Essays

Platform Work and Trade Union Participation: European and American Perspectives

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Abstract

This contribution analyses the role of trade unions in regulating platform work in the European Union and the United States. First, a review of the situation in the EU is provided. The proposal for a directive on platform work of 2021, whose latest version was addressed in March 2024, is examined, placing it in a broader context since the European Union is trying to contribute to regulating that type of work far beyond that proposal, as it is evident from the most recent version of the proposal for a regulation on Artificial Intelligence. More generally, an attempt is made to show that the European social partners are essential in using digitalisation as a ground, at least to maintain their space within the framework of a traditional role more akin to that played by national social actors. On a more particular level, the contribution deals with the social partners' spaces in the information and consultation procedures provided for in the draft directive, the draft regulation and the agreements signed in recent years at the European level. Next, the situation in the US is reviewed. Unions have a weaker position in the US as compared to the EU, and labor law regulation is generally less favourable. Moreover, regulation of the status of platform workers (as independent contractors or employees) is even more fragmented in the US, with regulation determined state by state, and at the federal level, even statute by statute. As a result, the focus of unions has been 1) to support litigation and lobbying efforts to change the status of platform workers to that of employees, so that they can be represented in collective bargaining, and 2) to provide support and advice to platform workers even where they are not considered to be employees. The authors conclude that unions and collective action have a critical role in improving the conditions of platform workers in both the EU and US, although their prospects are greater in the EU at least in the near to medium term.

I. Introduction

The use of Artificial Intelligence (AI) at work is capturing the attention of society. More and more employers are using AI in recruiting, screening and hiring applicants, for example, and the more unusual cases – such as workers who claimed they were interviewed by Siri – are grabbing headlines.[1] There is a sense that a

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This paper evolved from a common idea. However, Massimiliano Delfino is the author of part II, while Charles Szymanski is the author of part III. Both authors wrote parts I and IV.

[1] A. Demopoulos, 'The job applicants shut out by AI: "The interviewer sounded like Siri" ' *The Guardian*, available at https://tinyurl.com/p6v464ex (last visited 30 September 2024).

future where AI permeates every aspect of work – not only in hiring, but in day-to-day management and discipline and discharge – is not too far over the horizon. However, this future is now for platform workers. Their work is regularly affected by AI, particularly algorithmic management systems. Applications and algorithms already regulate most aspects of the typical rideshare driver or food delivery worker, from what work they receive, the pace at which they perform it, how they are evaluated, and even whether they will receive any new work. Since platform workers are often in a precarious position (new immigrants, individuals who cannot find regular employment, or who are economically vulnerable), and because of legal regimes which keep them outside of labor law, they are not able to resist the excesses of a model of work driven by AI. In this environment, trade unions have an outsized role in protecting these workers and in so doing, placing some limits on the AI for the platform workers and also for the rest of the workforce when AI takes its next step forward. What unions have done, are able to do and plan to do to help platform workers in the European Union (EU) and United States (US) therefore takes on a wider significance.

The emergence of the gig economy caught unions in both the EU and the US somewhat on their back feet. Platform work used a new technological model and was designed to operate outside of traditional labor relationships with which unions were familiar. The unions' initial reactions included the use of pre-existing legal instruments to argue these new platform workers were in fact employees, and should be subject to all the normal protections of labor law, including the right to collectively bargain. These actions were time consuming and brought mixed result on a case-by-case basis. In the meantime, the platforms grew and accumulated more power. A change in union strategy was warranted.

In the EU, the legislative environment was somewhat sympathetic, and unions leveraged their roles as social partners to push for new EU and national regulation in the field of platform work and the use of AI. Within this new regulatory framework, unions maintained an institutional role as consultative partners without losing completely their role as negotiating parties. The object was to more definitively classify platform workers as individuals with all or most of the rights of employees, and directly shield them (as well as other workers) from the abuses of management by algorithm. In the US, unions lacked a structural policymaking role, and could only influence the future of platform working conditions through collective bargaining, ie, through representing these workers and negotiating their terms and conditions of employment. As a result, their efforts were concentrated on lobbying and strategic litigation at the federal, state and local levels to enable these workers to join unions and collectively bargain. At the same time, unions also tried to develop new models of representation that could operate outside the traditional labor law framework.

This article focuses on the successes and also the difficulties European and American unions faced (and continue to face) in attempting to achieve these objectives. In this way the authors hope to present a way forward, not only for

unions, but for society, in the face of the darker aspects of AI controlling our work life. Our thesis is that only through collective action can society limit the excesses of AI, in platform work and in work in general.

II. Unions and Platform Work in the EU

1. The 2020 European Agreement on Digitalisation as a Precursor to the Proposed Directive on Platform Work In 2021

The idea behind this part of the contribution is to analyse the 9 December 2021 proposal for a directive on digital platforms, whose latest version was addressed by the Permanent Representatives Committee to the Council on 8 March 2024, even though it has not been enforced yet, by lowering it into a broader context since the European Union, among lights and shadows, is trying to contribute to regulating work on platforms far beyond that proposal. On a general level, an attempt will be made to show that the European social partners have a vital prominence as they are using digitalisation as a ground to maintain their spaces and, possibly, to win new ones; within the framework, however, of a traditional role and more similar to that played by national social actors. On a particular level, we will deal with the margins of intervention of the social partners in the information and consultation procedures, leaving out, if not for some profiles, the role they play as negotiating actors.

Leaving aside the more distant experiences when this type of work was presented in a pioneering version (the reference is to the 2002 framework agreement on telework), it is undoubtedly necessary to start from the European social partners' agreement on digitalisation of 2 June 2020. Before going into the details of its clauses, it is worth reflecting on the type of collective agreement involved. This is an autonomous collective agreement signed under Art 155 TFEU, that is, without any impetus from the European Commission.[2] Moreover, this agreement has not been transposed into a directive. It does not have a universal application but

> 'commits the members of Business Europe, SME united, CEEP and ETUC … to promote and to implement tools and measures, where necessary at national, sectoral and/or enterprise levels, in accordance with the procedures and practices specific to management and labour in the Member States'.[3]

[2] The agreement explicitly specifies that it is 'an autonomous initiative and is the result of negotiations between the European social partners in the context of the sixth multiannual work program for 2019-2021. In the framework of Art 155 of the Treaty, this autonomous European Framework Agreement commits the members of Business Europe, SMEunited, CEEP and ETUC (and the EUROCADRES/CEC Liaison Committee) to promote and implement instruments and measures, if necessary at national, sectoral and/or company level, in accordance with the specific procedures and practices of the social partners in the Member States and the countries of the European Economic Area.

[3] Thus the 2020 Framework Agreement in the part on implementation and monitoring (at 12).

This agreement covers all workers and employers in the public and private sectors and all economic activities. Concerning the contents, it is emphasised that

> 'it is critical that digital technology is introduced in timely consultation with the workforce, and their representatives, in the framework of industrial relations systems, so that trust in the process can be built'.

Thus, it is clear that the involvement of workers and social partners, through their timely consultation, is crucial to gaining workers' consent to digital technology.[4]

2. Are The *Epsu* Judgments and The Consequent 'Shocks' to the European Social Dialogue behind the Choices Made by the Proposed Directive?

As has just been seen regarding the digitisation of labour, the role of the European social partners within the autonomous social dialogue has been prominent. The same cannot be said within the induced social dialogue in which the collective agreement, once signed, is transposed into a directive. This, however, should come as no surprise. A brief digression is necessary here since it is essential for understanding the role played by the social partners. The General Court of the European Union and the Court of Justice, in 2019 and 2021,[5] respectively, provided an interpretation of Art 155 TFEU according to which, when the social partners request the transposition of the signed collective agreement into a directive, the Commission, contrary to what was believed until then in doctrine,[6] has broad discretion in whether or not to propose transposition to the Council. This jurisprudential approach, on the one hand, has negative repercussions because it lessens the powers and weakens the position of the social partners in the production of Union law. Still, on closer inspection, on the other hand, it has positive implications. In fact, on a more optimistic view, it can be assumed that the social partners have a different role, more akin to that played in the national legal systems of most member states, where, as part of the tripartite social dialogue (involving the Executive, trade unions and employers' associations), the government can transform agreements entered by the social partners into provisions or bills.[7] Ultimately, this breakthrough could be a

[4] The quote is also taken from the 2020 agreement (at 9).

