Fordham Law Review

Volume 86 | Issue 4 Article 12

2018

A Modern Union for the Modern Economy

Jeffrey M. Hirsch
University of North Carolina School of Law

Joseph A. Seiner
University of South Carolina School of Law

A Modern Union for the Modern Economy

Erratum

Law; Labor and Employment Law; Legislation; Law and Politics

ARTICLES

A MODERN UNION FOR THE MODERN ECONOMY

Jeffrey M. Hirsch & Joseph A. Seiner***

Membership in traditional unions has steeply declined over the past two decades. As the White House and Congress are now completely Republican controlled, there promises to be no reversal of this trend in the near future. In the face of this rejection of traditional bargaining efforts, several attempts have been made to create alternative "quasi-union" or "alt-labor" relationships between workers and employers. These arrangements represent a creative approach by workers to have their voices heard in a collective manner, though still falling far short of the traditional protections afforded by employment and labor law statutes.

This Article critiques one such high-profile, quasi-union effort in the technology sector—the Uber Guild. While the Guild does not provide any of the traditional bargaining protections found in the National Labor Relations Act (NLRA), it offers Uber drivers some input over the terms and conditions under which they work. Falling somewhere between employment-at-will and unionization protected under the NLRA, the Uber Guild is a creative attempt to help both workers and the company to better understand how they can improve the working relationship.

This Article navigates the Uber Guild and other nontraditional efforts that promise a collective voice for workers in the face of a precipitous decline in union membership. This Article further explores how workers in the technology sector face unique challenges under workplace laws. We argue that these workers are particularly well situated to benefit from a nontraditional union model and explain what that model should look like. While a traditional union protected by the NLRA is the optimal bargaining arrangement, we must consider the enormous challenges workers in the technology sector face in obtaining these protections.

---

* Associate Dean of Strategy and Geneva Yeargan Rand Distinguished Professor of Law, University of North Carolina School of Law.

** Professor of Law, University of South Carolina School of Law. The authors would like to thank Sanjukta Paul, Benjamin Means, Derek Black, and Cynthia Estlund for their helpful input on this Article. This Article benefited greatly from the extraordinary research efforts of Arden Lowndes, Megan Clemency, Chelsea Evans, Elliot Condon, and Emily Rummel. This Article also benefited from the many helpful comments of those attending the *Colloquium on Scholarship in Employment and Labor Law* held at the Texas A&M University School of Law.

> A nation that successfully moved from farm to factory to mainframe can certainly find a way to harness new digital technologies and data-driven decision making in a way that ensures workers are fairly treated and prosperity is broadly shared. We can't fall into the trap of believing that the latest innovation is so transformational that we simply can't accommodate and acclimate.[1]
>
> —Former U.S. Secretary of Labor

INTRODUCTION

A federal court recently surmised that applying existing laws to on-demand workers is like being "handed a square peg and asked to choose between two round holes."[2] Workers in the on-demand technology sector represent a new breed of employees, and courts are still struggling to define this hybrid working relationship. While the law grapples with the rights that should be afforded to these workers, many employee protections are simply falling through the cracks. One clear example of this phenomenon can be seen with respect to union rights in this emerging sector. Involvement in traditional union activity has seen a steep decline across all industries. In the on-demand economy, it is almost nonexistent.[3] This has forced workers to consider alternative ways to have their voices heard when pursuing workplace change.

The decline of traditional unionism has been well documented and widespread.[4] Union density rates have faced steep declines in the United States—and, to a lesser extent, in many other countries—over the last couple of decades.[5] Yet, worker demand for representation and voice in the

1. Memorandum from Thomas E. Perez, former Secretary, Dep't of Labor, to the American People (Jan. 5, 2017) [hereinafter Exit Memorandum], https://www.dol.gov/sites/default/files/dol-exit-memo.pdf [https://perma.cc/GRJ9-JP6Y].

2. Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (denying summary judgment).

3. For instance, in 2017, only 1.2 percent of workers in the computer-systems industry were union members. Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database, Union Membership, Coverage, Density, and Employment by Industry*, UNION STATS, http://unionstats.gsu.edu/Ind_U_2017.htm [https://perma.cc/Y3QR-DLBJ] (last visited Feb. 14, 2018) [hereinafter Hirsch & MacPherson *Coverage Database*]. *See generally* Barry T. Hirsch & David A. Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349 (2003); Steven Greenhouse, *On Demand, and Demanding Their Rights*, AM. PROSPECT (June 28, 2016), http://prospect.org/article/demand-and-demanding-their-rights [https://perma.cc/EUG6-5RYR] ("In many ways, digital on-demand workers face far more obstacles to organizing and being heard than workers in the traditional economy. Isolated as so many of them are, on-demand workers rarely meet face to face, and online forums are a second-best substitute for building trust and solidarity."); David McCabe, *Labor, Tech Unite Behind Push for 'On Demand' Worker Rights*, HILL (Nov. 15, 2015), http://thehill.com/policy/technology/260140-labor-tech-unite-behind-push-for-on-demand-worker-rights [https://perma.cc/ED4C-ZPAV].

4. *See* Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 584–85, 588–90, 598, 606–07, 613 (2007) (arguing that decline in unionization is largely the result of the NLRA's failure to adopt a corporatist model).

5. Private-sector union density in the United States peaked at 35.7 percent in 1953 and is down to 6.5 percent as of 2017. *See* LEO TROY & NEIL SHEFLIN, U.S. UNION SOURCEBOOK: MEMBERSHIP, FINANCES, STRUCTURE, DIRECTORY, at A-1 (1985); Hirsch & Macpherson *Coverage Database*, *supra* note 3. Although exact comparisons to other countries are difficult

workplace appears as strong as ever. Nowhere is this demand more pronounced than in the emerging on-demand economy.[6] This growing industry presents unique problems for workers as the employment status of these individuals is remarkably ill-defined. This Article explores possible ways to bridge the gap between workers' desires for representation in the technology sector and the severe limitations of the traditional collective-bargaining arrangement envisioned by the National Labor Relations Act (NLRA).[7]

Perhaps the best-case example of nontraditional unionization efforts involves Uber, a major technology sector company.[8] Uber is a massive transportation business that provides an on-demand platform for drivers to use across the country.[9] While the courts still struggle with the issue of whether these workers should be treated as employees or independent contractors,[10] workplace protections remain in flux. It is unclear which—if

---

because of data differences, virtually all developed countries show significant declines in union membership over the past few decades. *See Trade Union Density*, OECD (2017), https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN [http://web.archive.org/web/20171107235235/https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN] (showing total union density decline in the combined public and private sectors in France (from 19.6 percent in 1960 to 7.7 percent in 2013), Germany (from 34.7 percent in 1960 to 18.1 percent in 2013), United Kingdom (from 40.4 percent in 1960 to 25.1 percent in 2014), Canada (from 29.2 percent in 1960 to 26.4 percent in 2014), and the United States (from 30.9 percent in 1960 to 10.7 percent in 2014)).

6. *See* Patrick Dorrian, *Gig Workers and Job-Related Bias: Are Protections on the Way?*, Daily Lab. Rep. (BNA) No. 243, at 1 (Dec. 19, 2016) (discussing a survey showing that over a third of current U.S. workers are contingent and predicting that 43 percent of the U.S. workforce will be contingent by 2020, as well as a report showing that 69 percent of firms in the ride-sharing industry, which typically classify drivers as independent contractors, have no employees).

7. 29 U.S.C. §§ 151–169 (2012).

8. *See The Unicorn List*, FORTUNE (Jan. 19, 2016), http://fortune.com/unicorns/ [https://perma.cc/B4B4-QDVA] (listing Uber as top privately held company in the world, with value estimated at $62 billion).

9. *See* John Patrick Pullen, *Everything You Need to Know About Uber*, TIME (Nov. 4, 2014), http://time.com/3556741/uber/ [https://perma.cc/W4WW-M2B6]; *Driver App*, UBER, https://www.uber.com/drive/partner-app/ [http://web.archive.org/web/20171107061220/https://www.uber.com/drive/partner-app/] (last visited Feb. 14, 2018); *Uber Cities*, UBER, https://www.uber.com/cities/ [http://web.archive.org/web/20171107040028/https://www.uber.com/cities/] (last visited Feb. 14, 2018) (listing the hundreds of cities where Uber currently operates).

10. *See, e.g.*, Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 778 (N.D. Cal. 2016) (finding that an employer-employee relationship may plausibly exist between Uber and its drivers); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1148–53 (N.D. Cal. 2015) (declining to rule on employment status as matter of law and noting the difficulty in applying a common law employment test to Uber drivers); Heather Kelly, *Uber's Never-Ending Stream of Lawsuits*, CNN (Aug. 11, 2016, 10:30 AM), http://money.cnn.com/2016/08/11/technology/uber-lawsuits/ [https://perma.cc/2NGT-CPNS] (stating that there are more than seventy federal suits pending against Uber); *see also* Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), https://nyti.ms/2mDBCaK [https://perma.cc/PV63-NERH]; Mike Isaac & Natasha Singer, *California Says Uber Driver Is Employee, Not a Contractor*, N.Y. TIMES (June 17, 2015), https://nyti.ms/2jLkD1K [https://perma.cc/ZN57-DFE6]; Erik Sherman, *Uber Faces New Class Action Suit by Drivers*, FORBES (May 4, 2016, 5:30 AM),

any—federal laws protect these workers, including the NLRA. In the face of these challenges, Uber, and many of its drivers, has agreed to engage in a nontraditional collective relationship—the Uber Guild.[11] This Article explores the import of this relationship, critiquing the model and explaining its implications for the broader gig-sector economy.

Other alternative models also exist, and this Article examines these additional "alt-labor" relationships. In particular, this Article explores the model adopted by the Freelancer's Union—a collective group of workers who pursue benefits despite not having employment status under the law. Similarly, this Article examines "Working America," a group that does not actively represent workers but instead promotes political action. Finally, this Article explores attempts at quasi-union arrangements in the more traditional brick-and-mortar employment relationships and looks at efforts by General Electric and Volkswagen to create alt-labor agreements.

It is important to note at the outset that although such alternative union options exist, they do not hold much hope for substantial increases in unionization nationwide. The barriers to union representation are quite high and, especially given the important role of global trade, are largely outside the bounds of any realistic reform measures.[12] This is especially true given that the White House and both houses of Congress are now controlled by Republicans, who have not traditionally pursued measures to bolster unionization.[13] Accordingly, the options explored here are not panaceas for

---

http://www.forbes.com/sites/eriksherman/2016/05/04/will-a-new-class-action-suit-change-uber-or-cause-drivers-to-permanently-lose/ [https://perma.cc/FPC9-U32E].

11. *See* Josh Eidelson, *Uber Found an Unlikely Friend in Organized Labor*, BLOOMBERG (Oct. 27, 2016, 6:00 AM) https://www.bloomberg.com/news/articles/2016-10-27/uber-found-an-unlikely-friend-in-organized-labor [https://perma.cc/7DW7-JG49]; Natalie Foster, *Uber's Major Step Forward for Workers*, CNN (May 25, 2016, 6:14 PM), http://www.cnn.com/2016/05/25/opinions/uber-guild-agreement-portable-benefits-natalie-foster/index.html [https://perma.cc/P842-B393]; INDEP. DRIVERS GUILD, https://drivingguild.org [https://perma.cc/S8TY-XNAT] (last visited Feb. 14, 2018).

12. *See* Douglas MacMillan, *Uber Agrees to Work with a Guild for Its Drivers in New York City*, WALL ST. J. (May 10, 2016, 4:54 PM), https://www.wsj.com/articles/uber-agrees-to-work-with-a-guild-for-its-drivers-in-new-york-city-1462913669 [https://perma.cc/TKR9-Q3DP]; Noam Scheiber & Mike Isaac, *Uber Recognizes New York Drivers' Group, Short of a Union*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/technology/uber-agrees-to-union-deal-in-new-york.html [https://perma.cc/2S6F-M5RR]; *see also About the IDG*, INDEP. DRIVERS GUILD, https://drivingguild.org/about [https://perma.cc/6LQN-EN4A] (last visited Feb. 14, 2018).

13. *See, e.g.*, Timothy Aeppel & Daniel Wiessner, *Unions Brace for Pro-Business Shift in Labor Policy Under Trump*, REUTERS (Nov. 9, 2016, 3:01 PM), http://www.reuters.com/article/us-usa-election-unions-idUSKBN1343LU [https://perma.cc/X9EU-LXTF] ("Trump has expressed support for so-called right-to-work legislation, which allows workers to avoid paying union dues. Republican leaders in Congress have consistently sought such a change at the national level."); Geoffrey Kabaservice, *When Republicans Take Power*, N.Y. TIMES (Nov. 12, 2016), https://www.nytimes.com/2016/11/13/opinion/sunday/when-republicans-take-power.html [http://perma.cc/U58T-APGY]; Jeffrey M. Jones, *Approval of Labor Unions Holds Near Its Low, at 52%*, GALLUP (Aug. 31, 2011), http://www.gallup.com/poll/149279/Approval-Labor-Unions-Holds-Near-Low.aspx [https://perma.cc/B996-NE3D] (showing that 26 percent of Republicans approve of labor unions); Jeffrey M. Jones, *New High of 55% of Americans Foresee Labor Unions Weakening*, GALLUP (Sept. 1, 2011), http://www.gallup.com/poll/149300/New-High-Americans-Foresee-Labor-Unions-

the labor movement. Instead, they are alternatives to the traditional collective-bargaining process that seem likely to do a better job at fulfilling some of workers' unmet desires.

Given this gloomy status quo, why seek any improvements? Although no magic bullet exists, expanding worker voice and opportunities to participate in workplace decision-making promises gains for workers, as well as society as a whole. The NLRA and other labor laws were enacted, at least in part, to improve the U.S. economy and the living standards of workers.[14] Those policy goals still resonate—particularly given recent economic trouble—yet, the traditional NLRA model leaves many of them unmet.[15] Addressing these shortcomings, even only in part, could have a real, positive impact for many people. Efforts to circumvent the outdated model set forth in the statute have resulted in various alternative bargaining relationships between employers and workers. At times, these new models even include workers that would not be considered "employees" under traditional employment laws.[16]

The starting point for possible reform is the traditional labor union. Although traditional, private-sector unionization has been particularly weak in the last couple of decades, the fact remains that unions are the largest, best organized, and most well-funded employee-side groups in the United States. Thus, the initial question is what unions can do to change the current dynamic. This Article discusses nontraditional groups and their potential contribution to expanding employee participation and voice, but those groups are nowhere close to having the strength of unions.

Ultimately, no model will be perfect, but nontraditional unionization efforts are imperative if workers in the technology sector want any semblance of a collective voice. The Uber Guild simply represents one joint attempt by workers and management to create a model that comports with the modern economy. Given the high profile nature of this business, however, this example provides an excellent platform for discussing how traditional union benefits can be molded to fit nontraditional companies. The modern union suggested by this Article contemplates this example and offers a broader approach for the technology sector, which could be applied in many other sectors as well. Navigating the existing attempts at quasi-union

---

Weakening.aspx [http://perma.cc/P6KE-L768] (showing that 69 percent of Republicans wished to see less union influence).

14. 29 U.S.C. § 151 (2012) (stating that "inequality of bargaining power between employees . . . and employers . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions"); *see also National Labor Relations Act*, NLRB, https://www.nlrb.gov/nlrb-introduction [https://perma.cc/JF4F-Y7A2] (last visited Feb. 14, 2018) ("Congress enacted the National Labor Relations Act ('NLRA') in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private-sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.").

15. *See generally* Paul M. Secunda, *The Wagner Model of Labour Law Is Dead—Long Live Labour Law!*, 38 QUEEN'S L.J. 545 (2013) (discussing the shortcomings of the Wagner labor model in the United States).

16. *See infra* Part II (addressing alternative union models).

arrangements, this Article suggests the development of a modern union for the modern economy.[17]

In Part II, this Article identifies the need for more cooperation between workers and management in light of the steep national decline in unionization. Part III then examines how the lack of formal collective bargaining has directly impacted workers in the technology sector. It further explores the nontraditional efforts at worker organization, including the Freelancer's Union, Working America, and the Uber Guild. In Part IV, we look at workplace participation groups and discuss their role in the employment setting. Part IV also explains the potential advantages and disadvantages of quasi-unions in the technology sector, exploring how the alt-labor strategy can fit within the contours of the modern economy. We then conclude in Part V by examining what quasi-unions should look like in the modern economy and describing the three primary forms such groups could assume.

I. THE NEED FOR MORE COOPERATION

The history of labor regulation in the United States—particularly the NLRA, which governs most private-sector workplaces—embodies cooperation as an overarching policy goal.[18] Throughout the late nineteenth and early twentieth centuries, the largely unregulated labor relations were marked by a rash of strikes, widespread boycotts, and violence by unions and employers alike.[19] Congress responded to the economic turmoil that resulted from this labor unrest by enacting statutes limiting courts' ability to enjoin labor activity;[20] regulating labor relations in the railroad industry;[21] and most importantly, in 1935, enacting the Wagner Act (or NLRA).[22] Although Congress recognized that labor strife cannot be eliminated, the NLRA's aim was to regulate the conduct of unions and employers so that harm to the national economy would be mitigated.[23]

---

17. *Cf.* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 93 (2016) (arguing for a different approach to the field of labor law); Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 CARDOZO L. REV. 1455, 1456 (2016) (explaining that "various collaborations . . . have developed between new forms of worker organizations and employers" and that "these organizations are vulnerable to 'labor organization' classification and the bans on company support found in section 8(a)(2) of the National Labor Relations Act and section 302 of the Labor Management Relations Act").

18. *See* 29 U.S.C. § 151 (2012) (declaring that the policy is to eliminate strife between employers and employees through cooperation); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1461 (1993).

19. For more detail, see PAUL M. SECUNDA ET AL., MASTERING LABOR LAW 8–12 (2014); Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427, 429–37 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

20. Norris-LaGuardia Act, 29 U.S.C. §§ 101–115 (2012).

21. Railway Labor Act, 45 U.S.C. §§ 151–188 (2012).

22. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

23. *Id.* § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and

As Congress made explicit in section I—the introductory portion of the NLRA, which sets forth its policies—the primary aim of the law was to create a new way of settling workplace disputes that would help the national economy.[24] Among the threats to the economy at that time were employer denials of employees' right to engage in collective action; unequal bargaining power; and unions' use of strikes and other labor unrest that, among other things, impeded commerce, contributed to business depressions, and depressed wages.[25] The solution, as discussed in the Introduction,[26] is a system that encourages the "friendly adjustment" of labor disputes by protecting employees' right to organize and to seek collective representation and by limiting strikes and other labor unrest.[27] Although the NLRA expressly protected the right to strike, this option was to be more of a last resort, replaced by the less harmful process of collective bargaining. Although it is difficult to prove causation, by many measures this solution was successful for quite some time.[28]

---

eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . .").

24. *Id.*

25. *See* Wachter, *supra* note 19, at 429–30 (indicating that strikes often required intervention by the National Guard and federal troops); *see also* Irving Bernstein, *Americans in Depression and War*, *in* A HISTORY OF THE AMERICAN WORKER 151, 159–60 (Richard B. Morris ed., 1983) (noting that 1934 saw 1856 strikes, many of which were coupled with violence, including a coast-wide maritime shutdown in San Francisco and a textile strike in New England and the South that saw 376,000 workers walk off the job); *Employer/Union Rights & Obligations*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/rights-we-protect/employerunion-rights-and-obligations [https://perma.cc/PRL3-ALWF] (last visited Feb. 14, 2018).

