Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social

XXIII Congreso Mundial

7 - 10 de Septiembre de 2021 - Lima, Perú

RETOS DE LOS SISTEMAS DE LEGISLACIÓN LABORAL Y SEGURIDAD SOCIAL

- Transformación del trabajo: desafíos para el Derecho del Trabajo
- Comercio internacional y trabajo
- Nuevos retos de la Seguridad Social
- Trabajadores migrantes
- Trabajadores atípicos e informales
- Igualdad en el trabajo
- El Estado y las nuevas formas de voz colectiva

SPDTSS

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TRABAJADORES ATÍPICOS E INFORMALES

NON-STANDARD AND INFORMAL WORKERS

ATHLETES AS GIG-WORKERS? THE CASE OF MMA IN A COMPARATIVE PERSPECTIVE

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ABSTRACT: The business and labour practices of professional combat sports (Mixed Martial Arts) appear indicative of the main recent labour market trends and present many aspects characterizing non- standard employment and gig-economy work. The issues of this specific sector may be consideredrepresentative of the various options available to regulators as well as the potential problemslinked with the definition, implementation and effective enforcement of a set of labour protections may therefore prove as a testbed for regulatory options providing an effective protection to particularly vulnerable categories of workers, avoiding further fragmentation of labour market.

KEYWORDS: gig employment, working conditions, collective bargaining, antitrust.

1. INTRODUCTION

While the growth of platform-based delivery and private transportation services has garnered most of the media and political attention in recent times, the increasing recourse to non-standard forms of employment o organize and coordinate economic activities to reduce costs and increase efficiency rapresents a defining element of the current labour market.

These forms of employment have experienced a marked rise in recent times, especially inbigger urban centers in a widening number of sectors[1], and the number of workers employed in there kind of activities has significantly grown in particular as a consequence of the variousrestrictions of movement and lockdowns imposed by the domestic governments and local authorities as a response to the Covid-19 pandemic in order to address the public health crisis and mitigate the spread of the virus.

Both the recurring use of technological instruments[2] and of flexible work contracts can provide a broader range of options in accommodating the evolving

1 Beyond the aforementioned food delivery and private transportation, these kind of arrangements cover a diverse range of activities including travel and tourism, domestic work and home services (errands, laundry, pet care, floral), healthcare, elderly assistance, child care, tutoring and education, an are carachterized by a pay structure linked to the completion of specific tasks.

2 Among the chief reasons for the rise of this phenomenon it is certainly possible to identify an increasingly strong mobile internet coverage and the easy access to smartphones equipped with apps and messaging services, which represent themain tool through which companies in the sector remotely hire individuals and coordinate their specific activities, rather than organizing a collabo-

needs of workers and employers, in particular by allowing for greater flexibility in defining some of the most relevant aspects regarding the organization of the working relationship.

However, it is worth noting how the majority of the services and activities carried out by the workers in the gig economy do not represent "new" economic activities, and one of the maindrivers of the success and profitability of the so-called "virtual marketplace companies" (VMCs) is represented by their ability to maintain low labor costs in the various sectors in which they operate.

Companies consistently frame such activities as occasional work, widely utilizing terms such as "gigs", "freelancing" and work "on the side", therefore not needing excessive regulations. Furthermore, it is highlighted how the structure of pay for the completion of specific tasks, sales or projects is strictly linked to the acquisition of a mainly supplemental income. However, rather than representing an accessory activity for people who already work ordinary jobs or are involved in educational tracks and through which they can supplement their income without having to join an overly organised workforce, these types of activities come to represent the main source of income (in particular for certain demographics) and the main occupation of otherwise unemployed individuals[3].

Several key aspects appear in need of clarification, and have represented the main issuesraised in a series of recent unionization efforts, regulatory proposals and ongoing litigations both in national setting and at European level, while posing serious questions on the viability of the business models provided by the platform companies, which have often pushed back against proposed national regulations and court rulings which have at least in part, outlined some of the rules and norms applicable to this category of workers. The current lack of structured framework onthe various forms of employment connected to the gig-economy is bound to produce an even more segmented workforce[4], subject

rative team.

3 More than a 1/4 of workers participate in the gig economy in some capacity. More than one in ten workers rely on alternative arrangements for their main job, including temp agency work, on-call work, contracted work, and freelancing. Other estimates are slightly higher: see for instance an analysis by Forbes highlighting that over 35% of the USworkforce are "gig workers,", and that Upwork, a large website dedicated to freelancers, reports that the younger generations experience higher percentages of the recourse to gig work (up to 53% for those born between the years 1995–2014)

4 Protecting workers in the platform economy has long been on the European Parliament's agenda

to precarious and exploitative working conditions carachterised by low pay[5] and

and the Directive 2019/1153 adopted in 2019 aimed at improving protections for casual and short-term workers in the gig economy (domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive. The aim is to improve protection of their employment relationships) while leaving self-employed persons outside its scope, and therefore not addressing or solving the issue of whether self-employed individuals in the gig economy need to be treated as undertakings in particular within the meaningof antitrust law, nor the CJEU did not go into this specific matter in its judgment in the preliminary ruling procedure in Spain on Elite Taxi/Uber (C-434/15): therefore, in the gig economy market, the least powerful actors in it, namely individual workers and entrepreneurs, may be barred from engaging in economic coordination - even collective bargaining in order to receive a fair share of the revenues they generate - while powerful companies (and in particular thetech platforms) are left substantially free to coordinate prices beyond their firm boundaries. See Sanjukta P., *The AntitrustParadox of the Gig Economy, Canadian Law of Work Forum (CLWF),* April 2 2020, available at https://lawofwork.ca/the- antitrust-paradox-of-the-gig-economy/

5 Especially when it is considered waiting time to access a shift against the time actually spent in the performance of the activity may cause an undercutting of wage rates, While also appearing potentially in contrast with working timeregulations, in particular when the maximum amount of daily working time and the necessity of rest periods as well as thedichotomy between working time and waiting periods exemplified by the SiMAP-Jaeger jurisprudence by the CJEU is taken into consideration. The ECJ has expressed its opinion in particular in relation to on-call duty and the opt-out as wellas regarding reference periods and rest periods. The Directive does not take into account any alternative or intermediate definition; either a person is working or is resting/not working. In SiMAP (C-303/98), the ECJ found, in particular, that the entire period of on-call duty in the workplace must be classified as working time irrespective of whether the employeewas actually deployed by the employer. This arises from the fact that the employee must be present and available at the workplace in order to perform his/her work. Whether work was actually performed is irrelevant in this regard.

