

WORKER RIGHTS IN THE GIG ECONOMY

ENSURING EQUAL EMPLOYMENT STANDARDS PROTECTIONS FOR ALL WORKERS



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An executive summary of this report is available at bcfed.ca/precariouswork



BC Federation of Labour 5118 Joyce Street Vancouver, BC V5R 4H1 t: 604.430.1421 bcfed.ca The BC Federation of Labour represents more than 500,000 members of affiliated unions, working in every sector of the economy and every corner of the province.

The BCFED has a long and proud history of fighting for the rights of all working people.

The goals of the BCFED are best exemplified by the slogan: "What we desire for ourselves, we wish for all."

The BC Federation of Labour's work spans across the territories of two hundred and three First Nations that make up the area colonially known as the province of British Columbia. Our office is located on the unceded and traditional territory of the Halqeméylem speaking peoples, including x^wməθk^wəyəm, Skwxwú7mesh, səlílwəta?4, qiqéyt, k^wik^wəxəm, and Stz'uminus First Nations. As part of our ongoing commitment to build meaningful relationships with the original peoples of these lands, the BCFED's reconciliation plan framework can be found at bcfed.ca.

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Introduction

THE BC GOVERNMENT HAS COMMITTED to developing a precarious work strategy. The BC Federation of Labour believes that a critical first step in that strategy is to address the underlying cause of precarious work: the misclassification of employees as independent contractors.

Misclassification deprives workers of employment standards protections including paid sick leave, minimum wage provisions, termination and severance requirements, and more. It puts employers who treat their workers fairly at a competitive disadvantage. When workers are misclassified, there are significant consequences for them and their families. And it deprives government of badly-needed revenue. These consequences have a ripple effect on our broader communities, economy, and social programs.

Addressing misclassification is a simple first step for the BC government because it relies on the current protections in place for workers. It does not require developing a new system or an elaborate set of rules. It works because it strengthens and reinforces the clear set of rules that already applies to the majority of workers in our province.

The employer-worker relationship is changing. According to preliminary results from the Understanding Precarity in BC Project's precarity survey (Strauss et al., forthcoming):

- 53% of workers do not have one employer that they expect to be working for a year from now and that provides 30 hours of work and pays benefits;
- 27% of workers do not receive any form of benefits from their employer;
- 46% lack extended health coverage and 41% lack dental benefits;
- 27% of women and 31% of men worked multiple jobs in the last three months that number jumps to 33% for racialized workers; and
- 24% of men reported that 50% or more of their work is on-call.





Gig and platform workers

GIG WORK IS A FORM OF NON-STANDARD WORK where a worker is defined as an independent contractor or freelancer. Some workers choose this classification, but more often than not, workers are told they do not qualify or cannot work for a company as an employee. Gig work is not something new. It has been a long-used tactic by employers, and it affects a wide range of workers. Historically, we have seen misclassified workers in areas such as the construction trades, visual effects, graphic design, high technology, taxi industry, domestic work, hair styling, and personal care.

The BC Building Trades has been battling this issue for years. The BCBT's 2022 *Report on the Underground Economy* outlines the ongoing impact on workers, industry, and government. It estimates 14,000 workers are misclassified in the construction industry alone, with misclassification being highest among drywallers, painters, flooring installers, and tile installers (BCBT 2022).

With the emergence of app-based technologies, misclassification has grown and expanded into new areas. Ride hailing and food delivery are commonly understood as gig work. But platform-based gig work is performed in a variety of areas including personal

shopping and chores, moving, yardwork, minor home improvement, and pet care.

More recently, gig work has been growing into a variety of professional roles including copy editing, translation, human resources, and graphic design. Some gig workers even provide caregiving and other health care services.

The "gigification" of work is steadily moving into new sectors and tasks as companies see an opportunity to capitalize on consumer demand and reduce overhead costs.

Given the expansion of and the popular interest in digital platform services, this paper predominantly focuses on examples from these industries. With the emergence of app-based technologies, misclassification has grown and expanded into new areas. This paper predominantly focuses on examples from these industries.





Proliferation of gig work

THERE IS LIMITED DATA on the number of workers who are engaged in gig work in BC. Based on the growth in platform services and consumer uptake, however, it is fair to say that more workers than ever are engaged in gig work.

A Statistics Canada study using tax data found that gig work in Canada increased from 5.5 per cent of workers in 2005 to 8.2 per cent in 2016 (Jeon, Liu, & Ostrovsky, 2019). It shows British Columbia as having the highest number of gig workers in Canada, with 8.7 per cent of men and 10.7 per cent of women employed in gig work. Gig work is increasing at a greater rate in the metropolitan area of Vancouver than in Montreal and Toronto. Vancouver is currently the only studied area where more than 10 per cent of workers are engaged in gig work. This study covers tax data up to 2016 only — employment trends and the number of platform companies have significantly changed since then, so this almost certainly underestimates the current number of gig workers in BC.

In the Statistics Canada study, Jeon, Liu, and Ostrovsky (2019) found that the industries with the highest percentages of gig workers are professional, scientific and technical services, health care and social assistance, administrative support, waste management, and remediation services and construction. The study also confirms that gig workers tend to be lower paid — their income more often falls into the two lowest-income quintiles. Their data also shows that women are more represented in gig work than men.

The prevalence of gig work is supported by a more recent report (2021) from Payments Canada that estimates more than one in ten Canadian workers (13 per cent) are employed in the gig economy and one in three businesses (37 per cent) hire gig workers (Payments Canada, 2021).

Using a conservative 9.7 per cent prevalence rate and the March 2022 Labour Force Survey data that shows 2,737,800 employed workers in BC, we can estimate there are 265,500 or more workers in BC employed in the gig economy (Government of British Columbia, 2022).

In the US, where platform-based, gig-work companies have been operating longer, the Gig Economy Data Hub estimates between 25 and 35 per cent of workers earn all or some of their income in the gig economy (Gig Economy Data Hub, n.d.).



Claimed advantages of gig work

PLATFORM COMPANIES ARGUE that there are a number of advantages for workers in the gig work structure. They say workers can set their own hours, have the flexibility to meet other life needs, and earn pay quickly (Uber, n.d.-a).

Platform companies have resisted compliance with existing labour and employment laws, arguing that workers themselves do not want to be employees because it infringes on the flexibility enjoyed by workers. Yet there is nothing stopping an employer providing similar flexibility to workers covered by the *Employment Standards Act* (ESA).

And much of that "flexibility" disappears under real-world conditions.

Take the case of a ride-hail driver. Theoretically they can choose when to work, but if a driver wants to make a profit, they need to drive evenings and weekends, when there is a concert or an event, or when the weather is bad. Their schedule is significantly controlled by consumer demand and weather.

Companies exert control over workers' schedules too. They use promotions and pay differentials to direct when and where ride-hail drivers work. Platform companies essentially schedule workers through peak pricing, multi-trip "bonusing" and weekend targets to control when workers can pick up profitable jobs (Uber, n.d.-b; Sun, Z., Xu, Q., & Shi, B., 2020; Meyer, C., n.d.; Lyft, 2019). Regular rates are low; to make ends meet, workers must accept work that qualifies for these pay differentials.

Uber calls its program "surge pricing." When there are more customers, the price of a ride goes up to attract more drivers. Lyft calls its program "Personal Power Zones," which are located in areas or at times where there is high demand (Lyft, 2019). If drivers pick up a ride in a purple zone, then drivers will receive a higher rate of pay. Pink zones offer the highest pay rate. Successive rides trigger higher payouts. Lyft says, "The longer you stay in the pink zone, the bigger your bonus gets" (Lyft, 2019). Workers who leave the zone will lose the pay differential.

These kinds of successive-trip pay differentials fly in the face of gig company claims that their model is designed to be flexible to workers looking to pick up the occasional job. These pay differentials demonstrate that companies assign profitable work to workers who work longer, continuous shifts,



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rather than just picking up a ride here and there. Lyft's website says, "you'll lose our bonus if you go offline, cancel or miss the next ride request" (Lyft, n.d.-a).

Workers need to seek out higher-paying fares because many companies entice new drivers with promotions and incentives (Lyft, n.d.-b; Uber, n.d.-c). These incentives are temporary, and when the promotions expire, workers find they are earning far less. The idea of a bonus fare is a misnomer — drivers need to pick up rides that offer wage differentials to make ends meet.

With platform companies holding all the cards in terms of pricing, workers have no control over how much they earn, even for working the same number of trips or hours. In Ontario, Minister of Labour Training and Skills Development Monte McNaugton cited a situation where "There was one worker that made \$1,500 one week and the next week, for the same hours, made \$500" (CBC, 2022). With no consistency or predictability with regard to earnings, workers may find themselves unexpectedly trapped into working extra days and hours just to make their monthly bills.

Workers also lose out on other key protections that provide genuine flexibility. For example, misclassified workers do not have access to paid sick leave, vacation days, or statutory holiday pay. Access to paid leave is critical for workers' physical and mental health and for their relationships with family and in their communities. Not being able to take a day off when you are sick or plan a paid vacation is not very flexible — and it puts our workplaces and communities at risk.

Platform companies say their workforce is made up of part-timers earning "extra" cash as if that is an excuse to offer them inferior work conditions. In fact, for an increasing number of workers, income from gig work is critical to their financial stability. Workers may work full-time for one company or cobble together work from multiple platform apps to earn a full-time living.

Whether gig work is a full-time or part-time job, workers who do platform work have a right to be treated with respect and dignity.

Platform companies want regulators to see them as tech companies, not service providers, and certainly not employers. They say they sell a technology service that workers can use to connect with customers. Workers, they say, benefit from their app because they get access to a customer base they may not have been able to attract on their own. They also benefit from the massive investment in traditional and social media advertising.

But these companies would not have any revenue without these workers. A ride-hail app is worthless without drivers and a delivery service does not function without cyclists and drivers. No company can run a task-providing app without workers to perform those jobs. A platform company is no more purely a tech company than an insurance company is purely an office management company; the services they sell, and the workers who deliver them, these primarily define them.





Why do companies misclassify workers?

MISCLASSIFICATION IS A DELIBERATE CHOICE made by employers so they can gain market advantage, maximize profits, and minimize responsibility. When a company is permitted to misclassify workers, they get an unfair advantage over the competition and get out of paying their fair share of the costs of doing business in our province and country.

The biggest advantage for these companies is lower overhead costs. They avoid paying the employer share of payroll expenses such as Employment Insurance (EI) and Canada Pension Plan (CPP) contributions, and into other programs like the employer health tax. They do not have to administer a health and safety program or pay Workers' Compensation Board (WCB) premiums. They eliminate *Employment Standards Act* (ESA) obligations like statutory holiday and vacation time. The BC Building Trades report estimates the labour cost advantage to be 20 per cent for companies that misclassify workers (BCBT, 2022).

When factoring in other savings, companies can reduce their cost even more. The BC Building Trades estimate did not include the cost of other worker rights such as the new provision for up to five days of paid sick leave, or liabilities for compensation for length of service. And companies can save even more because they do not need to spend as much on human resources and payroll staffing.

By misclassifying workers, companies retain absolute control of all the terms and conditions of employment, as their workforce has virtually no ability to unionize and bargain collectively. This means inferior pay, benefits, and working conditions for workers.

The competitive advantage these companies gain is significant. If the BC government is not willing to stop this practice and enforce a level playing field, what is the incentive for employers to classify their workers correctly?

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GIG COMPANIES WANT WORKERS to make an expensive trade-off—and while they trumpet so-called flexibility, they never talk about what workers lose in exchange. Here's where misclassified workers are missing out.

NO CONTROL OVER TERMS AND CONDITIONS OF WORK

Most gig workers have no control over their terms and conditions of employment. The companies impose take-it-or-leave-it terms and conditions and leave no room to negotiate. Despite touting flexibility, their contracts are not very flexible at all. The companies set remuneration rates that vary based on factors determined solely by the company. They control the advertising, allocate the work, and can terminate workers from using their services without compensation for length of service.

Workers have no input or control in how the app algorithms work. These trade secrets are highly guarded by platform companies. Workers are left at the mercy of a programmer's code to access work and for compensation. For example, earnings for drivers are highly controlled by the company. According to Nicole Moore, a volunteer organizer with Rideshare Drivers United, companies frequently change terms and conditions:

When I started driving, I was guaranteed 80% of the fare. If that's where we were right now, you would see a very different equation on the road. Drivers are seeing 20, 30, 40% of the fare at times (Bursztynsky, 2021).

Additionally, workers are required to agree to non-negotiable terms and conditions of employment and onerous contracts that dictate how disputes are handled. For example, Uber contracts contained a clause that required disputes to be arbitrated under a specific set of rules and only in the Netherlands. A worker had to take a challenge to Canada's Supreme Court to get an order that their case could be heard in Ontario (Uber Technologies Inc. v. Heller, 2020).

Often companies require workers to agree disputes will be handled through an internal process or individual adjudication rather than a formal legal proceeding. These agreements often prohibit any



type of group or class action (DoorDash, n.d-a); Érudit, n.d.). And of course, without a union there is no grievance or arbitration process. Though these types of clauses have been successfully challenged in some jurisdictions, workers may feel bound to the process specified in the agreement and may not have the resources to fund a legal challenge.

NO PROACTIVE ENFORCEMENT TO PREVENT MISCLASSIFICATION

Though current BC employment laws may in fact cover the majority of these workers, there has been no proactive enforcement from the Employment Standards Branch (ESB) or clear direction to employers on how to classify these workers. Add that it will take years for a worker to get a determination on employment status and any determination will be challenged to the highest court. BC's ESB currently has wait times of over a year to have a complaint heard by an officer.