26. *See supra* Introduction.

27. In particular, the latter portion of 29 U.S.C. § 151 states:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

28. *See* Wachter, *supra* note 19, at 457–58 (arguing that the NLRA largely fulfilled its goals, particularly in stabilizing the nonunion sector).

Unions gained significant strength and power through their strong opposition to employers and their treatment of workers.[29] Armed with the Wagner Act's protections, union membership and influence increased exponentially.[30] The large number of union members gave organized labor tremendous resources in terms of both finances and individuals committed to fighting for their and other employees' working conditions. Ironically, this early increase in strength for unions initially resulted in more work stoppages, not fewer.[31] That said, these work stoppages were far less violent and disruptive than before.[32] Moreover, with enhanced union power came significant wage increases and declines in wage inequality.[33] Ultimately, however, unions' strength fell precipitously, accompanied by fewer strikes, declining employee wages, and falling wage equality.[34]

The steep decline in those numbers is accompanied by a similar decrease in unions' power.[35] But there is another, less obvious cost to this decline. As union membership dwindled, the public became less aware of the unions' role. Many, if not most, individuals are not immediately related to anyone in a union[36] so they lack an appreciation for the benefits that unions can provide. Combine this lack of awareness with the strong public relations campaigns that employers use to attack unions, and it is no surprise that their popularity has weakened over the years.[37] This weakness, in turn, has reduced

29. *See id.* at 441, 457–58 (exploring the power of workers to boycott employers until they are allowed to unionize and the use of "closed shop" rules).

30. Private sector union density (the percentage of employees who are union members) rose quickly from 15 percent in 1936, the year before the Supreme Court approved the constitutionality of the NLRA, to 35.7 percent in 1953. TROY & SHEFLIN, *supra* note 5, at A-1 (estimating pre-1953 data).

31. Wachter, *supra* note 19, at 451 ("In the period between the passage of the Wagner Act and the adoption of the Taft-Hartley amendments, the annual number of strikes was 3,539. Rather than bringing industrial peace, the number of strikes and lockouts nearly doubled under the Wagner Act.").

32. *Id.* at 450.

33. *See* Lawrence Mishel et al., *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. (Jan. 6, 2015), http://www.epi.org/publication/charting-wage-stagnation [https://perma.cc/JTD2-TYVY] (showing the relationship between increased union membership and decreased wage inequality, and vice versa, since 1917).

34. *Id.*; *see also* Wachter, *supra* note 19, at 454 (arguing that a major reason for the decline in strikes and union strength was the Taft-Hartley amendments, which made the NLRA more neutral and helped the nonunion private-sector grow in relation to the union sector).

35. Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages*, ECON. POL'Y INST. (Aug. 29, 2012), http://www.epi.org/files/2012/ib342-unions-inequality-middle-class-wages.pdf [https://perma.cc/9D7W-GGQZ]; *see* Josh Levs, *Analysis: Why America's Unions Are Losing Power*, CNN (Dec. 12, 2012, 4:06 PM), http://www.cnn.com/2012/12/11/us/union-power-analysis/ [https://perma.cc/D3PZ-Z9KH].

36. For instance, in a 2017 poll, 83 percent of respondents said that no one in their household was a union member. *Labor Unions*, GALLUP, http://news.gallup.com/poll/12751/labor-unions.aspx [https://perma.cc/8V83-BJPJ] (last visited Feb. 14, 2018).

37. Gallup has surveyed whether respondents "approve" or "disapprove" of labor unions since 1936. *Id.* Approval of unions had been in the 60 to 70 percent range since the early 1970s in all but one year, after which it has moved from as high as 65 percent and as low as 48 percent, with the most recent poll in August 2017 showing that 61 percent of respondents approved of labor unions and 33 percent disapproved. *Id.*; *see also* Drew DeSilver, *American Unions Membership Declines as Public Support Fluctuates*, PEW RES. CTR. (Feb. 20, 2014), http://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-

employees' ability to participate in the workplace and seek improvements in their working conditions.[38]

Although many of the causes of this declining power are structurally economic and largely outside of unions' control, it also seems apparent that a contributing factor is a serious public relations problem for unions. Unions have been under political assault in recent years. For instance, the U.S. Supreme Court has taken a renewed interest in challenging unions' ability to collect dues.[39] Moreover, unions have been the subject of substantial legislative and political attacks in Michigan, Ohio, and Wisconsin[40]—three states long known for union strength—which illustrates the degree to which unions have lost political and popular support. The story is more complex, of course. Unions still wield significant political power; they remain among the most important campaign contributors (and sources of campaign labor) for Democratic politicians.[41] In addition, voters in Ohio overturned the legislature's antiunion measures and Wisconsin witnessed an outpouring of

far-behind-public-support/ [https://perma.cc/ZW83-S7HP] (citing a 2013 poll finding that 51 percent of respondents had a favorable opinion of labor unions and that 42 percent had an unfavorable opinion).

38. *See* Paul Davidson, *Decline of Unions Has Hurt All Workers: Study*, USA TODAY (Aug. 30, 2016, 5:02 AM), http://www.usatoday.com/story/money/2016/08/30/decline-unions-has-hurt-all-workers-study/89557266/ [https://perma.cc/49ZU-LAUM]; Mishel, *supra* note 35.

39. *See, e.g.*, Janus v. Am. Fed'n, 138 S. Ct. 54 (2017) (No. 16-1466) (granting certiorari in a case addressing whether mandatory public sector union dues violate objecting employees' First Amendment rights); Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (per curiam) (affirming the lower court decision on the same question as presented in *Janus* by an equally divided Court); Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014) (prohibiting the collection of fees from those who do not wish to join a union).

40. *See* Monica Davey, *Unions Suffer Latest Defeat in Midwest with Signing of Wisconsin Measure*, N.Y. TIMES (Mar. 9, 2015), https://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html [https://perma.cc/M5BT-ARYW]; Monica Davey & Julie Bosman, *In Victory for Unions, Law on Dues Is Struck Down in Wisconsin*, N.Y. TIMES (Apr. 8, 2016), https://www.nytimes.com/2016/04/09/us/wisconsin-law-union-dues-scott-walker.html [https://perma.cc/7LGR-SCK2]; Matthew Dolan & Kris Maher, *Unions Dealt Blow in UAW's Home State*, WALL ST. J. (Dec. 12, 2012, 5:16 AM), http://www.wsj.com/articles/SB10001424127887323339704578173100435478428 [https://perma.cc/6QDF-MJN4]; Kathleen Gray, *Anti-Union Bills Pass Michigan House of Representatives*, DET. FREE PRESS (Dec. 7, 2016, 8:33 PM), http://www.freep.com/story/news/politics/2016/12/07/anti-union-bills-pass-michigan-house-representatives/95122178/ [https://perma.cc/66MV-D2CB]; Steven Greenhouse, *Wisconsin's Legacy for Unions*, N.Y. TIMES (Feb. 22, 2014), https://www.nytimes.com/2014/02/23/business/wisconsins-legacy-for-unions.html [https://perma.cc/N88Y-UDZ9]; Kris Maher & Amy Merrick, *Ohio Vote Puts Curbs on Unions in Reach*, WALL ST. J. (Mar. 3, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052748704005404576176812441615134 [https://perma.cc/2JXP-N7CM]; Sabrina Tavernise, *Ohio Turns Back a Law Limiting Unions' Rights*, N.Y. TIMES (Nov. 9, 2011), http://www.nytimes.com/2011/11/09/us/politics/ohio-turns-back-a-law-limiting-unions-rights.html [https://perma.cc/3XKJ-7DTY].

41. The political strength of unions, particularly public-sector unions, is also no doubt a major contributor to the political attacks against them. *See, e.g.*, Tom McGinty & Brody Mullins, *Political Spending by Unions Far Exceeds Direct Donations*, WALL ST. J. (July 10, 2012, 9:49 AM), http://www.wsj.com/articles/SB10001424052702304782404577488584031850026 [https://perma.cc/XLS5-8ZKW] ("Labor unions were responsible for $75 million in political donations, with 92% going to Democrats.").

opposition against that state's antiunion legislation.[42] But the overall sharp decline in union density over the last few decades has largely been met with a collective yawn from the public. Indeed, the fact that these antiunion legislative measures occurred in the first place speaks volumes about unions' overall lack of support from the public.

Given the low-density rate and poor public perception, unions should consider ways to bolster their popular support. As the recent state-level attacks on unions and the debate over the Employee Free Choice Act[43] show, support among the public—even individuals who are not union members or likely targets of future union campaigns—can have a significant impact on organized labor. Traditional NLRA organizing strategies are simply not enough in this economy to maintain broad support for unions. The difficulty is how unions might turn that trend around.

The modern economy's technology sector presents several additional hurdles. Most notably, employers in this industry have fought fiercely in court to define these workers as independent contractors rather than employees.[44] In the absence of true employment status, which is required for NLRA coverage,[45] there are few opportunities for such workers to gain the protection of labor unions.

Although there is no magic bullet for turning around unions' fortunes and increasing employee voice,[46] there does appear to be more that unions can do to achieve greater support than their current conflict-oriented model. One option is a broad public relations campaign. Through advertising and other types of outreach, unions could attempt to bolster their image among the general public in the hopes that it will stave off some of the attacks that seem to be cropping up more frequently. But the focus of this Article is on other measures, particularly those that implicate ways in which unions, and other advocates for workers, can help to expand employees' participation at work.

The common theme to these alternatives is the need for these groups to adopt a more cooperative strategy.[47] That is not to say that conflict with employers is unwise—indeed, unions should still fight hard for employees when warranted. But a permanently adversarial posture does not seem to be

42. *See* Davey & Bosman, *supra* note 40; Steven Greenhouse, *Bill Easing Unionizing Is Under Heavy Attack*, N.Y. TIMES (Jan. 8, 2009), http://www.nytimes.com/2009/01/09/us/09labor.html [https://perma.cc/MZ2T-J2EN]; Abby Sewell, *Protesters out in Force Nationwide to Oppose Wisconsin's Anti-Union Bill*, L.A. TIMES (Feb. 26, 2011), http://articles.latimes.com/2011/feb/26/nation/la-na-wisconsin-protests-20110227 [https://perma.cc/CK2U-6KY8]; Tavernise, *supra* note 40.

43. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009).

44. *See, e.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (addressing the employee/independent contractor question in the on-demand transportation context); *see also infra* Part II.B.

45. 29 U.S.C. § 152(3) (2012).

46. *See* Secunda, *supra* note 15, at 557–80 (discussing obstacles to private sector, union-related voice such as captive audience meetings, weak NLRB remedies, difficulty in unions' achieving first contracts, and permanent replacements for strikers).

47. *See generally* Samuel Estreicher, *Strategy for Labor Revisited*, 86 ST. JOHN'S L. REV. 413 (2012) (discussing potential arguments for and against more cooperative strategies).

serving unions well.[48] A willingness to engage in cooperative relationships with employers and, at times, to forgo some goals normally associated with unionization may result in greater gains. If employers view unionization as being less costly than they do now, in many instances they may be more accepting, or at least less resistant, to unions.[49] Employer resistance will always remain a serious issue. For many employers there is nothing a union can do to mitigate that hostility.[50] Yet, other employers may view the costs of fighting unionization—costs that include financial expenditures and decreased employee morale—as being less worthwhile if the prospect of a union presence is less restrictive than it appears to be now. Few employers are likely to welcome unionization, but even a reduction in the level of hostility could have a significant impact on unions' ability to represent or assist workers. Cooperation also allows independent contractors—in addition to employees—to have a voice in the organization. This distinction is critical for attempts at collective action in the modern economy, where the use of contingent workers is pervasive.

There are many ways in which unions and employee-side groups could engage in more cooperation with employers, both large and small. This Article discusses a few more prominent options, such as unions being more open to nontraditional employee-voice mechanisms and unions and employee groups focusing more on the provision of services rather than classic collective representation. This Article further identifies how these options would prove advantageous for workers in the technology sector, who currently face the most difficult hurdles with respect to traditional union representation.

II. THE MODERN ECONOMY, THE UBER GUILD, AND OTHER NONTRADITIONAL UNION AGREEMENTS

Although traditional unions remain the most robust form of worker representation, it is not a realistic possibility for many, if not most, American workers—particularly those in the gig economy. Taking into account the political barriers to substantial reform of U.S. labor law, we argue that, in many cases, seeking more cooperative strategies will be the best way to enhance worker voice and representation. These strategies can, but generally need not, involve assistance from traditional unions. However, such assistance would likely benefit both unions and workers. Unions possess

48. If the level of adversity were magnified—for instance, to the pre-NLRA level, which involved significant labor unrest—unions' influence may be greater. *See* Cynthia L. Estlund, *Citizens of the Corporation? Workplace Democracy in a Post-Union Era*, *in* CORPORATIONS AND CITIZENSHIP 165, 165 (Greg Urban ed., 2014) (noting that support for the NLRA largely grew from a desire to mitigate labor unrest). But there are no signs that unions and other proworkers groups are willing or able to create such disruptions.

49. *See id.* at 171.

50. *See* Cynthia L. Estlund, *Why Workers Still Need a Collective Voice in the Era of Norms and Mandates*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW, *supra* note 19, at 463, 465–66 (noting the widespread practice of employers trying to avoid unionization and arguing that this is caused by union effects on profits, as well as ideological, cultural, and psychological factors).

great expertise in representing workers, which would likely be of great value to workers involved with these alt-labor organizations. In turn, interest in unions would likely increase, particularly from workers who have positive experiences, employers that see the potential for a more cooperative relationship with unions, and the public that has more exposure and experience with the gains to be had by increased worker voice.

This Part first explores the unique problem facing workers in the modern economy in obtaining the employment status required to achieve protections under the NLRA and other workplace statutes. Given these challenges, workers in the technology sector have much to gain from more nontraditional unionization efforts. This Part then examines one such quasi-union effort by one of the largest gig-sector companies—the Uber Guild. It further navigates attempts by workers to organize outside of the NLRA. In particular, through the Freelancer's Union, contingent workers have achieved some control over the working relationship. And, Working America has provided workers a platform from which to pursue political actions. Finally, this Part examines how more traditional brick-and-mortar-type companies have also pursued quasi-union arrangements and looks at how General Electric and Volkswagen have provided workers with a collective voice outside of the protections of the NLRA. While much has been written on quasi-unions,[51] there is no literature extensively examining alt-unions in the context of the modern economy.

A. Contingent Workers

One increasingly large group of employees in particular need of workplace protections consists of independent contractors and other contingent workers.[52] Employers' ability and willingness to classify workers as independent contractors has had an enormous impact on those workers.[53]

---

51. *See, e.g.*, Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 843–49 (2014) (addressing the legal problems that might arise from alt-labor coordination); Dayne Lee, *Bundling "Alt-Labor": How Policy Reform Can Facilitate Political Organization in Emerging Worker Movements*, 51 HARV. C.R.-C.L.L. REV. 509, 529–35 (2016) (outlining tax and labor law reforms that could allow alt-labor organizations to emulate traditional labor unions); Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 609–10 (2016) (examining the alt-labor movement's influence on union practice); Brishen Rogers, *Libertarian Corporatism Is Not an Oxymoron*, 94 TEX. L. REV. 1623, 1631–35 (2016) (detailing the rise of the alt-labor movement and its current shortcomings).

52. *See* Adriene Hill, *Freelancers Piece Together a Living in the Temp Economy*, N.Y. TIMES (Mar. 24, 2014), https://www.nytimes.com/2014/03/25/your-money/freelancers-piece-together-a-living-in-the-temp-economy.html [https://perma.cc/C963-44XM] (noting a Government Accountability Office study showing 30 percent of the work force in 2006 as contingent, Bureau of Labor Statistics studies showing 14 million self-employed workers in February 2014, and that the number of temp agency workers has grown 46 percent since 2009).

53. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-859T, EMPLOYEE MISCLASSIFICATION: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 2 (2007), http://www.gao.gov/new.items/d07859t.pdf [https://perma.cc/5AAZ-BX4L] (noting that statements of Sigurd R. Nilsen, Director of Education, Workforce, and Income Security indicate increased use of independent contractors); Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial*

Aside from the often lower pay and lesser benefits that many employers unilaterally choose to provide, the independent-contractor classification also means that most labor and employment laws do not apply to these workers.[54] Thus, independent contractors neither have a right to collective action or bargaining nor any protection against, among other things, discrimination and pay that would violate the minimum wage or overtime rules.[55] Recent efforts to assist independent contractors, such as the Uber Guild, show potential options for all workers to improve their working conditions, even in the current economic climate.

Workers in the technology sector face an increasingly steep battle in their attempts to be recognized as "employees" under state and federal employment statutes. These workers are difficult to define as the nature of their employment is nontraditional and not easily categorized. The employment laws, such as the Fair Labor Standards Act of 1938 (FLSA),[56] were conceptualized at a time when the technologies that have enabled the success of Uber and others were nonexistent. As adeptly stated by one federal court, "[t]he test . . . developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem."[57] The laws were thus not developed for these modern workers, and the courts have struggled in their efforts to define these individuals as either independent contractors or employees. Take, for example, the pending litigation against Uber.

Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3), 15 HOFSTRA LAB. & EMP. L.J. 75, 79–125 (1997) (describing the development of employee/independent contractor distinction); Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. POL'Y J. 187, 223 (1999); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 283 (2006).

54. *See* Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 179–84 (2006); *see, e.g.*, Jeanne Sahadi, *When an Independent Contractor Is Really an Employee*, CNN (July 16, 2015, 4:36 PM), http://money.cnn.com/2015/07/16/pf/independent-contractors-employees/ [https://perma.cc/27YR-E3W9]; *Independent Contractors*, WORKPLACE FAIRNESS, http://www.workplacefairness.org/independent-contractors [https://perma.cc/MXT3-8RSS] (last visited Feb. 14, 2018); *My Employer Says I Am an Independent Contractor. What Does This Mean?*, COMM. WORKERS AM. [hereinafter *My Employer Says*], http://www.cwa-union.org/about/rights-on-job/legal-toolkit/my-employer-says-i-am-independent-contractor-what-does-mean [https://perma.cc/G8VQ-3HGY] (last visited Feb. 14, 2018). *See generally* Stone, *supra* note 53 (examining the legal benefits and protections available to independent contractors compared to employees).

55. *See* Stone, *supra* note 53, at 279 (addressing the implications of independent contractor classification). *See generally Misclassification of Employees as Independent Contractors*, U.S. DEP'T LAB., https://www.dol.gov/whd/workers/misclassification/ [https://perma.cc/D35U-QMGH] (last visited Feb. 14, 2018); *My Employer Says*, *supra* note 54.

56. 29 U.S.C. § 201 (2012).

57. Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

B. O'Connor v. Uber Technologies, Inc.

In *O'Connor v. Uber Technologies, Inc.*,[58] the U.S. District Court for the Northern District of California considered a class action against Uber over whether Uber drivers should be considered employees or independent contractors.[59] Four named plaintiffs brought the class action.[60] Two of the named plaintiffs, Douglas O'Connor and Thomas Colopy, drove for Uber's "UberBlack" service.[61] UberBlack drivers use limousine-like vehicles to transport customers.[62] O'Connor and Colopy had similar contracts with third-party limousine companies that provided them with vehicles to work as UberBlack drivers in exchange for fees.[63] The other two named plaintiffs, Matthew Manahan and Elie Gurfinkel, drove for the company's "uberX" service.[64] UberX drivers transport passengers in their own personal vehicles.[65] Under their contract with Uber, drivers were paid a "fee" for each ride; Uber set fares based on the duration and miles traveled during each trip.[66] The plaintiffs presented evidence that Uber took about 20 percent of each completed ride as its "fee per ride."[67]

As part of its motion for summary judgment, Uber argued that drivers are independent contractors and not employees, and therefore, are not entitled to the protection of the California Labor Code.[68] Uber maintained that it exercises minimal control over how its drivers actually provide services to Uber customers, which is an important factor in determining whether drivers are independent contractors.[69] Uber stressed that its drivers set their own schedules, provide their own vehicles, and operate with little supervision.[70] The plaintiffs disagreed with Uber's contentions,[71] alleging that Uber "exercises considerable control and supervision over both the methods and means of its drivers' provision of transportation services, and that under the applicable legal standard, they are employees."[72]

In analyzing the case, the court set forth California's test for employment status.[73] The court explained that the California Supreme Court's seminal opinion in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*[74] "enumerated a number of indicia of an employment relationship" for

58. 82 F. Supp. 3d 1133 (N.D. Cal. 2015).
59. *Id.* at 1135. The underlying issues in the case, which was brought under the California Labor Code, involved allegations of unpaid expenses and tips for the Uber drivers. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1136.
65. *Id.*
66. *Id.*
67. *Id.* at 1136–37.
68. *Id.* at 1137–38.
69. *Id.* at 1138.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. 769 P.2d 399 (1989).

determining whether an employer can rebut a prima facie showing of employment.[75] The most important consideration is the putative employer's "right to control work details."[76] The key question is "not how much control a hirer exercises, but how much control the hirer retains the right to exercise."[77] No one factor from *Borello* is dispositive, and multiple criteria must be weighed.[78]

Applying the *Borello* analysis, the court concluded that the plaintiffs were presumptively employees because they provided a service to Uber.[79] Moreover, the court stated that whether a driver is an employee or an independent contractor is a mixed question of law and fact,[80] generally to be decided by the jury. The court noted that important evidence in the case included whether Uber could fire the drivers at will—a fact that was in dispute.[81] Uber claimed that it could only terminate drivers "with notice or upon the other party's material breach" of the contracts.[82] In contrast, the plaintiffs argued that the contracts "seem to allow Uber to fire its drivers for any reason and at any time."[83]

Additionally, whether Uber had the right to significantly control the "manner and means" of the plaintiffs' transportation service was also disputed.[84] Uber pointed to various aspects of the driver contract in arguing that it did not significantly control the manner and means of the drivers' transportation services.[85] In contrast, plaintiffs noted that the Uber Driver Handbook clearly states that "[w]e expect on-duty drivers to accept all [ride] requests."[86] The parties strongly disagreed over various contentions relevant to whether Uber had the right to significantly control the "manner and means" of the transportation services.[87] Based on these contested issues, the court could not conclude as a matter of law whether the drivers were employees or independent contractors under the *Borello* test.[88] The court held that Uber was not entitled to summary judgment because genuine issues of material fact existed and a reasonable inference of an employment relationship could be found.[89]

In sum, the court held that Uber drivers were presumptively employees because they provided a service to Uber. However, a number of material

75. *O'Connor*, 82 F. Supp. 3d at 1138 (quoting Narayan v. EGL, Inc., 616 F.3d 895, 901 (9th Cir. 2010)).
76. *Id.* (quoting *S.G. Borello & Sons, Inc.*, 769 P.2d at 403–04).
77. *Id.* at 1139 (quoting Ayala v. Antelope Valley Newspapers Inc., 327 P.3d 165, 172 (2014)).
78. *Id.* at 1140–41.
79. *Id.* at 1141.
80. *Id.* at 1146.
81. *Id.* at 1149.
82. *Id.*
83. *Id.*
84. *Id.* (quoting Ayala v. Antelope Valley Newspapers Inc., 327 P.3d 165, 171 (2014)).
85. *Id.*
86. *Id.*
87. *Id.* (quoting *Ayala*, 327 P.3d at 171).
88. *Id.* at 1153.
89. *Id.*

facts relevant to the "primary" *Borello* analysis were in dispute so summary judgment was precluded.[90]

C. The Traditional Standard

As the Uber case makes clear, courts and litigants have faced immense struggles when applying the employee/independent contractor analysis to workers in the gig sector. The Uber case in no way stands as an anomaly, and class action litigation on the employee/independent contractor issue has been widespread in the technology sector. Cases have been brought against numerous on-demand companies,[91] including GrubHub,[92] Amazon,[93] Handy (previously Handybook),[94] CrowdFlower,[95] Homejoy,[96] Postmates,[97] Instacart,[98] and Washio.[99] An unsuccessful class action claim was even brought against Yelp, arguing that online reviewers of local businesses should be considered employees.[100] Much of the difficulty for courts in these cases is in the application of a traditional legal standard to a developing, ill-defined segment of workers in a modern sector of the economy. Typically, the courts (at least with respect to the FLSA) have considered the following factors when making the determination as to whether a worker is an independent contractor or an employee:

> (1) the level of control the employer maintains over the worker; (2) the opportunity for profit or loss maintained by the worker in the business; (3) the amount of capital investment the worker puts into the process; (4) the

90. *Id.* at 1152.

91. *See* Joseph A. Seiner, *Tailoring Class Actions to the On-Demand Economy*, 78 OHIO ST. L.J. 21, 46–53 (summarizing cases).

92. *See* Class Action Complaint at 1, Tan v. GrubHub, Inc., No. CGC-15-548103 (Cal. Super. Ct. Sept. 23, 2015).

93. *See* Class Action Complaint at 1, Truong v. Amazon.com, Inc., No. BC598993 (Cal. Super. Ct. Oct. 27, 2015).

94. *See* Zenelaj v. Handybook, Inc., 82 F. Supp. 3d 968, 970 (N.D. Cal. 2015).

95. *See* Otey v. CrowdFlower, Inc., No. 12-cv-05524-JST, 2014 WL 1477630, at *1 (N.D. Cal. Apr. 14, 2014).

96. *See* Collective & Class Action Complaint & Jury Demand at 1, Iglesias v. Homejoy, Inc., No. 3:15-cv-01286-LB (N.D. Cal. Mar. 19, 2015); Class Action Complaint for Damages at 1, Ventura v. Homejoy, Inc., No. CGC-15-544750 (Cal. Super. Ct. Mar. 16, 2015); Zenelaj v. Homejoy, Inc., No. CGC-15-544599 (Cal. Super. Ct. Mar. 9, 2015); Class Action Complaint at 1, Malveaux-Smith v. Homejoy, Inc., No. 37-2015-00005070-CU-OE-CTL (Cal. Super. Ct. Feb. 13, 2015).

97. *See* First Amended Collective & Class Action Complaint & Jury Demand at 1, Singer v. Postmates, Inc., No. 4:15-cv-01284 (N.D. Cal. Mar. 19, 2015); Complaint at 1, Marable v. Postmates, Inc., No. BC589052 (Cal. Super. Ct. July 23, 2015); Class Action Complaint at 1, Peppler v. Postmates, Inc., No. 1:15-cv-05145-RCL (D.C. Super. Ct. Aug. 25, 2015).

98. *See* Complaint at 1, Bynum v. Maplebear Inc., 160 F. Supp. 3d 527 (E.D.N.Y. 2016) (No. 15-cv-6263); Complaint at 1, Moton v. Maplebear Inc., No. 1:15-cv-08879-CM, 2016 WL 616343 (S.D.N.Y. Feb. 9, 2016); Class Action Complaint for Damages & Demand for Jury Trial at 1, Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930 (N.D. Cal. 2015) (No. 3:15-cv-00697-EMC); Class Action Complaint at 1, Sumerlin v. Maplebear, Inc., No. BC 603030 (Cal. Super. Ct. Dec. 2, 2015).

99. *See* Class Action Complaint & Jury Demand at 1, Taranto v. Washio, Inc., No. CGC-15-546584 (Cal. Super. Ct. June 29, 2015).

100. Jeung v. Yelp, Inc., No. 15-CV-02228-RS, 2015 WL 4776424, at *3 (N.D. Cal. Aug. 13, 2015).

> degree of skill necessary to perform the job; (5) whether performance of the job is integral to the operation of the business; and (6) the permanency of the relationship between the worker and the employer.[101]

While different courts and jurisdictions have articulated the FLSA classification test in varying ways,[102] all formulations focus on the "economic reality"[103] of the situation and the level of control exercised by the employer.[104] These factors were developed at a time when brick-and-mortar facilities were predominant in the workplace. The factors thus do not work well with companies like Uber or the broad range of other businesses in the technology sector. While the reason for such worker misclassification can be debated,[105] the difficulty likely arises from the increased amount of flexibility inherent in the technology workplace. Because there is often not a physical or stationary place of employment, many gig-sector jobs involve varying terms and conditions of employment and substantial flexibility in the way workers conduct the job and when they do it. As the traditional definition of an employee typically revolves around the issue of employer control, such worker flexibility is not often adequately considered as part of this test.

The worker classification issue extends well beyond the FLSA to other employment statutes. Indeed, for coverage, individuals must generally be considered employees for purposes of discrimination claims brought under Title VII of the Civil Rights Act of 1964,[106] the Americans with Disabilities

---

101. Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1526 (2016) (citing Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1534–35 (7th Cir. 1987)).

102. *See, e.g.*, McFeeley v. Jackson Street Entm't., LLC, 825 F.3d 235, 241 (4th Cir. 2016); Irizarry v. Catsimatidis, 722 F.3d 99, 104–05 (2d Cir. 2013); Moba v. Total Transp. Servs. Inc., 16 F. Supp. 3d 1257, 1263–64 (W.D. Wash. 2014); *see also* Means & Seiner, *supra* note 101, at 1526 n.58. The Supreme Court has also articulated a similar multifactor test, which is used for most federal statutes other than the FLSA and the Family Medical Leave Act. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992); 22 AM. JUR. 3D *Proof of Facts* § 353 (1993); Robin Perry, *Proving the Existence of an Employment Relationship*, 108 AM. JUR. 3D *Proof of Facts* § 247 (2009).

103. *Cf.* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 242 (1997) (arguing for an alternative test).

104. Means & Seiner, *supra* note 101, at 1526–27; *see also* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 724 (2013) (discussing standards for worker classification); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 362–64 (2011) (arguing for a change in the definition of employee).

105. *See generally* Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017) (discussing the worker classification issue in the on-demand economy).

106. 42 U.S.C. § 2000e-2(a)(2) (2012) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants . . . which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

Act,[107] and the Age Discrimination in Employment Act.[108] There is also pending litigation against Uber on the question whether the drivers are employees for purposes of the NLRA.[109]

The debate over whether technology workers are employees or independent contractors will likely be waged for years with varying outcomes depending upon the particular employer or jurisdiction where the claim is brought. Ultimately, the Supreme Court may have to weigh in on this issue.[110] In the meantime, however, these gig-sector workers are left in an untenable position.[111] With their employment status in flux, it will be difficult for them to obtain proper workplace protections and to have their collective interests adequately represented. We argue here that these workers can substantially benefit from less traditional methods of organizing.

Looking beyond the typical statutory protections, there are a number of avenues still available to such workers. We address a number of these below, including the Freelancer's Union and Working America. We also outline nontraditional attempts of workers to have their collective voice heard with their employers through informal mechanisms. In the technology sector, the best example of this is the Uber Guild, though we highlight other examples as well. There can be no perfect approach to organizing outside of the statutory protections that Congress has provided to so many workers. Nonetheless, we argue that more workers should attempt to bargain for informal protections where these traditional protections are unavailable. Our efforts here are by no means exhaustive. Rather, we hope to spark a dialogue on this topic and welcome the input of scholars, the courts, litigants, and others as to how best to properly define these informal arrangements in a developing technological economy.

---

107. 42 U.S.C. § 12112(b)(1) (2012) ("As used in subsection (a) of this section, the term 'discriminate against a qualified individual on the basis of disability' includes . . . limiting, segregating, or classifying a job applicant or employee . . . .").

108. 29 U.S.C. § 623(a)(1) (2012) ("It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.").

109. *See* Ted Hesson, *NLRB Argues Against Uber*, POLITICO (Nov. 3, 2016, 10:00 AM), http://www.politico.com/tipsheets/morning-shift/2016/11/nlrb-argues-against-uber-217214 [https://perma.cc/8YZW-QMMN] (describing NLRB litigation involving allegations that Uber misclassified drivers as independent contractors); *see also* 29 U.S.C. § 152(3) (2012) (defining "employee" and excluding independent contractors from the definition).

110. As the Secretary of Labor correctly observed recently, "The largest question for the next administration and beyond is how we embrace innovation in this dynamic economy while ensuring that the changing nature of work continues to honor the bedrock principle that workers are not in it alone in securing basic protections." *See* Exit Memorandum, *supra* note 1, at 14.

111. *Cf.* Exit Memorandum, *supra* note 1, at 14 (arguing for enforcement of labor standards "whether the workplace is virtual or brick-and-mortar—whether the work is associated with a mile-long manufacturing facility or a website").

D. Freelancers Union

One of the higher profile approaches to servicing contingent workers has been the Freelancers Union.[112] Founded in 1995, this organization has been described as the fastest-growing labor organization in the country, with over 200,000 independent contractors, part-time workers, and temps as members—primarily in New York State but expanding to other areas of the country.[113] The union does not engage in collective bargaining on behalf of its members; instead, it provides services to individuals who wish to purchase them, although membership is free.[114] Central among those services is health insurance, which the union identified as its members' primary concern.[115]

To be sure, the Freelancers Union's lack of traditional collective bargaining and representation limits its ability to change its members' work conditions. In spite of declining union density, unions have remained surprisingly capable of increasing their members' wages,[116] and their role in pursuing grievances on behalf of employees can be immensely important. But, the insurance and other benefits obtainable through the Freelancers Union can make a real difference for independent contractors and other workers who would otherwise not be able to afford them.[117] Also, the union allows members to rate "clients" they have worked for, which provides potentially valuable information that these workers would otherwise lack.[118] Moreover, the union has made moves in the political arena that could benefit independent contractors nationwide, such as a push for the Department of Labor to track the number of such workers and a New York City Council bill to tighten enforcement of wage theft for freelancers in New York.[119]

Neither of these goals has been met, although the union was able to convince New York City to implement a tax change that saved freelancers

---

112. *See* FREELANCERSUNION, http://www.freelancersunion.org [https://perma.cc/QS67-LDGA] (last visited Feb. 14, 2018).

113. *See* Steven Greenhouse, *Tackling Concerns of Independent Workers*, N.Y. TIMES (Mar. 23, 2013), http://www.nytimes.com/2013/03/24/business/freelancers-union-tackles-concerns-of-independent-workers.html [https://perma.cc/FH3J-Z96L].

114. These services offer much lower costs than individuals could obtain on their own. *Id.*

115. The union also provides other types of insurance, operates a health clinic, and has a 401(k) plan. *See Save for Retirement with Honest Dollar*, FREELANCERSUNION, https://www.freelancersunion.org/benefits/retirement/ [https://perma.cc/9TUN-4EAZ] (last visited Feb. 14, 2018).

116. *See* David G. Blanchflower & Alex Bryson, *Changes over Time in Union Relative Wage Effects in the UK and the US Revisited*, *in* INTERNATIONAL HANDBOOK OF TRADE UNIONS 197, 207–21 (John T. Addison & Claus Schnabel eds., 2003) (concluding that the U.S. union wage premium has declined only slightly over time).

117. The union also has an exchange for member-to-member service discounts. *Freelancer Discounts*, FREELANCERSUNION, https://www.freelancersunion.org/discounts/#/all [https://perma.cc/84TT-UXG5] (last visited Feb. 14, 2018).

118. *See* Gabrielle Wuolo, *New Tool Lets Freelancers Rate Clients and Companies*, FREELANCERSUNION (May 31, 2011), https://blog.freelancersunion.org/2011/05/31/new-tool-lets-freelancers-rate-clients-and-companies/ [https://perma.cc/VFQ2-YCJN]; *see, e.g.*, RATEMYBOSS.COM, http://www.ratemyboss.com [http://web.archive.org/web/20150818152950/http://www.ratemyboss.com:80/] (last visited Feb. 14, 2018).

119. Noam Scheiber, *As Freelancers' Ranks Grow, New York Moves to See They Get What They're Due*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/nyregion/freelancers-city-council-wage-theft.html [https://perma.cc/J4TM-FHZB].

up to several thousand dollars a year.[120] This political action, combined with its ability to attract workers with the option to purchase affordable benefits, gives the Freelancers Union and other organizations like it an opportunity to improve unions' reputations among the public. The union might also provide an important benefit for firms. A significant cost of being an independent contractor or other nonstatutory employee is the lack of benefits often associated with that arrangement. By permitting these workers to purchase benefits at a much lower price than what they could achieve on their own, the Freelancers Union—perhaps ironically—lowers the cost of working under these arrangements. This, in turn, will make the independent contractors and other similar workers even more attractive to firms who are unable or unwilling to provide benefits for those workers.[121]

E. Working America

Traditional unions have also explored the use of nontraditional employee groups. For instance, the AFL-CIO's organization Working America will celebrate its fifteenth anniversary in 2018.[122] It describes itself as the fastest-growing workers' organization in the country[123] and claims over three million members.[124] Working America does not formally represent workers; instead, its primary goal is to promote relevant political action.[125] For instance, it recently mobilized residents in the Albuquerque area to vote for a raise in the minimum wage.[126] It has also distributed information on matters such as companies' legal violations, mass layoffs, and offshoring

120. *See* Greenhouse, *supra* note 113.

121. The Affordable Care Act (ACA) also filled this role where its premiums were competitive with the Freelancers Union's health insurance. However, President Trump and Republicans in Congress have vowed to end the ACA, and it is unclear what, if any, replacement they would enact in its stead. *See* Mike DeBonis & Kelsey Snell, *House GOP Discusses Obamacare Replacement Ideas—but Doesn't Call Them a Plan*, WASH. POST (Feb. 16, 2017), https://wpo.st/kPjc2 [https://perma.cc/UYA2-NJF6].

122. *About*, WORKING AM., http://www.workingamerica.org/about [https://perma.cc/UPT3-ASXV] (last visited Feb. 14, 2018).

123. However, it is unclear on what basis Working America makes this claim, which the Freelancers Union also makes. *See* Greenhouse, *supra* note 113. Suffice it to say that both groups have been in a period of significant growth.

124. *See About*, *supra* note 122.

125. *See* Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 389 (2006) (identifying Working America as an alternative worker organization aimed at "get[ting]-out-the-vote"); Harold Meyerson, Opinion, *Labor Wrestles with Its Future*, WASH. POST (May 8, 2013), https://www.washingtonpost.com/opinions/harold-meyerson-labor-wrestles-with-its-future/2013/05/08/852192d6-b74f-11e2-b94c-b684dda07add_story.html [https://perma.cc/U6X2-LXGQ] (noting that Working America attempts to promote worker activism rather than secure collective bargaining contracts or membership dues); Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes* 8, 19–20 (Nat'l Bureau of Econ. Research, Working Paper No. 11298, 2005), http://www.nber.org/papers/w11298 [https://perma.cc/3K7F-93CU].