[5] On the *Epsu* case see F. Dorssemont et al, 'On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case' 48 *Industrial Law Journal*, 571 (2019); S. Borelli and F. Dorssemont eds, *European Social Dialogue in the Court of Justice. An Amicus curiae workshop on the EPSU case* (Catania: Centre for the Study of European Law 'Massimo D'Antona' Collective Volumes, 10, 2020).

[6] See, for all, A. Lo Faro, *Funzioni e finzioni della contrattazione collettiva comunitaria* (Milano: Giuffrè, 1999), 204.

[7] For further discussion, please refer to M. Delfino, 'La reinterpretazione del principio di sussidiarietà orizzontale nel diritto sociale europeo' *Diritti Lavori Mercati* 1, 155 (2020). See also E. Ales, 'EU Collective Labour Law: if any, how?', in B. ter Haar and A Kun eds, *EU Collective Labour Law* (Edward Elgar Publishing, 2021), 26.

starting point for a more mature European social dialogue in which the social partners propose an agreement to the Commission. That institution can decide whether to submit to the Council a proposal for a directive that can incorporate the contents of that agreement. On the other hand, it should be remembered that, at times, the social partners, particularly employers' associations, have been concerned about entering into collective agreements that could be 'transformed' into Union law and, for that reason, have decided not to sign them, as was the case with temporary agency work.[8] Consequently, the emphasis on the Commission's discretionary power could facilitate social dialogue in the sense that the social partners act on a terrain more friendly to them where the goal is to promote the interest of the signatory parties and, in short, the collective interest and not the general interest, the promotion of which is the responsibility of the European legislature.

And then it may not be coincidental what happened concerning the proposed directive on platform work. Indeed, following Art 154 TFEU, the Commission conducted a two-stage consultation with the social partners on possible Union action to improve working conditions. In the first stage, between 24 February and 7 April 2021, the Commission consulted the social partners on the need for such an initiative and the possible direction of such an initiative.[9] In the second stage, between 15 June and 15 September 2021, the Commission consulted the social partners on the content and legal instrument of the planned proposal.10 However, the social partners did not ask to suspend the ordinary legislative process and try to regulate the matter through a collective agreement to be transposed into a directive. One wonders if this choice is not related to the outcomes of the *Epsu* judgments, both of which were known at least at the time of the second consultation.[11]

3. The Spaces for Social Partners in the Proposed Directive (and Proposed IA Regulation). In Particular, Union Participation

Before turning to the provisions of the proposed directive (and beyond) that provide for the involvement of social partners, it is necessary to emphasise the difference between the just-mentioned proposal and the proposed Artificial Intelligence Regulation 21 April 2021, most recently amended by the European Parliament on 6 March 2024, and which, as the directive on platform work, has not been enforced yet.

First, the reference is to the type of source chosen, the effects of which in domestic legal systems, as is well known, differ. Indeed, the preference for regulation as a legal act is justified by the need for uniform application of new rules, such as

[8] Once again please refer to M. Delfino, 'Interpretation and Enforcement Questions in EU Temporary Agency Work Regulation. An Italian Point of view' 2 *European Labour Law Journal*, 287, 293 (2011).

[9] Consultation paper C(2020) 1127 final.

[10] ibid 4230 final, accompanied by Commission staff working paper SWD(2021) 143 final.

[11] The Tribunal's ruling was known at the time of the first consultation while the Court of Justice's ruling is 2 September 2021.

the definition of artificial intelligence, the prohibition of certain harmful practices, and the classification of specific artificial intelligence systems. The direct applicability of regulation under Art 288 TFEU will reduce legal fragmentation and facilitate the development of a single market for artificial intelligence systems. This will be achieved in particular by introducing a harmonised set of basic requirements regarding artificial intelligence systems classified as high risk and obligations regarding providers and users (or operators, according to the latest version) of such systems, improving the protection of fundamental rights and ensuring legal certainty for both operators and consumers.

On the contrary, the directive allows the Union to set minimum standards for the working conditions of people who perform work through digital platforms first and foremost when they are classified as 'employees'.[12]

Second, the two proposals have a very different legal basis, and this is not irrelevant to the discourse being conducted. As has been pointed out,[13] the legal basis of the proposed regulation is mainly Art 114 of the Treaty on the Functioning of the European Union,[14] which provides for the adoption of measures designed to ensure the establishment and functioning of the internal market. In contrast, the proposed directive is based on Art 153(1)(b) TFEU, which gives the Union the power to support and complement the action of Member States to improve working conditions.[15]

This alone makes it clear how difficult it is to expect an unambiguous attitude of the two proposals toward the role of the social partners. Indeed, it is clear that there is more room for social actors in the proposed directive, whose legal basis is social policy, than in the proposed regulation, which is to ensure the functioning of the internal market. However, it should be remembered that the latter saw the involvement of the social partners in the public consultation before the submission of the proposal itself.[16]

[12] The Court of Justice has held that the qualification as a 'self-employed person' under national law does not preclude a person from being classified as a 'worker' under EU law if his or her independence is merely fictitious and thereby conceals an employment relationship (Cases C-256/01, *Allonby*, and C-413/13, *FNV Kunsten Informatie en Media*, available at www.eur-lex.europa.eu).

[13] See, for example, L. Tebano 'La digitalizzazione del lavoro tra intelligenza artificiale e gestione algoritmica' 24 *Ianus*,45 (2021).

[14] The proposed regulation also has its legal basis in Art 16 TFEU with regard to certain specific rules on the protection of individuals with regard to the processing of personal data.

[15] To be fair, the proposed directive is also based on Art 16, para 2, TFEU insofar as it addresses the situation of persons performing work through digital platforms in relation to the protection of their personal data processed through automated decision-making and monitoring systems. On this point, see M. Barbieri, 'Prime osservazioni sulla proposta di direttiva per il miglioramento delle condizioni di lavoro nel lavoro con piattaforma' 7 *Labour & Law Issues*, 1 (2021).

[16] An online public consultation was launched on 19 February 2020, along with the publication of the White Paper on Artificial Intelligence, and lasted until 14 June 2020. The objective of this consultation was to gather views and opinions on the White Paper. This consultation was addressed to all relevant stakeholders from the public and private sectors, including governments, local authorities, commercial and noncommercial organizations, social partners, experts, academics, and citizens. After analyzing all responses received, the Commission published a summary of the

Going into the proposal's details on platforms, there is a space for social actors, though mainly through information and consultation.[17] In this regard, as has been highlighted in some recent contributions,[18] according to the version addressed by the Permanent Representatives Committee to the Council on 8 March 2024, some rules provide information and consultation procedures aimed at individual workers and others of the collective type. In all the provisions of the first type, information and consultation must be made to persons who perform work through a digital platform, regardless of their connection to the platform. In contrast, information and consultation of the collective type must be addressed to workers' representatives or, failing that, directly to workers, meaning those employed. In some cases, then, the information is made available to the persons who perform work through digital platforms and to the workers' representatives of the platforms, suggesting that if the workers are self-employed, the information must be made individually. At the same time, if there is a subordination bond, it must also be made or *only* to the workers' representatives. On the latter aspect, Art 9 distinguishes between the cases of information given to persons performing platform work who 'shall receive *concise* information about the systems and their features that directly affect them' and to workers' representatives who 'shall receive *comprehensive* and detailed information about all relevant systems and their features'.

Regarding collective information procedures, the key provisions are Arts 13 and 14 of the proposal.[19] It is understood from the first provision that the 'high

results, as well as individual responses, on its website.

[17] For an analysis of the evolution of the discipline of information and consultation in EU law, see, for all, M. Corti, 'La partecipazione dei lavoratori: avanti piano, quasi indietro', in Id ed, *Il pilastro europeo dei diritti sociali e il rilancio della politica sociale dell'UE* (Milano: Vita e Pensiero, 2021), 163.