Additionally, workers are fearful to come forward as they cannot afford to lose their jobs and financial security. They fear repercussions from their employers, not to mention the significant challenge for an individual worker to stand up to a multinational company. These powerful companies have deep pockets and top legal teams. The current class action case filed in 2017 by David Heller, a former driver, alleging he and other drivers were misclassified as independent contractors and denied employment rights by Uber, has already gone through extensive legal proceedings and the main case is still waiting to be heard five years later (Uber Technologies Inc. v. Heller, 2020). Needless to say, individual workers are left with little chance to successfully make their case.

Only aggressive proactive investigation and enforcement of the employment conditions of platform companies will begin to address the misclassification of gig workers.

NO EMPLOYMENT STANDARDS ACT COVERAGE

When workers are misclassified as independent contractors, they are not being guaranteed minimum employment standards. Ensuring that these workers are properly classified would solve the following problems.

No minimum wage or time worked guarantees

There is no guarantee of minimum wage or what constitutes time at work. For example, most platforms pay for "active" time worked only, when workers are actively driving a passenger, performing a task, or biking to deliver a meal. However, much of a worker's time is spent preparing materials, getting from one location to the next to pick up the job, waiting for an order to be prepared or a customer to show up, or performing upkeep and maintenance on equipment. Platform companies only pay for a fraction of the time gig workers work.



Yet these in-between times account for a significant share of workers' time. A 2019 study commissioned by Uber and Lyft found that 28 to 37 per cent of the distance driven by ride-hail drivers was covered while waiting or searching for a ride request (Fehr and Peers, 2019). And while kilometres covered doesn't directly correlate to time, it does provide insight into the significant amount of uncompensated time drivers spend logged into the app.

Even when companies share earnings data — like the recent report produced by Accenture for Uber suggesting drivers in Vancouver net \$25 per hour — it is based on only a fraction of the time actually worked. Further, these estimates only account for some operating costs and omit others, including the most significant: the cost of vehicle ownership (Accenture, 2021-a).

In contrast, Ontario Minister of Labour, Training and Skills Development Monte McNaughton said in his ministry's investigation into working conditions in ride hailing, drivers reported earnings as low as \$3 or \$4 per hour (CBC, 2022), well below the \$15 per hour minimum wage in Ontario.

No regulation of hours of work and overtime

There is no regulation of hours of work or overtime for gig workers. When demand is high, workers who take on long hours are not receiving overtime compensation. Many ride-hail drivers report they put in 80-hour weeks or more to make ends meet or to access multi-trip bonuses to help them pay their bills (Rodino-Colocino, 2019).

However, these long hours are not always reflected in individual company statistics as they do not track hours spent working for their competitors. Many drivers work for multiple apps to make ends meet, switching between ride hailing and food delivery for example.

Companies know that working long hours is a problem and can compromise safety. In 2018, Uber announced it would be enforcing a mandatory break after 12 straight hours of driving (CBC, 2018). However, the system does not track time that drivers may be working for their competitors. It also does not provide workers with overtime pay.

Termination without cause and no right to compensation for length of service

Many platform companies rely on a customer review system and retain the ability to both prioritize the allocation of work and to terminate workers based on this and other data points. This system means workers can be deactivated (terminated) by the platform company at any time.

Workers have little and usually no control over reviews. Current and former TaskRabbit employees, commenting on the site Indeed.com, report they have no ability to respond to bad reviews and their ratings suffer if they refuse a job (TaskRabbit employee reviews, n.d.). They also report little follow up from the company when they want to challenge a bad review, customer complaint, or payment dispute.

And when a worker is terminated without ESA protection, the company does not pay them compensation for length of service, and they are unlikely to qualify for Employment Insurance. Workers are left with no pay and little recourse to pursue an unfair termination.



NO COMPENSATION FOR BUSINESS EXPENSES

Workers covered by the ESA cannot be charged for an employer's business expenses:

Deductions 21 (2) — An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations (Employment Standards Act, 2022).

Yet gig workers are stuck footing the bill for all kinds of business expenses. Platform companies do not provide compensation for workers' fuel, most insurance costs, maintenance expenses, equipment, or any other legitimate business expenses.

This negatively impacts the wages earned by workers and distorts workers' perception of their take-home earnings. In a video on Uber's website, driver Laurel Chase speaks directly about the challenges she faces budgeting and managing car maintenance and repairs. She says,

...As amazing as Uber is in regards to the flexibility of your time and making your own money, budgeting is on a different level because we still have to maintain our vehicles, make sure that they're clean, they're gassed up and if anything needs to be fixed etc. etc. ... But for me it's when you make it, then it's like, okay, do I have any car expenses? So it's like automatically I need to, I know that my car, my vehicle needs to be on the road. So I have to keep my vehicle in functioning form. So you are making, but at the same time it is going right back out. So you're not seeing anything going into a savings so to speak... (Uber, n.d.-d).

The Accenture profile, commissioned by Uber, reports on working conditions for drivers in BC. The report estimates drivers' earnings and makes it clear that Uber considers drivers to be on the hook for their expenses. Further, the report fails to account for the most significant cost of driving — purchasing a vehicle. The report assumes that drivers already own a vehicle suitable for transporting passengers (Accenture, 2021-b).

However, Uber's own website (Uber, n.d.-e) acknowledges that not all prospective drivers already own a car, or if they do, that the vehicle is suitable and meets the company's qualifying criteria (Uber, n.d.-f) for transporting passengers. To address this, Uber has rental car agreements with both Hertz and Avis. The website says, "We launched the Vehicle Marketplace program to help drivers without access to a qualifying car find an opportunity to earn with Uber" (Uber, n.d.-g).

While some may choose to rent, other drivers may choose to upgrade by purchasing a new vehicle in order to meet the criteria, transport more passengers, or ensure better reviews for cleanliness, condition, and comfort of their riders.

Cars used for ride hailing will depreciate more quickly due to excessive mileage and drivers may also buy cars more frequently and do more maintenance due to the wear and tear of continuous driving. Workers also solely bear the brunt of price shocks—like rising gas prices. None of these legitimate business costs are compensated by companies.

Some companies require workers to purchase other types of equipment. SkipTheDishes requires its couriers to have two types of thermal bags to transport deliveries. Workers can either buy a bag from



SkipTheDishes or have another thermal bag approved based on a specific set of criteria (SkipTheDishes, n.d.-a).

TaskRabbit's site makes it clear to prospective customers that Taskers are independent contractors and that their equipment needs will vary (TaskRabbit, n.d.-a). But they do provide a detailed list of recommended equipment for Taskers (TaskRabbit, n.d.-b). The list includes various types of cleaners, a tool kit, and a ladder, power drill, and dolly. None of these items are provided by TaskRabbit.

NO HEALTH AND SAFETY PROTECTIONS OR COMPENSATION FOR INJURY OR OCCUPATIONAL DISEASE

When workers are misclassified, there are no health and safety standards or rules in place. This means there are no industry standards established by the Workers' Compensation Board. Employers are not advising workers of hazards, conducting risk assessments, outlining safe work practices, or providing training. Businesses with gig workers are not required to include them in health and safety committees.

As a result, it is possible for entire industries to operate without any health and safety standards at all. On-the-job safety is left to the workers; it is essentially a free-for-all. It places all the responsibility for safety on the worker and none on the employer. For example, during the COVID-19 pandemic each worker was responsible for developing and implementing their own COVID-19 safety protocols.

Gig workers do not have the right to refuse unsafe work. Workers providing home repair, moving, maintenance, and similar services through companies like TaskRabbit may find themselves in unsafe working conditions and feel pressured to complete unsafe work, due to fear of a negative review. In app-based employment, negative reviews can have significant consequences for future employment and even result in termination from the app. This pressure to complete jobs is especially high when workers first start with a new company and are trying to build an online reputation.

Misclassified workers lose out on compensation in the case of injury. While businesses may save big bucks by avoiding required contributions to the WCB, workers bear the financial risk. Workers have identified this as a big concern. In one of Uber's own promotional videos, a driver, Laurie Pringle, talks about her fear of being in a serious car accident while working and not having sufficient coverage. She talks about the need for critical benefits and protections for her and her family. She says,

...we're lucky but uh I know when you are out on the road, these days, we pass by a lot of terrible car accidents out there, and you don't want to think that if someone were hurt while driving for Uber or something else in their job regardless of where they work there wouldn't be adequate benefits to support them as they recover and need to get back to full health (Uber, n.d.-h).

While workers have the option to purchase Personal Option Protection (POP) from the WCB, coverage is limited, and few workers know about its availability. Uber's car insurance may cover drivers like Laurie in certain situations, but she wouldn't have the option of a WCB claim and may not be sufficiently covered depending on the type of work she is doing when the accident occurred. More on this below.



Misclassification also puts consumers at risk of liability. When a homeowner hires a worker to perform a task and the worker is injured, the homeowner may face a lawsuit or a ruling from WCB that they are liable to pay a fine.

UNDER-INSURANCE AND PERSONAL LIABILITY

Workers may find they lack appropriate insurance to protect them in case of an injury or accident involving themselves, a customer, or a member of the public.

According to ICBC, ride-hail drivers are on the hook for insurance costs unless they have a trip accepted or are actively engaged on a trip (ICBC, n.d.-a). Once a driver accepts a trip, the ride-hail company's insurance policy applies, but the time spent between trips is not covered. In the case of an at-fault accident, collision coverage for Uber, for example, has a \$2,500 deductible.

TaskRabbit does not provide any insurance coverage for Taskers for personal injury, property damage, or any other legal liability (TaskRabbit, n.d.-c). Instead, they offer to assist with disputes

with a Happiness Pledge. The pledge is available to users and clients to resolve issues at TaskRabbit's "discretion on a case-by-case basis." There are hard caps on payouts — a maximum of \$10,000 for most areas (TaskRabbit, n.d.-d) and a long list of terms and conditions to be eligible for payment.

According to the company's website, SkipTheDishes drivers are independent contractors responsible for their own insurance (SkipTheDishes, n.d.-b). In BC, commercial-delivery-vehicle insurance may be required to perform deliveries. This insurance can be significantly more expensive than business-use insurance and many drivers may not be aware of the requirement, leaving workers under-insured and possibly unprotected (CBC, 2020-a) in case of a serious accident. The impact could be financially devastating.

Workers may find they lack appropriate insurance to protect them in case of an injury or accident involving themselves, a customer, or a member of the public.

While the DoorDash website says it provides vehicle insurance for workers "on an active delivery," the extent of coverage and whether it applies in Canadian jurisdictions is unclear. Its website says, "You are considered on active delivery from the time you accept a delivery request until the time your customer receives their order, or the order is canceled" (DoorDash, n.d.-b). It is not specified whether the insurance complies with ICBC requirements for commercial delivery vehicles. DoorDash's contract states that workers are responsible for their own insurance and the website clarifies its insurance only kicks in if the worker's personal insurer denies the claim. The insurance does not cover driving to pick up an order or an event occurring between leaving a vehicle and delivering an item to someone's door. The coverage also does not apply to deliveries performed on bikes or scooters.



INSURANCE PROTECTION SUMMARY

UBER 🚘			
Vehicle insurance provided?	Yes	WCB or non-vehicle personal injury or liability insurance provided?	No
Coverage: Commercial auto applies when ride request is accepted or when transporting passengers, collision with \$2,500 deductible (Uber, n.di).		n/a	
Notes: Personal insurance required when app is active, but no trip accepted, coverage does not include provision of a rental car to ensure drivers can continue to earn.			

LYFT 🚘				
Vehicle insurance provided?	ehicle insurance provided? WCB or or liabil		No	
Coverage: Commercial auto applies when ride request is accepted or when transporting passengers, collision with \$2,500 deductible (Lyft, n.dc).		n/a		
Notes: Personal insurance required when app is active, but no trip accepted, coverage does not include provision of a rental car to ensure drivers can continue to earn.				

SKIPTHEDISHES			
Vehicle insurance provided? No WCB or non-vehicle personal in or liability insurance provided?		WCB or non-vehicle personal injury or liability insurance provided?	No
Coverage: n/a		n/a	
Notes: ICBC website says: "Your vehicle may need to be rated in a delivery rate class depending on what else you use the vehicle for and how often you use the vehicle for delivery" (ICBC, n.db).			



DOORDASH 🤉 🖑			
Vehicle insurance provided?	Unclear	WCB or non-vehicle personal injury or liability insurance provided?	No
Coverage: ? Notes: Contract states drivers are resfor their own insurance. But another commercial auto insurance is provide only if your claim is rejected by your insurance. It is not clear if this applies (DoorDash, n.dc).	page states ed but personal	Notes: Contract explicitly states: "CONTR agrees that CONTRACTOR will not be eligible for workers' compensation benefits through DOORDASH, and instead, will be responsifor providing CONTRACTOR's own worker compensation insurance or occupational insurance, if permitted by law" (DoorDas	gible ugh sible ers' al accident

TASK RABBIT 💢			
Vehicle insurance provided?	No	WCB or non-vehicle personal injury or liability insurance provided?	No
Coverage: n/a Notes: n/a		Notes: TaskRabbit offers a Happiness Ple compensate losses including property d theft, or bodily injury during the perforn task not otherwise covered by personal in This policy requires claims within 14 day hard caps of \$10,000 (TaskRabbit, n.de)	amage, nance of a insurance. s and has

INSTACART 📜			
Vehicle insurance provided?	No	WCB or non-vehicle personal injury or liability insurance provided?	No
Coverage: n/a			
Notes: Contract states that "securing and paying for automobile insurance in coverage amounts consistent with legal requirements, including any required no fault automobile insurance or commercial liability insurance" (Instacart, n.da) is the responsibility of the worker.		Notes: Contract states workers are response the following coverage: WCB, disability a insurance, EI, CPP, liability insurance, con automobile insurance, GST (Instacart. n. contract)	and health nmercial



NO BENEFITS

The vast majority of platform companies do not offer employees extended health or dental benefits or life insurance, yet access to benefits is a priority for workers.