126. *See* Doug Foote, *40,000 Workers in Albuquerque Get a Raise This Week (You Built That)*, WORKING AM. MAIN STREET BLOG (Jan. 3, 2013, 10:40 AM), http://blog.workingamerica.org/2013/01/03/40000-workers-in-albuquerque-get-a-raise-this-week-you-built-that/ [https://perma.cc/4VPT-WC23].

practices, which may help improve employees' ability to offset some employers' opportunistic use of their information advantages.[127] Like the Freelancers Union, Working America also has potential public relations benefits; as more workers and their families become acquainted with the potential benefits of labor organizations, all such groups may rise in the public's estimation. Indeed, the AFL-CIO has been open about Working America's potential to foster support for more formal unionization efforts as employees gain more positive experiences with representational groups.[128] This could occur by organizing groups of employees who are already members of Working America or other employees learning about Working America and thinking more favorably about unionization as a result of that knowledge. One example of the transition from nontraditional to traditional organizing is the Communication Workers of America's WashTech organization. WashTech started as a non-collective-bargaining group that assisted and lobbied for independent contractors and temporary workers at Microsoft but ultimately developed several groups that sought formal status as a collective-bargaining representative.[129]

These nontraditional worker groups are merely a sample of the various types of organizations that may help workers outside of the classic Wagner model of collective bargaining.[130] By removing the emotionally charged, formalistic labor law framework, they have an opportunity to assist workers while maintaining a less antagonistic relationship with employers—and a more favorable reputation with the general public. However, these groups

127. For instance, Working America used to run a "JobTracker" website that allowed searches of over 400,000 companies and their labor practices. *See Working America Exposes Outsourcing Culprits*, N.C. ST. AFL-CIO (Oct. 13, 2010), http://aflcionc.org/working-america-exposes-outsourcing-culprits/ [https://perma.cc/DUN6-2KLQ]; *see also* Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1142–43 (2007) (discussing employers' ability to take advantage of information asymmetries and unions' ability to mitigate the problem); Amy Joyce, *Labor Web Site Keeps Tabs on Business*, WASH. POST (Nov. 18, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/17/AR2005111701623.html [https://perma.cc/3TCT-ECW4] (describing Working America's online database of more than 60,000 companies). In 2006, the AFL-CIO also entered into an agreement with the National Day Laborer Organizing Network (NDLON) in part to create more community-based entities, called "worker centers," that provide services and advocate on behalf of nonunion workers. *See* Steven Greenhouse, *Labor Federation Forms a Pact with Day Workers*, N.Y. TIMES (Aug. 10, 2006), https://nytimes.com/2006/08/10/us/10labor.html [https://perma.cc/7N2F-BWLW].

128. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 218 (2004) (noting that the AFL-CIO's primary goal was to support possible future organizing efforts). Unions have also initiated associate member programs that allow nonunion or unemployed workers to pay reduced dues and enjoy certain privileges of union membership. *See* Paula Brantner, *Unions Create Associate Membership Programs to Help Maintain Their Strength*, TODAY'S WORKPLACE (Sept. 17, 2004), www.todaysworkplace.org/2004/09/17/unions-create-associate-membership-programs-to-help-maintain-their-strength [https://perma.cc/WL96-32AG].

129. *See* STONE, *supra* note 128, at 235; Hyde, *supra* note 125, at 390–91.

130. *See* Whitney, *supra* note 17, at 1480–86 (describing other non-NLRA-covered groups); *see also* FRAN QUIGLY, IF WE CAN WIN HERE: THE NEW FRONT LINES OF THE LABOR MOVEMENT 54 (2015) (stating that nontraditional worker groups are better at highlighting workplace problems than negotiating and maintaining agreements with employers).

have limits as well. Although the lack of formal collective bargaining will generally improve relationships with employers, the reason is largely because full-fledged bargaining is more effective at extracting wages and other benefits.[131] In addition, these groups could have funding difficulties without a steady source of dues or other income.[132] Yet, despite these barriers, it seems that unions and other organizations concerned about workers would benefit from more experimentation with nontraditional assistance. The degree to which these experiments will bear fruit is unclear, but it is highly unlikely that they will make things any worse. One such high-profile experiment has recently been undertaken in the gig economy.

F. The Uber Guild

In May 2016, Uber announced the creation of a drivers' union that it coined the "Independent Drivers Guild,"[133] which operates in New York City. This drivers' association falls far short of providing full union status but will offer workers "a forum for regular dialogue and afford them some limited benefits and protections."[134] This unique organization was created to represent drivers who (purportedly) wanted to remain independent while still being allowed to enjoy the protections and benefits of a collective association of Uber drivers.[135] The guild provides the 35,000 Uber drivers in the city with a voice in company operations, as well as other new benefits and protections.[136] The Independent Drivers Guild is affiliated with a regional branch of the International Association of Machinists and Aerospace Workers union ("IAM").[137]

The IAM represents nearly 600,000 members in aerospace, manufacturing, transportation, shipbuilding, woodworking, and electronics.[138] The organization describes itself as the workers "moving North America."[139] The IAM is split into numerous districts; District 15, where the Uber Guild operates, is one of IAM's largest, representing close to 19,000 active and retired members in various industries throughout the Northeast.[140] Its

131. *See* Secunda, *supra* note 15, at 580 (noting that the benefits of these groups may not be meaningful enough to attract workers).

132. *See* Joni Hersch, *A Workers' Lobby to Provide Portable Benefits*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 207, 207–11 (Richard B. Freeman et al. eds., 2005) (discussing possible funding problems with services that are partly public in nature, such as Working Today, the organization under which the Freelancers Union was formed).

133. Foster, *supra* note 11; INDEP. DRIVERS GUILD, *supra* note 11. This Article refers to the Independent Drivers Guild as "the Uber Guild."

134. Scheiber & Isaac, *supra* note 12.

135. *Id.*

136. *Id.*

137. *Id.*

138. Machinists Union, *About*, FACEBOOK, https://www.facebook.com/MachinistsUnion/about [https://perma.cc/U4UE-3WH4] (last visited Feb. 14, 2018). The IAM also represents workers in the federal sector. *Id.*

139. *Id.*

140. *About Us*, MACHINISTS UNION DISTRICT 15, http://www.iamdistrict15.org/#!about-us/c5ro [https://perma.cc/AV5R-943A] (last visited Feb. 14, 2018).

mission is "to negotiate agreements on behalf of its members containing the best possible wages, benefits and protections while continuing to discover ways to better the lives of [its] members outside of their collective bargaining agreements."[141] Additionally, District 15 is "continuously endeavoring to increase union density by organizing the unorganized through traditional and alternative methods of unionization."[142]

The creation of the guild follows a series of lawsuits alleging that the drivers should be considered employees of Uber instead of being classified as independent contractors.[143] The independent contractor classification used by Uber allows the company to keep labor costs low, and it also excludes the drivers from coverage under many labor and employment laws and regulations—including minimum wage and overtime provisions.[144] Independent contractors cannot form traditional unions.[145] The guild agreement with the IAM attempts to soften concerns from both drivers' groups and regulators regarding the company's labor model and classification of workers without formally allowing the creation of a union.[146] Moreover, the possibility of unionization has led Uber to enter into agreements with drivers that help ameliorate some of the mounting tension over workplace issues.[147] Uber had hoped to smooth relationships with the drivers after recent fare cuts and policy changes. According to Uber's chief advisor, the agreement was designed to "[i]mprove communication between Uber and our driver-partners; [p]rovide benefits without jeopardizing the independence and flexibility drivers love; and [g]ive drivers who have been barred from the app an additional voice in the deactivation appeals process."[148] This statement reveals the hope that the guild could provide a cooperative relationship that benefits both Uber and its drivers.

The guild was established for a five-year period. During those five years, "a group of drivers who are guild members will hold monthly meetings with Uber management in the city, where they can raise issues of concern."[149] In addition, "[t]he drivers will be able to appeal decisions by Uber to bar them from its platform, and can have guild officials represent them in their appeals."[150] The association also provides drivers with the option of purchasing discounted legal services, discounted life and disability insurance, and discounted roadside help for problems encountered while

141. *Id.*
142. *Id.*
143. *See supra* note 10.
144. *See supra* notes 106–08 and accompanying text.
145. *See* 29 U.S.C. § 152(3) (2012) (excluding independent contractors from the definition of "employee").
146. *See About Us*, *supra* note 140.
147. *See* Hesson, *supra* note 109.
148. David Plouffe, *David Plouffe Remarks on Creation of Independent Drivers Guild*, UBER (May 10, 2016), https://newsroom.uber.com/plouffe-idg-remarks/ [https://perma.cc/8HZ4-VRNX].
149. Scheiber & Isaac, *supra* note 12.
150. *Id.*

driving.[151] During the five-year duration of the guild, the IAM has stated that it will halt its efforts to unionize the drivers and will not encourage them to strike.[152]

However, the guild does not provide all of the benefits of a traditional union. Although the drivers will have more of a unified voice, as noted, they will not achieve formal union or employee status.[153] Guild members cannot bargain with Uber over contractual provisions concerning wage, benefits, or other protections.[154] Instead, the company will exclusively determine these provisions.[155] Nevertheless, Uber will receive more input from drivers when considering how to make these important determinations.[156]

But, in joining the guild, drivers have not waived any labor rights. If, during the term of the agreement, it is determined by a court that the drivers are employees, the IAM may still attempt to unionize the drivers.[157] The guild will also work with Uber to lobby for policies on which they agree.[158] Uber has declined to specify how much the company will pay to support the new group,[159] and the IAM plans to pay for some of the administrative costs of the organization.[160] Drivers that join the guild will not be required to pay any membership dues.[161]

In addition, Uber launched new features on its platform to further its attempts to ameliorate the frustrations voiced by many drivers. For instance, under these changes in Uber's mobile application, drivers are afforded the

151. Jing Cao & Eric Newcomer, *Uber and Union Agree to Form Drivers Guild in New York City*, BLOOMBERG (May 10, 2016), http://www.bloomberg.com/news/articles/2016-05-10/uber-and-union-agree-to-form-drivers-guild-in-new-york-city [https://perma.cc/9RDS-YX9Y]. According to the terms of the five-year agreement, Uber drivers will participate in regular meetings with Uber management, allowing drivers to discuss issues important to them. *IAM District 15 Announces Groundbreaking Deal with Uber in NYC*, INT'L ASS'N MACHINISTS & AEROSPACE WORKERS (May 12, 2016), http://www.goiam.org/news/iam-district-15-announces-groundbreaking-deal-with-uber-in-nyc [https://perma.cc/G9VX-G95V]. If drivers in New York City are "deactivated" by Uber, they will be able to appeal the company's decision. *Id.* Uber recently published a driver deactivation policy, which explains why a driver might be prohibited from driving for Uber. Plouffe, *supra* note 148. Additionally, in Seattle, Uber started a new appeals process where Uber partners hear the appeals of drivers who have been deactivated. *Id.* The goals of these actions are to increase transparency and accountability. *Id.* As part of the appeals process, drivers may now have guild officials represent them. Scheiber & Isaac, *supra* note 12. Drivers will also have access to various discounts, including legal services, life and disability insurance, roadside assistance, and education. *Id.*; *see also* Cao & Newcomer, *supra*. The guild's leaders are still working out some details of the agreement. Foster, *supra* note 11; *see* Kia Kokalitcheva, *Uber Strikes Deal with New York City Union to Create Driver Guild*, FORTUNE (May, 10, 2016), http://fortune.com/2016/05/10/uber-nyc-driver-guild/ [https://perma.cc/S6NY-3KSR].

152. Kokalitcheva, *supra* note 151.

153. Cao & Newcomer, *supra* note 151.

154. Scheiber & Isaac, *supra* note 12.

155. *Id.*

156. *See* Cao & Newcomer, *supra* note 151.

157. *Id.*

158. *Id.* These lobbying efforts are discussed in greater detail below. *See infra* Part IV.

159. Cao & Newcomer, *supra* note 151.

160. *Id.*

161. *Id.*

ability to pause rider requests for a coffee or bathroom break.[162] Drivers will also be paid for wait times that exceed two minutes[163] and, in some markets, can receive other discounts.[164] Moreover, drivers who are commuting may receive trip requests that occur only along their way home or to work.[165] Other changes include "in-app phone support, the ability to view earnings and be paid instantly from the app through an Uber debit card, and a fuel-finder function that allows drivers to find the cheapest gas nearby."[166]

Uber is hoping to build a relationship with its drivers through the guild.[167] According to Uber, the agreement is part of an ongoing effort by the company to work more closely with drivers who use the Uber platform.[168] The guild is purportedly a "win-win" for Uber and its workers—drivers receive a stronger voice while Uber prevents formal organization efforts and simultaneously adds a partner in its lobbying efforts for lower New York tax liability.[169] Uber hopes to change the New York State law that levies almost a 9 percent tax on black-car rides but not taxis, which face only a fifty-cent surcharge.[170] The IAM plans to assist Uber's efforts to lobby the state legislature to "treat all hired vehicles equally."[171] Uber has stated that if the law changes, the company's savings would flow to drivers and Uber would start a benefits fund that the guild would administer.[172] A successful change in this area could result in various potential new benefits for drivers, including paid time off and retirement savings accounts.[173]

Despite Uber's positive outlook for the guild, the company maintains that it is not seeking to replicate the concept outside of the city.[174] New York is a unique market for Uber since most drivers use the platform as a full-time (or close to full-time) employment opportunity.[175] Even though the guild may not be implemented in other areas, it could nonetheless form part of a larger strategy for building the new workforce in the gig economy.[176]

---

162. Faiz Siddiqui, *Uber Launches New Features Aimed at Improving Driver Experience*, WASH. POST (June 7, 2016), https://www.washingtonpost.com/news/dr-gridlock/wp/2016/06/07/uber-launches-new-features-aimed-at-improving-driver-experience [https://perma.cc/LUA8-P754].

163. *Id.*

164. *Id.* The company is experimenting with these discounts in several cities before deciding whether to make them permanent. *Id.* Uber provides these discounts to drivers by decreasing the commission percentage it takes out of a driver's fare. *Id.*

165. *Id.*

166. *Id.*

167. Plouffe, *supra* note 148.

168. *Id.*

169. Cao & Newcomer, *supra* note 151.

170. Scheiber & Isaac, *supra* note 12.

171. *Id. See generally* Anne E. Polivka, *A Profile of Contingent Workers*, MONTHLY LAB. REV., Oct. 1996, at 10.

172. Scheiber & Isaac, *supra* note 12.

173. *See generally id.*

174. *Id.*

175. *Id.* Note that when drivers use Uber as their primary source of employment, it increases the likelihood that they will be considered employees rather than independent contractors. *See* Corp. Express Delivery Sys., 332 N.L.R.B. 1522, 1522 (2000).

176. Scheiber & Isaac, *supra* note 12. The Independent Drivers Guild may stay in New York City exclusively for Uber drivers; however, there are hopes that the guild will spread to

Uber has also teamed up with the Freelancers Union to ensure better relations with drivers. Uber has stated that the "Freelancers Union, a longtime leader in advocating for independent workers, will advise Uber on how to best bring flexible benefits to independent workers in the on-demand economy."[177] These worker-friendly changes, along with the implementation of the guild, further Uber's objective of ameliorating the existing tensions with drivers while maintaining the company's platform, ideals, and cost structure.

G. Other Attempts at Quasi-Union Arrangements

The Uber Guild is a unique organization that has been tailored to fit the particular concerns raised by the structure of the working relationship of the company with its drivers. While limited, there have been other attempts to provide workers in non-gig sectors with benefits and representation outside of the traditional union setting. This Article sets forth two such examples below.

1. The GE Ombudsperson Process

Although many of General Electric's (GE) workers are represented by traditional unions,[178] the company has created an ombudsperson process for individuals to ask questions and report integrity concerns.[179] GE employs approximately 600 ombudspersons for all of its businesses.[180] GE workers become familiar with their local and regional ombudsperson through "frequent communications, articles and various Company intranet sites."[181] The GE ombudsperson process allows workers to voice their integrity questions and concerns, anonymously if they choose, and to avoid concerns over retaliation.[182]

Due to General Electric's global presence, ombudspersons "speak the local language and understand the culture and business environment of their locations."[183] Ombudspersons undergo training to learn "procedures for receiving concerns, initiating investigations and monitoring case progress and closure."[184] Furthermore, "[o]mbudspersons are introduced at all

other independent contractors in various locations. Foster, *supra* note 11. Although the future is unknown, the guild has sparked some positive reactions. *See id.* The New York state president of the AFL-CIO stated that the guild could become a "model for other states." Cao & Newcomer, *supra* note 151.

177. Plouffe, *supra* note 148.

178. *See generally Why Union?*, GEN. ELECTRIC WORKERS UNITED, http://www.geworkersunited.org/why [https://perma.cc/4B5A-E4TE] (last visited Feb. 14, 2018).

179. *GE Investors*, GE , http://www.ge.com/investor-relations/governance/ombudsperson-process [https://perma.cc/VU8F-ZPU3] (last visited Feb. 14, 2018). The ombudsman program has evolved since the research performed for this Article, and will likely continue to be refined by the company. *See generally id.*

180. *Id.*

181. *Id.*

182. Gen. Electric Co., Annual Report exhibit 14.2, at 3(Form 10-K) (June 2005).

183. *GE Investors*, *supra* note 179.

184. *Id.*

employee meetings within the businesses and regions, including integrity events and trainings."[185]

GE's website provides an online form to submit "an Ombuds concern" by filling out an integrity questionnaire.[186] In 2015, workers reported 3844 integrity concerns through the ombudsperson process.[187] All concerns raised go through the ombudsperson process, which includes an investigation.[188] The investigation process includes "assigning an investigation team," "conducting an investigation," "corrective action," and "feedback."[189] The process does not provide any formal union protections, but the ombudsperson program does provide clear benefits to employees. The company maintains that "[t]he GE Ombudsperson process allows [workers] to voice [their] integrity questions and concerns . . . and [they] will receive a response."[190] The goal of the "open reporting environment" is to encourage employees to report without fear of retaliation and for employees to "remain the Company's first and best line of defense for the early detection of potential compliance issues."[191] Each year, "fair employment practices" comprise the majority of concerns reported through the ombudsperson process.[192]

2. Volkswagen "Minority Union" Agreement

In 2014, the United Auto Workers (UAW) lost a union representation election at the Volkswagen (VW) Chattanooga plant in Tennessee.[193] In late 2014, VW implemented a "Community Engagement Program."[194] As part of the program, VW agreed to hold three meetings each month with the UAW despite the UAW's failed attempt to unionize VW's employees.[195] The meetings provide a "forum for the UAW to raise workplace issues, ranging from who works the graveyard shift to how much work the company gives lower-paid temps."[196] The policy attracted widespread media attention, with headlines that included "Minority Unionism (Sort of) Comes to VW

185. *Integrity & Compliance: A Strong Culture of Integrity*, GE, http://www.gesustainability.com/how-ge-works/integrity-compliance/a-strong-culture-of-integrity/ [http://web.archive.org/web/20160417014008/http://www.gesustainability.com/how-ge-works/integrity-compliance/a-strong-culture-of-integrity/].

186. *Raise an Ombuds Concern*, GE.COM, http://www.geenergyconnections.com/raise-ombuds-concern [https://perma.cc/9CAD-R5BV] (last visited Feb. 14, 2018).

187. *GE Investors*, *supra* note 179.

188. Gen. Electric Co., *supra* note 182.

189. *Id.*

190. *Id.*; *see also* 29 U.S.C. § 158(a)(2) (2012) (providing an exception to a company union ban: "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay").