[18] I. Purificato and I. Senatori, 'The Position of Collective Rights in the 'Platform Work' Directive Proposal: Commission v Parliament' *Hungarian Labour Law E-Journal*, 1, 14-18 (2023). On this point see also M. Otto, 'A step towards digital self &co-determination in the context of algorithmic management systems' 15 *Italian Labour Law e-Journal*, 51 (2022).

[19] '1. This Directive shall not affect Directive 89/391/EEC as regards information and consultation, or Directives 2002/14/EC and 2009/38/EC.

2. In addition to complying with the Directives referred to in para 1 of this Art, Member States shall ensure that information and consultation, as defined in Art 2, points (f) and (g), of Directive 2002/14/EC, of workers' representatives by digital labour platforms also covers decisions likely to lead to the introduction of or to substantial changes in the use of automated monitoring or decision-making systems. For the purposes of this paragraph, information and consultation of workers' representatives shall be carried out under the same modalities concerning the exercise of information and consultation rights as those laid down in Directive 2002/14/EC'.

'Without prejudice to the rights and obligations under Directive 2002/14/EC, Member States shall ensure the information and consultation of the representatives of digital platform workers or, in the absence of such representatives, of the digital platform workers concerned by digital work platforms regarding decisions that may involve the introduction of or substantial changes in the use of automated decision-making and monitoring systems referred to in Art 6(1) in accordance with this Art.

2. For the purposes of this Art, the definitions of 'information' and 'consultation' in Art 2(f) and (g) of Directive 2002/14/EC shall apply. The rules in Art 4(1), (3) and (4) and Arts 6 and 7 of

road' of information and consultation is to be taken by workers' representatives who may be assisted by an expert. While, according to Art 14, only when 'there are no representatives of platform workers, Member States shall ensure that digital labour platform directly inform the platform workers concerned' and consultation obligations cover 'decisions likely to lead to the introduction of or to substantial changes in the use of automated monitoring or decision-making systems'.[20]

In addition, there are several references in Art 14 to Directive 2002/14 on the right to information and consultation. A first point to be made is that the right recognised by the proposed directive has a broader scope because, in contrast to the 2002 directive, it is not limited, depending on the choice made by national legal systems, to companies employing at least fifty employees or to establishments employing at least twenty employees in a Member State. Art 13 of the proposed directive only, in one case, provides for a numerical limit of workers, but this refers to anything but. Once the threshold of two hundred and fit workers per platform is exceeded, the costs of the expert chosen by the workers' representatives to examine the matters subject to information and consultation are placed at the expense of the platform.

There is no problem with the definitions of information and consultation in the 2002 Directive regarding the timing of the involvement of employee representatives; there is no doubt that it must take place before decisions are made since Art 27 CFREU, which uses the expression 'in good time', applies.[21] The reference to the 2002 Directive and the presence in this proposal of rules on information and consultation allows the secondary rules to be interpreted in light of the provision of the Charter mentioned earlier, even when implementing them in domestic law.

There is also not much to say about applying Arts 6 and 7 of the 2002 Directive to platform workers, which deal with confidential information and the protection of workers' representatives, respectively.

The application to platform work of Art 4 of the 2002 directive appears to be more problematic. This provision was implemented in Italy by Art 1(2) Legislative Decree 25/2007, according to which the modalities of information and consultation shall be established by collective agreement, and by Art 4(1), also of the 2007

Directive 2002/14/EC shall apply accordingly.

3. The representatives of the digital platform workers or the digital platform workers concerned may be assisted by an expert of their choice to the extent necessary for them to examine the matter which is the subject of information and consultation and to give an opinion. If a digital work platform has more than 500 digital platform workers in a member state, the expenses for the expert shall be borne by the digital work platform, provided that they are proportionate'.

[20] For example, with regard to their access to work assignments, their earnings, their occupational health and safety, their working hours, their promotion, and their contractual status, including the restriction, suspension, or termination of their *account*. See C. Spinelli, 'La trasparenza delle decisioni algoritmiche nella proposta di Direttiva UE sul lavoro tramite piattaforma' *Lavoro Diritti Europa*, 6 (2022).

[21] In fact, the presence of Directive 2002/14 means that we find ourselves in the realm of the implementation of Union law, so that under Art 51, the Charter of Fundamental Rights is applicable to domestic systems.

Legislative Decree, according to which collective agreements shall define the venues, times, subjects, modalities and contents of information and consultation rights. Asit is well known, workers' collective bargaining on platforms is a big question, so the legislation is difficult to apply to the case at hand. Therefore, assuming the proposal is approved, to make the constraints arising from the 2002 directive operational, it would be necessary to adapt the domestic rules just mentioned by introducing provisions that either incentivise or support collective bargaining in the area of work through digital platforms or provide for a substitute role for the legislator.[22]

Synonymous with the discourse being conducted is one of the amendments in the version of the proposal for AI Regulation of 6 March 2024. The reference is to Art 26, para 7, which states that

> 'prior to putting into service or use a high-risk AI system at the workplace, deployers who are employers shall inform workers representatives and the affected workers that they will be subject to the system. This information shall be provided, where applicable, in accordance with the rules and procedures laid down in Union and national law and practice on information of workers and their representatives'.

On the contrary, in the 2023 version of the proposal, submitted by the European Parliament to the proposed Artificial Intelligence Regulation, Art 29, para 5a, provided that deployers 'shall consult workers representatives with a view to reaching an agreement in accordance with Directive 2002/14/EC and inform the affected employees'. The provisions call for information from workers' representatives and the affected workers. In contrast, only the 2023 provision contained a mention of the agreement provided for in the general directive on information and consultation, which can only be, first and foremost, governed by Art 5 of the European source of the law, ie, the agreement by which the arrangements for informing and consulting employees are defined, even in derogation of the provisions of Art 4 of the same directive.[23] This choice was by no means a foregone conclusion because the regulation could have referred generically to what is provided for by the European source, a sign that the European legislator in the field of high-risk AI systems in 2024 seemed to prefer the negotiated participatory route, considered, perhaps, more suitable for managing such systems also because it was closer to the needs of the different company realities, since, according to Art 5 of the 2002 directive, the agreement could be concluded at the appropriate level,

[22] More generally on the effects of the transposition of the proposed directive in Italy, see M. Falsone, 'What Impact Will the Proposed EU Directive on Platform Work Have on the Italian System?' 15 *Italian Labour Law e-Journal*, 99 (2022).

[23] The reference could also be to the agreement under Art 4(4)(e), Directive 2002/14, which deals with 'a view to reaching an agreement on decisions within the scope of the employer's powers.' On this point see U. Gargiulo, 'Intelligenza Artificiale e poteri datoriali: limiti normativi e ruolo dell'autonomia collettiva' 29 *federalismi.it*, 170 (2023) and L. Tebano, 'Poteri datoriali e dati biometrici nel contesto dell'AI Act' 25 *federalismi.it*, 198 (2023).

including that of the company or establishment. Suppose the regulation was approved in this version. In that case, the choice presented a similar danger to the one highlighted a moment ago concerning work through digital platforms, namely the lack of collective bargaining on the subject. However, this risk could have been mitigated by the fact that the use of artificial intelligence was increasingly widespread and across the board, so that, also given the Italian legislation transposing the 2002 directive about high-risk artificial intelligence systems, it would have been easier to conclude collective agreements of various levels that define in general the 'contours' of the right to information and consultation and provide for specific clauses.

As can be seen, Art 26, para 7, only makes a general reference to the rules and procedures concerning information laid down in Union and national law. The reference to consultation to reach an agreement has been repealed, thus weakening the role of social partners, especially because social partners no longer have a role as negotiating parties.

4. The Agreement for Social Dialogue in Central Government Administrations of 17 June 2022, in the prism of *Epsu* jurisprudence

It is worth mentioning the agreement signed on 17 June 2022, by the EU Committee for Social Dialogue in Central Government Administrations on Digitization and the national and European delegation of trade unions (Tuned) and public administration employers (Epsu).