In response to this pressure from workers, platform companies are devising complex plans so as to appear as though they are addressing this demand from workers. However, these companies aim to do so without incurring the true costs of running an effective benefits program or making contributions to federal benefit programs like EI and CPP.

Schemes like Uber's Flexible Work+ propose an explicit trade-off: swapping employment protections for participation in a forced-savings benefit program (Archer and Mandryk, 2022). While such programs may offer a tantalizing headline, the fine print tells a different story. As explained by lawyers Simon Archer and Josh Mandryk, this is an expensive trade-off for governments and a "bad deal for workers." Workers lose out on access to employment protections like minimum wage, overtime, and statutory holiday pay. Governments give up their share of payroll taxes, El, and CPP contributions — contributions that could add up to more than double what Uber is willing to contribute to the benefits plan.

In return, workers would participate in a savings plan and allocate a percentage of their earnings to a benefit type of their choosing. But the benefits on offer may provide little value to workers. Flexible Work+ (Uber, 2021) does not guarantee a defined benefit plan in exchange for contributions, e.g., \$500 a year for physiotherapy. The program would be available only to workers who meet a particular threshold for hours worked, potentially leaving many workers without access to any benefits. And it is not clear how employer contributions would be applied. Will Uber match employee contributions 50/50 or will they contribute at a lower rate?

To truly make a difference for workers, benefit plans must be built on top of basic employment rights.



Uber kept dropping prices every season to gain more ridership to satisfy their growth, and it didn't matter to Uber if the driver is not even making minimum wage... And the worst part is, they call us partners, [but] they make the rules, set the price, and they even choose the cars you can use."

— Fawzi Kamel, Uber driver, who spoke to former UBER CEO about changes in driver remuneration (Andrews, T. & Larimer, S., 2017).



LIMITED ACCESS TO EMPLOYMENT INSURANCE AND RETIREMENT SECURITY

Independent contractors lose out on access to critical supports and programs. For example, they have limited access to Employment Insurance. The government loses employer contributions critical to the health of the program. Workers are only eligible to buy into special coverages at their own cost and receive no compensation during a work slowdown or when laid off.

Workers also see reduced CPP benefits. Again, employer contributions are not made on their behalf. Workers will pay the full share out of their pocket, and their contributions are likely to be smaller as they are calculated based on net income. This incentivizes maximizing write-offs in order to minimize income tax, but the long-term consequence of lower-reported income is a lower pension.

As a result, workers may end up on other programs like social assistance and disability as well as other government-funded and community-coordinated programs. These programs generally provide a smaller benefit, and the full cost of these programs is borne by taxpayers, not the platform companies who should be responsible for making contributions.

COMPARISON OF EMPLOYEE AND INDEPENDENT CONTRACTOR RIGHTS

Employment right in BC	Employee	Independent contractor
\$15.65/hr minimum wage	Yes	No
Overtime pay	Yes	No
Employment Insurance	Yes	(worker can pay in for limited coverage)
Workers' compensation	Yes	(worker can pay in for limited coverage)
Five paid sick days	Yes	No
Five days domestic and sexual violence leave	Yes	No
Statutory holiday and vacation pay	Yes	No
Right to refuse unsafe work	Yes	No
Right to a join union	Yes	No
Notice/compensation for length of service (severance)	Yes	No
Compensation for business expenses	Yes	No
Employer contribution to CPP	Yes	No

^{*}Adapted from Economic Policy Institute (Rhinehart, McNicholas, Poydock, & Mangundayao, 2021-a).



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Cost of misclassification

PRECARIOUS WORK IS A DETERMINANT OF POPULATION HEALTH

Multiple studies have found that precarious work is associated with a number of health issues (van der Noordt, IJzelenberg, Droomers, Proper, 2013) including both mental and physical illness (Gunn, Håkansta, et al., 2021). Additionally, given that precarious work is more likely to impact workers of intersecting identities, it can compound existing health inequities in our communities.

Here in Canada, the Poverty and Employment Precarity in Southern Ontario ("PEPSO") study (Lewchuk-Laflèche et al., 2015) found that employment precarity was strongly associated with "poorer mental health" and that for low-wage, precarious workers it "is associated with poorer general health and with poorer mental health."

A recent research article citing two Italian studies focused on the male population determined that "precarious employment contributes through financial strain to reduce the mental health related quality of life and to increase mental disorders such as symptoms of depression or dysthymia" (Ferrante-Fasanelli et al., 2019).

Knowing this, decision makers have a responsibility to shape public policy to deliver better health outcomes for workers and reduce the negative impact of systemic discrimination.

CONSEQUENCES FOR COMMUNITIES AND GOVERNMENT

It is not just workers who suffer. We all pay the price when workers are misclassified.

All work should be good work. The pandemic cast a light on all the essential work performed in our communities. We saw the critical role of front-line service work, the need for resilient supply chains and how many low-wage workers have been keeping our communities safe and our economy running. The BC government has an obligation to ensure that all workers are treated with fairness and dignity. Workers need to be protected from exploitation and must have access to a pathway to justice.



Misclassification distorts the economy and allows some companies to gain advantage by gaming the system. This hurts companies that are complying with our laws and paying their fair share. It makes it harder for legitimate actors to compete.

Misclassifying workers has a broader impact — it destabilizes the social safety net by underfunding some government programs and relying on other programs to fill the gaps. This shifts costs from business to taxpayers.

Many government programs rely on an economy of scale to deliver benefits at an affordable contribution rate; misclassification depletes the participation base. This includes programs like EI, Workers' Compensation, and CPP. Businesses contribute lower payroll and income taxes, and workers make lower contributions to EI, CPP, and income tax as well. The BC Building Trades estimate a loss of \$115.4 million annually in direct program revenue to the government (BCBT, 2022). This is for one sector alone.

In many cases, a lack of coverage shifts costs onto other government programs. For example, injured workers without WCB coverage do not receive compensation for health care costs they incur as a result of a workplace injury. When a WCB claim is accepted, the health care system is compensated for the cost of treating the illness or injury. When WCB coverage does not apply, the health care system must absorb the costs. Further, workers who suffer long-term illness or become disabled as a result of an injury may

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require other provincial and federal programs such as disability assistance, social assistance, and other community supports. These programs are funded by taxpayers rather than employers.

There are other examples of this shift in responsibility. During the pandemic, the federal government needed to act quickly to expand El coverage to thousands of independent contractors who lost their jobs. Due to their employment status, they did not qualify for coverage under the current El rules. Workers needed support and the El program stepped up. However, independent contractors and more significantly their employers did not contribute to the El system to cover the cost of these payouts.

NO ACCESS TO THEIR CHARTER RIGHT TO JOIN A UNION

When workers are misclassified as independent contractors, they may lose out on their right to join a union. Without a union, gig workers lack the power to improve their pay and working conditions, have no representation, and lack a binding and balanced dispute resolution mechanism.

While platform companies tout the benefits of their employment model, there is growing global evidence that workers are not satisfied with their working conditions and want to see improvements:



- Canadian Pizza Hut delivery drivers allege they were misclassified and filed a lawsuit (Mojtehedzadeh, 2022);
- A class action lawsuit alleging misclassification has been filed against Uber and Uber Eats and will be heard in Canada (Samfiru Tumarkin, LLP, 2021; Fric, L., Rowe, M.A., Scott, L., 2021);
- In September 2021, a group of DoorDash employees in California protested outside CEO Tony Xu's home to demand better wages and working conditions (Leahy, G., 2021);
- Canadian couriers working for Foodora joined Gig Workers United and won the right to unionize before the company shuttered its Canadian operations (CBC, 2020-b);
- US app-based workers engaged in a one-day strike over their working conditions (Paul, K., 2021); and
- South African drivers in Gauteng engaged in a three-day strike over misclassification and working conditions (Khumalo, S., 2022).

It is already extremely difficult for low-wage workers to form a union. Multinational corporations have deep pockets and lots of tools to fight back. That is why it has taken decades, a pandemic, a new president, and multiple attempts to unionize the first corporate Starbucks coffee shops and an Amazon warehouse in the US (Isidore & O'Brien, 2022). The first Canadian corporate Starbucks was unionized in 2021 in Victoria.

It is no small feat to stand up to a multinational corporation and win. And gig workers face an even bigger hurdle — workers who are classified as independent contractors are unable to unionize unless they are successful in challenging misclassification first. Further, gig workers do not have a central dispatch or common work location, making it difficult for them to connect with each other to organize.

While gig workers have had some victories around the right to unionize, they have been only partially successful. In the UK, Uber drivers were found to be workers but not full employees (Uber BV and others v Aslam and others, 2021). This gives drivers access to some basic rights like minimum wage, statutory holidays, some hours of work protections, and the right to unionize, but not full protection through minimum employment standards (Government of United Kingdom, n.d.).

In Ontario, bicycle couriers employed by Foodora were found to be dependent contractors (White, R., 2020). Under Ontario laws, dependent contractors are not covered by their employment standards laws but are entitled to unionize and have access to other rights like notice of termination (Cavalluzzo, 2019).

As noted throughout this document, the impact of a lack of employment standards coverage is significant. In 2018, the BC government brought in legislation to ensure that all employees, including those covered by a collective agreement, would have access to minimum employment standards. But if workers are not classified as employees, even if they win the right to bargain a collective agreement, the floor will not apply. These workers are stuck negotiating from a weaker position — either from zero or from a set of reduced rights, rather than being able to build up from a floor established in the applicable employment legislation.





Gig companies push back

PLATFORM COMPANIES HAVE SHOWN they will go to considerable lengths to avoid the responsibility of being employers. In January 2020, the California government brought in a new law, AB–5 (Assembly Bill 5, 2019), designed to protect gig workers and give them access to employment standards protections. It included bringing in a new test, the ABC test, to determine whether a worker is an employee or independent contractor. The legislation enshrined employee status for most gig workers.

But gig companies fought back.

In California, platform companies funnelled \$204 million into Proposition 22 (n.d.), a ballot measure designed to counteract AB–5 legislation. They proposed Proposition 22 to exclude app-based drivers and food delivery workers from basic employment rights and prevent new laws that allow unionization from being brought in. Then they marketed the ballot measure as a tool to help the very workers it would hurt.

Marketing focused on centring the voice of workers and on issues like access to a livable wage. Yet once it passed, workers would have fewer employment protections. Companies like Uber and Lyft also threatened to leave California if the ballot measure was lost (Hussain, Bhuiyan, & Menezes, 2020).

California brought in a new law to protect gig workers and give them access to employment standards protections. But gig companies fought back.

The ballot measure did indeed succeed, but the fight for workers' rights did not end there. Workers took a case forward challenging the law. The Alameda Superior Court of California recently overturned Proposition 22, finding it unconstitutionally denied employment rights to workers (Chen, B., & Padin, L., 2021; Castellanos vs. State of California, 2021).

a A: The first person is free from the direct or indirect control and direction of the second person in connection with the performance of the work, both under the terms of the contract for the performance of the work and in fact. B: The first person performs work that is outside the usual course of the second person's business. C: The first person is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.





Policy solutions

THE RAMPANT MISCLASSIFICATION OF WORKERS is a system-wide problem that requires concrete action on behalf of the government. The impact is too great and too widespread to ignore.

The BC government must adopt a multi-prong approach that strengthens legislation and regulations and ensures compliance through a rigorous program of enforcement.

WE ARE CALLING ON THE BC GOVERNMENT TO:

1. Implement the ABC model as the legal test for determining employee status

The ABC test, first used in California, is now the gold standard for determining who is an employee. The ABC test is superior to the previously-relied-on Common Law test, as it presumes employee status unless three clear conditions are met (see page 23). The ABC test is easier to apply, reflects changes in our modern workplaces, and recognizes the differential power between workers and employers.

Twenty-one US states use the ABC test to determine eligibility for unemployment insurance, or access to basic employment standards. Six of those states — California, Connecticut, Massachusetts, Nebraska, New Jersey, and Vermont — apply the ABC test for both unemployment insurance and access to basic employment standards (Rhinehart, et al., 2021-b).

The BC government must adopt a multiprong approach that strengthens legislation and regulations and ensures compliance through a rigorous program of enforcement.



The ABC test, first used in California, is now the gold standard for determining who is an employee.

In Canada, the Ontario NDP tabled a bill called the *Preventing Worker Misclassification Act, 2021* (Bill 28, 2021) in an unsuccessful attempt to bring in the ABC test. We recommend the following test is used for coverage under the *Employment Standards Act* and *Workers Compensation Act*.

The person doing the work will be considered an employee unless the employer shows:

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

2. Reverse the onus of proof so workers are considered employees unless the employer can prove otherwise

The government should reverse the onus of proof so that it falls to employers to prove that a worker is not an employee. This would send a strong message to employers that are misclassifying workers. It means an employer would have to produce clear evidence to establish that the worker is not an employee. This also supports balance in the workplace, as reversing the onus recognizes that employers hold more power over terms and conditions of employment: employers do the hiring and they for the most part set the terms and conditions of employment in lower-wage and non-unionized workplaces.