The ECJ distinguishes this from being on stand-by where the employee must be permanently accessible but does not need to be present at the workplace. Since, in this case, the employee is freer to manage his/her own time and interests, only that time in which work was actually carried out for the employer should be included as working time. Jaeger (C-151/02) confirmed the classification of on-call duty as working time arises from the obligation to be present at the workplace: the employee is subject to greater restrictions than if he were merely on stand-by because he is apart fromhis family and social environment and has less freedom to manage his "inactive" time. Among the definitions of particular relevance in the EU working time regulation, in order to protect workers' health and safety, daily and weekly working hours must meet minimum standards applicable throughout the EU. Furthermore, every worker is entitled to minimum rest periods (11 consecutive hours daily and a 35 weekly) which can be however detailed (and under certain conditions, derogated) by by way of collective agreements or agreements between the social partners allowing the worker to earn extra money (in the form of overtime paid at higher rates).

job insecurity[6] and exposed to risks of various nature, not seldom connected to the specific features of the new working arrangement and relationships[7].

2. THE CASE OF MIXED MARTIAL ARTS (MMA): A FAILED UNIONIZATION EFFORT AND AN ONGOING ANTITRUST LAWSUIT

Alongside the more "classical" jobs linked with the gig-economy, the current landscape of professional combat sports (in particular Mixed Martial Arts) presents striking analogies with other non-standard forms of employment, both in terms of the main features of the work relationship but also in terms of the issues that need to be addressed with reference to the working conditions and social protection of the various actors involved.

The Ultimate Fighting Championship (UFC) is currently the premier and largest MMA promotion,featuring the highest-level fighters in the sport, and has experienced in the last few years a significant increase in its company value, through a series of sponsorship agreements[8] , a multi- billion sale to the holding company for talent and media agencies William Morris Endeavor Entertainment (WME or WME-IMG, now Endeavor), and an exclusive media rights deal with the cable sports provider ESPN[9]. However, such growth was

6 That is, the potential absence of guaranteed work opportunities in the face of an individual's availability with respect to the rest of the active workers (in particular within a specific timeframe). In most cases, the worker is not allowed to individually set prices or market the personal services offered to potential customers and therefore its opportunities are significantly limited by the company's control of the price and assignments.

7 Such as for the case of lack of rest periods and fatigue, insufficient health and safety training leading to accidents, as well as sexual harrassment, discrimination in the workplace and/or in the perfroming of the activity. Uber's first safety report for its U.S. operations detailed its policies and processes (including the number of driver applications it has turned down and how many it has deactivated for their behavior) as well as the number of "safety incidents" such as sexual assaults (drivers were 45% of the accused) or fatal physical assaults (7 out of 19) out of a total number of 1 billion ridesin 2017 and 1.3 billion in 2018. As part of a settlement with the Equal Employment Opportunity Commission (EEOC), the company has ulimately agreed to pay $4.4 million into a fund for victims of sexual harassment and to set up a system to guarantee the accountabiity of its managers in responding to reports.

8 The first exclusive sponsorship agreement was signed with Reebok in 2016 and is evaluated at $70 million, and was followed by another contract with Venum in 2021 whose value was not reported but which also entailed a review of the outfitting policy (see *infra* in this paragraph). In both cases these decision were taken unilaterally by the company, withoutany involvement of athletes or their representatives either in the decisional process or in the negotiation with the suppliers.

9 The expiring date of the original deal was further extended from 2023 to 2025 and the deal itself was expanded to include pay-per-views within the scope of the exclusivity. Darren Rovell & Brett Okamoto, Dana White on $4 Billion UFC Sale: 'Sport Is Going to the Next Level,' ESPN.

not complemented by an increase in the average salaries of the fighters, which consistently average 18% of the revenues[10], a figure that appears particularly low when compared with the 45-50% of other major professional US sports leagues such as the NBA, the NFL, NHL and MLB, all covered by CBAs negotiated by the player's association and with the other combat sport of boxing where the revenue split is even higher with athletes regularly receiving 60-70 percent of the revenue collected by a promoter. A competing MMA promotion at the end of the 2000s, Strikeforce, paid its fighters 93% to 97% of eventrevenues in 2008-09 and 51% in 2010, according to the exhibits released in an antitrust lawsuit brought forward by some former athletes of the UFC.

TABLE 10: AGGREGATE DAMAGES TO BOUT CLASS (MILLIONS) THROUGH JUNE 30, 2017
ZUFFA FORECLOSURE REGRESSION MODEL

YEAR	ZUFFA EVENT REVENUE	ACTUAL FIGHTER SHARE	BUT-FOR FIGHYER SHARE	DAMAGES
From Dec 16 2010	$ 20.3	24.9%	46.8%	$ 4.43
2011	$ 408.9	19.4%	42.9%	$ 9.61
2012	$ 401.5	18.6%	47.9%	$ 117.8
2013	$ 482.2	20.3%	51.9%	$ 152.4
2014				
2015				
2016				
Through 6/30/2017				
TOTAL				$ 894.3

NOTES: Event Revenue includes PPV, broadcast gate, and on-demand video revenues, as reported in Zuffa's financial documents. Zuffa's Event Revenue data are extrapolated for the first half of 2017. Figures for 2010 truncated to conform to Class Period.

Figure 1. Expert Report of Hal Singer

com, July 11, 2017, http://www.espn.com/mma/story/_/id/16970360/ ufc- sold-unprecedented-4-billion-dana-white-confirms

10 According to the report of plaintiffs' expert witness Dr. Hal Singer (see fig.1), the share of Zuffa event revenues going tofighters as compensation ranged from 18.6% to 20.3% from 2011 to 2013. Zuffa is the parent company of the UFC, and from 2011 to 2012 (and one event in 2013), it included some Strikeforce events as well. Unlike prior media estimates, Singer's data includes all forms of fighter compensation—some publicly disclosed, such as fight night bonuses; others occasionally disclosed, such as show and win purses; and still others rarely disclosed, such as pay-per-view payments, letter of agreement payments and other discretionary pay. Singer argues that but for the UFC's alleged conduct, the share of event revenues going to fighters should have ranged from 42.9% to 77.1% over the same three years, depending on the model employed.

