacted/en/html>.

<sup>164</sup> See GROOVER, *supra* note 64 (Perhaps the promise of City leaders to “ensure Uber and Lyft drivers make Seattle’s \$16 minimum wage” starting in the summer of 2020 will support the Union’s effort).

<sup>165</sup> “‘Fare Share’ is the branding [Mayor] Durkan’s office gave to a package of laws passed last year to create a new resolution center for drivers, set new rules about driver deactivations, lay the groundwork for a minimum wage for drivers and establish a new per-ride fee on ride-hailing trips.” Heidi Groover, *Lengthy Legal Fight over Seattle’s Uber Unionization Law Comes to an End*, SEATTLE TIMES (Apr. 13, 2020 5:27 PM), <https://www.seattletimes.com/seattle-news/transportation/lengthy-legal-fight-over-seattles-uber-unionization-law-comes-to-an-end/>.



for independent contractors, including benefits, worker protections and wage regulations.<sup>166</sup>

It's unclear whether drivers will seek to unionize under the original law. Teamsters 117, the union that backed the ordinance in 2015, said in an email, drivers 'moved on' to backing the new protections while the legal fight played out. 'We will continue to fight to implement the law, raise driver pay, and bring new levels of protections and representation to the driver community through the Drivers Union affiliated with Teamsters 117,' the union said.<sup>167</sup>

On the other hand, California and other states have authority and a history of its wage boards issuing minimum wage levels, which could fill in the void if further legislation were necessary.

Lacking a Congress favorable to federal labor reform, some states are bringing reforms individually. Labor advocates argue for increased state protection of ride-hail drivers,<sup>168</sup> while at the same time, business interests are moving at the state level to carve out rideshare workers from being classified as employees. So, at this time, the battle lines and opportunities seem to lie at the state or local levels, though for use of approaches like the Seattle Ordinance, hurdles of federal preemption and antitrust must first be addressed and surmounted.<sup>169</sup>

## V. CONCLUSION

Workplaces vary and are changing in this time of Industry 4.0 and the economics of the platform economy and labor interests are always playing catch-up to the corporate world's new advances. Workers are caught between old traditional legal concepts of master-servant and control tests, and the new and evolving realities in the new platform workplace. This

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<sup>166</sup> The stipulation did not provide details behind the decision to drop the suit, but it may have involved discovery issues of Uber. Telephone Interview with Joshua Welter, Representative, Teamster's Seattle Local Union 117 (Apr. 16, 2020).

<sup>167</sup> Groover, *supra* note 165.

<sup>168</sup> See Jonathan Harkavy, *A Modest Blueprint for Representing Working People and Labor Unions in Fraught Times* (Sept. 9, 2019), available at <https://ssrn.com/abstract=3450619>. Aubrey Sparks, *State Constitutions and Protections for Workers*, ON LABOR (May 16, 2018), <https://onlabor.org/state-constitutions-and-protections-for-workers/>.

<sup>169</sup> Block & Sachs, *supra* note 156 ("[A]lthough the Seattle law was blocked by anti-trust legal challenges, it's pretty clear that a state could plausibly do what Seattle was prevented from doing.").

should not be an invitation to continue to use business models that exclude them from rights and benefits and overlook the needs workers have for fair treatment. Instead, it can be an opportunity to find creative solutions that balance and re-balance the interests of business and labor. The Seattle approach of granting a collective voice against multi-million-dollar companies in the rideshare businesses seems to be a reasoned approach toward that end. It also provides cities or states with reasonable oversight authority in their indispensable transportation industry.