First, this is again an autonomous agreement also signed by *Epsu*. This employer organisation had been the subject of an appeal before the EU Tribunal and the Court of Justice.

Regarding the subject matter of this paper, in addition to the fact that the involvement of the social partners is *in re ipsa* because they signed the agreement, the introductory section goes into detail by defining employee representatives as trade union representatives, elected representatives, or a combination of both, and further on by stating that in telework – defined as a form of work organisation and/or performance using information technology, in the context of an employment contract/relationship, in which work, which could also be performed on the employer's premises, is regularly performed off those premises –, central among the collective rights are the trade union rights of information, consultation and participation aimed at defining the new working environment (Art 4, para 2). There is a circularity with what is stated in the proposed directive on digitisation because there, too, as mentioned, the participatory route is preferred.

In addition, the 2022 agreement, precisely regarding telework, tries to foster effective social dialogue and union rights at the national level (Art 1) and also recognises the right to disconnect as the right of all workers to turn off their digital tools outside working hours without incurring consequences for not responding to emails, phone calls or any other communication. For what is relevant here, then, the right to disconnect must be agreed upon with unions at all relevant levels to

ensure its effectiveness (Art 4, no 12).

As anticipated, the agreement in question produces the effects of an autonomous agreement concerning only the European employers and trade union parties of the central administrations. It should be made clear, then, that it is a sectoral agreement, that is, having a scope limited to central administrations.

The EU Committee for Social Dialogue in Central Government Administrations, on 30 January 2023, officially requested to activate the procedure under Art 155(2) TFEU to have the text in question become a binding legal act at the Union level (eg, a directive). However, the Commission has indicated that it has suspended the relevant process, given that in the meantime, a cross-sectoral negotiation has opened (thus also concerning the private sector) on remote work and the right to disconnection. This negotiation impacts similar areas to those affected by the sectoral agreement in question and the 2020 agreement. In any case, if and when such an agreement is signed, there will be the question of how to link the texts mentioned. Finally, it will need to be seen whether the Commission will decide to follow up the latest agreements with the issuance of a directive or other act with binding force.

III. Unions and Platform Work in the US

1. A Fragmented Legal Regime Creates Serious Obstacles for Unions to Represent and Improve Conditions for Platform Workers

Unlike in the EU, there is no structural, consultative role on labor policy envisioned for unions in the US. Instead, unions influence labor standards and rights in two interconnected ways: primarily, by representing employees in collective bargaining, and secondarily, through lobbying efforts at the federal, state and local levels.[24] Lobbying activities related to improving employee wages and working conditions are funded by, and therefore dependent upon, the dues and fees of union members and sometimes non-member employees represented by the union in collective bargaining.[25] When there has been a high percentage of employees represented by unions, as in the 1950s and 1960s, this model proved to be effective. The standards set by collective bargaining agreements improved the lives of union-

[24] K. Andrias, 'The New Labor Law' 126 *Yale Law Journal*, 2, 6 (2016) ('Unlike legal regimes prevalent in Europe, the NLRA does not empower unions to bargain on behalf of workers generally, nor does it provide affirmative state support for collective bargaining.'); A.C. Hodges, 'Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power' 94 *Marquette Law Review* 889, 902 (2011) ('unions can play an important role in developing favourable law through litigation and lobbying for legislative change.').

[25] The current trend of the law is that only fees from union members can be used to support lobbying activities in the public and even private sectors. *Janus* v *Am. Fed'n of State, Cnty., &Mun. Emps.*, ––– US ––––, 138 S. Ct. 2448, 2486, 201 L.Ed.2d 924 (2018) (public sector); *United Nurses & Allied Professionals* v *National Labor Relations Board* 975 F.3d 34 (1st Cir. 2020) (private sector). Non-members represented by the union cannot be compelled to pay for lobbying.

represented employees, and also positively influenced wages and working conditions in the non-union sector. With significant funds and large memberships, unions were an important political force and were able to influence even national labor policy and legislation.[26]

In more recent times, declining rates of union penetration in the labor market has sent this model in somewhat of a death spiral. With private sector unionization rates and overall unionization rates hovering around 6% and 10%, respectively, the sheer numbers of employees covered by collective bargaining agreements have seriously declined.[27] This, in turn, has led to a drastic reduction in union revenue generated from employee dues and fees. Unfavorable court decisions and legislation have also restricted the ability of unions to collect fees from non-member employees that they represent, further reducing their income stream. These developments have reduced the capacity of unions to improve labor standards through both representation and lobbying.[28] This is not to say union influence over labor policy has been completely eviscerated, however. In certain regions and states, particularly the Northeast (New York, New Jersey) and West (California), and in large urban areas, union density remains high.[29] Consequently, in these places, unions still play a role in promoting pro-worker legislation. At the national level, too, unions have retained some influence in moving labor legislation forward, particularly when acting in concert with other left-leaning organizations (ie, minority rights and environmental groups).[30] Still, union power is not what it was even 10-20 years ago, and much less than it held 50-60 years ago.

The rise of the gig economy from the 2000s to the present time further threatened to constrict the influence of unions. Gig work, particularly in the transport sector, was premised upon two factors: the existence of a computer platform, run by certain algorithms that would efficiently connect parties needing a service (for example, riders) with parties providing a service (transport by car), and that the

[26] K. Andrias, n 24 above,5; E.K. Kim, 'Labor's Antitrust Problem: A Case For Worker Welfare' 130 *Yale Law Journal*, 428, 450 (2020) (restating the general proposition that 'nonunion wages tend to increase with union activity, in part because unions establish workplace norms that spill over to nonunionized workers.').

[27] Economic News Release, Union Membership (Annual), US Bureau of Labor Statistics, 23 January 2024, available at https://tinyurl.com/3c8j9rb9 (last visited 30 September 2024).

[28] S.W. Cudahy et al, 'Total Eclipse of the Court? Janus v. AFSCME, Council 31 in Historical, Legal, and Public Policy Contexts' 36 *Hofstra Labor & Employment Law Journal* 55, 122 (2018) ('The decline in revenue for unions, however, could likely undermine the effectiveness of labor representation at the bargaining table, in the workplace, and before legislative bodies.').

[29] L. Compa, 'Not Dead Yet: Preserving Labor Law Strengths While Exploring New Labor Law Strategies' 4 *UC Irvine Law Review*, 609, 620 (2014) ('Union density is in many ways a regional phenomenon. In New England, around the Great Lakes, on the West Coast, and in other states, union density is substantially greater than the national average…').

[30] R.T. Drury, 'Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance' 19 *Journal of Environmental Law and Litigation* 5, 18 (2004) (explaining the benefits of a blue-brown-green alliance of unions, environmentalists and minorities); E.J. Kennedy, 'Equitable, Sustainable, and Just: A Transition Framework' 64 *Arizona Law Review*, 1045, 1053 (2022).

platform and service provider would not be in an employer-employee relationship. This latter point enabled the platforms to evade social insurance contributions and other tax obligations, increasing their profitability, and to also avoid the reach of labor and employment laws. US labor law applies to employees, and not to independent businesspeople, known as independent contractors. As a result, gig workers (as independent contractors) are not subject to minimum wage and overtime rules, as well as employment antidiscrimination laws, and do not possess the right to join a labor union.[31]

If the gig economy was the future of work, and gig workers could not unionize, unions faced an existential threat.[32] Even in their weakened state, unions needed to summon whatever resources they still possessed to head off this potential catastrophe. The key would be to ensure through litigation and lobbying that gig workers would be classified as employees and thus, be able to unionize. A reserve position would be to push for state and local legislation to allow for union representation of non-employee gig workers, or, barring that, provide other services to gig workers outside the traditional collective bargaining context (ie, as would a professional association to its members).