UFC's labour relations and practices appear indicative of the main recent trends of US economy, where most of the new jobs created since 2005 are gigs or temporary position or contractor jobs, in large part because companies are not inclined to pay for healthcare or benefits: the main features of this business model are in fact represented by the classification of fighters as independent contractors and a pay structure linked to the completion of specific tasks.

The around 500 fighters, in fact, are not employed by the UFC, a fact that entails a series of significant considerations with regards to the main features of their relationship with the UFC company and management.

The first aspect to be considered is the one connected to financial compensation: the pay structure in the UFC is linked to the completion of specific tasks, such as the participation in the event and being declared the winner of the bout (the so called show/win money), as well as an automatic increase of the amount of the economic compensation for the case of consecutive wins.

Contracts also allow for discretionary performance bonuses[11] or a percentage of gate income or

pay-per-view sales, usually reserved for division champions and other high-profile athletes[12].

Furthermore, under the UFC Promotional Guidelines no individual sponsorship are allowed, but in all their public interaction and performances fighters are mandated to utilize gear and material provided by the main sponsors of the UFC and receive an additional compensation according to a tiered system through which fighters are paid a certain amount per fight depending on their"seniority"[13]. UFC Promotional Guidelines require fighters to attend, cooperate and assist in the promotion of event in which they fight (in terms of

11 Two "Performance of the Night" and one "Fight of the Night" bonuses are awarded each event, each one ranging from 50.000 to 75.000 US$

12 Unlike other major professional sports leagues such as the NBA, monetary figures in MMA have largely been privatized, leaving consumers analysts and observers without precise elements about a series of financial and fiscal aspects of the sport.

13 i.e. their number of fights in the various organization under the Zuffa banner. It has been highlighted how such a system is inherently discriminatory for female fighters, which until 2012 were not allowed to compete and whose previousfights do not count towards the compensation system set by the outfitting policy, while male fighters are rewarded alsofor the fights carried out under the umbrella of other organizations that were subsequently acquired or incorporated by the UFC.

media obligations, location requirements and other items) and if required, any other bouts, events, broadcasts, press conferences and sale of merchandise, for no additional compensation. In line with their classification of independent contractors, training costs are covered by the fighters (and not by a team as for the case of most organized sports) which also are not provided with any health-care plan, except a full insurance policy for fights and a general health policy that covers up to $50K per year for training accidents[14].

However, even if the fighters classified as independent contractors, much in line with other individual professional sports such as tennis and golf, the fighters are bound to the main company by a series of significant exclusive clauses: the UFC, in fact, has exclusive rights to secure, promote, arrange and present a number of fights, prohibits athletes from appearing in bouts televised or organized by actual or potential rival promotions[15].

Furthermore, according to the Ancillary Rights Clause, the company is granted exclusive personality and identity rights not only of the UFC fighter, but of 'all persons associated with' the athlete in any medium and for all other commercial purposes: fighter are to be compensated on thebasis of a percentage of the sale of the items connected to them[16].

While the contracts identify usually a set duration an a set number of fights to be performed[17], they also include an extension clause allowing the UFC to extend the term of the contract during periods when he or she is injured, retired, or otherwise declines to compete: in the case of a champion in a specific weight class this extension is indefinited, and entails a prohibition of agreements with other promoters even after the end of his/her original UFC contract term. In any case, the UFC has also a right to match financial terms and conditions of any contract offer to a fighter even after the original contract has expired.

14 It must also be noted that the UFC is the only MMA organization that offers such insurance coverage.

15 From 2010 to 2015, 99.1% of UFC contracts contained a champion's clause, allowing for a one-year or three-fight extension should a fighter win a title, and 100% of them allowed for tolling extensions due to fighter injury or retirement

16 With specific reference to the NIL (name, image and likeness) rights in the sporting context see recently the Supreme Court decision in *NCAA v. Alston* No. 20–512

17 The initial terms of UFC contracts tend to be quite short: according to an expert analysis, a substantial majority of them(82.5%) have a duration of two years or less, and the most common contracts are of a length of 20 months (35.5%), a year and a half (20.9%) and one year (18.4%).

With respect to the sporting activities that fighters are expected to carry out contracts generally require a high level of performance but at the same time allow the UFC to release a fighter independently from the results obtained: furthermore no guarantees or transparency is provided to the fighters with respect to fight arrangements, since the organization lacks either a tournament structure, a ranking system or the provision of mandatory challenger for the divisional champions binding the promoter in its choices which therefore remain purely discretional and fundamentally linked to commercial and economic interests.

On the other hand, beside the promotional compliance and outfitting policy fighters on the UFC roster are also required to observe a series of further commitments: they have to abide to a code ofconduct outside of the sporting event, which a failure to comply to could results in fines or bans, and need to adhere to the anti-doping USADA 24/7 whereabouts[18] medical examinations by the UFC in the event of a possible injury.

While MMA isn't regulated at the federal level the same way boxing is under the Muhammad Ali Boxing Reform Act[19], these rigid and restrictive conditions of employment raise doubts as whether fighters should be considered employees in particular because of their being heavily dependent from the organizational and decisional power of the UFC, as opposed to independent contractors: several key aspects appear in need of clarification[20], and have in fact represented the

18 Unlike any other MMA organization, the UFC has its own anti-doping poli- cy, which is administered by a third party,the United States Anti-Doping Associ- ation ("USADA"). The Anti-Doping Policy is modeled on the World Anti-Doping Code. Each UFC contracted fighter can be randomly tested by USADA. There is an appeal board comprised of an independent third-party entity in the case that a fighter is punished for a purported violation of the policy and then issued a suspension and/or fine. Other organizations devise their own anti-doping drug testing policies and/or follow the lead of the athletic commission or licensing agency with respect to drug testing. USADA UFC Anti-Doping Program, April 2017, https://ufc.usada.org/wp-content/uploads/UFC-Anti-Doping-Policy-effective-April-1-2017.pdf See Cruz J.J., *Rethinking the Use of Antitrust Law in Combat Sports*, in *Journal of Legal Aspects of Sport*, 2018, 28, p. 64

19 A set of indipendent lawmakers, the former presidential candidate Andrew Yang and one of the fighters' association mentioned below have also proposed the expansion to the sport of MMA of the so-called Ali Act, which had been originally adopted for professional boxers with the aim of protecting the rights and welfare of athletes against exploitation by managers and promoters, avoid potential conflicts of interest and prevent other kind of abuses such as riggedrankings and matches by providing a limited series of regulation and enforcement mechanisms.