The Canada Labour Code was amended by the federal Liberal government to bring in this change as follows:

Marginal note: Burden of proof — 167.2 If, in any proceeding in respect of a complaint made under this Part, the employer alleges that the complainant is not their employee, the burden of proof is on the employer (Canada Labour Code, 2021-a).

This change has been in force since January 1, 2021.

Additionally, the Wynne government in Ontario brought in a similar law as part of the reforms recommended by the Ontario Changing Workplaces review. These improvements have since been repealed by the Ford government.



From Ontario's now-repealed bill 148:

Onus of proof — (2) Subject to subsection 122 (4), if, during the course of an employment standards officer's investigation or inspection or in any proceeding under this Act, other than a prosecution, an employer or alleged employer claims that a person is not an employee, the burden of proof that the person is not an employee lies upon the employer or alleged employer (Bill 148, 2017).

3. Eliminate exemptions and carve-outs to the Employment Standards Act

There should be one set of rules that applies to all workers. That is the strongest basis for building compliance. The BC government must resist the urge to create new carve-outs as they erode protections for all workers by creating a lack of clarity about which rules apply in which scenario. In BC, we have seen direct evidence of this in the abuse of the ESA's high-tech exemption, confirmed in a 2018 determination won by film animators (Employment Standards Branch, 2018).

Getting rid of the sexist server wage was an important step, but many other exemptions remain. Farmworkers are excluded from many protections including minimum wage, overtime, and statutory holiday pay. High-tech workers are excluded from a host of provisions including hours free from work, overtime, and statutory holiday pay (Government of British Columbia, 2016). The BC government should continue to remove exclusions contained in the ESA and regulations, including the high-tech exemption and exemptions for farmworkers.

We strongly oppose the creation of a third category of worker with fewer rights. We believe the majority of gig workers are misclassified and should be covered by the full protection of the ESA.

4. Develop a robust plan for education and enforcement, including high penalties for employers found to knowingly misclassify workers

Laws are not effective without enforcement. The government must clearly communicate its expectations of employers.

This can be achieved through an express prohibition on misclassification. Again, an example is included in the *Canada Labour Code*:

Prohibition — 167.1 An employer is prohibited from treating an employee as if they were not their employee in order to avoid their obligations under this Part or to deprive the employee of their rights under this Part (Canada Labour Code, 2021-b).

To support a prohibition on misclassification, the government has a responsibility to sufficiently resource the ESB and hire and train more enforcement officers to enforce the law. This must include education coupled with clear directives, compliance blitzes in problem sectors, and random spot checks.



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Enforcement needs to be coupled with stiff penalties. Financial penalties for businesses are an effective way to deter abuse. However, in BC, officials continue to be reluctant to issue penalties even for flagrant violations. Penalties are also not increased based on the number of employees impacted. So an employer that underpays 100 employees is treated the same way as an employer with a single violation. Further penalties only increase for violations of the same provisions of the ESA. Employers can violate different sections of the ESA within a three-year period and not see their financial penalties increase.

The BC government should:

- Ensure that penalties for a contravention of the ESA increase in proportion to the number of employees affected;
- Require penalties to increase every time any provision of the ESA is violated by an employer; and
- Increase penalty amounts in the regulation retroactively and on a go-forward basis by at least the rate of increase in the annual BC inflation rate since 2001 39.3 per cent in 2021 (will exceed 40 per cent in 2022).

5. Identify sectors where worker classification is abused and legislate employment standards coverage

The government should provide clear direction to workers and businesses. It can remove confusion by establishing sectors where workers are classified as employees. While the steps above will be effective, they still require challenges to be brought forward or proactive enforcement to be conducted by the ESB. This will take a significant amount of resources and, given the experience in other jurisdictions, workers will be tied up fighting legal challenges for years. This can be avoided by providing direction, through legislation and regulation, to workers and employers.



6. Take concrete action to end discrimination in workplaces to support the rights and full participation of workers who are Indigenous, Black, racialized, neuro-diverse, women, two-spirit, gender diverse, diverse in sexual orientation, or living with a disability

Though data on the demographics of gig workers is limited, we know that workers from equity groups are over-represented in low-wage and precarious work in general (Block et al., 2019). There are a number of actions the BC government can take to address discrimination in the workplace, including bringing in pay equity legislation, ensuring that translation services are available at the Employment Standards Branch, providing additional resources to the Human Rights Commission and Tribunal, and advocating for the federal government to provide migrant workers with permanent residency upon arrival and open work permits.

The BC government must also continue with important work like development and implementation of the Gender Based Violence Action Plan, the implementation of the Declaration Act Action Plan, and using the data collected as part of the *Anti-racism Data Act* to make informed decisions on the effectiveness of government programs for racialized British Columbians.

Though data on the demographics of gig workers is limited, we know that workers from equity groups are over-represented in low-wage and precarious work in general. There are a number of actions the BC government can take to address discrimination in the workplace.





Conclusion

MISCLASSIFICATION OF WORKERS is a widespread and growing problem with significant consequences for workers, business, our communities, and government programs. It cannot be effectively challenged by individual workers or small groups of workers. Fixing misclassification will take strong policy leadership from the BC government.

In particular, the BC government needs to take six concrete actions to stop misclassification:

- Implement the ABC model as the legal test for determining employee status;
- Reverse the onus so workers are considered employees unless the employer can prove otherwise;
- Eliminate exemptions and carve-outs to the Employment Standards Act;
- Develop a robust plan for enforcement, and establish high penalties for employers who are found to knowingly misclassify;
- Take action to end discrimination in workplaces to support the rights and full participation of workers who are Indigenous, Black, racialized, neuro-diverse, women, two-spirit, gender diverse, diverse in sexual orientation, or living with a disability; and
- Identify sectors where worker classification is abused, and legislate employment standards coverage. There are some sectors that require crystal-clear guidance to keep workers from being tied up for years fighting legal challenges.

Misclassification of workers is a widespread and growing problem with significant consequences for workers, business, our communities and government programs. It cannot be effectively challenged by individual workers or small groups of workers.



Appendix 1

JURISDICTIONAL COMPARISONS

ABC test or similar used to determine employment rights (Rhinehart et al., 2021-c)	Reverse onus
 California Connecticut District of Columbia (construction) Illinois (construction) Maryland (construction and landscaping) Massachusetts Nebraska New Jersey New York (construction) Vermont 	 Canada Labour Code Ontario (repealed by Ford government) Australia (Fair Work Act, 2009) European Union — Directive of the European Parliament and of the Council



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PRECARIOUS WORK GLOSSARY

ABC test

The ABC test is now the gold standard for determining who is an employee. We recommend this test is used for coverage under the *Employment Standards Act* and *Workers Compensation Act*.

The person doing the work will be considered an employee unless the employer shows:

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

App-based employment

Employment that operates through a software application, such as Uber or SkipTheDishes.

Common law test

This test focuses on how two key aspects function in an employment relationship: control and dependency. "Who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations?" a

Dependent contractor

On a scale of employment relationship, this is an intermediate category in relation to the key factors of control and dependency. "A dependent contractor might set their own hours and hire their own employees but derive most of their income from a contract with one business, and thus be fairly dependent on that business to earn their living." Currently, the employment rights of dependent

b Law Students' Legal Advice Manual, Law Foundation of British Columbia, 2021, Chapter 9, p. 14, Islap.bc.ca/uploads/2/9/3/5/29358111/9_-employment_law__2021_.pdf



a McCormick v. Fasken Martineau DuMoulin LLP, 2014 SCC 39 (CanLII), [2014] 2 SCR 108, canlii.org/en/ca/scc/doc/2014/2014scc39/2014scc39.html

contractors are limited to the right to unionize and the right to reasonable notice of termination.^c Dependent contractors may be covered by workers compensation if they meet the definition of a worker under the Workers Compensation Act.

Employee

Under the *Employment Standards Act*, an "employee" includes:

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall.d

Employer

Under the *Employment Standards Act*, an "employer" includes a person:

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.

Gig work

A form of non-standard work where a worker is defined as an independent or dependent contractor (or freelancer). Some workers choose this classification but, more often than not, workers are told by a company that they do not qualify or cannot accept work as an employee. Historically, gig work has included work in the construction trades, visual effects, graphic design, high technology, taxi industry, domestic work, hair styling, and personal care. Currently, app-based technologies are emerging as a significant sector of gig work. A gig company is a business that profits through this type of work.

e Ibid.



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c Cavalluzzo, Employees, Dependent Contractors and Independent Contractors: What's the Difference? What misclassification can mean to you, 2019, cavalluzzo.com/resources/blog/post/item/employees-dependentcontractors-and-independent-contractors-what-s-the-difference

d Employment Standards Act, Definitions, current to July 13, 2022, bclaws.gov.bc.ca/civix/document/id/ complete/statreg/00_96113_01#section1

Independent contractor

A person who is self-employed, running their own business. "When deciding if a worker is an employee or an independent contractor, one of the main questions to ask is 'whose business is it?""

Misclassification

When employers incorrectly classify workers as independent contractors instead of employees. Misclassification deprives workers of employment standards protections including paid sick leave, minimum wage provisions, termination and severance requirements, and more.

Platform company

A business that operates through a software platform, such as Uber or SkipTheDishes.

Worker for the purposes of workers compensation

Under the Workers Compensation Act, a "worker" includes the following:

(a) a person who has entered into or works under a contract of service or apprenticeship, whether the contract is written or oral, express or implied, and whether by way of manual labour or otherwise.⁹

g Workers Compensation Act, Definitions, current to July 13, 2022, bclaws.gov.bc.ca/civix/document/id/complete/statreg/19001_01#section1



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f Employment Standards Branch Factsheet, July 2016, gov.bc.ca/assets/gov/employment-business-and-economic-development/employment-standards-workplace-safety/employment-standards/factsheets-pdfs/pdfs/employee_or_contractor.pdf



Submission to the BC Ministry of Labour

Submission with respect to the
Discussion Paper "Proposing
Employment Standards and Other
Protections for App-Based Ride-Hail
and Food-Delivery Workers in
British Columbia

September 2023



Authority

The BC Federation of Labour ("Federation," "BCFED") and our affiliated unions are pleased to participate in the consultation on the BC Ministry of Labour's Discussion Paper, "Proposing Employment Standards and Other Protections for App-Based Ride-Hail and Food-Delivery Workers in British Columbia."

The BCFED represents more than 500,000 members of our affiliated unions, from more than 1,100 locals working in every aspect of the BC economy.

Sussanne Skidmore

President

Hermender Singh Kailley Secretary-Treasurer

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Introduction

We are pleased to see the BC government propose laws and regulations to better protect workers. You are joining governments across the globe that have already taken action to improve working conditions for ride-hail and food delivery workers.

Ride-hail and food delivery services are widely used in our province. These services themselves are in no way new -- companies have been moving goods and passengers for hundreds of years. All that is new is the use of smartphone-based applications, which have, to a significant degree, replaced traditional dispatch systems.

However, this app-dispatched gig work has been allowed to grow in BC outside of traditional employment standards, health and safety protections and labour laws. This has had harmful consequences for workers and for our province's programs and services.

The exclusion of these workers from basic protections is unacceptable and inconsistent with how we treat other sectors.

Workers in these jobs report a multitude of issues including low wages, long hours, exposure to harassment and violence, unfair suspensions and terminations, tip theft and more. These workers are organizing themselves into networks and raising their voices on social and traditional media, standing up and demanding change.

There is growing evidence that the majority of app-based work is being done by newcomers and racialized workers¹ and their exclusion from the rights and protections afforded to other workers is a systemic issue. Many of our previous and existing exclusions and exemptions to the *Employment Standards Act* ("ESA") also predominantly affect racialized workers — for instance, farmworkers. Allowing these app-based workers to continue to have substandard employment conditions is inconsistent with the *Human Rights Code* and the provincial government's commitment to address systemic racism.

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¹ From the BCFED's recent survey of gig drivers, approximately three-quarters (74%) were immigrants and 83% were non-white.

Making exceptions for employers simply because they're app-based sets a terrible precedent. Employers in other sectors are very likely to demand similar (or worse) exemptions, turning employment standards in British Columbia into a patchwork — and dramatically increasing the extent of precarious employment and poor working conditions. The expansion of these practices could set employment protections back a century.

The better path is clear. Workers have delivered two strong messages – they are tired of being treated worse than other workers in our province, and they feel powerless in their dealings with huge multi-national platform companies.

In response to the government's options paper, we have therefore focused on two main themes:

- Ensuring workers have access, at a minimum, to all the basic employment rights and protections other workers receive through the ESA and *Workers Compensation Act*; and
- Providing workers with a pathway to unionization so they can have a voice in their pay and working conditions in negotiations with app companies.

Minimum wage = A living wage

Workers have told us emphatically that they are being underpaid for their work"² They want minimum hourly rate protections, so they know that they are guaranteed a fair wage for all the time they work.

We believe the minimum wage rate for app-based ride-hail and food-delivery workers should be equivalent to BC's highest living wage for a metro area. For 2023, that is \$24.49 per hour.