A threshold problem for the first strategy (making gig workers employees) is the fragmented regime in the US for determining employee status.[33] Each of the 50 states technically has its own standard for determining whether a person was an employee or an independent contractor. What's more, they may use either a statutory test or a common law test. In either case, these tests are often complex and multifaceted. One such test previously used in California, for example, utilized a right of control test with a total of 13 secondary factors.[34] Unfortunately, the situation is not better at the federal level. Different federal statutes also use different tests, and so a given worker may or not be considered an employee depending on whether the legal issues involves federal tax law, wage and hour law or labor law.[35] This

[31] M. Lao, 'Workers in the 'Gig' Economy: The Case for Extending the Antitrust Labor Exemption' 51 *UC Davis Law Review*, 1543, 1551-1552 (2018); M. MacDonald, 'Risky Business: Misclassifying Gig Employees' 45 *LawPrac.* 50, 53 (2019) ('The premise of the gig economy is that workers become their own employers or are essentially independent contractors.').

[32] J. Chaisse and N. Banik, 'The Gig Workers Facing the Regulator: The Good, the Bad, and the Future' 31 *Transnational Law & Contemporary Problems* 1, 20 (2021) ('a shift in employment trends and the development of gig and platform work poses new organizational challenges to unionization.').

[33] E. Priest, 'Working Toward Break Point: Professional Tennis and the Growing Problem with Employee and Independent Contractor Misclassifications' 75 *SMU Law Review*, 943, 957 (Fall, 2022) (noting fragmentation of legal standards).

[34] *O'Connor* v *Uber*, 82 F.Supp.3d 1133, 1138-1140 (N.D. Ca. 2015). However, it is also true that many states share or utilize the same or similar tests.

[35] O. O'Callaghan, 'Independent Contractor Injustice: The Case for Amending Discriminatory Discrimination Laws' 55 *Houston Law Review*, 1187, 1196 (2018) ('The classification test which a court uses in a given case depends on the statute under which the plaintiff brings his claim.'); A.H. Miller, 'Curbing Worker Misclassification in Vermont: Proposed State Actions to Improve a National Problem' 39 *Vermont Law Review*, 207, 218 (2014) ('agencies and reviewing courts rely on a number of balancing tests to determine worker status, creating a situation in which a

fragmentation and complexity creates a number of difficulties for unions.

In a common law system such as the US, strategic litigation is often a useful means to achieve change.[36] Unions could either initiate and litigate cases on gig worker employee status themselves, or support (through advice or amicus curiae/ friend of the court briefs) existing litigation brought by other parties (often individual workers). To the extent the courts are persuaded by the unions' arguments that the gig worker(s) at issue are employees under the relevant federal or state law test, their employment status is eventually resolved judicially. No legislative change is necessary. However, there are serious impediments to the use of strategic litigation in the case of gig work. Because of the fragmentation noted above, such litigation would have to occur in a multitude of states and federal courts, taking account the different standards used in different jurisdictions and statutes. This would stretch the unions' resources.

It would also be very time consuming. Many of the cases on the status of a gig worker would be quite fact specific – the conditions of a driver at Uber may be different than those of a driver at Lyft, and these drivers' conditions may diverge from those of a food delivery driver working at another platform. Under the common law system, as these cases work their way through the appeals courts and ultimately the supreme courts, precedent on these issues is created over time. However, a decision on an Uber driver may be distinguishable on therefore not controlling on the case of a Lyft driver, resulting in the need for additional – and lengthy – litigation.

Likewise, successful legislative lobbying efforts directed at 50 states and at changing numerous federal statutes would be beyond the current capacity of the American labor movement. At best, targeted litigation and lobbying in key states where union density remains high (New York, California) and at the federal level, for a favorable interpretation or amendment of the most important statute, the National Labor Relations Act, which governs the right to unionize, is the most realistic option.

2. Union Efforts to Reclassify Platform Workers as Employees under Federal Law

The federal National Labor Relations Act (NLRA) governs the right to join a union and regulates collective bargaining in the US. It applies to private sector employees through the entire US, but it has a number of important exemptions, excluding supervisors and managers, agricultural workers, and, most relevant here,

worker could be an independent contractor for some purposes and an employee for others. Some federal laws apply different tests, creating a horizontal conflict. Additionally, some related federal and state laws apply different tests, creating a vertical conflict.').

[36] O. Razzolini, 'Self-Employed Workers and Collective Action: A Necessary Response to Increasing Income Inequality' 42 *Comparative Labor Law and Policy Journal*, 293, 299 (2021) (Observing that even in Europe, 'Strategic litigation seems to be used by unions as a tool of revitalization'); see also F. Kahraman, 'What Makes an International Institution Work for Labor Activists? Shaping International Law Through Strategic Litigation' 57 *Law & Society Review*, 61 (2023) (commenting on British and Turkish unions' strategic litigation at the international level).

independent contractors from its coverage.[37] Other employment statutes, such as the Fair Labor Standards Act (FLSA), which covers minimum wage and overtime, also only cover employees, and not independent contractors.[38] The platforms, such as Uber, contend that their workers are independent contractors, and therefore do not have the right to join and form trade unions under the NLRA, nor do they possess other employment rights under various other federal statutes such as the FLSA.[39] For unions, it is essential to either obtain a legal determination that gig workers are employees within the meaning of the NLRA, or to lobby for a reinterpretation or an amendment of the NLRA to include gig workers within the scope of its coverage, so that such workers may join unions and enjoy the benefits of collective bargaining.

Unions litigated the issue of whether gig workers were employees or independent contractors under the NLRA. The NLRA is enforced by an administrative agency, the National Labor Relations Board (NLRB).[40] Unions, employees and employers all may file unfair labor practice (ULP) complaints alleging a violation of certain provisions of the NLRA.[41] Unions may also file representation petitions with the NLRB, in order for the NLRB to direct a representation election in a certain unit of employees of a given employer.[42] A potential defense to either an ULP charge or a representation petition is that the workers at issue are not employees within the meaning of the NLRA. In resolving this question, the NLRB has used a traditional 10 part common law test, where no one factor would predominate. The factors include:

> '(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employee disengaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; d) the skill required in the particular occupation; e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether

[37] 29 U.S.C. § Section 152(3).

[38] 29 U.S.C. § 203(r)(1).

[39] K.L. Griffith, 'The Fair Labor Standards Act at 80: Everything Old is New Again' 104 *Cornell Law Review*, 557 (2019) (discussing the problem of gig worker misclassification as independent contractors under the FLSA).

[40] 29 U.S.C. § 153.

[41] 29 U.S.C. § 160(b).

[42] 29 U.S.C. § 159.

the principal is or is not in business.'[43]

This test was modified in 2019, when the NLRB decided to place a special emphasis on the opportunity of the worker to achieve entrepreneurial gain.[44]

In 2015 and 2016, various ULP charges were filed with the NLRB alleging that Uber violated the NLRA by its conduct towards its drivers. In defense, Uber argued that its drivers were not employees and therefore were not protected by the NLRA. In an advice memorandum issued in 2019, the NLRB's Office of General Counsel (OGC) agreed. The OGC found that, while various elements in the 10 factor test favored independent contractor status, and others suggested employee status, the fact that the drivers had substantial opportunity for entrepreneurial gain was decisive in finding they were not employees. The drivers had substantial control over when and how much they would work, and could even work for competing ridesharing platforms.[45]

In light of the OGC's determination, unions then pursued extensive lobbying efforts to amend the NLRA's definition of employee so as to include platform workers such as uber drivers. The resulting draft legislation, known as the PRO Act and supported by many Democratic congresspersons and senators, addressed the union's concerns. The PRO Act provided for numerous amendments of the NLRA that would benefit labor unions.[46] One of these would amend the definition of employee to incorporate the 'ABC' test used by various jurisdictions.[47] Under the ABC test, individuals performing work for an employer were presumed to be employees, unless all three of the following factors were met:

> '(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed'.[48]

The effect of the ABC test would be to make the vast majority of gig workers employees. Providing transportation services or delivering meals is a core part of

[43] *The Atlanta Opera, Inc.* 372 NLRB No. 95, *3 (2023); J.F. Grella, 'From Corporate Express to Fedex Home Delivery: A New Hurdle for Employees Seeking the Protections of the National Labor Relations Act in the D.C. Circuit' 18 *American University Journal of Gender, Social Policy & the Law*, 877, 882-883 (2010).