20 Beside the issues regarding fighter pay, exclusivity clauses and company discretion in future opportunities, some of theother features that need to be specifically addressed include fighters health and safety concerning specific risksconnected to the sport (such as weight cutting, TBI, CTE, etc.), differences in rulesets adopted by the same organization (10, according to an ABC survey)

main issues raised in a series of recent unionization efforts, ongoing litigations, and regulatory proposals which may provide clarity with regards their situation and at the same time pose serious questions on the profitability and viability of the business model provided by UFC[21].

In the aftermath of the mentioned WME sale, numerous efforts to organize MMA fighters, including Project Spearhead, the MMA Fighters Association, and the Professional Fighters Association, have been carried out but have not been so far successful, despite a wide support among fighters[22] to create an MMA union so that fighter concerns about pay, healthcare and retirement could be heard qnd addressed.

Among the factors which may have hampered these initiatives, there is the fact that MMA is an individual sport and the current context favors the maximization of profits in a potentially limited window versus a long-term commitment. Furthermore, UFC's fighters reside in very different countries, and with the exception of some bigger facilities or teams, are usually quite isolated from one another during their professional life.

However, it cannot be ignored how the legal status of the fighters and the wide discretionally of the UFC in making its decisions in offering fighters specific opportunities, investing promotional resources, allowing a more or less favorable match-up or placement within the event can create a chilling effect in the unionization efforts: in particular Project Spearhead has tried to collect signed authorization cards from UFC fighters in order to solicit a review by the National Labour Relations Board to determine if fighters should be classified as

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on a state-by-state basis, the specific features of the anti-doping practices and policies implemented (in particular for possible waivers, involuntary violations, reputational impact), and various issues concerning the collection and management of athletes' biometrical data (during events or through the existing athletic programs managed by the UFC), all of which have been the object of extensive negotiations are now addressed in detailed provisions in the CBAs signed in the other professional sport leagues.

21 For a comprehensive reconstruction of the main legal issues surrounding the sport see *amplius* Cruz Jason J., *Mixed Martial Arts and the Law: Disputes, Suits and Legal Issues,* McFarland 2020

22 Nearly 80 percent — 79.4 percent, to be exact — of MMA athletes reached as part of *The Athletic*'s inaugural fighter survey said they would be in favor of organizing with their peers in a way comparable to the professional unions and associations in other sports. Only 6.5 percent of fighters said they would oppose such a move while 14.1 percent said they were unsure or preferred not to answer. See Dundas C., *MMA fighters overwhelmingly support unionization, despiteno clear path forward* in*The Athletic,* available at https://theathletic.com/1850784/2020/06/03/mma-fighters-support- association-unionization-no-clear-path/, retrieved on 7-14-21

employees or independent contractors: had the NLRB classified UFC athletes as employees, then they'd be eligible to claim benefits and lost wages and also would have been able to legally start a union.

However, both the main MMA fighters leading the union drive were released by the UFC in a way that has been perceived as anti-union. Kajan Johnson, Project Spearhead's interim vice president, did not have his contract renewed by the UFC after a loss while Leslie Smith, the organization's leader was released from the promotion after her opponent missed weight and she refused the bout, with the company paying out her show money and win bonus before declaringher contract fulfilled.

Both fighters cited their involvement with the group as a possible reason for their release, and inparticular Smith filed a charge with the National Labor Relations Board claiming that ZUFFA (UFC'sparent company) should have been considered a statutory employer under the National Labour Relations Act (NLRA) of the MMA fighters that compete within its promotion[23], and that her dismissal was a retaliation due the organizing activity and also asserting, prohibited by the NLRA.

While the Regional Office of the Board in Pennsylvania determined that Smith's claims had merit, the relevant Washington D.C. Office dismissed the claim, having found "no evidence"showing that she was dismissed due to the protected activity but believed it to a contractual dispute, and the subsequent appeal was also rejected on the basis of it "lacking merit"; more significantly for the matter at hand, the Board ruled against the claim of retaliation, and therefore there was no final determination regarding the issue of the legal status of the fighters, which was ultimately not addressed by the NLRB.

In 2014 a group of former fighters has filed a lawsuit against the UFC accusing the company of violating section 2 of the Sherman Antitrust Act[24], the federal antitrust regulation, which makes it unlawful for any person to "monopolize" or "attempt" to monopolize or "conspire" to monopolize "any part of the trade or commerce", has violated antitrust laws and provisions

23 Therefore, beyond the specific claims linked to the dismissal, the core of the complaint was addressed at inducing the NLRB to determine whether UFC fighters are to be considered employees or independent contractors. The complaintcan be found at https://wp.usatodaysports.com/wp-content/uploads/sites/91/2018/05/leslie-smith-nlrb-lawsuit.pdf

24 26 Stat. 209, 15 U.S.C. §§ 1–7

by engaging in a scheme to maintain and enhance its monopoly power in the market for promotion of live elite professional mixed martial arts bouts, since the other promoters are either relegated to second-tier status, as well as its consequent monopsony power in the market for live elite professional MMA fighter services, by having an absolutedly dominant position in a market as to control the setting of the price with the result of suppressing fighter remuneration below what a competitive marketwould have paid, as well as claiming exclusive rights linked to marketing and merchandising.

A series of elements have been highlighted as central to the scheme, which in many cases overlap with the issues highlighted above, such as for the case of the provision of long-term exclusive contracts which also included the use of so-called "tolling provisions" allowing the UFC toextend the contract for various reasons: the plaintiffs have, however, also specifically addressedthe issue of the company's dominant position.

The first aspect to be considered in this sense in the lawsuit concerns the way in which the UFChas been increasing its market dominance, in particular by acquiring and then closing down other MMA promoters that could be considered its competitors[25]: Through these commercial operations athletes were denied options and opportunities in the MMA fighter market, at the same time an increasingly larger number of fighters were now bound by exclusive Zuffa contracts and there removed from the larger pool of available fighters.

Having acquired this position, the plaintiffs claim that the UFC has been using its market dominance to coerce fighters to re-sign contracts through a series of tactics, such as moving fighters to unfavorable placement on the card or giving the fighter an unfavorable matchup or depriving them of title opportunities if they didn't sign the contract offered by the UFC, in order to keep the wages under a predetermined level of around 20%.

