Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability[1]

I. Introduction

Congress enacted the Clayton and Norris-LaGuardia Acts in significant part to protect the ability of workers to organize and to collectively bargain over wages and labor conditions. Several provisions of these acts prevent courts from enjoining qualifying labor activity and shield such activity from antitrust liability. Collectively, these provisions are known as the labor exemption to the antitrust laws, and they shield from antitrust liability the conduct of bona fide labor organizations engaged in labor disputes—*i.e.*, organizing and bargaining over the terms and conditions of employment.

It has long been clear that employees who are directly hired by an employer are protected from antitrust liability by the labor exemption when they are organizing or bargaining with that employer over their compensation and/or working conditions. More recently, however, the rise of independent contracting, and of "gig work" in particular, has presented questions about the labor exemption's application to the organizing and bargaining of workers who are classified—or potentially misclassified—by a firm as independent contractors.[2] Particularly as gig workers contemplate efforts to organize or bargain collectively with platforms for the first time, they face a patchwork of cases regarding the exemption's application.

In this enforcement policy statement, the Commission clarifies its view that the labor exemption's application does not turn on whether a worker is formally classified by a firm as an independent contractor under the Fair Labor Standards Act ("FLSA"), the National Labor Relations Act ("NLRA"), tax law, state common law, or any other law. Rather, workers' organizing and collective bargaining activity may be protected from antitrust liability when what is at issue is the compensation for their labor or their working conditions. Workers engaged in such protected activity are not categorically beyond the scope of the labor exemption from antitrust liability simply because they do not have a formal employer-employee relationship with the firm with whom they seek to negotiate over the compensation for their labor or their working conditions.

[1] This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).

[2] *See, e.g.*, Rebecca K. Slaughter, Comm'r, Fed. Trade Comm., Comment Letter on Dep't of Labor Notice of Proposed Rulemaking re: Independent Contractor Status under the Fair Labor Standards Act (Oct. 26, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582178/comment_of_commissioner_rebecca_kelly_slaughter_on_the_department_of_labor_proposed_rule_on_0.pdf.

II. Background

A. Enactment of the Labor Exemption from the Antitrust Laws

The labor exemption from the antitrust laws stems from several enactments in which Congress sought to broadly protect workers' ability to organize and to negotiate for better pay and working conditions. After Congress passed the Sherman Act in 1890, employers used the Act to challenge and disrupt the activities of labor unions. Indeed, twelve of the first thirteen successful antitrust lawsuits under the Sherman Act were brought against labor unions, not corporations.[3] In what was popularly known as the "Danbury Hatters' Case," the Supreme Court in 1908 enjoined employees of a Danbury, Connecticut hat manufacturer from unionizing, unanimously holding that organizations of laborers were not exempt from the Sherman Act.[4]

In response to such uses of the Sherman Act against organizing workers, Congress enacted Sections 6 and 20 of the Clayton Act in 1914,[5] creating what is known as the labor exemption to the antitrust laws. Section 6 of the Clayton Act provides that the "labor of a human being is not a commodity or article of commerce" and that the antitrust laws shall not be "construed to forbid the existence and operation of labor . . . organizations" or "to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects" of those organizations.[6]

Section 20 of the Clayton Act prohibits "restraining order[s] or injunction[s] . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment," unless necessary to protect certain property interests.[7] It further prohibits "restraining order[s] or injunctions" that "prohibit any person or persons" from engaging in certain protected activities, including "ceasing to perform any work or labor," peacefully persuading others to "abstain from working," "ceasing to patronize" parties to a dispute, peacefully persuading others not to patronize parties to a dispute, peacefully and lawfully assembling, providing strike benefits, and "doing any act or

[3] Edward Berman, LABOR AND THE SHERMAN ACT 3 (1930). *See also* Kate Andrias, Beyond the Labor Exemption: Labor's Antimonopoly Vision and the Fight for Greater Democracy 6 (2023) ("By one count, at least 4,300 injunctions were issued against union activity between 1880 o.9 (s) (t)-2 (8.04 -0 0 8.04 2)-10 ()-2 (ngH106.48 -0c 0 29.663325 0 Td(

thing which might lawfully be done in the absence of such dispute by any party thereto."[8] Senator Ashurst referred to the labor provisions of the bill as the "laborer's bill of rights."[9]

Despite the broad language of the Clayton Act, courts construed Sections 6 and 20 narrowly and continued to issue injunctions and impose antitrust liability on labor unions' organizing and collective bargaining activity.[10] In response, Congress passed the Norris-LaGuardia Act in 1932, which expanded the labor exemption.[11] As the Supreme Court has explained, "[t]he underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."[12]

The Norris-LaGuardia Act states that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."[13] Specifically, Section 2 of the Norris-LaGuardia Act declares "the public policy of the United States" as follows:

lower incomes and may earn less than the minimum wage.[22] More

relationships between the disputants. Instead, disputes are covered "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[35] The definition of "labor dispute" thus "establishe[s] that the allowable area of union activity was not to be restricted to an immediate employer-employee relation."[36]

The Supreme Court has accordingly held exempt from antitrust liability the labor organizing activities of persons who were not employees of the firm whose labor practices they sought to change. For example, in *New Negro Alliance v. Sanitary Grocery Co*., the Court found that alliance members who picketed a grocery store to press the store to hire Black workers were "persons interested" in a "labor dispute" despite the fact that they were not employees of the store.

regarding the terms of sale of a finished product.[50]