[44] *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).

[45] *Uber Technologies, Inc.*, 2019 WL 12521431 (N.L.R.B.G.C.).

[46] J.F. Harris and D. Holmes, 'The 'Protecting the Right to Organize' Act and the Radical Roots of Labor Law Reform'49 *Human Rights*, 26 (2023) (providing an overview of the PRO Act).

[47] J. Jones, 'The Pas De Deux Between Unionization and Federal Arts Funding: Why Congress Must Address Its Overcorrection that Impeded the Freelance Dance Industry' 30 *UCLA Entertainment Law Review* 95, 115-116 (2023).

[48] ibid 116, quoting § 101(b)(A)-(C) of the PRO Act legislation.

ridesharing or food delivery platforms, and drivers or delivery people used by the platforms are not performing work outside the scope of this business, within the meaning of part B of the ABC test.[49]

The PRO Act was introduced in 2020, when the Democratic Party controlled the Presidency and both chamber of Congress (the House of Representatives and the Senate). However, the Democrats' majority in the Senate was razor thin, 50 out of a 100 senators, plus the tie-breaking vote of the Democratic Vice-President, Kamala Harris. Under the Filibuster rule in the Senate, a 60 vote majority was necessary to advance legislation. As a result, the Republicans, who are generally pro-business, were able to block any further consideration of this legislation. Subsequently, in 2022, the Republicans regained control of the House of Representatives, putting the passage of the PRO Act even further out of reach. As of 2024, it is difficult to imagine a scenario where the Democrats regain control of the House, retain the Presidency (so as to avoid a veto of the PRO Act by a Republican President), and obtain a supermajority of 60+ senators to forestall any filibuster, all of which would have to occur for the PRO Act to have any chance of becoming law.[50] Historically speaking, it has been extremely difficult for either party to amend the NLRA.[51] The last substantive amendments to the NLRA dealt with strikes and collective bargaining in the healthcare sector, and were enacted in 1974 – 50 years ago.[52]

A more realistic and therefore more fruitful focus for unions has been to use their resources to support the election of a Democratic president. The NLRA is enforced by a federal administrative agency, the NLRB, and as such it is under the sway of the executive branch of government. The president appoints the General Counsel of the NLRB and also the majority of the members of its 5 person administrative decision-making body (also called the NLRB).[53] When most of the NLRB's members have been appointed by a Democratic president, the NLRB's decisions have been more favorable to unions, and vice-versa when the members were appointed by a Republican president.[54] These practices are quite relevant

[49] ibid 116-117 ('If the PRO Act were passed, section (B) of the 'ABC' test is anticipated to have a tremendous impact on independent contractors.').

[50] J.F. Harris and D. Holmes, n 46 above,27 ('But almost all agree that the chances of the act's passage are slim.').

[51] K. Bigley, 'Between Public and Private: Care Workers, Fissuring, and Labor Law' 132 *Yale Law Journal* 250, 315, fn 328 (2022) (labor law reform through amending the NLRA is notoriously difficult to achieve).

[52] G. Forté, 'Rethinking America's Approach to Workplace Safety: A Model for Advancing Safety Issues in the Chemical Industry' 53 *Cleveland State Law Review*, 513, 524-525 (2005-06) ('In 1974, Congress passed healthcare industry amendments to the NLRA that extended its reach to non profit healthcare institutions. Since the amendments, Congress has passed no other legislation aimed at the NLRA.').

[53] 29 U.S.C. § 153(a). Board members are appointed by the president for 5 year staggered terms, making it very likely that a given president can appoint a majority of the Board over the course of one or two terms of office.

[54] R. Turner, 'Ideological Voting on the National Labor Relations Board' 8 *University of Pennsylvania Journal of Labor and Employment Law*, 707 (2006).

to the status of gig workers. Led by members appointed by President Barack Obama, the NLRB found that certain drivers working for FedEx were employees rather than independent contractors;[55] at the time, this augured well for the NLRB making a similar finding that platform drivers likewise should be considered employees. However, Republican Donald Trump was elected President in 2016, and he made his own appointments to the NLRB. By 2019, the NLRB overruled its prior FedEx decision and replaced it with a new standard more amenable to finding that platform workers were independent contractors.[56] It was only after applying this new standard did the (Trump-era) OGC find that Uber drivers were not employees.[57]

Under Democratic President Biden, the NLRB shifted back to a relatively pro-labor orientation.[58] In 2023, the Biden-appointed NLRB restored the previous FedEx standard for determining employee status, overruling the 2019 decision of the Trump-appointed NLRB.[59] To the extent that organized labor can help President Biden win re-election in 2024, there would be at least a reasonable prospect that the NLRB might continue to apply this standard and reverse the OGC's Trump-era opinion that Uber drivers are not employees.[60]

3. Union Efforts to Reclassify Platform Workers as Employees under State and Local Law

At the national level, unions influence over the status of platform workers has been limited by the NLRB's determination that they are not employees and therefore do not have the right to unionize. Until and unless the NLRB reverses this decision (perhaps helped in this process by union support in the re-election campaign of President Joe Biden), unions must focus their efforts to reclassify gig workers as employees at the state and local level. Such a state/local strategy, as opposed to a national one, is not as limited as it first may appear. It is true that unions have been in decline for decades in the US and therefore lack resources to mount a campaign to change the status of gig workers in all 50 states. However, the states and cities in which they still retain some influence – in the West, the Northeast and major urban areas – are precisely the places where the platforms' services are most popular – particularly the use of ridesharing and food delivery services. Therefore, from a strategic point of view, the unions are not losing much by neglecting most of the Southern and rural Mountain states, which are in any

[55] *FedEx Home Delivery*, 361 NLRB 610 (2014) ('FedEx II').

[56] *SuperShuttle DFW, Inc.* n 44 above.

[57] *Uber Technologies, Inc.*, 2019 WL 12521431 (N.L.R.B.G.C.).

[58] L.C.S. Newberry, 'The ABCs of Gaming: Activision, Biden, and Covid-19 Set the Stage for Labor Unionization in the Video Game Industry' *Wisconsin Law Review*, 1027, 1056-1057 (2022) ('As predicted, President Biden's liberal administration ensured that pro-union Democrats regained the NLRB majority.').

[59] *The Atlanta Opera, Inc.* n 43 above.

[60] K. Andrias, 'Constitutional Clash: Labor, Capital, and Democracy', 118 *Northwestern University Law Review* 985, 1033 (2024).

case both hostile to unions and lack a concentration of platform services. A focus on local legislation in major, pro-union urban areas would give unions some tactical advantages and could achieve positive results in a shorter period of time.[61] At the same time, any gains might be overridden by contradictory state legislation. In the event, unions proceeded at both levels.

The unions' efforts would have two goals: to be able to represent gig workers locally, or to disrupt the platforms' business model by forcing them to pay normal employment and social insurance taxes for their workers once they were properly classified as employees, removing their competitive advantage *vis-à-vis* other employers. The first goal – union representation at the local or state level – has a number of serious legal obstacles. The NLRA covers most private sector employees at the national level, but excludes independent contractors (which the NLRB determined included platform drivers). Unions would therefore need to lobby for state or local legislation (or court rulings) that either classified platform workers as employees for state/local purposes, or state/local legislation that gave platform workers, as independent contractors, the right to join unions and collectively bargain. Critically, such a strategy very likely conflicts with federal antitrust law, which as a general proposition forecloses collective, coordinated action by independent contractors (in effect small businesses) to increase or fix their income.[62] Another problem is a potential conflict with the NLRA, which excludes independent contractors from its coverage. Under constitutional supremacy principles, federal antitrust law and labor law would pre-empt any inconsistent state law.