The UFC's defense has focused on the fact that its contract do not present significant differences with those used by other MMA promotions and that the large share of the market is deriving by their success in promoting fights and marketing the brand: furthermore, the UFC has also highlighted how fighter wage levels have steadily continued to rise in the last year, and that therefore

25 The most relevant examples of this is activity are the acquisition of the Japanese promotion Pride in 2007 and the sale of Strikeforce in 2011.

this metric should take precedence with respect to the percentage of revenue allocated infighter pay when evaluating the matter at hand.

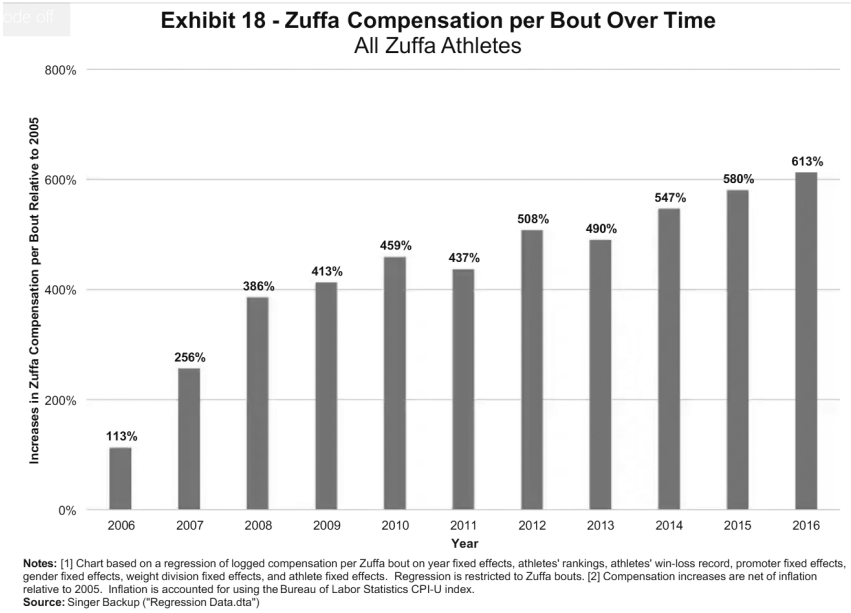

Fig.2 Expert Report of Robert Topel

Originally the plaintiffs were suing on behalf of two different classes[26]: the "bout" class, includingthose fighters that had fought in the UFC and the "identity" class, which on the other hand included those fighters whose image rights have been used by the UFC, but the court chose not to grant class action status to the fighters' claims that the UFC also suppressed earnings stemming from their image rights[27].

However, the announcement in December 2020 of a ruling certifying the class action for thebout class means that every fighter who competed under the UFC in a bout that was either held or broadcast in the United States at any

26 *Cung Le, et al. v. Zuffa, LLC d/b/a Ultimate Fighting Championship and UFC*, No. 2:15-cv-01045-RFB-BNW (D. Nev. The first three fighters to file a complaint against the ufc were Cung Le, Nate Quarry and John Fitch back on December 16, 2014: subsequently, m four more lawsuits were filed and other eight fighters were attached: eventually all those lawsuits were condensed into one action with 5 named plaintiffs (the original three plus Javier Vasquez, Brandon Vera and Kyle Kingsbury) See the original complaint at https:// angeion- public. s 3 . amazo-naws. com/www.FighterClassAction.com/docs/ECF+No.+1+-+Complaint.pdf

27 For a reconstruction of the class certification processes and criteria, see Burbank S.B & Farhang, *Class Certification in the U.S. Courts of Appeals: A Longitudinal Study* in 84 *Law and Contemporary Problems* 73-106 (2021) Available at: https://scholarship.law.duke.edu/lcp/vol84/iss2/7

time between December 16, 2010 and June 30, 2017 will be automatically a part of the lawsuit unless they opt out[28].

The possible outcomes of the lawsuits[29] are potentially extremely far-reaching: should the case go to trial and a jury decide in the fighter's favor then the fighters could be awarded significant monetary compensation. The plaintiff's economic experts have in fact put forward estimates that range from 811 million to 1.6 billion US$ in damages which, could also be trebled to 2.4 billion to

4.8 billion according to the provisions concerning punitive damages in antitrust. Furthermore, the plaintiffs are also asking for injunctive relief and requesting that the court determine an effective solution in dismantling the monopolistic scheme: therefore the court could also rule on other significant aspect of the employment relationship between the fighter and the UFC[30].

3. AN EVOLVING JUDICIAL AND REGULATORY CONTEXT

With reference to the legal status of the employment relationships (within the specific case of Mia but also in the broader context of the gig economy, the main necessity is to determine and define the status of the worker with reference to the main company, in particular within thecategories of (subordinate) employee or self-employed worker/independent contractor, which entailsignificant differences in particular for what it refers to minimum wage standards, access towelfare, termination of contract and transparency on future employment opportunities[31] .Furthermore, misclassifying employees as

28 On June 23, 2021, Kajan Johnson (previously involved in the aforementioned Project Spearhead) and C.B. Dollaway also filed a proposed class action antitrust lawsuit against Zuffa, LLC (d/b/a Ultimate Fighting Championship and UFC) and its parent company Endeavor Group Holdings, Inc. The lawsuit is similar to the mentioned class action, but the class period ultimately proposed concerns those who fought in a bout promoted by the UFC on or after July 1, 2017.

29 The Court denying Zuffa's motion to dismiss should not be taken as a com- mentary on the strengths or weaknesses of the plaintiffs' complaint as a whole. It is only a ruling on whether or not the complaint was sufficient to pass standards required by the rules under 12(b)(6) of the Federal Rules of Civil Procedure. It was Zuffa's burden to carry in order to prove that the complaint lacked sufficient facts to move forward. Weighing the evidence in light of the non-moving party, the Court determined that the plaintiffs had pled a sufficient amount for the case to move forward. See Cruz J.J., *Rethinking the Use of Antitrust Law in Combat Sports*, in *Journal of Legal Aspects of Sport*, 2018, 28, p. 85

30 It must be underlined how an extremely significant aspect of the UFC lawsuit is represented by an extremely wide discovery and deposition phase: the fighters' lawyers were granted the release of more than 2.5 million documents, and questioned 50 witnesses under oath in depositions, including top UFC officials

31 The field is further complicated by the existence, in some settings (i.e. Sweden and the Nordic

independent contractors and not incurring the related costs[32] can give these employers a competitive advantage over employers who treat their workers as employees, also undercuts competition, hurting other businesses creating further imbalances in the various sectors involved in these processes.