The wage rate must be paid for ALL time worked and be calculated AFTER expenses. We define work as all "I began doing food delivery during the pandemic. Back then, there was a lot more demand. I earned pretty good money. But now, I am only getting forced to make choices that the app gives me whether to accept the assignment or not. If I don't accept, that affects my acceptance rate which impacts the next chance of getting assignments. If I accept, I may have to work longer shifts that barely leaves me with less than a minimum wage. I realize that I am forced to make these choices that eventually only benefit the platform, not me as a worker. I am not getting fair compensation for the time that I work." worker K.

² The quotes featured in this submission are taken from the BCFED's focus groups with gig drivers during Summer 2023. We have kept them anonymous to allow them to speak without fear of retaliation.

the time a worker spends on the app performing various duties -- not just the time they are transporting customers or goods.

Their minimum pay should be calculated on a daily basis. We do not believe this amount should be averaged like the taxi industry over a month³ as suggested in the paper.

Pay rate

All workers in BC should be guaranteed a fair wage. Every year, the Living Wage for Families campaign calculates this rate based on the actual cost of living in our communities; it best reflects workers' actual economic needs. We believe the living wage should be the minimum wage standard for all workers in BC.

But many workers report to us that after expenses and excluding tips, they are earning far below not only the living wage but even the current minimum wage (\$16.75/hr). We believe as a matter of principle that companies in BC should not be permitted to pay poverty-level wages.

Workers report that their wages have consistently declined since the introduction of transportation network services ("TNS") while their expenses have increased sharply. To address these low wages, workers report they are having to work more and more hours to make ends meet. Many workers tell us they are working more than 10 hours in a day and more than 60 hours in a week. Many work at least six days a week.⁴

"If I don't work all seven days now, I cannot make my ends meet. That means 15h or 16h per day." – worker T.

The lack of regulation of earnings leaves workers with no predictability or security around the minimum they are guaranteed to earn for the same amount of work on different days.

Pay for all time worked:

Studies have shown that on average 40% of a workers' time is spent outside of what companies define as engaged hours. Even with legislative measures in place to increase usage rates, publicly available data collected in New York⁵ – a market much larger than Vancouver -- shows that ride-hail

³ We also support requiring the taxi industry to move to a daily standard.

⁴ From the BCFED's recent survey of gig drivers, almost one quarter are working over 60 hours per week.

⁵ https://toddwschneider.com/dashboards/nyc-taxi-ridehailing-uber-lyft-data/

vehicles average one-point-eight (1.8) trips per hour with an average duration of 20 minutes per trip. That means an average of 36 minutes out of every hour are spent with a rider in the vehicle, representing only 60% of the driver's time.⁶

Time between assignments is not "free time" -- it is work. Workers are not free to engage in activities of their choosing because, due to the time-sensitive nature of the work, they must be immediately available at any moment. Companies control workers' choices during these "in between" times, for example with punitive consequences for workers who do not accept assignments. These consequences may include being blocked from prime pickup areas such as the airport or losing access to critical information about their work, like pay and destination information.

Not paying workers for all of their work time can also exclude them from other benefits they should be entitled to. If a worker is injured between customers while repositioning or immediately after delivering an order, for example, they may be ineligible to make a workers' compensation claim. Not paying workers for all hours of their work hours may also mean they lack the hours for EI eligibility and its associated funding programs.

The dangers of "engaged time"

We believe the government should reject a payment system based only on the made-up construct of "engaged time." This is an extremely dangerous and regressive concept.

The work of providing ride-hail and food delivery services extends beyond transporting customers or products. It includes many other duties including repositioning, waiting for restaurants and customers, cleaning, refueling, searching for assignments, communicating with the company and more. These duties are essential to the services provided by the company, as without them, the transportation of goods and customers could not occur.

The government must also consider the precedent and impact on other sectors and workers. Our employment and labour laws have moved away from compensating workers based on a per job or piece rate — and for good reason. Piece rates raise stress, promote overwork, lower safety

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⁶ In our survey, drivers estimated only 30% of their time was spent transporting a customer or package.

"I feel pushed and pressured to work
more and more. I am more than 60 now. I
push myself to work more too and it's
something that's against human right.
That's against labor right. That's against
even the public safety." – worker A1.

standards, create unhealthy competition, and can lead to an oversaturation of the labour pool that results in all workers receiving poverty wages. They are profoundly unfair and should not be used. The Federation has long campaigned for the remaining piece rates for hand harvesters (farmworkers) to be eliminated.

Work-related expenses

Workers must be compensated for work-related expenses and must not be required to pay the company's business costs. "We don't even make minimum wage after the gas, insurance and other expenses" – Survey respondent

The Ministry must consider the significant impact of expenses on workers' take-home pay. Workers report that their earnings drop below the minimum wage due to the out-of-pocket expenses they must cover. Yet in their estimates of take-home pay, companies fail to account for many of the real costs workers must pay out.

Additionally, workers must not be required to pay to use the app to access work.

Workers using vehicles

An appropriate reimbursement rate should include compensation at the CRA mileage rate for vehicle use. The CRA mileage rate should be paid for <u>all</u> kilometres driven while on the app, including repositioning after a drop off. Workers frequently are asked to drop off customers or orders in areas where they will not be immediately able to access a next assignment.

"For maintenance, I think I put 4 to \$5000 a year. I just bought new winter tires. I had to buy new summer tires. I had to get my transmission replaced. I had to get a new 2 new front brakes, new set of rear brakes plus the headlights, my seat's coming apart, my keys are actually falling apart because of so many times that I'm getting back in the car and turning it on and off. And those keys, turns out, are \$170 a piece.

On top of this amount, workers should be

compensated for other expenses including but not limited to: cleaning; safety equipment such as

cameras and roadside safety kits; cell phone and data usage; parking; and any additional licensing

fees or inspections that are required.

Workers using e-bikes and e-scooters⁷

For workers who use e-bikes and e-scooters for delivery, a per-kilometre rate should be established

for vehicle use. This should cover charging, repairs and maintenance, depreciation of equipment

including batteries, insurance and attached special equipment like lights, racks and baskets. This

rate should be paid for all kilometres travelled on the app.8

On top of that rate, workers should be reimbursed for other expenses including but not limited to

cell phone and data usage, special equipment including thermal bags, and safety equipment such

as gloves, rain gear, high-visibility vests and helmets.

Expenses should not unnecessarily pass through workers or be billed back

Other business costs like city or airport fees, levies and GST should be handled directly by the

companies and should not be funneled through workers.

Workers report they are currently being charged for many business-related expenses such as

airport fees, booking fees, GST on fees, city fees and split-fare fees. Companies must not be

permitted to make deductions from workers' pay to cover these types of business expenses.

As well, companies must not be permitted to bill workers for any benefits that the company must

provide them. For example, the company must be prevented from billing workers for employer

compensation contributions or for the employer's share of payroll taxes.

Prohibit unauthorized deductions

As set out in the ESA, companies must be prohibited from making unauthorized deductions from a

worker's pay. We have received several reports of deductions and "overpayment" reimbursements

where workers have not consented to the charge or negotiated a repayment plan. A recent

⁷ We have not observed many workers still using traditional bicycles for this purpose.

⁸ Electric bike rental companies may provide an effective comparator in determining this rate. For example, Evo car

share charges \$.35 per minute for an e-bike rental.

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example is a company making deductions for criminal record checks when numerous workers report they have already paid for them at the police station.

When unauthorized deductions are made, workers are faced with a poor communication system in order to challenge the charge. Some workers may not see the deduction or be afraid to make a complaint because of fear of suspension or deactivation.

Tip protection

Workers should have access to the tip protection provided in the ESA. Tips are not wages, and the Ministry must ensure that workers' base wages are calculated separately from tips.

Tips are highly variable and at the discretion of customers. How much a worker receives can be impacted by racism, sexism and discrimination based on other prohibited grounds.

We see no need to develop and administer a different set of rules for this industry. There should be one clear standard for how tips are treated across industries, as universal protections are more likely to be adhered to and are easier to enforce.

Pay and destination transparency

Pay and destination transparency is a significant issue for workers. They have expressed frustration that assignments are offered with very little to no information.

"Because I am in a group community, we often talk about this algorithmic wage differences. And unless I talk to other drivers and actually compare our apps together, I will never know that we are offered different pays for the exact same assignment. And this has happened to me many times already which is one of the reasons why I am going to stop working this job soon." – worker K.

Workers should receive both an estimate of pay and destination information at the time an assignment is offered. Companies currently offer pay and destination information to some workers (often as a perk), so we do not see any legal or administrative barrier to providing this information.

Workers should also be informed of the tips they have received for each assignment. When providing this information, companies should also disclose any fare multipliers or bonusing that applies to the assignment that alters the base rate of pay.

In addition, workers should receive wage statements (pay stubs) for each pay period that clearly indicate the time worked, the rate of pay including any incentive or bonuses, allowances and/or expense reimbursements, vacation and statutory holiday pay, tips and the statutory or other deductions that were made. They should also receive their remaining paid sick leave entitlement. Section 27 of the ESA outlines the appropriate information workers should receive. The wage statement should also include an accounting of tips and expense reimbursements.

Suspensions and terminations (deactivation)

The majority of workers we've spoken with say they've been suspended from working for ride-hail and food delivery companies at least once in the time they've been working. Many are unaware of the reason for the suspension and report poor communication with the company when trying to rectify the situation. In many cases, the workers were reinstated. However, they report a significant loss in income and are not made whole even when it is found they were not at fault.

Further, workers report that they have been threatened with suspension and/or deactivation for raising concerns about issues with their pay, tips and safety.

Many workers whose accounts were deactivated say they had few avenues to challenge the deactivations. This resulted in unemployment and a significant loss of income. Since most of these workers have not paid into the Employment Insurance ("EI") system, they were ineligible for EI benefits.

"Uber deactivates the account without listening the driver. If the passenger calls for whatever reason, Uber first deactivates your account. Then they may review what happened, but they don't care. They are not going to give any compensation for the time they kept you deactivated." Worker A

Ride-hail and food delivery workers would like to see protections that extend beyond those provided in the ESA in the event of a suspension or termination. We believe these protections should be available to all workers in BC.

The suspension and termination provisions in the ESA should be strengthened for all workers as follows.

Suspensions

Workers should not be suspended without prior warning and without just cause. When discipline is

warranted, it must be progressive and appropriate to the infraction. Suspensions are a serious form

of discipline and not an initial step except in the case of the most egregious violations. Should a

suspension be made in error, or should a worker be found not to have engaged in misconduct, they

should be made whole including the repayment of their average daily wages for any time loss.

Terminations

Workers should not be terminated without cause.

Notice and compensation for length of service

Ride-hail and food delivery workers should be eligible to receive notice or compensation for length

of service in the case of a layoff, as per the ESA.

Access to Employment Insurance

Workers should have access to EI in the event of layoff through both their own contributions and

contributions made on their behalf by app companies through payroll deductions.

Complaints

Complaints should be handled through a fully-funded and effective Employment Standards Branch,

with the resources to conduct timely investigations and adjudications. Workers accessing the

services of the Branch have the right to representation. The Ministry should consider developing an

expedited complaints process to deal with unfair terminations for all workers. When a worker's

livelihood is jeopardized, they should be able to get an immediate adjudication.

Workers should also have access to unionization and be able to file complaints through their union

representative using the grievance procedure.

Workers' compensation coverage

The safety of these workers is at risk every day. Within the past year there have been several high-

profile incidents involving ride-hail and food delivery workers. These incidents include a stabbing, a

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physical and verbal assault and the death of a worker in a motor vehicle accident.

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"On my last shift or my last delivery of the night in the winter last year, I dropped the order off at the customer's door and then, as I was walking back to my vehicle. I missed a step on their pathway. And my foot turned. It was very badly sprained, and I fractured it in 3 places. But I yelled out help because I mean, I felt my foot go. And yeah, the customer picked up their order. I don't know if they just saw me or didn't see me and didn't choose to see me, I have no idea. So I had to drive myself to the emergency room. and the and the injury was on my right foot. Unfortunately, I was just too desperate to start making or needing money that I didn't fully go through their contract in the beginning and we're all independent contractors. We are responsible for our own personal insurance. We have absolutely no rights and no coverage under SkipTheDishes." – worker J.

Companies are not following the health and safety laws designed to prevent injuries and deaths. They are not implementing violence prevention plans, addressing bullying and harassment or providing safety equipment.

Currently most workers employed in ride-hailing and food delivery have no workers' compensation protection in the case of an injury or occupational disease. The few that may be eligible (mostly food delivery workers using bikes or on foot) likely don't even know they could file a claim. In general, companies are not contributing to our workers' compensation system.

Prevention and compensation

In addition, to ensuring that workers can access compensation in the case of an injury, ride-hail and food delivery workers must be protected by all of our health and safety laws. Employers should be required to establish health and safety committees and create safe work policies to prevent injury and illness. Premiums should be paid by the companies and not downloaded onto workers.

Protection for all work

It is essential that workers are protected for all of their work time because they continue to be vulnerable to injury between transporting passengers or orders. If a worker completes a delivery but is injured exiting a

building, or if a ride-hail driver is assaulted while waiting outside a concert for an assignment, they should be covered. Workers should not be forced to prove the injury arose "out of employment"

and have to face legal challenges from deep-pocketed app companies. If they are active on the app,

they must be covered.

Manitoba provides workers' compensation coverage to ride-hail and food delivery workers with

only narrow, strict exclusions.9

Paid sick leave

During the COVID-19 pandemic, we saw the critical importance of having access to paid sick leave

as a way of preventing the transmission of communicable diseases. Providing workers access to

paid sick leave keeps our economy functioning and our communities safe. Ride-hail and food

delivery workers fulfilled essential tasks when British Columbians were required to isolate or

unable to take public transportation.