Courts have also rejected application of the exemption where the party seeking the exemption was best characterized as an independent business pursuing its business interests, rather than as a worker who provides labor services seeking to improve his or her compensation or labor conditions. For example, courts have rejected application to disputes involving "an entrepreneur, not a laborer,"[51] to "a businessman organization" seeking a better "return on capital investment,"[52] and to "an association of individual practitioners each exercising his calling as an independent unit."[53] These cases are all consistent with the First Circuit's holding that the core question is "whether what is at issue is compensation for [a worker's] labor" or working conditions.[54] As such, owners of independent businesses that sell finished products or are primarily concerned with a return on capital investments are often appropriately characterized as independent contractors and will generally be outside the labor exemption's protections. For example, highly paid professionals who operate their own businesses would often be more appropriately characterized as entrepreneurs pursuing business interests as opposed to workers who provide labor services. However, that does not mean that the labor exemption's application stands or falls with whether a worker is formally classified (or misclassified) as an independent contractor.

To further dispel confusion, two other cases bear mention. In *H.A. Artists & Associates, Inc. v. Actors' Equity Assoc.*, the Supreme Court held that the Equity actors' union was protected by the labor exemption when it sought to regulate the conduct of independent contractor agents in order to protect actors' compensation.[55] In a footnote, the Court stated, "[o]f course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur."[56] However, this statement was mere dicta because, as the Court explained, there was "no dispute" that the Equity union seeking the labor exemption's protections was a bona fide labor group.[57] In any event, the Commission does not read this dicta as op(nt)-2 (r)37pBDC 0.eureIa7

exemption if classified (or misclassified) as independent contractors. Rather, in referring to "independent contractor or entrepreneur[s]," the Commission believes the Court was referring to the types of business entities and interests discussed above that would indeed be beyond the scope of the labor exemption because they do not reflect a worker who provides labor services seeking better compensation or working conditions (*e.g.*, businesses negotiating over finished products or highly paid professionals who operate their own businesses furthering other non-labor interests).

In another case, *Taylor v. Local No. 7, International Union of Journeymen Horseshoers of the United States & Canada (AFL-CIO)*, the Fourth Circuit held the labor exemption did not protect the conduct of "independent businessmen" horseshoers who charged an agreed-upon fixed price for shoeing a horse (for both the horseshoe and the service) and who boycotted those who did not use union horseshoers.[58] The Fourth Circuit reversed the district court's holding that the horseshoers were protected by the labor exemption because they were employees. In rejecting the district court's reasoning, the Fourth Circuit applied the NLRA's test for independent contractor status—*i.e.*, the test Congress adopted when it enacted an express exemption to the NLRA for independent contractor status.[59] The Fourth Circuit found the horseshoers to be independent contractors because, among other things, they controlled when and how much to work, controlled their own horseshoeing process, chose and owned their own tools, controlled their own prices and the risk of profit and loss, did not work regular hours for one employer, chose whether to hire their own employees, and regarded themselves as independent contractors.[60]

The Fourth Circuit did not, however, find the horseshoers' independent contractor status under the NLRA test dispositive of the labor exemption's application, acknowledging that the exemption can apply to disputes in which the parties to the dispute do not themselves stand in the relationship of employer and employee.[61] Instead, the court went on to reject application of the exemption to the horseshoers' conduct because it found that there was no employer-employee relationship involved in the dispute—whether extant or prospective.[62] The Fourth Circuit explained, "the horseshoers are not attempting to force the owners and trainers to use any of them as employees, nor are the unions attempting to organize any employees of the trainers or owners."[63] Rather, "[t]he only interests [they] sought to . . . advance[]" through their boycott and price-fixing were "of those independent horseshoers who render services to trainers and owners for a certain fee, unilaterally fixed, per horse."[64]

Accordingly, *Taylor* did not confront a scenario, like that in *Confederación Hípica de Puerto Rico*, in which independent contractors who provide labor services engage in a dispute over their compensation and job conditions. Nor did *Taylor* hold that the conduct of a worker currently classified (or misclassified) as an independent contractor can never be protected by the labor exemption. To the contrary, the Fourth Circuit's decision implied that it would have found

[58] 353 F.2d 593, 595-606 (4th Cir. 1965).
[59] *See id.* at 595-601 (applying test from *NLRB v. A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964)).
[60] *Id.* at 599-600.
[61] *Id.* at 605-06.
[62] *Id.*
[63] *Id.* at 606.
[64] *Id*.

the horseshoers' conduct protected were they organizing for the purpose of becoming directly hired union employees.[65] Moreover, although *Taylor* applies the NLRA test for independent contractor status in the course of rejecting the district court's reasoning, it never addressed the fact that the Clayton and Norris-LaGuardia Acts lack the express independent contractor exemption present in the NLRA.

For the forgoing reasons, the Commission believes that the First Circuit's decision in *Confederación Hípica de Puerto Rico* is correct and that workers who provide labor services and that are engaged in protected labor activities can be shielded by the labor exemption, even if formally classified (or misclassified) as independent contractors. As the First Circuit explained, this understanding is consistent with the plain text and original meaning of the Clayton and Norris-LaGuardia Acts, as well as with judicial decisions applying the labor exemption.[66]

antitrust laws should not be used to disrupt collective action by workers who provide labor services to improve their terms and conditions of employment. Accordingly, the Commission will not challenge collective action by independent contractors who provide labor services and are seeking better compensation and job conditions because such activities are exempted under the Clayton Act and the Norris-LaGuardia Act.