In the cases brought before various national courts, the main aspect addressed has been the one relating to the obligation by the platform worker to perform the working service vis-a- vis his personal freedom or flexibility in terms of the amount of working time and organization of timetables and shifts which is strictly linked with self-employment[33]

countries), ofintermediate bodies such as self-employed companies acting as service providers and as the main contractual counterpart for the platform workers. Furthermore, other companies have began operating in the labour market in a work procurement role, providing assistance to companies in posting job offers, searching potential employees and selecting candidates, also assessing their work-related skills.

32 the NLRB has found in *Velox Express, Inc.,* 368 NLRB No. 61 (2019) that an employer does not violate the Act simply by misclassifying its employees as independent contractors. An employer's "mere communication to its workers that they are classified as independent contractors does not expressly invoke the Act. It does not prohibit the workers from engaging in Section 7 activity. It does not threaten them with adverse consequences for doing so, or promise them benefits if they refrain from doing so." (only if the employer would have responded with threats, promises, interrogations, and so forth, the company would have violated the provisions of the NLRA). The classification of its workers as independent contractors by a company substantially equates to a legal opinion regarding the status of those workers and"shall not constitute or be evidence of an unfair labor practice..., if such expression contains no threat of reprisal or force or promise of benefit." (Section 8(c) of the NLRA).

33 Uber has lost the right to classify UK drivers as self-employed, as an employment tribunal ruling stated that the company must also pay drivers national living wage and holiday pay: the Court was able to classify the drivers as workers, citing in particular Uber's control over their working conditions which offset the ""personal flexibility" in particular with reference to the organization of working hours and shifts: On February 19, 2021 the UK Supreme Court finally ruled that Uber drivers are to be considered workers and not self-employed, and treated as such.The SC dismissed Uber's appeal that it was an intermediary party in the relationship, stating that drivers should be considered as workingwhenever they are logged in to the app and not simply while they are carrying out the activity of transporting apassenger. The court also considered a series of further elements in its judgement, namely that the company set the fare(and therefore the earning capacity of the driver, who can only increase their earnings by working longer hours), the contract terms that drivers had to agree to, and can unilaterally penalise drivers who reject too many rides, as well as terminating them on the basis of a low score in an arbitrary ranking system. See Uber BV and others (Appellants) v*Aslam and others* (Respondents) [2021] UKSC 5 On appeal from: [2018] EWCA Civ 2748.
Similarly, in France, as part of the ruling of the Paris Court of Appeals of 10 January 2019, the judges pointed out that theUber drivers adhered to the platform's directives having to follow the GPS application instructions and was controlled by accepting the races since the refusal of solicitations could induce the company to limit or disable the access or use of theapp at any time, based on these elements, the Court deduced the existence of a sufficient aggregate of indexes that allows

In the U.S.A. context, this fundamental issue in the gig economy is framed within the context of the National Labor Relations Act (NLRA) and can be synthesized in whether gig economy workers are to ben considered "employees" as defined under § 2(3) of the NLRA, or whether they are independent contractors excluded from the Act's protections[34]: to this end the NLRB has applied, for the purposes of unionizing, collective bargaining, and other collective rights protected under thestatute, a common law test to determine employment status[35] based on ten factors to be to be weighed and assessed separately.

Both the Labor Department and the NLRB (National Labor Relations Board), have addressed this topic numerous times and most recently concluded in 2019 that the workers at the behest of VMCs are to be considered contractors and not employees[36], reversing the extensive approach followed by the NLRB under the previous administration on the *FedEx* decision[37].

This outcome stemmed from the analysis of several factors that determining the collectively contribute to whether a worker is a (subordinate) employee or an (independent) contractor, including the extent to which the company can

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the qualification of an employment relationship and the status of employee to the Uber driver. On the other hand, in April 2018 an employment tribunal in Italy ruled that the delivery riders are not employees of Foodora but self-employed, and that as a result the company may decide at any time to terminate the employment relationship. The decision was primarily based on the fact that the riders can make themselves available for deliveries whenever they want and as a consequence cannot be considered as having an obligation to perform the working service and, as such, subject to the direction and organizational power of the employer. However the appellate judge in theItalian case reversed the previous decision and ruled that Foodora's workers have the right to obtain a compensationwith reference to the activity performed consistent with direct and indirect remuneration to the employees in the logistics sector, including yearly bonuses, holidays and pay. The right to economic parity of platform workers was determined through the extension of the employment rules to collaboration activities "organized by the contractor" provided by art. 2 D.lgs. 81/2015, (i.e. those jobs that are carried out on a personal level, but whose methods of execution are organized bythe client with reference to times and places of work). The ruling therefore confirms that the collaborators are not to be recognized as subordinate workers (as it was proposed by the workers) but must still be considered as self-employed, also providing that in some specific cases, according to the provisions of the Decree, the discipline of the employment relationship can find application on some aspects.

34 In the context of contact sports see *Square Ring Inc., v. Toryanovksy* US District Court (Florida) which concluded that aboxer under a promotional agreement was neither an "employee" (not sufficient control exerted by the management) nor a "laborer" (not performing unskilled labor)

35 State laws cannot override or encroach upon this authority. See *Garner v. Teamsters Union*, 346 U.S. 485 (1953) and *San Diego Unions v. Garmon*, 359 U.S. 236 (1959)

36 *SuperShuttle* DFW, Inc., 367 NLRB No. 75 (2019) and the Advice memorandum, *Uber Technologies*, Inc., Cases 13-CA-163062 et al. (April 16, 2019)

37 *FedEx Home Delivery*, 361 NLRB 610 (2014)

control how the work is performed and whether the company or the worker provides equipment: in particular, the NLRB memorandum gave prevalenceto factors that indicate a contractor relationship, as for the case of the way in which the parties involved frame their relationship while downplaying the significance of elements that are, on the other hand, able to suggest an employment relationship, as for the case that in most cases these workers perform a function that is central to Uber's business. The Labor Department opinion also stated that VMC may simply provide a referral service and therefore, it does not directly receive services from service providers, but rather "empowers service providers to provide services to end-market consumers"[38].