The BCFED and other worker advocacy groups fought to ensure that paid sick leave was available to

casual and part-time workers, and the government agreed. These workers, whether they work

casually, part-time or full time, are just as deserving of access to the five days of paid sick leave as

other workers in our province.

Other employment protections

Ride-hail and food delivery workers deserve access to all the other protections provided to workers

in BC. This includes but is not limited to meal breaks, vacation and statutory holiday pay, and

domestic and sexual violence leave.

Workers should be protected from retaliation by a company for raising an employment, health and

safety or human rights issue.

Flexibility

We want to stress that there is nothing in the ESA that prevents employers from providing

flexibility to workers over when and where to work. For example, in many school districts, teachers

on call are able to choose from half- to full-day assignments and can even choose what grade level

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⁹ https://wcb.mb.ca/wcb-coverage-for-app-based-workers

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or neighborhood they would like to work in. While there may be a minimum number of assignments they must take in a school year, the district doesn't dictate on which days they must occur. Flexibility is purely a function of how the employer chooses to manage its workforce.

It is also important to note that despite many companies touting worker flexibility, in actual practice, workers have little control. Workers report that of the three main food delivery companies operating in the Lower Mainland, only one is accepting new workers. Several food delivery companies are requiring workers to sign up for shifts and limiting the number of shifts that are available. Workers have reported that they'd like to work but that a shift is unavailable.

Ride-hailing companies restrict where workers can pick up assignments. Workers can be prohibited from pick ups in certain areas due to having low acceptance rates or customer ratings.

This is clear evidence that it is not classification that determines the flexibility of the work, but rather how management exercises its discretion.

Access to unionization

One of the strongest themes we've heard from workers is the sense of powerlessness they feel in their relationship with app companies. The companies unilaterally set the customers' rates and workers' pay, and control ratings, privileges and in some cases when and where drivers can work. As individuals, these workers have no power over the terms and conditions of their employment. They need the ability to negotiate collectively.¹⁰

Workers also want to have influence over terms that extend beyond basic employment standards. Though the government may choose to intervene in some areas in the short term – like pay and destination transparency as discussed earlier -- companies often make changes to their services based on changes in consumer behavior and the algorithmic data they collect. It is nearly impossible for the government to respond to potential changes in a timely manner.

Every worker in Canada must have access to their Charter-protected right to unionize. As it stands, ride-hail and food delivery workers do not have a clear path to unionization. There are significant

BCFED Submission to the BC Ministry of Labour

¹⁰ According to the BCFED survey, 87% of workers would join a union if they had the option.

legal and practical hurdles to unionization that would need to be overcome.

We see the pathway to unionization as a two-step process.

First, ride-hail and food delivery workers must be covered by the *Labour Relations Code*. This should happen through inclusion in the ESA as employees. As we see companies make more significant interventions into the management of the workforce – requiring workers to accept shifts, punishment for rejecting offers of work, promoting and demoting workers based on performance -- it is likely that these workers would meet the current legal test as an employee.

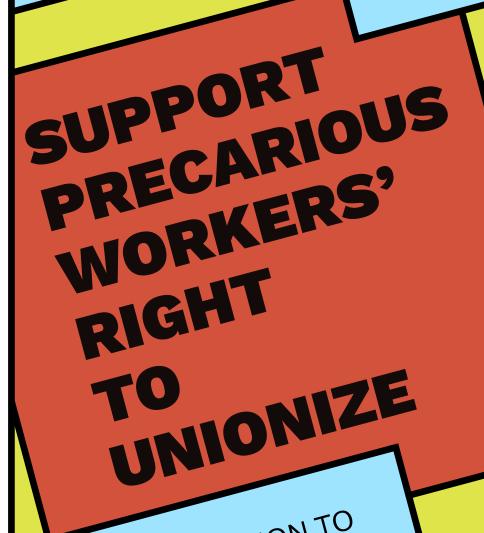
Though there is a pathway to unionization as dependent contractors, workers would not be guaranteed the basic standards provided by the ESA. In practical terms it means rather than starting to negotiate from \$16.75/hr, workers would start from \$0.00/hr, and there would be no requirement for the final agreement to meet or exceed the ESA. And as discussed earlier, excluding a workforce that is predominantly made up of newcomers and racialized workers from the entitlements of the ESA is systemic racism and goes against the grain of the government's agenda to address structural and systemic racism.

The second step is to implement a sectoral bargaining model. It makes sense for ride-hail and food delivery to be the pilot area for expanded sectoral bargaining in BC. There are significant challenges in identifying and agreeing on the eligible list of workers: the work is low pay, the workforce has high turnover, there is no central dispatch location, workers can be spread out over a large geographic area and the use of algorithms and AI significantly interfere in the allocation and management of work. And this is what companies say they want; they have publicly asked for sector-wide labour standards in order to ensure a level playing field between companies.

Conclusion

The writing is on the wall. Ride-hail and food delivery (and, we argue, all gig workers) need employment, health and safety and labour rights. Governments across the globe are taking action and BC is being left behind. Our province is uniquely positioned to get this right, by taking the most logical and simplest path forward: providing workers with the same basic protections afforded to other workers in our province. Let's apply the proven BC model to this form of work, and not create a new, unnecessary approach. This works because we have already built up a network of intersecting rights and protections to ensure that workers don't fall through the cracks. From wage protections to sick leave, from EI to Canada Pension Plan, from violence prevention strategies to compensation for injuries on the job, the legislation is already written and it works.

For more information on working conditions for ride-hail and food delivery workers, you can also read our previous submission to the Ministry on this topic at https://bcfed.ca/precariouswork.



AN INTRODUCTION TO BROADER-BASED AND BROADER-BARGAINING SECTORAL BARGAINING

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1. THE CASE FOR BROADER-BASED AND SECTORAL BARGAINING

The Current Labour Code Leaves Out Many Workers

Existing legislation on unionizing the private sector is skewed against people in the most precarious industries.

Currently, the labour code for the private sector is oriented towards what's called **enterprise bargaining**. A single union represents a bargaining unit, which is made up of people in a single workplace who work for the same employer. People who hold the same position but work for different employers are barred from belonging to the same bargaining unit and being covered by the same collective agreement.

This model works great in a factory or a mine, where one employer oversees a large number of workers in a single work site. When hundreds or thousands of workers come together to form a union and negotiate together, they have a lot of leverage over their employer. If the employer doesn't negotiate fairly, all those unionized workers could withhold their labour at great cost to the employer.

Today, more and more workers are making a living outside the traditional workplace model that enterprise bargaining is based on. The existing labour code makes unionization very difficult for small workplaces, franchises, single locations within multinational corporations, and subcontracted industries. This means workers in retail, fast food, domestic work, ride hailing, dentistry, and many other sectors are rarely able to unionize, even though many of them want to.

Let's consider a few cases to illustrate the challenges faced by precarious workers.

1

CERTIFIED DENTAL ASSISTANTS

Certified Dental Assistants (CDAs) help dentists wth procedures like fillings, surgeries, sterilization, and preventative procedures. Most dental offices have under ten employees, including just a few CDAs—sometimes an office only has one CDA. CDAs work in close proximity with the dentist, their employer.

Due to the small size of their workplace, an individual CDA who wants to unionize faces a far greater risk for retaliation from the employer than a union supporter in a workplace with hundreds of other workers. This is especially true in a close-knit industry like dentistry, where word travels and workers who advocate for themselves risk being blacklisted across the province. Organizing dental offices is very challenging.

Even if a CDA unionization drive were to succeed against great odds, the unionized workers would need to negotiate a collective agreement that only covered a handful of people. Organizing and bargaining shop-by-shop would be extremely laborious.

Since 2021, CDA Movement has been working on a campaign to remove the barriers to unionization faced by CDAs and other dental workers.

Check out CDA Movement: cdamovement.org

DOMESTIC WORKERS

Domestic workers assist their employers with personal care and housekeeping. They usually work alone in their employers' home, where they often also live. The working conditions of domestic work restrict the impact of withholding labour as a form of bargaining power during negotiation. A single worker going on strike has no leverage over the employer, who can easily find a replacement. Since the 1990s, the Vancouver Committee for Domestic Workers' and Caregivers' Rights has been advocating for shifts in the labour code to extend collective bargaining to domestic workers.

Check out Vancouver Committee for Domestic Workers' and Caregivers' Rights to support domestic workers: adwar.org

RETAIL AND FAST FOOD WORKERS

Retail and fast food workers are often employed at franchises. In a franchise model, a central office establishes brand rules and runs a few stores, but most of a franchise's locations are operated by independent owners. The central corporation controls costs and many workplace policy directives, which makes collective bargaining very challenging. Unionized workers must negotiate with their direct employer, the franchise owner, who does not actually control many of the working conditions.

Even retail and fast-food outlets that are not franchises—for example, most Starbucks locations around the world are company-owned—face barriers to unionizing under the existing bargaining model. Often, workers are "diffused," meaning they circulate between multiple locations, which makes organizing coworkers very challenging. Further, even upon certification, a single unionized outlet has little leverage against the powerful and moneyed central office. A single location going on strike has little impact on the company's overall bottom line, so the corporate office has no incentive to fairly negotiate with a unionized outlet.

The workers in these case studies have two points of commonality:

- 1) The very structure of their workplaces limits their access to unionization
- 2) Even if they do manage to unionize, against massive barriers, they have limited bargaining power to negotiate a strong contract

In order to meaningfully access their right to unionize, workers in precarious industries require an alternative approach to collective bargaining.

Broader-Based and Sectoral Bargaining

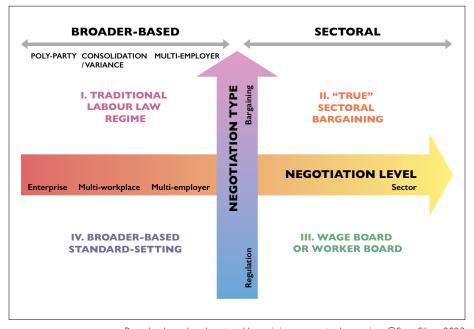
Increasingly, advocates for precarious workers in the private sector have looked to broader-based and sectoral bargaining to address the two limitations of enterprise bargaining.

Broader-based and sectoral bargaining are both approaches that expand on enterprise bargaining in some way. Instead of a single union representing a bargaining unit composed of workers in a single workplace under a single employer, broader-based and sectoral bargaining could include multiple unions, bargaining units, workplaces, or employers — or some combination of those.

While enterprise bargaining dominates labour relations in Canada, models of broader-based and sectoral bargaining have existed in this country throughout history and in certain industries or jurisdictions today. This approach is well established in many European countries and has been gaining ground elsewhere — New Zealand recently passed a highly publicized version of sectoral bargaining legislation.

A variety of models, more or less appropriate for different circumstances, fall under the umbrella of broader-based and sectoral bargaining.

Sara Slinn, Associate Professor at Osgoode Hall Law School, has devised a conceptual framework explaining different approaches to broader-based and sectoral bargaining, shown in the diagram below.



Broader-based and sectoral bargaining conceptual overview ©Sara Slinn, 2023

In the diagram, the horizontal axis, **Negotiation Level**, refers to the scope of the parties engaged in bargaining, generally referred to as the *level* of bargaining.

This ranges from enterprise-level bargaining (single-union, single-unit, single-workplace, single-employer) to negotiation involving all the workers of a sector within a defined geographic area (for example, "all

fast food outlets in North Vancouver" or "all Certified Dental Assistants in British Columbia"). *Sectoral* models, on the right side of the diagram, involve an entire sector while *broader-based* systems are broader than strictly enterprise bargaining without applying to a whole sector (e.g. multiworkplace or multi-employer).

A jurisdiction dominated by enterprise bargaining experiences a high degree of fragmentation: there is a multitude of collective agreements, each with unique terms and applying only to a small portion of the entire workforce within a sector. In contrast, full sectoral bargaining represents the most centralized and concentrated level of negotiation: a single agreement covers all workplaces within a geographically defined sector.

The vertical axis, **Negotiation Type**, refers to the way that negotiation takes place. This ranges from collective bargaining, which happens freely between representatives of workers and employers, to regulation, which often involves government with varying input from workers and employers. Often, government has final say on whether to accept, reject, or unilaterally amend regulations.

Different negotiation types produce different outcomes. Collective bargaining determines working conditions in absolute terms, while regulation sets a floor of minimum standards.

The diagram is divided into four **quadrants**, each representing a different approach to bargaining at different ends of the axes.

I. Traditional Labour Law Regime

The top-left quadrant is where our existing labour relations system generally resides. Negotiation does not extend to an entire sector and involves free bargaining, leading to a collective agreement that sets absolute terms rather than minimum standards.

Even under the current labour relations code, however, some options exist for bargaining approaches that are broader than strictly enterprise bargaining. These include poly-party bargaining (establishing a single collective agreement between an employer and multiple unions), consolidation / variance (where unions apply to consolidate existing bargaining units or vary certification to extend a bargaining unit), and multi-employer bargaining (bargaining with an association of multiple employers).

Some well-known proposals for broader-based bargaining reside in this quadrant. These proposals would adapt the traditional labour law regime to facilitate bargaining beyond the enterprise level. One example of this is the Baigent-Ready Model, which emerged from a

1992 labour code review in British Columbia. The next section of this document includes a brief overview of the history of this model.