191. *GE Investors*, *supra* note 179.

192. *Id.* The online report does not provide a specific definition as to what type of worker conduct or concerns would specifically fall under the umbrella of "fair employment practices." *See id.*

193. Josh Eidelson, *Union-ish: VW and UAW Are Odd Bedfellows at a Southern U.S. Plant*, BLOOMBERG BUSINESSWEEK, Feb. 19, 2015, at 21.

194. *Id.*

195. *Id.*

196. *Id.*

Chattanooga,"[197] and "Volkswagen's Sort-of Union in Tennessee."[198] The program thus immediately became controversial based on its structure and the benefits provided to workers as part of the policy.

The arrangement between the UAW and VW is a form of "unionization-lite" in which "VW certified that the UAW represents at least 45 percent of its hourly employees."[199] Under the program, groups that VW has certified as representing 15 percent or 30 percent of employees also meet with VW, but less often.[200] Labor activists hope that the arrangement will grow into a "minority union" arrangement, "where a union represents and negotiates contracts for those employees who sign up, whether or not it has majority support."[201]

The policy does not establish a "true minority unionism at Volkswagen."[202] The policy also does not include any actual bargaining obligations, and VW is only required to "meet" with the organizations to listen to their concerns.[203] In addition, the policy allows employees to "[d]iscuss and/or promote their interests."[204] Although the new policy does not establish a traditional union for workers, it does attempt to build a strong relationship between VW Chattanooga and its employees.[205] Although the door has not been opened all the way, labor leaders are hopeful that this policy might eventually grow into a "'minority union' arrangement."[206]

---

197. Benjamin Sachs, *Minority Unionism (Sort Of) Comes to VW Chattanooga*, ONLABOR (Nov. 12, 2014), https://onlabor.org/2014/11/12/minority-unionism-sort-of-comes-to-vw-chattanooga/ [https://perma.cc/SJ4L-4VCR].

198. Eidelson, *supra* note 193.

199. *Id.*

200. *Id.* The amount of access provided to VW management depends on the percentage of VW employees the organization represents. *See* Volkswagen, *Community Organization Engagement*, NASHVILLE PUB. RADIO, http://nashvillepublicmedia.org/wp-content/uploads/2014/11/Community-Organization-Engagement.pdf [https://perma.cc/PS7S-XH99] (last visited Feb. 14, 2018). The policy has three levels of opportunities and benefits available to organizations which is proportionate to the percentage of Volkswagen employees represented. Press Release, Volkswagen, Volkswagen Chattanooga Establishes Community Organization Engagement Policy (Nov. 12, 2014), https://media.vw.com/en-us/releases/396 [https://perma.cc/DK7S-A63H]. If an organization represents more than 15 percent of VW employees, it can use the company space for meetings and "[m]eet monthly with Volkswagen Human Resources to present topics that are of general interest to their membership." Volkswagen, *supra*. If the organization represents more than 30 percent of the workforce, it can "meet quarterly with a member of the Volkswagen Chattanooga Executive Committee." *Id*. Once the organization reaches more than 45 percent of the workforce, it can meet every month with the Executive Committee and biweekly with Human Resources. *Id.*

201. Eidelson, *supra* note 193.

202. Sachs, *supra* note 197.

203. *Id.*

204. Volkswagen, *supra* note 200, at 2.

205. Mike Pare, *Labor Groups Support New VW Policy as Volkswagen Opens Way for Talks, Meetings with UAW and ACE*, TIMES FREE PRESS (Tenn.) (Nov. 13, 2014), http://www.timesfreepress.com/news/business/aroundregion/story/2014/nov/13/labor-groups-support-new-vw-policyvolkswagen/273310/ [https://perma.cc/W5EZ-MR5S].

206. Eidelson, *supra* note 193. A "minority union agreement" would have to be limited to employees who agreed to have the union act as their representative; section 8(a)(2) prevents an employer like VW from reaching a broader agreement with a union that does not have support from a majority of employees in the relevant bargaining unit. *See* Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 737–38 (1961); *infra* Part III.

With the exception of the United States, China, and Russia, VW implements local "works councils" in its operations worldwide.[207] The works councils provide elected blue-collar employees to have a voice in management and company policies.[208] Although both the UAW and VW have embraced the idea of bringing the works-council model to the United States, federal law prohibiting "company-dominated" unions hinders such an arrangement.[209]

Despite the cooperative agreement between VW and the UAW, their relationship has cooled of late. In December 2015, a small group of VW workers—around 160 skilled tradesmen—voted in favor of UAW representation.[210] Shortly thereafter, the National Labor Relations Board (NLRB) certified the election results.[211] The UAW and VW have been embroiled in a dispute over how to proceed with union representation since the election.[212] VW appealed the decision to the NLRB and refused to recognize the skilled tradesmen as a collective bargaining unit while the appeal was pending.[213] The UAW then sued VW for unfair labor practices alleging that VW unlawfully refused "to negotiate on a labor contract with [the] newly formed bargaining unit."[214] The NLRB ultimately rejected VW's request to review the decision, but VW has yet to recognize the unit and begin labor negotiations.[215] In August 2016, the NLRB ordered VW to open bargaining talks with the unit.[216] However, instead of complying with the NLRB's order, VW chose to pursue an appeal through a federal appellate

207. Eidelson, *supra* note 193, at 1–2.

208. *Id.*

209. *Id.*; *see infra* Part III.

210. Mike Ramsey, *UAW Wins Vote at VW Chattanooga Plant as Some Workers Vote to Unionize*, WALL ST. J. (Dec. 7, 2015, 11:35 AM), http://www.wsj.com/articles/uaw-wins-victory-at-vw-chattanooga-plant-as-workers-vote-to-unionize-1449283820 [https://perma.cc/W9TZ-D2YM].

211. Mike Ramsey, *UAW Union of Skilled Tradesmen at Volkswagen Plant Is Official*, WALL ST. J. (Dec. 15, 2015, 10:27 AM), http://www.wsj.com/articles/uaw-union-of-skilled-tradesmen-at-volkswagen-plant-is-official-1450193233 [https://perma.cc/N3JN-3X5B].

212. William Boston, *VW and UAW to Meet for Talks on Car Maker's Chattanooga Plant*, WALL ST. J. (May 1, 2016, 7:40 PM), http://www.wsj.com/articles/vw-and-uaw-to-meet-for-talks-on-car-makers-chattanooga-plant-1462134557 [https://perma.cc/6V64-TDA4]; Ramsey, *supra* note 210; *see Who We Are*, UAW LOCAL 42, http://local42.org/who-we-are/ [https://perma.cc/9RWW-F9ZJ] (last visited Feb. 14, 2018).

213. Ramsey, *supra* note 211.

214. Mike Ramsey, *UAW Files Unfair Labor Practice Charge Against VW for Not Bargaining*, WALL. ST. J. (Dec. 22, 2015, 11:00 AM), http://www.wsj.com/articles/uaw-files-unfair-labor-practice-charge-against-vw-for-not-bargaining-1450800028 [https://perma.cc/CM35-HX4T].

215. William Boston, *No Progress for VW, Auto Workers' Union in Resolving U.S. Labor Dispute*, WALL ST. J. (June 9, 2016, 12:23 PM), http://www.wsj.com/articles/no-progress-for-vw-auto-workers-union-in-resolving-u-s-labor-dispute-1465474976 [https://perma.cc/583W-D5KY]; *see* Volkswagen Grp. of Am., Inc., 364 N.L.R.B. No. 110 (Aug. 26, 2016), 2016 WL 4548856, at *3; *see also* Reuters, *Auto Union Urges Volkswagen to Accept Labor Board Ruling on Chattanooga Plant*, FORTUNE (Sept. 1, 2016), http://fortune.com/2016/09/01/uaw-volkswagen-nlrb-tennessee/ [https://perma.cc/B35Y-BPJH] (discussing NLRB ruling).

216. Volkswagen Grp. of Am., Inc., No. 10-RC-162530, slip op. at 1 (N.L.R.B. Apr. 13, 2016), 2016 WL 1458535; Reuters, *supra* note 215.

court.[217] The D.C. Circuit remanded the case to the NLRB for reconsideration in light of a recent NLRB decision.[218]

III. HELPING EMPLOYERS HELP EMPLOYEES: WORKPLACE PARTICIPATION GROUPS

As previously discussed, quasi-union arrangements often benefit from the participation of traditional unions but can succeed independently of them. However, one quasi-union strategy that requires some degree of union participation or acquiescence is the expansion of "employee participation groups." These are groups that are housed at a specific workplace and that provide employees with a means to give input to their employers.[219] Many employee participation groups already exist but often operate illegally.[220] Unions could enhance their existence in many ways, although they have been resistant to such efforts thus far.

One of the Wagner Act's original provisions was a ban on "company unions." At the time, many employers created and dominated so-called "unions" that purported to represent employees but were often intended to weaken employees' desire and ability to seek truly independent representation.[221] To combat this problem, Congress added section 8(a)(2), which makes it unlawful for an employer to dominate or interfere with any labor organization.[222]

One of the key conditions for a section 8(a)(2) violation is that the work group at issue qualify as a "labor organization" as defined by section 2(5).[223] Under section 2(5), a group will be considered a labor organization if it has employee participation and its purpose is to deal with an employer over terms and conditions of work.[224] The NLRB has expansively interpreted section 2(5), particularly the requirement that a labor organization have the purpose

217. Reuters, *Volkswagen Is Challenging UAW's Union Strategy*, FORTUNE (Sept. 26, 2016), http://fortune.com/2016/09/26/volkswagen-uaw-union/ [https://perma.cc/HE6H-BR6A].

218. Volkswagen Grp. of Am., Inc. v. NLRB, No. 16-1309, slip op. at 1 (D.C. Cir. Dec. 26, 2017).

219. For examples of these groups, see *infra* notes 237–38 and accompanying text.

220. *See infra* note 237 and accompanying text.

221. *See* Electromation, Inc., 309 N.L.R.B. 990, 992–94 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); Samuel Estreicher, Essay, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 129–33 (1994); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 174–76 (1993).

222. 29 U.S.C. § 158(a)(2) (2012) (making it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization").

223. *Id.* § 152(5) (defining "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work").

224. *Electromation*, 309 N.L.R.B. at 994 (concluding that group will be "a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment").

of "dealing with" an employer. According to the NLRB, "dealing with" is defined as a bilateral process or a "pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required."[225] Moreover, under NLRB jurisprudence, a group can be a labor organization even if it lacks a formal structure; has no elected officers, bylaws, regular meetings, or dues; and its discussions with an employer fall far short of traditional collective bargaining.[226] As discussed below, section 2(5) has far-reaching effects on nontraditional worker groups,[227] including the result that an employer cannot provide any support to or exercise control over a group considered a labor organization without violating section 8(a)(2).[228] However, employers could lawfully form or support a group made up of workers who are not classified as employees under the NLRA; thus, independent contractors and other similarly situated gig workers have an opportunity for cooperation with their employers that workers classified as employees lack.

The general debate over section 8(a)(2) and calls for its reform are well known.[229] This Article does not revisit this discussion; instead, it argues that section 8(a)(2) represents another area in which a more cooperative approach could be beneficial to unions—not to mention employees and employers. Unions have strongly objected to attempts to narrow section 8(a)(2)'s reach,[230] but reconsideration of that stance may now be appropriate.

Surveys have demonstrated that there is an unmet demand for employee voice (or participation) at work.[231] Employees overwhelmingly want more opportunities to provide input on business operations and to discuss working conditions with their employers.[232] Employers also frequently recognize the value in certain types of employee participation, particularly as the economy relies more on jobs that require independent thinking.[233] For instance,

225. E. I. Du Pont De Nemours & Co., 311 N.L.R.B. 893, 894 (1993); *see also Electromation*, 309 N.L.R.B. at 995 n.21 (concluding that "dealing with" exists when there is "a bilateral mechanism involving proposals from [an] employee committee concerning the subjects listed in Sec[tion] 2(5), coupled with real or apparent consideration of those proposals by management").

226. *See Electromation*, 309 N.L.R.B. at 993–94 (concluding that the legislative history of section 8(a)(2) required a broad interpretation of "labor organization" in order to ban "employee representation committees," which had little formal structure); *see also* Sahara Datsun, Inc. v. NLRB, 811 F.2d 1317, 1320 (9th Cir. 1987).

227. *See infra* Part IV.A.2.

228. *See E. I. Du Pont*, 311 N.L.R.B. at 897–98; *Electromation*, 309 N.L.R.B. at 995.

229. *See* Hirsch & Hirsch, *supra* note 127, at 1152–67 (describing this issue).

230. *See* Johanna Oreskovic, *Capturing Volition Itself: Employee Involvement and the TEAM Act*, 19 BERKELEY J. EMP. & LAB. L. 229, 276, 278 (1998).

231. *See, e.g.*, RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 32–33, 81–84 (1999); Oreskovic, *supra* note 230, at 247–49.

232. *See* Estlund, *supra* note 50, at 463–90 (arguing that workers still have significant need for collective voice, despite an increase in individual protections).

233. *See* Matthew T. Bodie, *Workers, Information, and Corporate Combinations: The Case for Nonbinding Employee Referenda in Transformative Transactions*, 85 WASH. U. L. REV. 871, 900 (2007) (stating that employees can provide valuable information to employers); Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 804–09 (2011) (discussing the benefits of

employee input can improve productivity and morale, as well as provide a better way to address workplace grievances.[234] As a result, many—although certainly not all—managers have expressed their support for allowing some form of employee voice in the workplace.[235]

Although the desires of employers and employees are not always congruent—an employer may want employee input on production operations but not on working conditions—there is often enough overlap that some increase in employee participation and voice could be achieved. That is, of course, if section 8(a)(2) did not prohibit most employee participation groups. The breadth of section 8(a)(2), or more specifically the breadth of section 2(5)'s definition of a "labor organization" that an employer is not allowed to dominate or support, allows for little experimentation—it is largely a choice between traditional union representation or nothing at all.[236] Because employers will often take the lead in organizing these groups, section 8(a)(2)'s expansive reach means that these groups cannot be created lawfully. The result is an unmet demand for employee participation and voice. However, this unmet demand is not as dire as it initially seems.

Despite the potential of an unfair-labor-practice finding, it appears that employers frequently use employee participation groups that may violate section 8(a)(2)—likely reflecting the potential advantages for employers and the weak remedies found in the NLRA.[237] There is significant variety in the

---

employee collective voice); *see also* Estreicher, *supra* note 221, at 135–39 (stating that employees can provide valuable information to employers).

234. For discussions of possible productivity and related advantages, see FREEMAN & ROGERS, *supra* note 231, at 131–35; Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 885–90, 927 & n.826 (1994); Hirsch & Hirsch, *supra* note 127, at 1154–55 (discussing the potential gains). For possible employee-related benefits, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1541–42 n.69 (2002) (citing Gregory R. Watchman, *Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA*, 4 CORNELL J.L. & PUB. POL'Y 65, 82–89 (1994)) (discussing the safety benefit); Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT'L L.J. 373, 431 (2000) (same); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 133–35 (1993). For grievance process advantages, see FREEMAN & ROGERS, *supra* note 231, at 164–67; Hyde, *supra* note 221, at 152–54.

235. *See* FREEMAN & ROGERS, *supra* note 231, at 131–35 (describing survey results showing managerial support); Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 198–200 (2001). *But see* DAVID I. LEVINE, REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN 63 (1995) (noting that "[m]any middle- and lower-level managers resist and sometimes sabotage employee involvement" because greater employee autonomy "may be threatening to supervisors and managers").

236. *See* Estlund, *supra* note 234, at 1546. Some exceptions exist, such as where an employer gives an employee group virtually full decision-making authority over certain topics. *See* Crown Cork & Seal Co., 334 N.L.R.B. 699, 699 (2001). But employers will often be reluctant to delegate this degree of control to employees.

237. *See* FREEMAN & ROGERS, *supra* note 231, at 119, 120; LEVINE, *supra* note 235, at 7 (citing a 1990 study of Fortune 1000 companies); Orley Lobel & Anne Marie Lofaso, *Systems of Employee Representation: The US Report*, *in* SYSTEMS OF EMPLOYEE REPRESENTATION AT THE ENTERPRISE: A COMPARATIVE STUDY 205, 208 (Roger Blanpain et al. eds., 2012) (citing studies); Estlund, *supra* note 50, at 468; John Godard & Carola Frege, *Labor Unions*,

form that these groups can take, as well as in the amount of employee participation and topics they consider, such as self-managed employee teams and quality circles that focus on production rather than work conditions; quality of work or employee-action committees that often focus on safety, grievances, and other human resource issues; employee caucuses that promote better work conditions; and profit-sharing groups, like employee stock ownership plans, that usually lack decision-making authority.[238] Many of these groups appear to involve input about working conditions and—perhaps not surprisingly, given that one would expect less hostile employers to be more open to meaningful employee input—employees generally have favorable views of the groups.[239]

Expanding the opportunity for employee participation groups, in addition to removing the specter of illegality on those that currently exist, is challenging but certainly not hopeless. Because many employers want some form of employee voice—enough so that many willingly violate the law to get it—the normal alliances are turned upside down. It is largely unions that oppose reform, while employers are more aligned with the general sentiment of employees. That is not to say that unions and others who oppose weakening section 8(a)(2) have no justification for their position; the potential harm of company unions and the risk that even more benevolent employee participation groups may create a misleading façade of participation is quite real.[240] But the unusual alignment between employees and employers on this issue produces a potential for compromise.

Unions need to ask themselves how much they really object to section 8(a)(2) reform. In particular, they should consider whether acceding to some changes in section 8(a)(2) could provide benefits that outweigh the feared costs of reform. Those benefits could come in the form of other legislative changes as well as the ability to promote a more cooperative image and relationship with other labor law actors.

Alternative Forms of Representation, and the Exercise of Authority Relations in U.S. Workplaces, 66 ILR REV. 142, 151–52 (2013) (showing that approximately one-third of surveyed nonunion employees report some form of employer-created representation group); Bruce E. Kaufman, *Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729, 747, 776–77 (1999) (describing evidence showing that some employers knowingly operate legally suspect employee participation groups because of weak penalties and low risk of section 8(a)(2) violation). *But see* Kaufman, *supra*, at 753, 777–78 (describing managers who want to avoid section 8(a)(2) litigation and give unions an opportunity to file unfair labor practice charges).

238. Lobel & Lofaso, *supra* note 237, at 224; *see also* Estreicher, *supra* note 221, at 127 (describing different types of employee participation groups).

239. *See* Godard & Frege, *supra* note 237, at 153.

240. *See* Electromation, Inc., 309 N.L.R.B. 990, 992–94 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); Estreicher, *supra* note 221, at 129–33; Hyde, *supra* note 221, at 174–76 (discussing the possible rationales of section 8(a)(2)); Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1661–62 (1999) (noting that many early twentieth-century employee participation groups were progressive, but other employers created such groups in anticipation of federal labor legislation and in the hopes of barring independent unions from the workplace).