The conflict with antitrust law is especially problematic, from the unions perspective. While employee collective action is exempt from the scope of antitrust law, that of independent contractors is not. Consequently, even if a state or city were to give collective bargaining rights to independent contractors, it would only be permitted if this action fell into a recognized exception to antitrust law. Two possible exceptions might apply. First, under certain conditions, the state action exception allows states to promulgate laws that permit anticompetitive behavior, without running afoul of federal antitrust law. State legislation may allow municipalities, for example, to regulate billboard advertising in such a way that permits some anticompetitive behavior-preexisting billboards may get a preference over new ones, in the interest of setting zoning standards. However, the exception is construed narrowly, and the state legislation must clearly intend to allow certain anticompetitive conduct, and, where it is a municipality that is acting, the state must exercise supervisory control over the law's implementation.[63]

[61] See generally, S.L. Cummings and A. Elmore, 'Mobilizable Labor Law' 99 *Indiana Law Journal*, 127 (2023), and A. Elmore, 'Labor's New Localism' 95 *Southern California Law Review*, 253 (2021), both outlining benefits of unions focusing on a local strategy.

[62] E.J. Kennedy, 'Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors" ' 26 *Berkeley Journal of Employment and Labor Law*, 146, 169 (2005).

[63] C. Estlund and W.B. Liebman, 'Collective Bargaining Beyond Employment in the United States' 42 *Comparative Labor Law and Policy Journal*, 371, 383-387 (2021) (explaining the state

The City of Seattle, with the support of unions, enacted an ordinance that would provide platform drivers in the city the right to collectively bargain.[64] Uber challenged this law on the grounds that it ran afoul of federal antitrust law and that it was pre-empted by the NLRA. Seattle argued that the ordinance fell within the scope of the state action exception to antitrust law – the ordinance was enacted pursuant to state law that allowed municipalities to regulate local transportation issues. On appeal, the Federal Court of Appeals rejected this argument, noting that there was no specific state intention in that state law to grant bargaining rights to independent contractor drivers (normally anticompetitive behavior). Moreover, the court noted that in any case the state did not have a sufficient supervisory role in the implementation of this local ordinance for the state action exception to apply. The court did reject Uber's NLRA pre-emption argument. While the NLRA did exempt certain categories of workers from its coverage, such as independent contractors, public employees and agricultural employees, this did not mean states were prohibited from giving them collective bargaining rights. Indeed, state had granted public employees and agricultural workers such rights for decades after the passage of the NLRA without objection.[65]

Moving forward, unions in sympathetic states or cities must work with local authorities to create laws that allow platform workers the right to collectively bargain that more clearly fit into the state action antitrust exception than the one in Seattle. State enabling legislation needs to specifically contemplate that platform workers may be given collective bargaining rights, and the state should be involved in enforcing and implementing such legislation. One such example is a law proposed by the state of New York, which permits sectoral bargaining between platforms and platform workers in the transportation and delivery sectors. Bargaining would take place in the context of newly created 'industry councils.' After negotiations, these Councils then prepare recommendations, which are either accepted or rejected by the State. This law was drafted with antitrust considerations and the state action exception in mind: the law specifically permits collective bargaining for these categories of platform workers, and the state has a direct role in the law's implementation. Connecticut and Massachusetts also have considered similar legislation.[66]

A second antitrust exception involves the application of the broader labor exemption in certain circumstances involving independent contractors. Traditionally, this was quite limited, and involved conduct by independent contractors that impacted the wages of employees performing similar work.[67] However, a recent

action exception).

[64] R.C. Brown, 'Ride-Hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!' 29 *Washington International Law Journal*, 533, 545-549 (2020) (describing the Seattle ordinance in detail).

[65] *Chamber of Com. of the US* v *City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

[66] J. Jacob, 'Avenues for Gig Worker Collective Action after Jinetes' 123 *Columbia Law Review*, 208, 225-226 (2023).

[67] D. Lee, 'Bundling 'Alt-Labor': How Policy Reform Can Facilitate Political Organization in

Federal Court of Appeals decision potentially expanded the scope of this exception, applying it to independent contractors (in that case, horse racing jockeys) who went on strike to improve their wages.[68] The Court ruled that since the sole issue was worker compensation, the jockeys' action fell into the labor exemption, irrespective of their independent contractor status. There are still doubts about the scope of this decision and its impact on platform worker collective action. It may only apply where the collective dispute is solely about wages or income for work. The jockeys did not own their horses or their equipment; they only offered their labor. Transport platform workers, on the other hand, typically use their own cars and so their relationship with the platforms does not purely revolve around income for work. Still, unions may try to exploit this exception, trying to expand it through further strategic litigation and taking advantage of it by supporting platform worker collective action, such as strikes, where the dispute only involves wages for labor.[69]

Apart from obtaining collective bargaining rights for platform workers, unions may also try to achieve other benefits of employee status for them. Most notably, employee status under state law would make the platforms responsible for payroll taxes, including social insurance contributions, and the platform workers would receive the right to the state minimum wage and overtime. They would also receive protection from employment discrimination under state employment laws. In addition to benefiting the workers, this strategy targets the core business model of the platforms. A key pillar for gig work is the platform workers' status as an independent contractor. This frees the platforms from significant tax and regulatory burdens that come with having actual employees, as well as from potential minimum wage and overtime payments that very well might be necessary.[70] If the platforms became responsible for these payments and compliance requirements, they may well be forced either into bankruptcy, quit the local market or to radically change their business model (ie, charging higher prices for consumers or relying on fewer platform workers, but paying them more).[71] Probably either result would suit the

Emerging Worker Movements'51 *Harvard Civil Rights-Civil Liberties Law Review*, 509, 530 (2016) ('Independent contractors cannot form NLRA-governed labor unions and can only join or coordinate with labor unions if they: (1) perform the same work as and (2) compete with bona fide employees in the industry.').

[68] *Confederación Hípica de Puerto Rico, Inc.* v *Confederación de Jinetes Puertorriqueñs, Inc.*, 30 F.4th 306 (1st Cir.2022).

[69] J. Jacob, n 66 above, 216-224. The Democrat appointed Federal Trade Commission members have promised not interfere with any attempted collective activities initiated by gig workers on antitrust grounds. D. Papscun and K. Atkinson, 'Antitrust Shield for Independent Worker Action Gains Momentum' *Bloomsberg News*, available at https://tinyurl.com/et8t7jsh (last visited 30 September 2024). However, this announcement is more symbolic than practical - clearly the platforms themselves would raise an antitrust defense in these situations.

[70] A. Rizzo, 'The Changing Landscape of Worker Rights in the 21st Century Workplace' 79 *NYU Annual Survey of American Law*, 221, 229-230 (2023).

[71] For example, Uber and Lyft recently quit the Minneapolis market after the local council substantially raised the minimum wage for platform drivers. J. Valinsky, 'Lyft and Uber to cease operations in Minneapolis after new minimum wage law', available at https://tinyurl.com/234vywpv

unions. The platforms might be replaced by more traditional employers that were actually possible to unionize, or would themselves morph into a regular employer.

While this strategy avoids the obstacle of antitrust law, it is also not so simple. The unions tried to do this in California, now a core Democratic party stronghold and a generally progressive state. In part due to union lobbying, the Democratic controlled legislature passed legislation that would make most platform workers employees under California law by codifying the ABC test.[72] The major transportation and delivery platforms did not give up easily, however. They spent hundreds of millions of dollars to initiate a popular referendum on the status of platform workers, pursuant to the referendum provisions of the California constitution. The proposed language in the referendum would override the aforementioned legislation, but also give the platform drivers some additional rights, such as insurance benefits and a minimum payment guarantee.[73] Again, Uber and similar platforms spent tremendous amounts of money on advertising convincing the public that keeping platform drivers independent contractors would result in lower consumer prices for rideshare services.[74] In the end, the platforms' campaign was successful, and the referendum proposal passed. After a subsequent court challenge to the referendum backed by the unions largely failed, platform drivers in California are securely independent contractors.

In one sense, the outcome in California shows the imbalance in power between the platforms and labor unions, even upon favorable ground for the unions. At the same time, most states do not have a constitutional provision allowing the public to overrule unpopular legislation through a referendum; this is somewhat unique to California. Consequently unions have and will continue to pursue a legislative strategy to change the status of platform workers in other union-friendly states, such as those in the Northeast.