As modifications of the traditional labour law regime, broader-based bargaining proposals in this quadrant are most appropriate to sectors that already have some union density, even if they are traditionally underrepresented by unions. This is because workers need to continue navigating the traditional certification or variance process. Further, this approach works most effectively for sectors that are relatively homogenous and discrete.

II. "True" Sectoral Bargaining

The top-right quadrant contains true sectoral bargaining. Here, negotiation occurs across an entire sector defined along geographic and occupational or industrial dimensions. This approach typically includes some form of recognition or certification test, which could be more flexible than the mandatory vote certification model in traditional labour law regimes. An example of this flexibility is the *Status of the Artist Act* sectoral bargaining system in the federal jurisdiction, where representation and bargaining rights are not established through cardbased certification. Rather, an artists' association has to prove that it is the most representative association in the sector it seeks to represent.

Bargaining often occurs on the basis of councils, usually between a labour council and an employers' council. Sectoral bargaining involves free bargaining, producing to a collective agreement that sets absolute terms rather than minimum standards regulation.

Sectoral bargaining can apply to a sector that doesn't have much union density, though it is important that some unions already be active in the sector. It is less crucial, under this approach, that sectors be relatively homogenous or discrete, although those qualities are helpful. Sectoral bargaining could incorporate a large geographic sector, like a significantly sized region or an entire province.

Sectoral bargaining exists in many areas of the public sector, like education and healthcare, as well as certain private industries like construction.

III. Wage Board or Worker Board

The bottom-right quadrant covers an approach often known as wage board or worker board. This refers to regulation that sets minimum standards across an entire sector, with varying degrees of input by worker and employer representatives. Government is often involved

in these negotiations and could have a final say in the implemented regulation. There may be no threshold test or representation by unions. Sectors that are more well-defined, discrete, and homogenous could see a greater scope of matters included in their minimum-standards regulations.

This approach is most appropriate to occupations, industries, or groups of workers that are extremely difficult or impossible to organize, with effectively no union density. This typically covers low-wage, low-power occupational sectors.

IV. Broader-Based Standard Setting

The bottom-left quadrant, broader-based standard setting, occurs at a subsectoral level. It does not involve free collective bargaining but rather minimum standards regulation that applies across multiple workplaces or a subsectoral region. This could look like very specific regulations in the employment standards regulation

There is no contemporary proposal for broader-based bargaining reflecting this fourth quadrant. It is unlikely to be useful for promoting collective representation or collective bargaining among workers. The first three quadrants are more relevant to proposals for amending the existing labour code to include broader-based or sectoral bargaining reforms.

2. HISTORIC OVERVIEW

In Canada, the 1992 labour law review in British Columbia and the 2015 *Change Workplaces Review* in Ontario were two unsuccessful attempts to incorporate broader-based or sectoral bargaining into the labour code. They provide lessons for challenges that proponents for broader-based bargaining must overcome.

Baigent-Ready Model of Broader-Based Bargaining

In 1992, the NDP government in British Columbia commissioned a panel of special advisors to review the labour code. The panel included John Baigent, a union-side labour lawyer, Vince Ready, a well-known arbitrator, and Tom Ropert, an employer-side lawyer.

Two of the special advisors, Baigent and Ready, were interested in broader-based and sectoral bargaining as a mechanism for addressing the changing nature of work. At the time, a number of unions were supportive of broader-based bargaining, in particular resource-based unions, which had extensive histories with the approach. Some of them bargained through industry-wide bargaining councils while others organized across occupations, industries, establishments, and resource towns. Those unions were familiar with the advantages of less fragmented, non-enterprise basis structures for bargaining, and they also experienced negative consequences as resource industries shifted towards enterprise-level bargaining in the 1980s. Thus, by the 1990s, resource-based unions were interested in revitalizing broader bargaining structures in their industries.

Another group of unions supportive of broader-based and sectoral options were healthcare unions, which at the time saw sectoral bargaining as an organizing and growth strategy. They also thought sectoral bargaining could slow the expansion of precarious work in healthcare, especially in the home-care sector, which was rapidly becoming deprofessionalized into contract-service work.

Baigent and Ready consulted with representatives from the labour movement but did not receive a great deal of input for concrete proposals. Baigent and Ready ended up working mostly on their own to formulate a broader-based organizing and bargaining approach that especially targeted small workplaces and underrepresented sectors. Their proposal is known as the Baigent-Ready model, which you can learn more about on page 22.

The employer member of the 1992 special advisory panel, Tom Ropert, was opposed to the Baigent-Ready Model. The NDP government was only willing to adopt one non-consensus proposal from the advisory group, and labour had to choose to consolidate support between the Baigent-Ready Model and a non-consensus proposal on replacement-worker provision. The replacement-worker provision won by a narrow margin, which was adopted.

Notably, the NDP government did implement recommendations from a separate 1992 review, the Korbin Commission, to reorganize the public sector into a highly centralized, broader-based structure that incorporated multi-party or multi-tier bargaining.

Changing Workplaces Review

In Ontario, an extensive labour and employment law review occurred from 2015 to 2017. The special advisors involved explicitly sought input on whether broader-based bargaining was feasible and recommended, either generally or for certain industries.

The advisors faced the same problem as the advisory panel in British Columbia, receiving few submissions to their request. The advisors set out nine options that they devised for potential broader-based or sectoral bargaining amendments to the legislation but were unable to produce consensus among unions.

The absence of consensus and specific proposals led the special advisors to make only a modest recommendation in their report for a broader-based model, which would be solely applicable to franchisees of a single franchisor. It was not adopted into the legislation.

Opposition to Broader-Based and Sectoral Bargaining

In both British Columbia and Ontario, broader-based and sectoral bargaining proposals faced strong employer resistance. Apart from opposition to increased access to unionization, employers also cited concerns about

potential loss of flexibility that could result from negotiations occurring at a level beyond the workplace. Smaller employers, in particular, objected to the possibility of losing the ability to compete by lowering wages.

While a number of unions supported broader-based and sectoral bargaining, many others expressed misapprehensions or a lack of understanding. Some unions were worried about whether broader-based or sectoral structures could threaten their existing representation rights. The prospect of a council of unions — present in some broader-based or sectoral bargaining models — also raised question about whether the voices of individual unions would be diluted and possible jurisdictional conflicts arising from new representation structures.

The concern about diluting the voice of individual unions was especially active in the 2015-2017 Ontario *Changing Workplaces Review*. In the years before the review, the government restructured the public sector to impose a multi-tier, centralized bargaining structure on unions. In that case, sectoral bargaining was implemented to undermine the uneven bargaining power that unions wielded, including the ability to engage in militant tactics like significant whipsawing.

The power structure is very different in private sector industries currently featured in discussions about broader-based or sectoral bargaining. Changes to the current bargaining structure would focus on workplaces, occupations, and industries that are very difficult to organize, where workers have no systemic bargaining-power advantage.

3. EXISTING MODELS

Despite the dominance of enterprise bargaining in Canada, broader-based and sectoral bargaining have been implemented in specific industries or jurisdictions across the country for over a century. Recently, broader-based and sectoral bargaining reforms have started gaining momentum, with legislation passing in New Zealand and California¹. This section offers a basic introduction to three real-world examples of broader-based or sectoral bargaining models that currently exist.

New Zealand Fair Pay Agreement

In 2022, New Zealand implemented the *Fair Pay Agreement* (*FPA*). The *FPA* falls under the Wage Board or Worker Board quadrant on the conceptual framework diagram in Chapter 1, which means that it sets minimum standards across an entire sector and is designed to specifically targets industries or occupations that are difficult, if not impossible, to organize. Compared to many other Wage Board or Worker Board models, the standards established by the *FPA* negotiation process are subject to free bargaining between the worker and employer councils, with interference from government only if the negotiated outcome is contrary to another legislation.

Organizing within the *FPA* involves two phases. In the initiation phase, a union or workers organization applies to government for the right to start the bargaining process for a fair pay agreement within a particular sector. In order to do this, they must pass two tests.

First, the initiating union or organization needs to pass a "public interest test" showing that the employees they want to represent receive low pay and one of the following conditions: they have little bargaining power or lack of pay progression or are not paid well enough considering factors like long hours, night shifts, weekends, or employment uncertainty.

California's FAST Recovery Act, which sets minimum standards for the state's fast food industry, has recently been held by a judge in response to a legal challenge brought forward by a petition from employers, leading the legislation to move to a public referendum. No comparable legal challenge framework exists in British Columbia.

Passing the public interest test enables the union or organization to bypass the traditional card-check certification process in favour of a "representation test." The representation test is the mechanism for the initiating union or workers organization to demonstrate that it has sufficient support among workers within the sector in consideration. In the FPA, sufficient support is defined as at least either 1000 or 10% of all employees in a sector.

After the union or organization passes the representation test, it can move onto the bargaining phase. In bargaining, all affected people and representatives involved in the sector under consideration come together to form two councils, each representing workers or employers. The workers' council could include a combination of unions, worker representatives, and government officials, while the employers' council includes all employers that have a presence in the sector. A system of weighted voting exists within these councils, and the government provides financial and professional support for the negotiation process.

Bargaining takes places between the two high level councils to establish minimum standards within certain categories like pay, working hours, and health and safety. Importantly, the *FPA* cannot undercut the standards of existing legislation. The *FPA* also does not preclude further organizing. Unions could continue producing collective agreements with better conditions through the traditional certification process.

On the right is screenshot from the campaign from a union, E tū, to pass the representation test in order to begin negotiation for a fair trade agreement in security, cleaning, and hospitality sectors. The union is targeting their own membership and non-union workers in those sectors.



Hospitality Fair Pay Agreement (not yet E tū members)

Quebec Decree System

The Quebec labour code includes a very unique system that was implemented nearly a century ago, in 1935. This system allows for the extension — or "decree" — of certain provisions from an existing collective agreement to other workers, both unionized an non-unionized, within the same sector and geographic area.

A decree is considered the legal extension of a collective agreement. Not all negotiated terms within a collective agreement form a decree, which tend to focus on financial conditions. The decree system is mainly in place to minimize unfair competition from employers who are not subject to collective agreements and ensure that employers do not resort to wage suppression and poor working conditions as their primary mechanisms for competition.

Decrees are issued by the Quebec provincial government upon being approached by a group of workers or a union. Once a decree is in place, it is administered and enforced by a Parity Committee made up of combinations of workers, unions, and employers working collaboratively.

The Quebec decree system exists as a combination of Traditional Labour Law Regime, the first quadrant of the conceptual framework, and Wage Board or Worker Board, the third quadrant. This model involves organizing a bargaining unit through a traditional enterprise-level certification process, freely bargaining on the enterprise level to produce a collective agreement with absolute terms, then extending that collective agreement into a sector-wide minimum-standards regulation overseen by government and the Parity Committee.

British Columbia Health Authorities Act

As discussed in Chapter 2, the 1992 Korbin Commission centralized public-sector bargaining in British Columbia into broader-based structures. One example of this is the *Health Authorities Act*, a two-tier system in the British Columbia healthcare sector. Tier One concerns collective bargaining while Tier Two considers the administration of collective agreements.

Tier One includes six multi-union associations, each representing workers within a healthcare subsector, and one multi-employer bargaining agent called Health Employer Associations of BC (HEABC). The six subsectors named in the statute are Ambulance Paramedics and Ambulance Dispatchers, Community, Facilities, Health Sciences Professionals, Nurses, and Resident Doctors.

Unions representing healthcare workers within British Columbia must join one of the six subsectoral associations. Each association has its own rules and conventions, dictating issues like how unions are represented within the association, how they communicate and negotiate, and so on. Each association bargains separately with HEABC to produce a master collective agreement for the entire subsector across the province.

While bargaining happens at the subsectoral level, the day-to-day administration of a master collective agreement takes place at a more local scale. Individual unions engage with the employer responsible for a particular worksite to represent members at that location.

The British Columbia *Health Authorities Act* is situated in the top-right quadrant of the conceptual framework diagram, "True" Sectoral Bargaining, where many public sectors reside. Like other models in the quadrant, it applies to entire (sub)sectors within a large geographic region and produces freely bargained collective agreements that set working conditions in absolute terms.

4. NEXT STEPS

Government Opportunities

This year presents a window of opportunity to campaign for changes to bargaining structures in British Columbia. The provincial *Labour Relations Code* requires no more than five years between government reviews of the code. The last review took place in 2018, so this year should see another one where reforms for broader-based and sectoral bargaining could be introduced.

Last December, the Office of the Premier released mandate letters outlining the objectives and priorities for the Ministry of Labour over the next two years. The letters to Minister of Labour Harry Bains and Parliamentary Secretary of Labour Janet Routledge both include sections that are compatible with reforms for broader-based and sectoral bargaining, as seen below.

As you continue to make progress on items in your previous mandate letter, over the remaining period of this mandate I expect you to prioritize making progress on the following:

- Work to improve the timeliness of employment standards dispute resolution.
- Continue engaging with affected parties on implementation of the recommendations of the Industrial Inquiry Commission regarding Forest Industry Successorship.
- Work with WorkSafeBC to ensure meaningful programs are in place to support the return of injured workers to their workplaces.
- Support WorkSafeBC, with involvement of the Minister of Health and the
 Minister of Mental Health and Addictions, to develop better options for chronic
 work-related pain, including improving pain management practices for injured
 workers and providing treatment on demand to those with chronic pain as a
 result of workplace injuries.
- Ensure our labour law is keeping up with modern workplaces through the upcoming review of the Labour Code, providing stable labour relations and supporting the exercise of collective bargaining rights.