If a compromise on section 8(a)(2) reform occurred—a political long shot, to be sure—what might it look like?[241] There is general agreement that the prohibition against the most pernicious of company unions, such as sham organizations that employers use to prevent independent unions or to trick employees into believing that they have real representation, should be maintained.[242] But section 8(a)(2) bans organizations that fall short of that concern, leaving ample room for far more narrow coverage that would still respect the provision's central policy concerns.[243] This would be especially true if an employer's ability to create an employee participation group was tied to the lack of significant labor law violations.[244]

Unions have opposed narrowing section 8(a)(2) in part because of their fear that employer-initiated employee participation groups will compete with traditional unions and mislead employees regarding the actual independence of their representation.[245] Those fears are not unfounded, but they may be exaggerated and stand in the way of an opportunity worth pursuing. The risk of employees being misled about the true nature of their representation is a serious concern, but one that could be addressed by adding information requirements to a limited reform measure—such as requiring employers that use employee participation groups to inform workers of employer involvement and their right to join an independent union.

Moreover, it is difficult to believe that allowing more employer-initiated employee groups would make union density drop substantially below its current historical low. To the contrary, there are valid arguments that the expansion of these groups would actually lead to greater unionization. For instance, employee participation groups might spur more interest in traditional unionization as employees have positive experiences with

---

241. Duff, *supra* note 51, at 875–76 (proposing a union-employer compromise).

242. For instance, the Republican-introduced TEAM Act would have created a proviso to section 8(a)(2) stating that it is not unlawful:

> for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees who participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except . . . a case in which a labor organization is the representative of such employees as provided in section 9(a).

Teamwork for Employees and Managers Act, H.R. 743, 104th Cong. (1996). The House and Senate passed the TEAM Act, which President Clinton vetoed. *See* 142 CONG. REC. H8816 (daily ed. July 30, 1996).

243. *See* Hirsch & Hirsch, *supra* note 127, at 1158–59; *see also* Estlund, *supra* note 50, at 486 (arguing for a legislative "co-regulation" program, which would include collective participation of employees and for employers that self-regulate in good faith); Estreicher, *supra* note 221, at 150 (proposing a change to section 2(5)'s definition of "labor organization").

244. Estlund, *supra* note 50, at 489.

245. *See* Jonathan P. Hiatt & Laurence E. Gold, *Employer-Employee Committees: A Union Perspective*, *in* NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 498, 507–08 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000).

collective participation in the workplace.[246] As a result, these groups could represent potential organization targets for unions.[247] Employee participation groups could also spur unions to improve, which may make them more attractive to employees.[248] Indeed, most other countries with developed labor laws lack section 8(a)(2)'s prohibition against nonunion employee participation groups yet have union density rates that are far greater than what is found in the United States.[249] Many countries also require employee representation in some form.[250] As a final matter, the reality is that many of these groups already exist (often illegally),[251] so it is unclear how much advantage flows to unions by keeping the broad but weak section 8(a)(2) unchanged.

Unions, of course, are well aware of these considerations and still believe that the uncertainties of section 8(a)(2) reform outweigh the need to change a status quo that does not appear to have hurt them. But the potential benefits of cooperation may be a less obvious, or at least more discounted, factor. In addition to the potential gains resulting from a hypothetical legislative compromise, unions could see benefits flow from a less hostile stance toward employee participation groups. For instance, employers' resistance to unionization could decline if they have a positive experience with an employee participation group.[252]

---

246. *See* Barenberg, *supra* note 234, at 831–35 (discussing pre-NLRA company labor organizations that subsequently developed into traditional, independent unions); Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 145 (2003) ("The steel unions and the National Education Association . . . evolved in part from company unions."); LeRoy, *supra* note 240, at 1702, 1710–11; Summers, *supra* note 234, at 138 (arguing that employers' ability to fight unionization under current law may be reducing employees' stated preferences for traditional unions and that reducing that hostility may increase the taste for traditional unionization); *see also* Hyde, *supra* note 221, at 160 (arguing that work groups might lead to unionization and may allow some form of union representation in workplaces where there is not majority support for the union).

247. *Cf.* Kaufman, *supra* note 237, at 805–08 (arguing that Canada's union density advantage over the United States is due, in part, to traditional, independent unions co-opting employer-initiated work groups).

248. Estlund, *supra* note 234, at 1544, 1551, 1601 (arguing that employee work groups could spur innovation among unions); *cf.* Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. PA. J. LAB. & EMP. L. 651, 681–88 (2006) (arguing that increased interunion competition will lead to increased union membership).

249. *See* Charter of Fundamental Rights of the European Union art. 27, 2012 O.J. C 326/391, at 401; Samuel Estreicher, *Nonunion Employee Representation: A Legal/Policy Perspective*, *in* NONUNION EMPLOYEE REPRESENTATION, *supra* note 245, at 196, 196; Dau-Schmidt, *supra* note 233, at 811–19 (discussing "coordinated market economies," like Germany and Japan, that involve labor in corporate decision-making and noting that German-style codetermination is part of several EU directives).

250. Estlund, *supra* note 50, at 468.

251. *See supra* Part II (discussing various alt-labor arrangements).

252. Employers in countries that encourage or require employee work groups typically have favorable, or at least lack an unfavorable, view of these groups. *See* Summers, *supra* note 234, at 132–33; *see also* CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 177–231 (1988); LEVINE, *supra* note 235, at 3–4, 115–21. This does not necessarily translate into support for traditional, independent unionization, but it cannot hurt and would likely reduce resistance in many instances.

In the unlikely event that legislative reform is possible,[253] unions need not—indeed, should not—open the door to section 8(a)(2) reform unconditionally. For instance, narrowing section 8(a)(2) in exchange for allowing the NLRB to issue fines, which is particularly important in cases that do not involve direct financial harm, may be a worthwhile tradeoff for unions. Similarly, strengthening enforcement against unlawful terminations, expanding unions' organizing capabilities (such as increasing access to employees and decreasing election delays), and developing more types of injunctive relief could also be bargaining chips.[254] Some employer groups may be open to these types of trade-offs, especially representatives of the largest employers, which are better able to create and enjoy the benefits of employee groups. This sweet spot may be illusory, but it is certainly an effort worth pursuing.[255]

If, as is likely in the short term, legislative reform is unattainable, unions could help implement de facto reform. For employers that are interested in employee input and participation and that are not overly hostile to union involvement, a potential compromise exists: an employer can avoid section 8(a)(2) liability if its employee group is created or partially run by an outside union or other employee group.[256] The most straightforward means of achieving this status is the voluntary recognition of a union that has agreed to limit its bargaining rights with a prerecognition framework agreement.[257] That option has its limits, primarily because many employers will not be willing to recognize a union simply to avoid a potential section 8(a)(2) violation that has little cost.

But there are alternatives such an arrangement. For instance, unions or quasi-union entities could help establish employee work groups in places where there are no formal collective-bargaining representatives. If the

253. An example of unions shifting their legislative priorities to work with employers is immigration reform. This is not a perfect comparison but one that suggests a possible realignment.

254. Estreicher, *supra* note 221, at 155; Hirsch & Hirsch, *supra* note 127, at 1163–64; Weiler, *supra* note 235, at 189–90, 205–06; *see also* Dau-Schmidt, *supra* note 233, at 825, 827, 830–31 (arguing for requiring employee representation on corporate boards of directors, electing employee committees that consider certain issues, and eliminating exclusive representation requirement).

255. In a similar vein, unions may have been better off giving up card-check recognition under the Employee Free Choice Act and "settling" for the other important provisions of the bill, such as fines and mandatory first contract arbitration.

256. *See generally supra* Part I (discussing the union approach at Volkswagen).

257. A prerecognition framework agreement is an agreement between a union and an employer that outlines basic principles that will govern their future relationship if the union eventually gains support from a majority of employees. Often, these agreements will include promises by the employer to remain neutral during a union campaign or to voluntarily recognize the union if it gets majority support. The NLRB recently clarified when such frameworks are allowed. Dana Corp., 356 N.L.R.B. 256 (2010) (noting the factors to determine whether agreement represents unlawful employer support under section 8(a)(2)), *enforced sub nom.* Montague v. NLRB, 698 F.3d 307 (6th Cir. 2012); *see also* Samuel Estreicher, Essay, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 834–39 (1996); Martin H. Malin, *The Canadian Auto Workers-Magna International, Inc. Framework of Fairness Agreement: A U.S. Perspective*, 54 ST. LOUIS U. L.J. 525, 530 (2010).

employer does not create an employee group or otherwise unlawfully support it, section 8(a)(2) is not implicated.[258] Moreover, unions—or a quasi-union like Working America—could simply provide information and assistance to employees interested in gaining more input at work. If these employees work for a firm that is sympathetic to increased employee voice, the employer can agree to discuss issues once the group is formed. As long as the employer does not recognize the group as a collective-bargaining representative and does not provide other unlawful domination or interference, there will generally be no section 8(a)(2) violation.

Whether unions will rethink their opposition to section 8(a)(2) reform remains an open question. But they need not go as far as supporting legislation to test the waters. Exploring opportunities to support employee participation groups could provide unions with more control over groups that already exist, remove some uncertainty about the effects of these groups, and provide opportunities for more cooperation with employers. These possible effects, in addition to others discussed, hold promise for unions and near-certain benefits for the largest employers who want more participation and voice in their workplaces.

If unions do not explore these options, they may find that the ship will sail without them. The desire of both employees and many employers to permit more voice at work can certainly enjoy the aid of unions but may not need unions to expand such opportunities. For instance, Professor Cynthia Estlund has discussed the possibility that corporate employers will internalize support for workplace democracy, much as they have done for diversity efforts.[259] As she rightly notes, however, employer antipathy for organized labor means that corporate citizenship will never embrace workers' right to voice if it is tied exclusively to the process of formal unionization.[260] Instead, nonunion groups, such as progressive companies and coalitions of quasi-unions, are more likely to play the primary role in changing corporate culture to favor workplace democracy.[261] Unions can and should be involved with such efforts, but it will require them to put their traditional collective bargaining interests to the side at times.[262] If they fail to do so and other groups successfully push corporations to internalize workplace democracy, then unions risk further marginalizing themselves.

---

258. Nonunion groups could also perform similar functions, although unions are likely to be more effective. *Cf.* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 179 (2010); Cynthia Estlund, *Employment Rights and Workplace Conflict: A Governance Perspective*, *in* THE OXFORD HANDBOOK OF CONFLICT MANAGEMENT IN ORGANIZATIONS 53, 70 (William K. Roche et al. eds., 2014) (arguing in favor of a coregulation scheme while noting union advantages).

259. *See* Estlund, *supra* note 48, at 179–80.

260. *Id.* at 180.

261. *See id.* at 179.

262. Moreover, these efforts can face additional difficulty without a consistent source of funding. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 93 (2016) (noting that the lack of membership dues or other sources of funding limits unions' ability to indefinitely support nonexclusive membership efforts); Hersch, *supra* note 132, at 207–08.

The strength of employees' desire for workplace voice, and the desire of many employers to listen to their employees, makes the possibility of increased workplace democracy real. A significant number of employers are using worker participation groups, even though many of them are illegal under section 8(a)(2).[263] Moreover, attempts to repeal section 8(a)(2) have already come close to succeeding.[264] Thus, it would be no surprise to see legal change in this area. The question is how such change will occur. Will unions continue to fight any modification of the employee participation rules, or will they try to influence the direction of future reform? Will quasi-unions see workplace democracy as a goal worth the fight? Employers seem to have already concluded that workplace voice should be expanded and, given the current political environment, the chances are that they will ultimately be able to effect change. Unions and other proemployee groups should ensure that they have influence over that process. If not, the resulting law may be as bad as some of them fear and fail to accomplish the hopeful goals that workplace democracy promises.

IV. THE KNIFE'S EDGE: NAVIGATING THE LEGAL BOUNDARIES OF TRADITIONAL AND NONTRADITIONAL WORKER REPRESENTATION

Given the currently poor prospects for traditional union collective bargaining, organizations that serve employees through other means may hold particular promise. Although generally not an equal substitute for unions' advocacy and influence over working conditions, these quasi-union worker representation organizations can still provide benefits to employees through other means, such as the provision of services, sharing useful employment-related information, and assisting employee attempts to engage in collective activity.[265] They might also breathe some new life into organized labor. If the Wagner model of collective bargaining has been failing workers and unions, then seeking alternatives could help both groups.

The problem with traditional organizing and collective bargaining has not gone unnoticed by unions,[266] which have increasingly explored new ways to organize and represent workers. For example, the Service Employees International Union (SEIU) implemented a successful Justice for Janitors campaign in Southern California by focusing heavily on the workers' Mexican culture and seeking assistance from local religious and political

263. *See* Tara Mahoney & Allison Drutchas, *Could Your Employee Participation Program Be Illegal? Two Laws You Should Know*, SOC'Y HUM. RESOURCE MGMT. (June 9, 2016), https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/could-your-employee-participation-program-be-illegal.aspx [https://perma.cc/RF6S-AR6L] (providing examples of illegal employee participation programs).

264. *See* Whitney, *supra* note 17, at 1510 ("Both narrowing and repealing sections 8(a)(2) directly were . . . proposed by scholars in the 1990s.").

265. *See* Secunda, *supra* note 15, at 579–81. One limited—and less cooperative—example is coworker.org, which assists worker attempts to organize coworkers to make demands on their employers and which, among other things, provides access to similar attempts in the same industry, region, and other divisions. *See id.* at 575–77.

266. *See supra* Part II.

leaders.[267] As part of that effort, the SEIU also used a public relations campaign that took advantage of the fact that many of the janitorial companies' clients were well-known retailers. By leading highly publicized demonstrations and boycotts against clients like Apple, the union was able to exert more pressure on the primary employer than would normally be possible.[268] But a more radical change in strategy may be warranted.

As the Uber Guild and other examples show, quasi-union worker representation groups can achieve gains for workers by being more service oriented toward members and working with employers to find ways to achieve gains for both employers and their workers.[269] Cooperative strategies will not always be successful or appropriate, but these nontraditional groups are particularly suited to take advantage of instances where they would be beneficial.

By providing previously unorganized workers with some level of voice and representation, nontraditional groups could provide significant opportunities for this large segment of the workforce. The degree of voice and representation may be less than what would occur under a formal, traditional collective-bargaining relationship, but in most cases nontraditional representation will produce far more benefits for workers than currently exist. This is especially true for the many contingent workers in technology and other fields, like Uber drivers, who may not be classified as employees under workplace statutes. For these workers, as well as the vast majority of employees who are not unionized, their only opportunity for input on their work conditions exists at the whim of their employers. Finding ways to fill the gap between workers' overwhelming desire for voice[270] and the current dearth of such opportunities should be a central priority for the labor movement.

Beyond the direct advantages to providing workers with voice and representation, nontraditional strategies might provide long-term gains for collective representation generally. As discussed earlier, the labor movement is suffering through a serious public relations problem, which has contributed to a sharp decline in unionization rates and increased legislative and judicial

267. *See* STONE, *supra* note 128, at 224–25; Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 496–97 (2002).

268. *See* Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the Twenty-First Century?*, *in* THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION 22, 29 (Phanindra V. Wunnava ed., 2004); Whitney, *supra* note 17, at 1479–80 (describing consumer-based campaigns for workers); *see also* Estlund, *supra* note 234, at 1604–06 (discussing union "corporate campaigns"); Hyde, *supra* note 267, at 497.

269. Professor Matthew Bodie has been among those who have argued for unions to adopt an approach similar to the service model approach, which convinces employees that their services are worth the costs. *See generally* Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1 (2008). Bodie has focused his suggestion on traditional collective bargaining, but his argument is equally, if not more, applicable to nontraditional worker representation.

270. *See supra* note 231 and accompanying text.

barriers to organizing.[271] Although it is unlikely that any strategy can substantially reverse these trends, increasing the number of workers who have experience with some form of collective bargaining is likely to help. These workers, as well as their friends and families, may acquire a "taste" for collective representation that could lead to higher unionization rates and more nontraditional representation.[272] Additionally, if these nontraditional representation strategies prove beneficial for employers, or even less negative than they feared, then employer opposition to unions and other types of worker representation may shrink to some extent.[273] More generally, as employers and workers gain a better view of workplace representation, the general public may be less solicitous of political attacks against unions and other proworker efforts.

Beyond these strategic issues, however, is the impact of the law on worker representation groups. Because nontraditional quasi-unions straddle the line between traditional unions and nonlabor membership organizations, the legal restrictions that apply are often unclear. This lack of clarity typically results from the difficulty in determining whether a quasi-union should be classified as a labor organization, with the answer imposing significant legal consequences that will sharply affect the type of activities that the group can lawfully pursue. For instance, groups that are not considered labor organizations can avoid many burdensome regulations governing traditional unions and can take advantage of certain types of pressure on employers that unions are prohibited from pursuing. At the same time, avoiding the labor organization classification restricts groups' ability to represent workers and potentially exposes them to antitrust liability.[274] In other words, nontraditional groups act on a knife's edge, on which a move in one direction can expose them to significant monetary or even criminal liability, while a move in the other direction makes them more like traditional unions and the shortcomings that such a designation entails.

The modern economy holds great promise for nontraditional worker groups, but as we discuss below, the law has not kept up with changes in the technology sector and other similar industries. Given the current political climate, it is not realistic to hope for legislative reforms; thus, nontraditional groups must be cognizant of the legal consequences of their actions and shape their organizational and representational strategies accordingly.

A. Potential Advantages of Nontraditional Strategies

There are various legal advantages to nontraditional representation strategies over more formal union representation, particularly for workers in the technology sector. These advantages generally stem from the possibility that most of these groups would avoid classification as a "labor organization"

---

271. *See supra* notes 39–40 and accompanying text.
272. *See supra* note 246 and accompanying text (discussing scholarship on this issue).
273. *See supra* notes 263–64 and accompanying text.
274. *See infra* Parts IV.A and IV.B (addressing potential advantages and drawbacks of nontraditional organizations).

under the NLRA.[275] For example, groups that are not classified as labor organizations under the statute can receive support from an employer without violating section 8(a)(2).[276] In other words, groups that do not engage in bilateral bargaining over wages, hours, and terms and conditions of employment can currently provide workers with some degree of representation with an employers' acquiescence. Although not all employers will be willing to engage in this type of bargaining, for those that are, this quasi-union strategy provides workers with some degree of representation as well as the opportunity to engage in a more cooperative relationship with the employer.

Despite its nontraditional nature, many of these quasi-unions may still enjoy traditional legal protections. For instance, although the NLRA's section 8(a)(1)[277] antiretaliation protection for employee collective action is typically associated with union activity, it also applies to nonunion employee attempts to act together to improve their working conditions.[278] Thus, even nonunionized employees who work with nontraditional groups or engage in activities to further their interests as employees will remain protected. However, workers who are not classified as employees lack this NLRA protection. For these workers, collective action remains a serious threat to their job status. This lack of protection can be a significant impediment to collective action, but it also illustrates the importance of efforts like the Uber Guild, which provide a more cooperative—and less risky—strategy for collective representation.

Acting outside of the traditional legal framework can have potential liabilities,[279] but there are numerous benefits as well. In particular,

---

275. *See* 29 U.S.C. § 152(5) (2012); Duff, *supra* note 51, at 866 (arguing that a practical test for alt-labor groups consists of "(1) how a particular group explicitly defines its purpose, (2) a fact-finder's inference of 'dealing with' purpose drawn from the group's actions, and (3) whether the group's actions arguably permitting an inference of 'dealing with' purpose implicate constitutionally-protected conduct" (footnote omitted)); *supra* notes 223–26 and accompanying text. *But see* U.S. CHAMBER OF COMMERCE, THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORK CENTERS 2 (2014), https://www.uschamber.com/sites/default/files/documents/files/wfi_worker_center_study_-_new_model_of_representation._final_version_downloaded_2.20.14.pdf [https://perma.cc/9PTM-UX7X] (arguing that many work centers should be classified as traditional unions).