The NLRB also adopted a significantly extensive view of the of entrepreneurship, stating that the main element in the the determination of contractor status[39] was represented by the opportunity for the worker to profit from an activity in the same way an entrepreneur would. "The drivers had significant entrepreneurial opportunity by virtue of their near complete control of their cars and work schedules, together with freedom to choose login locations and to perform other activities, including working at the behest of competitors of the company": according to these two 2019 determinations, contractors lack the protection given to employees under federal law — and enforced by the labor board — for unionizing and other collective activity, such as protesting the policies of employers, making it extremely difficult for Uber drivers to form a representative body that can be recognized as a union.

However, in April 2019 the California Supreme Court in the *Dynamex* case[40] adopted the so- called "ABC test" to determine whether a worker is an

38 https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf . It can be highlighted how the Court of Justice of the European Union has ruled in C-434/15 that a service provided by a company such as Uber representsmore than a "simple" intermediation service consisting of connecting, by means of a smartphone application, a non- professional driver (using his or her own vehicle) with a person wishing to make an urban journey but that the service must be regarded as forming "an integral part of an overall service whose main component is a transport service": as a consequence, it must be classified a service in the field of transport, and Member States are authorized to regulate its conditions.

39 In the wording utilized by the NLRB, the "animating principle". NLRB overturned its decision in *FedEx* which modified the test for whether an individual is an "employee" or an independent contractor under the NLRA that limited the import ofan individual's entrepreneurial opportunity for purposes of the independent contractor analysis, and returned to the traditional common-law agency test.

40 *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903

employee. Businesses and employers therefore have to prove that the worker: a) is free from the company's control b) is doing work that

isn't central to the company's business, and c) has an independent business/activity in the sector.If these conditions aren't met then the workers have to be classified as employees for the purposesof minimum wages and overtime pay (while not addressing compensation benefits, rest periods, paid leave and other benefits).

In May 2019 the California State Assembly passed the AB5 bill, which expands the judicial decision in *Dynamex* by applying the ABC test[41] to determine who is an independent contractor, detailing labor protections such as unemployment insurance, health care subsidies, paid parental leave, overtime pay, workers' compensation, and also providing a guaranteed $12 minimum hourlywage[42]. Furthermore, with the aim of providing platform workers with an effective degree ofprotections, it allows State and city attorneys[43] to sue companies through injunctive reliefs in order to enforce AB5's new worker classification standards. It must also be noted that AB5 also exempts a series of occupations from the application of the ABC test[44].

41 2750.3. (a) (1) For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be consideredan employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work,both under the contract for the performance of the work and in fact.
(B) The person performs work that is outside the usual course of the hiring entity's business.
(C) The person is customarily engaged in an independently established trade, occupation, or business of the samenature as that involved in the work performed.

42 By codifying the decision in Dynamex, the bill aims to ensure employees' workplace protections and avoid the unfairness of companies who use misclassification to avoid payment of payroll taxes, workers compensation, Social Security, unemployment, and disability insurance. See AB5 Section1(c), (e).

43 (Legal remedies can be sought by State AG or a city attorney "of a city having a population in excess of 750,000", which highlights the relevance of the phenomenon in bigger urban centers (in the specific case San Diego, San Francisco, San Jose and Los Angeles).

44 Section 2(b). The list of exempted occupations includes licensed professionals in various financial activities; commercial fishermen; certain licensed barbers and cosmetologists; and others performing professional services under acontract with another business entity, or pursuant to a subcontract in the construction industry. In order to carry out the analysis for this exclusion, AB5 directs courts to apply the Supreme Court decision in *Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 and also provides courts with the flexibility to apply the mulit-factor *Borello* test for other occupations if a court rules the ABC test "cannot be applied to a

In the wake of the adoption of AB5, several delivery and transportation companies (Uber, Lyft, DoorDash, Instacart) launched a ballot initative in order to secure an exception to the classifcation of the platform workers as employees: the so-called Proposition 22 passed in November 2020 with 59% of the vote and granted app-based transportation and delivery companies an exception to AB5. These companies were therefore able to retain the right to classify their workers as independent contractors, exempting employers from providing the benefits mandated by the California bill but rather focusing on economic incentives[45], full contribution to medical costs[46] anda series of actions regarding workplace discrimination and safety[47].

The regulatory option[48] was the one pursued also through the Italian decree n. 101/2019[49], which set out a series of provision with a view of gua-

particular context based on grounds other than an express exception" listed in the bill. See Section 2(a)(3)

45 Specifically, a retribution calculated in 120 % of the local applicable wage for each hour a driver spends driving (with passenger or en route), albeit with the significant exclusion of time spent waiting and a $0.30/mile compensation for expenses for each mile driven with passenger or en route.

46 Among the provisions of the measure is a health insurance stipend for drivers who average more than 15 hours per week driving and a requirement for the companies to pay medical costs and some lost income for drivers hurt while driving or waiting, as well as a prohibition for drivers from working more than 12 hours in a 24-hour period for a single rideshare or delivery company.

47 The measure prohibits workplace discrimination and requires that companies: (1) develop sexual harassment policies,
(2) conduct criminal background checks, and (3) mandate safety training for drivers. See the report on the measure bythe California Legislative Analyst's Office, available at https://lao.ca.gov/ballot/2020/Prop22-110320.pdf

48 Within the U.S. context, the example of California is not isolated: similar stringent requirements are being consideredin the states of New York, Oregon and Washington, and New Jersey enacted at the beginning of 2020 a series of laws aimed at protecting the rights in particular of self-employed workers (like truckers and freelance writers) by requiring the companies that hire them to pay payroll taxes, penalizing employers intentionally misclassifying employees, requiring employers to post notices describing misclassification. On the enforcement side a series of legal items allow the sharing of tax information between the state Department of Treasury with Labor and Workforce Development, and to hold both labor contractors and employers equally liable for evading tax laws, as well as to allow stop-work orders to be issued against employers violating state wage, benefit or tax law. The aim of this normative package is to address some of the problems most commonly associated with businesses misclassifying workers and that had already brought forth a series of lawsuits where the NJ State's labor department has fined Uber for more than $600 millions in back taxes linked to misclassification of its drivers as independent contractors instead of as employees.

49 Digital platforms are defined as the IT programs and procedures that, independently of the place of establishment, organize and manage the delivery of goods, fixing the price and determining the specific methods of performance of the service: the decree therefore adopts a perspective similar to

ranteeing base economic and legal protection for particularly weak categories of "precarious" workers, including those whose activity is organized through digital platforms or perform delivery services, extending the scope of art. 2 par. 1 of Legislative Decree no. 81/2015, establishing in turn the application of the discipline of subordinate work to those exclusively personal continuous collaboration relationships, whose execution methods are organized by the client also with reference to time and place of work.