4. Assistance Provided by Unions to Platform Workers Outside of the Employment Context

Existing NLRB precedent and federal antitrust law, taken together, are formidable barriers for unions seeking to obtain any type of formal voice or collective bargaining role in support of platform workers. Most of these difficulties

(last visited 30 September 2024).

[72] D. Gobel, 'Proposition 22 and the Fight to Prevent Platform Workers from Misclassification and Exploitation' 31 *Southern California Interdisciplinary Law Journal*, 143, 158 (2021); M.A. Cherry, 'Employee Status for "Essential Workers": The Case for Gig Worker Parity' 55 *Loyola of Los Angeles Law Review* 683, 707-708 (2022).

[73] D. Gobel, n 72 above, 161-162 (outlining the various additional benefits that the referendum proposition would give platform drivers).

[74] M.A. Cherry, n 72 above,709-710 ('Gig economy companies contributed over $200 million to exempt on-demand companies from AB5 and to keep gig workers as independent contractors. While unions and groups of gig workers strongly opposed these efforts in grassroots campaigns, they were outspent by more than twenty to one in the leadup to the November election season.').

revolve around the platform workers' legal status as independent contractors. Under such conditions, a potential fallback position would be for union to simply provide certain services to platform workers outside the collective bargaining context.[75] Various trade and professional associations have long provided services to their small business or sole proprietor members, and unions could do something similar for platform workers.

The model used by the Screen Actors Guild (SAG) may be the most useful, as it comes the closest to providing a service that actually might improve an independent contractor's working conditions. Various social media influencers have come to realize that their work on internet platforms can be quite precarious. Facebook, X (Twitter) and even Only Fans may have the right to remove users from their services, or abruptly change the terms and conditions of the use of their platforms, in such a manner that restricts their use. Influencers, whose income depends on their access to these platforms, may find themselves booted off the platforms with little notice and little recourse to reverse the platform's decision.[76] Since influencers are most often deemed independent contractors, they are unable to formally join unions and negotiate a protective collective bargaining agreement.

The solution offered by SAG offers an end run around this problem. Influencers may join SAG, and for a fee, they receive support from SAG in reaching an individual agreement with the advertisers whose products are being promoted. Moreover, SAG helpfully has provided a model agreement for influencers which may serve as the basis for an individual agreement. These are not collective bargaining activities, but rather a form of consulting services, as well as a vehicle for the influencer to obtain union healthcare and pension benefits (as provided in the model SAG agreement).[77] Of course, the SAG model works best with high skill platform workers (influencers) who – with the benefit of SAG expertise – have the negotiating power to actually change their working conditions at an individual level. This model may not be easily transferable to food delivery platform workers. Still, even with lower skill platform workers, unions could set up professional associations and give workers advice and individual legal representation in order to improve their working conditions.

[75] A. Curl, 'Turning the Channel: Why Online Content Creators Can and Should Unionize Under the NLRA' 36 *ABA Journal of Labor & Employment Law* 517, 537-540 (2022) (providing options for influencers in lieu of collective bargaining).

[76] S.A. O'Brien, 'Sex workers helped popularize Only Fans. Now their future on the platform is uncertain' *CNN*, available at https://tinyurl.com/2ktuabwn (last visited 30 September 2024).

[77] A. Curl, n 75 above, 539-540 (summarizing SAG's influencer agreement, but stressing that the agreement is between the influencer and an advertiser, and not the influencer and the platform); B.R. Mulcahy and G.R. Ilardi, 'Engaging Influencers' 43 *MAY Los Angeles Law*, 24 (2020); S. Shiffman, 'The Tik Tok Union: Unionization in the age of new media' 34 *Loyola Consumer Law Review*, 155 (2022).

IV. Conclusions

Trade unions in both the European Union and the US have a vital role to play in the ongoing and future regulation of platform work and AI. In the European Union, as has been pointed out, the role of social actors in the measures being approved and in the agreements that have been concluded (and perhaps in those in the process of being signed) is prominent. Institutional and social actors in the Union are aware that, without union involvement in the broad sense of the expression, it is impossible to regulate the growing phenomenon of the digitisation of work.

Concerning the European social dialogue plan, the social partners have always been involved not only, of course, in the drafting of all the agreements but also the binding proposals launched so far. However, they have opted not to exercise the prerogatives recognised to them by the Treaty on the Functioning of the European Union and, therefore, have decided to play mainly the role, consistently recognized the primary source, of recipients of information and consultations (as in the proposal for a directive on platform work and the proposal for a regulation on Artificial Intelligence) rather than trying to negotiate agreements in those matters. In other cases (in 2020 and 2022), they concluded agreements at the European level. Still, they decided not to require their transposition into binding Union acts, probably also due to the shocks to social dialogue following the *Epsu* decisions.

As far as the participatory profile in the strict sense is concerned, the European legislator has envisaged the involvement of workers, but above all, of trade unions, which are tasked with affecting non-secondary profiles of the new regulations. This involvement will be effective when certain conditions are met, that is: 1) if the proposals are passed in the versions currently known, 2) if the new regulations are linked with other European regulations in force, 3) and if they are adapted to the various national contexts, intervening at that level even if the implementation process is not formally required, as in the case of the regulation on AI.

The situation in the United States is somewhat more problematic for trade unions. Unlike in Europe, there is no institutional role for unions in the form of tripartite (government-employer-union) consultations or social dialogue. Unions may influence social policy affecting workers directly through the representation of employees in the collective bargaining process and by ultimately concluding collective bargaining agreements with employers. Secondarily, and often tied to collective bargaining, unions may lobby at the national, state, and local levels for favourable legislation protecting the rights of unions and employees. Depending on the political climate, this may involve lobbying for positive, pro-worker legislation or to stop more draconian pro-business labor law legislation from coming into effect. Since the US has a common law legal system, where the courts exercise considerable influence in the construction and interpretation of labor law, unions also have pursued strategic litigation to judicially expand the rights of unions and workers.

In modern times, union penetration in the American labor market has reached

historic lows, and new legal restrictions have compromised unions' ability to raise funds from the workers they represent. These developments have restricted unions' room for manoeuvre. At this same moment, with the emergence of the gig economy and the rise of platform work, a grave threat has been posed to the American labor movement. Gig or platform workers are considered independent contractors under federal labor law, and as a result do not possess the right to join or form labor unions and collectively bargain. Thus, the greater the expansion and reach of the platforms, the smaller the pool of employees American labor unions have to represent. Consequently, despite their diminished state, unions have focused their efforts on securing legislative changes through lobbying and legal changes through litigation that would allow platform workers to collectively bargain.

At the national level, unions have advocated for the passage of the PRO Act, which would amend the NLRA to encompass most platform workers, and thus make them eligible to collectively bargain. However, the filibuster rule in the US Senate, which requires a supermajority of 60 votes for most legislation to be advanced, makes it almost impossible to enact the PRO Act. Pro-union Democrats barely hold 50 seats in the Senate, and it is inconceivable that they could win 60 or more votes in the foreseeable future. A more fruitful path would be for unions to help secure the re-election of Democratic President Joe Biden; in a tight election, even a weakened labor movement may exercise outsized influence. The President of the US controls the appointments to key positions in various administrative bodies in the federal government, including the NLRB. A pro-labor NLRB may well reverse its decision from the era of President Trump that platform workers are independent contractors.

At the state and local level, unions have tried to promote creative legislation that would permit platform workers to collectively bargain. Federal antitrust law creates a very high barrier here, unfortunately. Unions are left with trying to navigate various minor exceptions in antitrust law by which state and local legislation, or innovative judicial decisions, may sneak through and permit some level of representation of these workers. In the worst case, unions have begun preparing to offer professional services to certain high skill platform workers (such as influencers), which, although falling short of representation through collective bargaining, may help improve their wages and working conditions.

Clearly, the sheer magnitude and scope of changes wrought by AI in the labor market, especially – thus far – through platform work, have made it increasingly difficult for workers to protect their own interests at an individual level. Only a collective response will offer them solace. European and American unions will continue to fight for a place at the policymaking table to ensure the workers' interests are protected, notwithstanding some recent reverses.