276. *See supra* Part III. Of course, there may be a risk that an employer could attempt to use such a group as a "sham union," but that risk is mitigated by limits on nonlabor organizations' power to bargain under current law. Even if section 8(a)(2) was amended to allow for more bargaining, limits on that expanded bargaining could protect against abuses. *See supra* Part III.

277. 29 U.S.C. § 158(a)(1) (2012). Section 7 of the NLRA protects employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157. These section 7 rights are enforced through section 8(a)(1), which states that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of [their section 7] rights." *Id.* § 158(a)(1).

278. *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–17 (1962) (holding that an employer violated section 8(a)(1) by firing nonunionized employees who participated in a walkout); Hirsch & Hirsch, *supra* note 127, at 1162.

279. *See infra* Part IV.B.

nontraditional groups may be able to avoid some of the more restrictive limits placed on traditional unions. Three of the most significant of these restrictions are possible limits on agreements with employers, recordkeeping and structural organizational requirements, and prohibitions against various types of employer pressure.

1. Avoiding Section 302 Attacks on Cooperative Agreements

Nontraditional groups whose actions put them outside of section 2(5)'s definition of a labor organization will have greater freedom to cooperate with employers. In particular, these quasi-unions will likely be able to avoid certain legal challenges to any agreements they secure with employers. Chief among these challenges is the claim that an agreement violates section 302 of the Labor Management Relations Act (LMRA or "Taft-Hartley Act").[280] Antilabor organizations and workers have been increasingly using this provision to attack agreements between unions and employers.

Under section 302(a), it is unlawful for an employer to provide "any . . . thing of value" to a labor organization or representative of its employees.[281] This provision is primarily intended to prohibit employer bribes of union officials,[282] but dissenting employees, often acting with antiunion groups, have used private rights of action under section 302 to argue for an expansion of its scope.[283] This expansive interpretation of section 302 could be a significant barrier to traditional union organizing and, in turn, represent an advantage of nontraditional representation efforts.

The recent section 302 strategy centers on the argument that this provision extends beyond traditional bribery and extortion to include actions such as an employer promise to a union that it will remain neutral in an organizing

---

280. 29 U.S.C. § 186.

281. *Id.* § 186(a). This provision states that:

> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; . . . .

Id.

282. Toth v. USX Corp., 883 F.2d 1297, 1300 (7th Cir. 1989) ("[A] central purpose of section 302 . . . was to prevent employers from bribing union officials."); Turner v. Local Union No. 302, 604 F.2d 1219, 1227 (9th Cir. 1979) ("The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers.").

283. *See* Nicholas M. Ohanesian, *Does "Why" or "What" Matter: Should Section 302 Apply to Card Check Neutrality Agreements?*, 45 U. MEM. L. REV. 249, 250–53, 257–61 (2014) (discussing the history of section 302 through *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (2013) (per curiam)). Whether that private right of action still exists is more of an open question. *See infra* note 294. However, violations of section 302 are also considered criminal and may be a felony. 29 U.S.C. § 186(d) (outlining criminal penalties).

campaign; that it will voluntarily recognize the union if it achieves majority support; or that it will abide by other ground rules, such as providing access to the employer's premises.[284] In the past, courts have rejected claims that such promises are a "thing of value" under section 302.[285] However, in *Mulhall v. Unite Here Local 355*,[286] the Eleventh Circuit appeared to open the door to such claims. In *Mulhall*, the court held that an employer's promise to remain neutral during organizing drives,[287] among other assistance, could be considered a "thing of value."[288]

Union opponents heralded the *Mulhall* decision as a legal tool to attack the use of neutrality and similar agreements between employers and unions, especially after the Supreme Court agreed to hear the case.[289] Unions, in turn, were alarmed by *Mulhall*—so much so that they also sought certiorari.[290] However, both sides may have placed too much weight on the Eleventh Circuit's decision; while it certainly opened the door wider to section 302 claims, the court also seemed to limit potential liability to employer promises that amounted to corruption or extortion.[291] That said, the fact that the Supreme Court agreed to hear the case raised a genuine possibility that it would help usher in a new type of attack on union organizing.

Despite its promise as a potential labor law blockbuster, *Mulhall* ultimately ended with a whimper when the Court dismissed the case as improvidently granted.[292] Nevertheless, as the Supreme Court maintains—and potentially

284. *See, e.g.*, Mulhall v. Unite Here Local 355, 667 F.3d 1211, 1216 (11th Cir. 2012); Adcock v. Freightliner LLC, 550 F.3d 369, 371 (4th Cir. 2008); Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 207–08 (3d Cir. 2004).

285. *See, e.g.*, *Adcock*, 550 F.3d at 377; *Hotel Emps. & Rest. Emps. Union, Local 57*, 390 F.3d at 218–19.

286. 667 F.3d 1211 (11th Cir. 2012).

287. *Id.* at 1213 ("Mardi Gras promised to (1) provide union representatives access to non-public work premises to organize employees during non-work hours; (2) provide the union a list of employees, their job classifications, departments, and addresses; and (3) remain neutral to the unionization of employees. In return, Unite promised to lend financial support to a ballot initiative regarding casino gaming.").

288. *Id.* at 1215 ("It seems apparent that organizing assistance can be a thing of value . . . .").

289. *See* Sean P. Redmond, *Supreme Court Considers NLRA Case ("Mulhall Case")*, U.S. CHAMBER COM. (Jan. 18, 2013, 4:29 PM), https://www.uschamber.com/article/supreme-court-considers-nlra-case-mulhall-case [https://perma.cc/YPB3-DX3N].

290. *See* Petition for Writ of Certiorari by Unite Here at 1, Unite Here Local 355 v. Mulhall, 134 S. Ct. 594 (2013) (No. 12-99), 2012 WL 3027183.

291. *Mulhall*, 667 F.3d at 1215 ("If employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302—curbing bribery and extortion—are implicated. It is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302. Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement. But innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.").

292. Unite Here Local 355 v. Mulhall, 134 S. Ct. 594, 594 (2013) (per curiam). According to Justice Breyer's dissent, dismissal was warranted due to questions of mootness (the employer-union agreement at issue had expired) and standing (Mulhall, the dissenting employee, had worked in a right-to-work state and, therefore, did not have to pay any dues to the union). *Id.* at 595 (Breyer, J., dissenting); *see also* Mulhall v. Unite Here Local 355, 618

expands—its conservative bent under the new administration, we can expect to see this issue before the Court again. If it follows *Mulhall*'s lead, or pushes the interpretation of section 302 further, the Court could severely limit a union's ability to cooperate with employers, which they have increasingly done in organizing drives.[293] In the meantime, parties will likely continue to argue that section 302 should be broadly interpreted to cover neutrality and other similar promises.[294] We might see arguments that other types of agreements violate section 302, such as employer promises to provide appeal rights from certain workplace actions—like being dismissed from the Uber platform—or to have periodic meetings with the company.[295]

The Uber Guild agreement implicates many of these potential section 302 promises, but the group and others like it should have little to fear. Indeed, the ability to mitigate the risk of such claims represents one of the advantages of nontraditional representation groups because the distinguishing features that make them nontraditional also serve to inoculate them from section 302 liability. First, if a group represents workers who are not classified as employees, then section 302—by its own terms—does not apply.[296] Second, even if a group represents workers who are classified as employees, the group would likely still avoid liability as long as it is not categorized as a traditional labor organization under section 2(5) of the NLRA.[297] In other words, as

F.3d 1279, 1286–90 (11th Cir. 2010) (discussing the standing issue and holding that standing existed); Thomas W. Frampton, Neutrality Agreements and Article III Standing: Why *Unite Here Local 355 v. Mulhall* Is Nonjusticiable 3 (Oct. 7, 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336677 [https://perma.cc/37LW-3533] (arguing that Mulhall lacked standing).

293. For instance, in the majority of campaigns, unions seek agreements with employers to voluntarily recognize the union if it gains majority support, rather than use an NLRB election. *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 839–40 (2005).

294. *See, e.g.*, Prime Healthcare Servs., Inc. v. Serv. Emps. Int'l Union, 97 F. Supp. 3d 1169, 1187–89 (S.D. Cal. 2015) (dismissing a *Mulhall*-based claim of section 302 violation because of a lack of facts showing a "delivery" of a benefit). However, the Court could essentially eliminate these claims by finding that section 302 does not permit private rights of action. In Justice Breyer's *Mulhall* dissent, he questioned whether the assumption that section 302 had a private right of action—which was confirmed in dicta by the Court in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 205 (1962)—still held true given the Court's subsequent limits on implied private rights of action. *See Mulhall*, 134 S. Ct. at 595 (Breyer, J., dissenting) (citing Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)). If Justice Breyer is correct, then section 302 enforcement would be dependent on the federal government pursuing a case. It is possible that federal prosecutors would press cases that stretch the original intent of section 302, but that outcome is not likely and is certainly less of a risk to nontraditional representation groups than to claims by private parties.

295. *See supra* Part III (discussing existing quasi-union arrangements); *see also* Whitney, *supra* note 17, at 1473–74 (describing a section 302 suit, which was later withdrawn, against the VW-Chattanooga agreement with the UAW).

296. Section 302 covers only an "employer" giving something of value to (1) "any representative of any of his employees"; (2) "any labor organization . . . which represents . . . any of the employees of such employer"; (3) "any employee or group or committee of employees of such employer"; and (4) "any officer or employee of a labor organization." 29 U.S.C. § 186(a) (2012)

297. *See* United States v. Ryan, 350 U.S. 299, 301 (1956) (holding that the LMRA expressly states that section 302's use of "representative" shall have the same meaning as in

long as nontraditional groups are not "dealing with employers,"[298] they should not be at risk for a section 302 violation. Groups in this situation would have to decide whether reducing section 302 liability is worth the limitations required to avoid dealing with employers.

2. Lowering Organizational and Administrative Legal Burdens

In addition to the mitigation of liability under section 302, nontraditional representation groups, particularly those found in the technology sector, can avoid many of the burdensome requirements of the Labor-Management Reporting and Disclosure Act (LMRDA).[299] Although these requirements were intended, at least in part, to promote democracy and fairness for union members, they also impose extra costs for covered organizations—costs that can be significant for smaller organizations.[300]

Among other things, the LMRDA imposes upon covered labor organizations (1) a duty of fair representation to members;[301] (2) a requirement that organizations implement democratic processes, such as conducting regular secret-ballot elections[302] and providing members the right to participate at meetings,[303] to regularly elect leaders,[304] and to vote on dues;[305] and (3) a requirement that members be given due process rights against discipline.[306] The LMRDA also requires detailed reporting on finances and time spent by organization leaders.[307]

If nontraditional groups are not considered labor organizations under the LMRDA, they can incorporate whatever requirements they and their members believe are appropriate while maintaining flexibility to alter or eliminate requirements that are unduly burdensome or need improvement.[308] Whether groups can avoid the labor organization classification is not always clear, however.

---

the NLRA). Groups should also avoid being so closely entwined with a labor organization that they are considered a subsidiary covered by LMRA section 302. *See supra* note 281.

298. *See* 29 U.S.C. § 152(5) (2012) (defining a "labor organization" for the purposes of the NLRA's section 8(a)(2) prohibitions).

299. *See* 29 U.S.C. § 431 (2012) (establishing reporting and disclosure obligations); *id.* § 439 (permitting imposition of fines or incarceration for failure to file required reports).

300. J. Ralph Beaird, *Employer and Consultant Reporting Under the LMRDA*, 20 GA. L. REV. 533, 536–37 (1986) (describing the purpose of LMRDA); Thomas I.M. Gottheil, Note, *Not Part of the Bargain: Worker Centers and Labor Law in Sociohistorical Context*, 89 N.Y.U. L. REV. 2228, 2263 (2014) (arguing that because there is no evidence of worker center abuse, placing costs of LMRDA compliance on worker centers is unwarranted).

301. *See* Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 73–78 (1991).

302. 29 U.S.C. § 481.

303. *Id.* § 411(a)(1).

304. *Id.* § 481(b).

305. *Id.* § 411(a)(3).

306. *Id.* § 411(a)(5).

307. *Id.* §§ 431(b), 436. To see the forms required, which are quite complicated, see *OLMS Electronic Forms System*, U.S. DEP'T LAB. (Jan. 2, 2018), https://www.dol.gov/olms/regs/compliance/efs/efsintro.htm [https://perma.cc/RFQ6-DMB7].

308. *Cf.* Hirsch & Hirsch, *supra* note 127, at 1161–62 (arguing that groups not covered by LMRDA would still incorporate protections for members because groups would need support from workers to maintain credibility and effectiveness).

One complication for nontraditional groups' ability to navigate their legal exposure under the LMRDA is that the statute arguably has a broader definition of "labor organization" than does the NLRA. The LMRDA incorporates the definition of labor organization used in section 2(5) but also adds coverage for "any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body."[309] Particularly for groups working with traditional unions, this addition creates the possibility of being classified as a labor organization for LMRDA purposes, even if they are not considered a labor organization under the NLRA.[310] Indeed, proemployer groups have already used this argument in an attempt to impose LMRDA requirements on nontraditional groups.[311]

The potential for LMRDA coverage creates a double-edged sword for nontraditional groups that represent statutory employees—the more effective they are at representing their members, the more likely they are to be subject to the restrictions that accompany status as a labor organization.[312] But if nontraditional groups are able to avoid this classification, they will be free to pursue a wider variety of financial and organizational models than is currently mandated by the LMRDA—models that would hopefully provide these groups a better opportunity to serve their members.[313]

3. Freedom to Pursue Secondary Pressure and Other Strategies Prohibited by the NLRA

Another set of legal limitations that nontraditional groups may avoid are the limits on the types of pressure that traditional unions can bring to bear against employers. A larger set of pressure tactics is advantageous when groups decide to take a less cooperative stance against employers. However, even cooperative strategies may involve some degree of pressure on employers, particularly when initially attempting to get an employer to participate in discussions. Whether a quasi-union is merely trying to get an employer's attention and interest in cooperation or is attempting to exert more forceful pressure, being nontraditional comes with certain legal advantages.

---

309. 29 U.S.C. § 402(i); *see* also 29 U.S.C. § 152(5) (2012).

310. *See* Catherine L. Fisk, *Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers*, 17 THEORETICAL INQUIRIES L. 101, 120–22 (2016).

311. *Compare* Stefan J. Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and Its Evolution into Coverage Under the NLRA and LMRDA*, ENGAGE, Oct. 2012, at 79, 84–85 (2012) (arguing for expanded coverage of worker centers under LMRDA), *with* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 229–30 (2015) (arguing that NLRA and LMRDA coverage should be the same), *and* Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 287–91 (2009) (same).

312. David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 482–95, 502–03 (2006) (discussing worker centers' status as labor organizations under the NLRA and LMRDA).

313. *See* Fisk, *supra* note 310, at 120–22.

In the 1947 Taft-Hartley amendments, Congress amended the NLRA by adding section 8(b), which prohibited labor organizations from engaging in various practices, including certain methods that unions had often used to pressure employers.[314] Most important for nontraditional groups are section 8(b)(4)'s limits on secondary pressure, such as boycotts and strikes that target businesses that deal with the employer at the center of the dispute.[315] Prior to 1947, unions had long targeted businesses in the hopes that they might exert pressure on the "primary employer"—the employer with whom the union has the dispute.[316] Under section 8(b)(4), labor organizations can still peacefully publicize a labor dispute, but they are prohibited from boycotting, striking, or picketing other employers who do business with the primary employer.[317]

Although there are questions about section 8(b)(4)'s constitutionality, these restrictions have been repeatedly upheld against unions.[318] Moreover, unlike unfair labor practices in which employees are the victims, employers can bring private lawsuits seeking compensatory damages against unions for violations of section 8(b)(4).[319] However, section 8(b)(4) applies only to labor organizations as defined by the NLRA; thus, nontraditional groups that can avoid that designation are largely free to use secondary pressure to influence the behavior of employers.[320]

Similarly, so-called "hot cargo" agreements between labor organizations and employers are illegal under section 8(e) of the NLRA.[321] This means that, unlike traditional unions, nontraditional groups that avoid classification as a labor organization can seek and enter into agreements with a company to avoid doing business with another company that has committed unfair labor practices or other acts that the group opposes.[322]

Recent events illustrate how nontraditional groups can engage in activities that might be viewed as violations of section 8(b)(4) had traditional unions been the primary actors. The most high-profile example is OURWalmart's efforts to improve the pay, benefits, and working conditions of Wal-Mart

314. 29 U.S.C. § 158(b) (2012).

315. *Id.* § 158(b)(4).

316. *See* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 908–18 (2005).

317. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 583–84 (1988). It is also illegal to picket when there is already a labor organization representing employees under 29 U.S.C. § 158(b)(7) and to picket in an attempt to get the employer to fire a supervisor under 29 U.S.C. § 158(b)(1)(B).

318. *See* Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2638 (2011).

319. *See* 29 U.S.C. § 187(b) (2012); Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 258 (1964).

320. *See* 29 U.S.C. § 152(5). These groups might also enjoy protection from state lawsuits challenging certain peaceful secondary pressure by arguing that the NLRA preempts attempts to regulate such activity. Duff, *supra* note 51, at 849.

321. 29 U.S.C. § 158(e).

322. *Id.* Section 8(b)(4)(A) also prohibits picketing to enforce or obtain a hot cargo agreement. *Id.* § 158(b)(4)(A).

employees.[323] OURWalmart's tactics included picketing, which led Wal-Mart to allege that the group violated section 8(b).[324] Wal-Mart argued that this provision was applicable because OURWalmart was affiliated with a traditional union and should therefore be considered a labor organization.[325] Wal-Mart's willingness to pursue this action illustrates the potential advantages of nontraditional groups. The existence of the suit itself indicates that OURWalmart's pressure was having an impact.

As long as nontraditional groups can avoid classification as labor organizations, or being considered part of such an organization, they will have much freer rein than traditional unions to impose pressure on employers. This is particularly true in the technology sector, which has many workers who are not classified as employees[326] and is particularly susceptible to secondary pressure because of the industry's breadth and substantial interaction with many different types of businesses.[327]

B. Potential Disadvantages of Alt-Labor Strategies

Although nontraditional worker representation comes with certain legal advantages, working outside of the mainstream labor organization structure presents potential legal risks as well. We believe that the likely advantages of nontraditional representation greatly outweigh these potential disadvantages—especially given the current anemic state of affairs for workers—but these risks are nonetheless important for groups to keep in mind as they make strategic decisions.[328]

1. Lack of Protection Against Retaliation

One of the major risks for workers is that support for collective representation may expose them to employer retaliation or even loss of their jobs.[329] This is less of a concern for statutory employees who, even if advocating or working for nontraditional representation, are typically protected by the NLRA.[330] Seeking redress through the NLRB is often a laborious process with limited monetary remedies, but it does offer a degree of legal protection for employee collective action. In contrast, the NLRA offers no protection against retaliation for workers who are not statutory

323. *See* Duff, *supra* note 51, at 838–43.

324. *Id.*

325. *Id.* at 838–40 (describing the informal resolution of a charge that alleged unlawful picketing for recognition, Fast Food Forward walkouts in 2013, and "day without immigrants" rallies in 2006).