D.L. 101/19 specifies that such rule is to be applied in the case in which the performance of the service "are organized through digital platforms"[50], and that Contracts must be provided in written form to the workers, who shall also receive all the relevant information for the protection of their interests, their rights and their safety[51].

For what it refers to the guarantee of employment opportunities, the exclusion from the platform as well as a decrease in job opportunities which can linked to non-acceptance of the task by the worker are prohibited: furthermore, the statutory protections from discrimination are bound to apply to all the aspects of the employment, including access to the platform. D.L. 101/2019 provides that the wages cannot be set "in a prevalent measure" on the basis of the deliveries completed, and that the worker will be entitled to the hourly wages if he accepts at least one task during that timeframe (furthermore, workers must be guaranteed a supplementary allowance of at least 10% for any activity performed at night, during the holidays and, in particular, in unfavorable weather conditions). Wages may be set through collective agreement (in absence of specifications, it can be inferred that such bargaining may also be carried out at company level) and which may also define "modular and incentive compensa-

the aforementioned ruling by the Turin Court of Appeal, and also broadens its cover beyond the delivery sector to any kind of platform work.

50 D. L. 3.9.2019 n. 101 "Disposizioni urgenti per la tutela del lavoro e per la risoluzione di crisi aziendali"

51 With specific regard to occupational H&S, an interesting set of provisions concerns the workers' protection for the case of accident, injury or occupational diseases: art. 47-ter entitles platform workers to the compulsory insurance coverage while also stating the obligation for the VMCs to fulfill the various requirements set out by the national health and safety regulations. Companies are therefore required to carry out preemptive risk assessment procedures, provide the necessary information and relevant training with reference to work-related risks, perform health surveillance activities during the course of the relationship and provide the personal protective equipment to the workers.

tion schemes, taking into account the methods of performance of the service and the various organizational models".

Furthermore, the decree establishes the creation of a independent monitoring body for the assessment and evaluation of the new provisions on the basis of the data provided by the main national statistical entities and authorities with regards to the effects of the new norms, as well advance amendments and revisions of the text deriving from the evolution of the features of the labour market.

4. CONCLUSION

Notwithstanding the substantive protections introduced and the involvement by the social partners set out by both texts, the AB5 and D.L. 101/2019 do not clarify in particular the degree of control by the employer or how specific the organization of the times and places of the activity mustbe in order to extend the scope of the rules on subordinate work and, in the U.S. case, also provide a set of explicit exclusions[52].

An effective regulation of the of the jobs connected to the gig-economy should avoid further fragmentation of labour market and should be able to go beyond the specificities of currentexperiences in domestic economic sectors. In this sense the recourse to existing legal frameworks for the main aspects of the employment relationship appears an adequate response to realign the regulation of these relationships with those in place at domestic and supranational setting for other forms of flexible and non-standard employment, while also recognizing and specifically addressing some of the more specific features of the form of employment considered, or the sector of activity covered[53].

52 It must also be noted that in June 2021 in California the District Judge in in a misclassification lawsuit (Kent Hassell v. Uber Technologies Inc., Case No. 20-cv-04062-PJH) put off the decision on whether the AB5 exemption introduced by Proposition 22 "abated" the legal rights of gig workers that existed before it was passed, denying the defendant's motion to dismiss while also underlining how the plaintiff had not shown that all of the rights employees enjoy under California labor law still applied to claims that predate the adoption of Prop 22. The 9th U.S. Circuit Court of Appeals is currently considering an analogous abatement issue in *Lawson v. Grubhub*, in which a judge ruled that a Grubhub delivery driver was an independent contractor under the test that was replaced by AB5.

53 The differential in bargaining power my not be entirely addressed by an antitrust solution, but this approach may represent a signmificant part, since it implicates the business models available to the economy's dominant firms: either workers are employees, in which case they are to be considered subject to the organizational power, monitoring and control by the company management and are to be granted statutory protections (including the right to bargain collectively), or they

And in this sense it appears of particular significance the involvement of relevant social partners[54] with a view of regulating several aspects linked with the actual possibilities for the employers to utilize non standard forms of employment, which is to be devolved to collective agreements signed at various levels (be it national, sectoral/territorial, or within the company workforce and the management), and covering a wide range of topics, identifying specific quantitative limits or derogations as well as the activities or services for which the recourse to these forms of employment is allowed, the requisites of contract that must be signed by the individual worker, but also containing in some cases provisions concerning equal treatment with regards to pay, social security and access to future employment or training opportunities, as well as specific communication duties imposed on employers and their inclusion within the scope of the provisions on mandatory insurance and injury compensation schemes, in order to tackle the most significant potential negative impact of gig work on the level of workers' social protections and to limitemployers' power in determining the working conditions and, in particular, limiting the access to future employment opportunities.

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are to be framed as independent contractors/service providers/businesses, and they should not be coerced by contract, or by any other means. Proposals to extend and strengthen labor law tests for statutory employmentto take account of gig economy technologies are crucial, but they will be ineffective so long as employers and lead firms retain the strong incentive to push workers outside their protection. The role of antitrust in that context is to create a significant cost to so doing: the potential for treble damages under antitrust liability should a lead firm be caught coordinating and directing the activities of its non-employee subsidiaries and contractors. That is the mechanism that would weigh against employers' incentive to mis-classify. See Steinbaum M., *Antitrust, the Gig Economy, and Labor Market Power* in 82 *Law and Contemporary Problems* 45-64 (2019) Available at: https://scholarship.law.duke.edu/lcp/ vol82/iss3/3

54 It is also to be underlined whether having the benefit of the antitrust labor exemption alone would actually ensure more equitable treatment of workers, since an exemption would simply allow workers to act in concert to pursue higher compensation and better contract terms without exposure to antitrust liability and, to the extent that any collective negotiation would occur outside the NLRA/NLRB system, the NLRB's processes, including its enforcement mechanisms and the NLRA's remedies, would be unavailable to the workers, the service providers would be under no legal obligation to negotiate with the workers acting collectively, let alone negotiate in good faith. Nor would they be bound by the NLRA'sprohibitions against unfair labor practices as defined by the Act, such as reprisals for workers who engage in collective action. See Lao M., *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption* in *UC Davis Law Review* Vol. 51-4, 2018, pp.1583-1584