326. *See* Di Giorgio Fruit Corp. v. NLRB, 191 F.2d 642, 648–49 (D.C. Cir. 1951) (holding that section 8(b)(4) did not apply to an agricultural workers' group because the workers were not employees under the NLRA).

327. *See supra* note 268 and accompanying text.

328. In addition to the disadvantages described here, working outside of NLRA coverage might result in more state regulation of representation activity, which the NLRA largely preempts with regard to traditional unions and the inability to enforce agreements in federal court. *See* Rosenfeld, *supra* note 312, at 500.

329. *See supra* Part IV.A. (discussing the NLRA's antiretaliation provision).

330. *See supra* Part IV.A.

employees—or, like Uber drivers, workers whose status is in serious doubt. As a result, it may be difficult to recruit these workers to support and join nontraditional representation efforts, especially when their employers are openly hostile to such efforts.[331]

This lack of legal protection against retaliation can be a significant barrier to the already difficult task of organizing workers—a task that is particularly hard for contingent and gig workers whose relative lack of physical proximity to coworkers make them less able to bond with each other.[332] However, this issue also illustrates the advantage of more cooperative representation efforts. Because a hostile employer emboldened by a complete lack of NLRA protection is likely to intimidate workers to prevent them from acting together, nontraditional groups that can find ways to work with employers will be able to provide significant value to their members.

2. Antitrust Liability

Among the potential disadvantages of nontraditional groups—and the most significant from a financial and criminal perspective—is antitrust law. Perhaps no issue better represents the knife's edge facing nontraditional groups, which must carefully monitor whether their actions may constitute anticompetitive behavior under antitrust law and, if so, whether they will enjoy protection under the antitrust labor exception. This task is made all the more difficult by the opacity of antitrust law as it applies to nontraditional labor efforts.

Since the initial enactment of federal antitrust legislation, worker collective action has been a concern. Indeed, immediately after passage of the Sherman Act in 1890, employers attacked unions by arguing that their attempts to restrict the supply of labor was an antitrust violation.[333] Ultimately, in 1914, Congress enacted the Clayton Act to provide an exemption for labor, although the Supreme Court has significantly limited its scope.[334] Nevertheless, traditional unions and employers enjoy an antitrust exemption when engaging in most collective bargaining.[335] Whether nontraditional representation enjoys or even needs an exemption is currently an open question.

Under the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."[336] This law provided employers with an effective tool against unions and their officials, who would frequently

---

331. *See, e.g.*, Elizabeth Dilts, *U.S. Fast-Food Workers Rally for Higher Minimum Wage*, CHI. TRIB. (Dec. 5, 2013), http://articles.chicagotribune.com/2013-12-05/news/sns-rt-us-usa-employment-fastfood-20131205_1_u-s-fast-food-workers-fast-food-forward-michael-saltsman [https://perma.cc/3EAK-XPML] (describing worker protests).

332. *See supra* Part II.A (discussing contingent workers).

333. SECUNDA, *supra* note 19, at 8–12.

334. *Id.* at 11–12.

335. Susan Schwochau, *The Labor Exemptions to Antitrust Law: An Overview*, 21 J. LAB. RES. 535, 536–37 (2000).

336. 15 U.S.C. § 1 (2012).

face criminal sanctions and treble damages for boycotts that sought to pressure employers to hire union employees and other similar actions.[337] As a result, Congress added an exemption to the Clayton Act, which was intended to remove antitrust liability for typical labor-union activity.[338] Despite its explicit statement that the "labor of a human being is not a commodity or an article of commerce," the Supreme Court has interpreted this exemption narrowly.[339]

Currently, there are two categories of antitrust exemptions for labor: a statutory exemption and a nonstatutory exemption.[340] The statutory exemption protects peaceful conduct related to a labor dispute in which "a union acts in its self-interest and does not combine with non-labor groups."[341] This means that the exemption would apply to a union boycott of a company as part of a labor dispute but would not apply when a union acted with an employer to resolve a labor dispute.[342]

The statutory exemption is clearly inapplicable to most nontraditional efforts, like the Uber Guild, which are premised on agreements with employers.[343] Although at first blush the nonstatutory exemption seems to hold more promise for nontraditional groups, the exemption's current interpretation is not particularly helpful. The Court established the nonstatutory exemption in two cases involving union agreements with employers, holding that there was an antitrust exemption for a union that seeks and obtains an agreement about hours, wages, or other terms and conditions of work (that is, "mandatory" subjects of bargaining) with an employer or set of employers, as long as the union is not trying to extend the agreement to other employers.[344] Nontraditional groups, like the Uber Guild,

---

337. *See, e.g.*, Loewe v. Lawlor, 208 U.S. 274, 290–91 (1908).

338. This exemption states:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (2012).

339. *See* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1020–33 (2016) (discussing the development of the antitrust exemption).

340. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996). The Court has also recognized a nonstatutory antitrust exemption for employers that applies to conduct directly related to the collective-bargaining process. *See id.* at 250. Moreover, Uber and many of its drivers are currently being sued for illegal price-fixing through Uber's fare algorithm. *See generally* Meyer v. Kalanick, 174 F. Supp. 3d 817 (S.D.N.Y. 2016).

341. *See* United States v. Hutcheson, 312 U.S. 219, 232 (1941).

342. *See* Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. Electrical Workers, 325 U.S. 797, 808 (1945) (holding that "mutual help" under the Clayton Act did not include unions' use of "employer-help").

343. *See supra* Part II.F (discussing the Uber Guild arrangement).

344. Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co., 381 U.S. 676, 688 (1965) (involving an agreement between union and

can argue that the nonstatutory exemption also protects their agreements with employers. The problem, however, is that current judicial interpretations of the labor antitrust exemption have limited their application to groups considered "labor organizations" under federal labor law.[345] In other words, this interpretation refuses to extend antitrust protection unless there is an employer-employee relationship or such a relationship was at the center of the dispute at issue (for instance, if Uber drivers engaged in conduct with the goal of establishing an employer-employee relationship).[346]

This limited scope of the nonstatutory exemption appears to leave most nontraditional collective action outside of its protection. The question, then, is whether a quasi-union's conduct raises antitrust concerns. Strikes and boycotts, as well as threats to engage in this activity, are areas that these groups need to avoid, as they raise significant antitrust risk.[347] What is less clear is whether an agreement between an employer and a nontraditional group, like the Uber Guild agreement, would also raise antitrust concerns.[348] At present, antitrust law is simply unclear about whether such agreements constitute illegal price-fixing. This lack of clarity poses a threat that nontraditional groups must take into account, but it also presents opportunities to pursue a litigation strategy that might result in favorable decisions that allow these groups leeway to reach some sort of agreement with employers without facing antitrust liability.

This possible antitrust liability for nontraditional worker groups illustrates the paradox in modern labor law. The changing economy begs for more

---

multiemployer bargaining group that capped hours for butchers); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 660 (1965) (involving an agreement between the union and mining companies to increase wages under an industry-wide collective-bargaining agreement). Moreover, if the agreement would violate federal labor law, then the union could not use the exemption. Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S 616, 636–37 (1975) (rejecting an exemption for an illegal hot cargo agreement).

345. Courts have held that the labor exemptions only cover "labor organizations" as that term is used in the Norris-LaGuardia Act, prohibiting federal court injunctions in cases arising out of most labor disputes. 29 U.S.C. §§ 101, 107 (2012); *see, e.g.*, Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers of U.S. & Can., 353 F.2d 593, 602 (4th Cir. 1965) (citing *Hutcheson*, 312 U.S. 219); *see also* Paul, *supra* note 339, at 977 (noting that "individual workers classified as independent contractors may be subject to antitrust prosecution for organizing for decent wages or working conditions under the price-fixing doctrine").

346. *See* Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods. Inc., 311 U.S. 91, 102–103 (1940) (holding that dispute between workers and employer is labor dispute while workers sought employee classification); New Negro All. v. Sanitary Grocery Co., 303 U.S. 552, 562–63 (1938) (holding that picketing to encourage hiring was protected because it was within the matrix of a labor controversy); *Taylor*, 353 F.2d at 604–05 (rejecting exemption for independent contractors). Activity by nonemployees that affect unionized employees' work conditions may also be covered by the labor exception. *See* Am. Fed'n of Musicians of U.S. & Can. v. Carroll, 391 U.S. 99, 106, 112–13 (1968) (looking to whether the activity was directed at an economic relationship, such as job or wage competition, between independent contractors and union employees that would affect the interests of the union employees); L.A. Meat & Provision Drivers Union v. United States, 371 U.S. 94, 102 (1962) (looking to whether the activity was directed at an economic relationship).

347. *See, e.g.*, *Hutcheson*, 312 U.S. at 239–41.

348. *See* Chris Opfer, *Gig Worker Organizers Find Hurdle in Antitrust Laws*, Antitrust & Trade Reg. Rep. (BNA) No. 110, at 1365 (Nov. 25, 2016) (noting questions about Uber Guild and similar groups' liability under antitrust law).

modern and less formal worker collective action, but labor law remains locked in a model that is no longer relevant to an increasing number of workers. As a result, groups are forced to make a decision: (1) to act like a traditional labor union and accept the burdens and hurdles of current labor law that accompanies that choice or (2) to seek new ways of representing workers but limit their actions out of fear of antitrust liability.[349] Although this paradox begs for legislative or judicial solutions, such help does not appear to be on the horizon. Indeed, recent reports suggest that the new administration may try to increase the burdens on nontraditional groups.[350] In the meantime, antitrust liability will be a significant factor in shaping nontraditional groups' strategies and actions.

V. NONTRADITIONAL REPRESENTATION STRATEGIES

One of the benefits of nontraditional worker representation is that it promises more flexibility to adjust to different circumstances. As we have described, workers in the modern economy are laboring under a wide variety of conditions. This variance means that there is no one ideal strategy for nontraditional groups to pursue as they navigate the different legal restrictions that might apply to them. However, the conditions under which a group operates—as well as the group's goals and tolerance for risk—may point toward certain general strategies.

There are at least two broad categories of nontraditional groups. One category involves groups that represent workers who are not considered employees under the NLRA or possibly, like members of the Uber Guild, are simply not pressing the issue.[351] This scenario provides a relatively straightforward legal analysis. Because the workers are not statutory employees, groups representing them will not be a labor organization.[352] Accordingly, such groups need not worry about the restrictions of sections 8(a)(2), 8(b)(4), and 8(e) of the NLRA, or of section 302 of the LMRA; thus, these groups can receive assistance from employers, pursue secondary pressure, and reach agreements with employers without fear of liability.[353] Moreover, groups with only nonemployee members are not required to

349. *Cf.* Paul, *supra* note 339, at 982. The director of an independent trucker campaign said that the threat of antitrust liability "was one of the three or four major strategic factors in virtually everything that we did. It was part of our checklist. The specter of antitrust liability has significantly suppressed drivers' ability to take collective action to change their economic circumstances." *Id.* The campaign's counsel was quoted as saying, "Apart from the merits and whether damages were recovered, the sheer cost of defending such an action would have been sufficient to shut the campaign down." *Id.*

350. Chris Opfer & Jasmine Ye Han, *Worker Centers May Get Closer Look Under Trump*, Daily Lab. Rep. (BNA) No. 30, at 3 (Feb. 15, 2017).

351. Groups with members who are arguably employees risk the possibility that the NLRB or a court will subsequently determine that the workers are statutory employees.

352. 29 U.S.C. § 152(5) (2012) (defining a "labor organization" as an entity "in which employees participate").

353. Groups must still be cognizant of state claims, such as trespassing, but that is true for labor organizations as well. *See* Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters, 436 U.S. 180, 185–86 (1978) (describing labor preemption analysis for independent state claims).

comply with the LMRDA and therefore have more flexibility to structure their operations.

Even so, the nonemployee members of such groups lack protection against retaliation, which creates a hurdle to organizing workers. But it also means that groups can provide value by reaching agreements with employers that provide some level of job security, such as the Uber Guild's negotiation of the right to challenge dismissal from the Uber platform.[354] The biggest risk for groups in this category, as noted, is antitrust liability.[355] Although the lack of labor organization status frees such groups to engage in bilateral negotiations with businesses without the specter of a section 8(a)(2) violation, any resulting agreements could face antitrust challenges. And although the applicability of antitrust law to agreements covering nonemployees is unclear,[356] nontraditional groups must consider their tolerance for risk. Groups that are more risk averse should avoid agreements that control wages and work stoppages[357]—which could arguably be considered unlawful price-fixing—and focus instead on other work issues, like the Uber agreement's guarantee of meetings with company officials and the right to challenge exclusion from the platform.[358] Groups with a higher risk tolerance, including those with the means to withstand potential treble damages (or are judgment proof because of a lack of funds), may be more willing to reach agreements on financial and work stoppage issues on the grounds that the benefits to workers outweigh a potential antitrust challenge. In sum, groups that represent nonemployees can more aggressively pressure employers and organize themselves freely, but their members lack protection from retaliation and potential antitrust liability looms over their negotiations with employers.

The second category involves groups that represent statutory employees. Employee-representation groups should generally consider two separate tracks: either attempt to avoid classification as a labor organization or willingly accept labor organization status. For groups that want to avoid being a labor organization, section 2(5) will be their lodestar. These groups must avoid bilateral negotiations over terms and conditions of work, which may be considered "dealing with" employers.[359] This puts a significant limitation on the degree to which groups can represent employees—making the groups more of a suggestion box for issues involving work conditions than an effective representative body. These groups could engage in more substantive negotiations of other issues—such as contracting out work—but would not be able to engage in significant cooperative bargaining.[360]

354. *See supra* Part II.F (discussing Uber Guild).
355. *See supra* Part IV.B.2.
356. *See supra* Part IV.B.2 (discussing the possibility of antitrust liability for quasi-unions).
357. *See supra* Part IV.B.2.
358. *See supra* Part II (discussing alternative labor arrangements).
359. *See supra* Part IV.A (discussing provisions of the NLRA).
360. The terms and conditions of work referred to in section 2(5) are equivalent to "mandatory subject[s] of bargaining" under the NLRA, which are distinct from permissive subjects that include agreements regarding most contracting out of work, among other matters. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 678 (1981).

However, these groups could still provide services to members without being hampered by the restrictions on secondary pressure from section 8(b)(4) and the requirements of the LMRDA. They could also receive assistance from employers without violating section 8(a)(2). Antitrust liability would remain a theoretical concern, but by avoiding bargaining that would result in labor organization status, the groups would likely avoid any meaningful antitrust challenges. Overall, such groups would enjoy the freedom to organize as they wish, have members who enjoy protection against retaliation, be able to exert pressure on secondary employers, and likely avoid antitrust issues; yet, the groups' ability to bargain with employers would be significantly limited.

For employee-representation groups that are willing to accept status as a labor organization, the second track is much different from the first. Because these groups represent employees, their members enjoy protection from retaliation. However, unless these groups want to become a traditional union that acts as the exclusive representative of employees, their bargaining options are limited. Under section 8(a)(2), an employer cannot recognize a group as the exclusive bargaining representative of its employees unless that group has majority support.[361] A willing employer would be able to engage in meaningful bargaining and reach an agreement with a labor organization that represents a minority of employees—such as what happened initially at Volkswagen Chattanooga—but it must avoid undue assistance or support under section 8(a)(2).[362] Moreover, such agreements could potentially face section 302 challenges if they include access and other promises.[363] These groups would also be prohibited from engaging in secondary pressure and, although nontraditional, they would have to comply with LMRDA requirements. However, such groups would enjoy the same antitrust immunity as traditional unions, which removes a potentially substantial threat. In short, these groups would operate under most of the same legal restrictions as traditional unions even though their goals fall short of the exclusive-representation model.

There is thus no "ideal" quasi-union for modern workers. Rather, the group should be tailored to fit the particular employer as well as the needs and demands of the workers. Many quasi-unions in the technology sector will fit the first category discussed above, as they will be comprised largely of contingent, nonemployee workers. Other groups, however, represent statutory employees and must be mindful of the legal consequences of their representational activity. Ultimately, just like no two labor unions are alike, nontraditional unions must be carefully crafted, each in a unique way, to fit the particular demands of a specific workplace.

---

361. Int'l Ladies' Garment Workers' Union (Bernhard-Altmann Tex. Corp.) v. NLRB, 366 U.S. 731, 737–38 (1961).

362. *See supra* Part II (discussing Volkswagen's quasi-union arrangement). That said, NLRA section 8(a)(2) only results in a violation against the *employer*, so this is less of a concern for the labor organization. And employers may not be too concerned given the lack of financial penalties. *See supra* Part IV (discussing statutory provisions of the NLRA).

363. *See supra* Part IV.

CONCLUSION

Traditional union membership may never return to the levels of its zenith in the 1950s. Yet workers' need for advocacy and assistance is now as strong as, if not stronger than, it was then.[364] Given the immense impediments to legislative reform, it is almost certain that we will not see any wholesale labor law changes that could reverse declining union density in the near future.[365] Thus, unions and other groups concerned with working conditions must seek alternative strategies. Nowhere is this need more pronounced than in the technology sector, where workers' employment status remains in flux.

One strategy addressed here is to seek more opportunities for cooperation with employers. This cooperation has the potential to lower employer resistance to formal and informal unionization, increase employee support for unions and nontraditional worker groups, and improve the public's perception of labor organizations. None of these benefits are certain and, even if they come to fruition, are not likely to completely turn the tide in favor of worker collective action. But expanding cooperation as a complement to more combative strategies is an idea that warrants more serious exploration by unions and quasi-unions alike.

The traditional NLRA model of collective bargaining is working for a declining number of unions and workers. As a result, the attachment to that model must weaken. The more adversarial model can still play an important role, but, by itself, it appears to be failing a growing percentage of the workforce. Workers need and deserve other options, whether through traditional unions that are willing to change or other less formal groups. The global economic headwinds will remain a significant barrier to organizing and other attempts to improve working conditions, but this does not mean that workers are helpless. Workers may never see the labor movement return to its former strength, but through more cooperation and quasi-union strategies, workers should be able to overcome the precarious situation they currently face.

The NLRA has unfortunately not been very hospitable to these nontraditional working groups, effectively reducing the choice set for most workers to a binary decision: either engage with traditional unions or submit to complete management control.[366] What we argue for here is a third option

364. *See supra* Part I.

365. *See* Estlund, *supra* note 234, at 1527–28.

366. Alex Bryson and Richard Freeman find that underlying preferences among workers are roughly similar in the United States and the United Kingdom but that workplace outcomes differ because the United Kingdom provides a greater range of institutional options than does the United States. Alex Bryson & Richard B. Freeman, Worker Needs and Voice in the US and the UK 22 (Nat'l Bureau of Econ. Research, Working Paper No. 12310, 2006), http://www.nber.org/papers/w12310 [https://perma.cc/DL3B-BU7Q]. The authors conclude:

> The different choices on offer in the two countries appear to affect the different responses of UK and US workers to fairly similar workplace needs/problems. The dichotomous choice between collective bargaining and no representation in the US produces a smaller rate of unionization in the US that manifests itself in greater unfilled demand for unions among non-union workers than in the UK; whereas the

that can be attractive to both workers and companies—a more flexible, nontraditional labor model. As discussed, this approach makes particular sense in the technology sector, and companies like Uber should continue to develop and fine-tune these new models. "We can't fall into the trap of believing that the latest innovation is so transformational that we simply can't accommodate and acclimate."[367] A more modern union is needed.

wider choice of voice institutions in the UK attracts many to take the free rider option.

Id.

367. Exit Memorandum, *supra* note 1, at 13.