Excerpt from mandate letter to Minister Bains (relevant section is highlighted)

You will work with your Minister to help advance these shared responsibilities:

- Support development and maintenance of relationships with organized labour to ensure their feedback is considered in policy development.
- Continue work to develop a precarious work strategy that reflects the diverse needs and unique situations of today's workers and workplaces.
- Propose employment standards and other protections relevant to app-based ride hail and food delivery drivers.
- Investigate the feasibility of a government-backed collective benefit fund and access to a voluntary pooled-capital pension plan for workers who do not otherwise have coverage.
- Review labour policy innovations in other jurisdictions related to the emerging economy and precarious work to identify trends that may inform the development of labour policy in British Columbia.

5. DECISION POINTS

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and nonunion, within a sector

SECTORS INCLUDED

All sectors

Sectors named in regulation or legislation (e.g. fast food sector)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined sector

Workplaces under a maximum threshold within a defined sector (e.g. under 50) Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (e.g. BC's *Health Authorities Act*)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (e.g. Certified Dental Assistants in BC) A sector and a region (e.g. fast food in Vancouver)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to bargaining unit

One certification campaign per sector to establish floor/standard/master collective agreement

Decision points for unions to determine and agree upon before proposing a broader-based / sectoral bargaining model for the upcoming labour code review.

CERTIFICATION PROCESS

Two-step verification (e.g. if 45-55% of required careds are signed)

One-step card check (e.g. if over 55% of required cards are signed)

UNION NEGOTIATION MODEL

Individual unions, each with its own multiworksite collective agreement with specific employer Most representative union within a sector

A centralized council of all unions who have certification within a sector

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification

A centralized council of employers

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified A master agreement across the entire province, which all unions and employers within a sector are bound to A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas

DISPUTE RESOLUTION MODELS

Strike/lockout

Binding arbitration

Final offer arbitration

IMPLEMENTATION TIMELINE

Phased in

Immediate

FAIR PAY AGREEMENT

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and nonunion, within a sector

SECTORS INCLUDED

All sectors

Sectors named in regulation or legislation (e.g. fast food sector)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined sector

Workplaces under a maximum threshold within a defined sector (e.g. under 50) Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (e.g. BC's *Health Authorities Act*)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (e.g. Certified Dental Assistants in BC) A sector and a region (a specific industry in a region)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to bargaining unit

One certification campaign per sector to establish floor/standard/master collective agreement

Implemented in 2022 in New Zealand, the Fair Pay Agreement "brings together unions and employer associations to bargain for minimum employment terms for all covered employees in an industry or occupation."

CERTIFICATION PROCESS

Two-step verification (e.g. if 45-55% of required careds are signed)

One-step card check (1000 or 10% of employees in a sector in a region)

UNION NEGOTIATION MODEL

Individual unions, each with its own multiworksite collective agreement with specific employer

Most representative union within a sector

A centralized council of all unions who have certification within a sector

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification

A centralized council of employers

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified A master agreement across the entire province, which all unions and employers within a sector are bound to A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas

DISPUTE RESOLUTION MODELS

Strike/lockout

Binding arbitration

Final offer arbitration

IMPLEMENTATION TIMELINE

Phased in

Immediate

BAIGENT-READY MODEL

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and nonunion, within a sector

SECTORS INCLUDED

All sectors

Sectors named in regulation or legislation (e.g. fast food sector)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined sector

Workplaces under a maximum threshold within a defined sector (under 50) Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (e.g. BC's *Health Authorities Act*)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (e.g. Certified Dental Assistants in BC) A sector and a region (workers performing "similar tasks" in a geographic region)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to bargaining unit

One certification campaign per sector to establish floor/standard/master collective agreement

A broader-based bargaining proposal that emerged from a 1992 report from a labour reform subcommittee commissioned by the the BC NDP. The proposal was not implemented.

CERTIFICATION PROCESS

Two-step verification (e.g. if 45-55% of required careds are signed)

One-step card check (e.g. if over 55% of required cards are signed)

UNION NEGOTIATION MODEL

Individual unions, each with its own multiworksite collective agreement with specific employer Most representative union within a sector

A centralized council of all unions who have certification within a sector

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification

A centralized council of employers

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified A master agreement across the entire province, which all unions and employers within a sector are bound to A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas

DISPUTE RESOLUTION MODELS

Strike/lockout

Binding arbitration

Final offer arbitration

IMPLEMENTATION TIMELINE

Phased in

Immediate

CONSTRUCTION INDUSTRY

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and nonunion, within a sector

SECTORS INCLUDED

All sectors

Sectors named in legislation (Industrial, Commercial, Institutional sector) Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined sector

Workplaces under a maximum threshold within a defined sector (e.g. under 50) Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (Ontario Labour Relations Act)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (ICI sector)

A sector and a region (e.g. fast food in Vancouver)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to bargaining unit

One certification campaign per sector to establish floor/standard/master collective agreement

Sectoral bargaining model for Ontario's construction industry, first implemented in the 1970s and compulsory for the Industrial, Commercial, and Institutional (ICI) sector since 1977.

CERTIFICATION PROCESS

Two-step verification (card check and vote by sector)

One-step card check (option to opt for one-step starting in 2005)

UNION NEGOTIATION MODEL

Individual unions, each with its own multiworksite collective agreement with specific employer

Most representative union within a sector

A centralized council of all unions who have certification within a sector

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification

A centralized council of employers

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified A master agreement across the entire province, which all unions and employers within a sector are bound to A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas

DISPUTE RESOLUTION MODELS

Strike/lockout

Binding arbitration

Final offer arbitration

IMPLEMENTATION TIMELINE

Phased in

Immediate

BC HEALTH SECTOR

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and nonunion, within a sector

SECTORS INCLUDED

All sectors

Subsectors named in legislation (Community, Facilities, Health Sciences Professionals, Nurses, Residents, Ambulance)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined subsector

Workplaces under a maximum threshold within a defined sector (e.g. under 50) Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (Health Authorities Act)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (Health Sciences Professionals, Nurses, Residents subsectors) By occupation and setting (Community, Facilities, Ambulance subsectors)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to consolidated subsector certification

One certification campaign per sector to establish floor/standard/master collective agreement

Established in 1995, sectoral bargaining in BC's health sector is defined by six multi-union associations. Each association represents a subsector and bargains its own collective agreement with the Health Employers Association of BC, the sole employer bargaining agent.

CERTIFICATION PROCESS

Two-step verification (e.g. if 45-55% of required careds are signed)

One-step card check (if over 55% of required cards are signed)

UNION NEGOTIATION MODEL

Individual unions, each with its own multiworksite collective agreement with specific employer

Most representative union within a sector

Six centralized council of all unions who have certification within a subsector

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification

A centralized council of employers (Health Employers Association of BC)

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified A master agreement across the entire province, which all unions and employers within a sector are bound to A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas

DISPUTE RESOLUTION MODELS

Strike/lockout

Binding arbitration

Final offer arbitration

IMPLEMENTATION TIMELINE

Phased in

Immediate

6. FURTHER READING

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CREDITS

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Chapter 1 is based on research and presentation from Sara Slinn, and presentations from Kriss Li, Megan Ballantyne, Judy Dalubutan, and Alexandra Sorrentino

Chapter 2 is based on presentation from Sara Slinn
Chapter 3 is based on presentation from Alicia Massie
Chapter 4 is based on presentation from Denise Moffatt
Chapter 5 is designed by Kriss Li with input from Sara Slinn and Andrew
Longhurst

Compiled and designed by Kriss Li





ILWU Canada Longshore Strike 2023: Strategies and Lessons from the Digital Picket Line

Genevieve Lorenzo
Organizing and Education
ILWU Canada

SUMMARY

When contract negotiations came to a standstill earlier this year, ILWU Canada's longshore workers served strike notice to the employer. Two of the Union's Locals (500 and 517) had members who were asked by their employer to work remotely during the strike. A digital picket line was required to stop this from happening. The digital picket was held through social media, concurrent to the physical picket lines, and employed a positive, entertaining, and highly visible campaign that gained traction among the broader membership. The digital picket was successful in preventing remote work from being performed, as affected members notified their bosses that they would be unable to work from home due to the digital picket line. This effort was the first of its kind in British Columbia, so this report includes recommendations for future digital picket lines.

OVERVIEW

How does a union, whose very existence and structure is founded upon the physical spaces its workers inhabit, fight a virtual threat? The International Longshore and Warehouse Union formed in response to waterfront bosses who used their places on the docks to bribe, divide, and weaken longshore workers. The equitable distribution of work from the Union's dispatch hall formed the beating heart of the ILWU, and that tradition is maintained today as an integral part of its governance and structure. In response to an increasingly online environment, the Union has stepped up to accommodate these changes, and organized workers whose jobs focus on digital technology, such as IT technicians. It is no surprise then, that in response to a threat of virtual scab labour via remote work, ILWU quickly adapted its concept of place to include the online spaces that its membership is active in, and to use those spaces to protect the integrity of its strike.

On July 1, 2023, ILWU Canada struck a digital picket line for the first time. No stranger to making history, ILWU Canada's strike also marked the first time a digital picket was used in the longshore industry, and among unions in British Columbia.

The concept of a digital picket line is not new, but it is still relatively uncommon in practice. Writing and journalism are industries that were affected early by digitization, with employers exploiting the convenience of freelance work and online spaces to drive down the cost of labour and the need for expensive physical spaces to host their workforces. Workers soon found themselves fighting against a race to the bottom in wages and working conditions. Arguably the earliest digital picket line occurred during the 2007-2008 Writers Guild of America strike¹. The WGA struck over the threat that digital distribution and streaming posed to workers' job security, increasing workload, and wage stagnation in the face of record profits for their employer, and they were on strike again in 2023 for many of the same issues. In 2016, the Halifax Typographical Union set up a digital picket line against the *Chronicle Herald*² in response to the boss employing scab labour and asked the public to stop reading and subscribing to the publication.

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¹ Miranda J. Banks (2010) The Picket Line Online: Creative Labor, Digital Activism, and the 2007–2008 Writers Guild of America Strike, Popular Communication, 8:1, 20-33, DOI: 10.1080/15405700903502387

² https://ourtimes.ca/article/crossing-a-digital-picket-line

By 2018 when Uber UK workers put up a digital picket line against the app that platformed their work³, the digital economy's impact on the nature of labour around the world was profound and permanent. For gig workers like those at Uber, the request was straightforward: log out and do not use the app. For workers at universities, such as the UK's University and College Union (UCU), the 2019 digital picket encompassed day-to-day labour performed digitally, such as planning lectures, teaching online courses, electronic marking, writing or publicising papers including research or grant applications, and work applications⁴. In 2022 and 2023, Insider Union, who represents the workers at Insider publications, asked people to "not cross the clicket line" by engaging with the company's websites and news, in an unfair labour practice dispute with their employer. And in a recent case, the New York Orchestra Musicians have asked the public to support them by participating in their digital picket line on social media through sharing and signal boosting.⁶

The methods of a digital picket line may vary depending on the labour being struck, but the means are consistent with traditional picket lines held in physical spaces: Draw the boundaries, form a line, hold fast, and stay united. Do not relent. This is how ILWU Canada succeeded in its first digital picket line.



Example of a meme shared by a digital picket team member.

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³ https://www.theguardian.com/technology/2018/oct/09/uber-uk-strike-users-urged-not-to-cross-digital-picket-line

⁴ https://www.ucu.org.uk/article/12469/FAQs

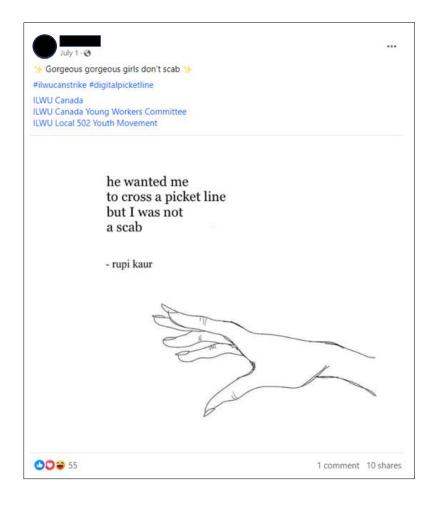
⁵ https://www.insiderunion.org/business-outsider/insider-union-strike-best-picket-signs-how-to-help

⁶ https://www.instagram.com/p/CqjJvLehexS/

COORDINATING THE DIGITAL PICKET

We recruited a team of 9 ILWU Canada longshore members from different locals. We looked for workers who were familiar with and comfortable using social media and had accounts on different platforms. We set up a WhatsApp group to act as our central communications hub, because this app is accessible and allows image and file sharing.

Since there had never been a digital picket in British Columbia before, our legal counsel at Victory Square Law Office (VSLO) provided us with a guide to follow. This guide included the standard legal requirements of any picket, with ground rules similar to those at physical picket lines (e.g., respectful communications, no defamatory statements), but also a helpfully thorough list of example captions that our team members could use on their posts along with memes, and social media accounts to tag. VSLO also provided us with an infographic that we could share to help explain to the broader public what a digital picket line was and how to support it (see Appendix 1). This guide and accompanying images were uploaded into a shared Google Drive that would be accessible to all team members. We used the Digital Picket Guide to train each of our team members. We spoke to each member individually and went through the guide with them, ensuring they were clear on the instructions and ground rules. Each post about the digital picket needed to have both the #digitalpicketline and #ilwucanstrike tags.

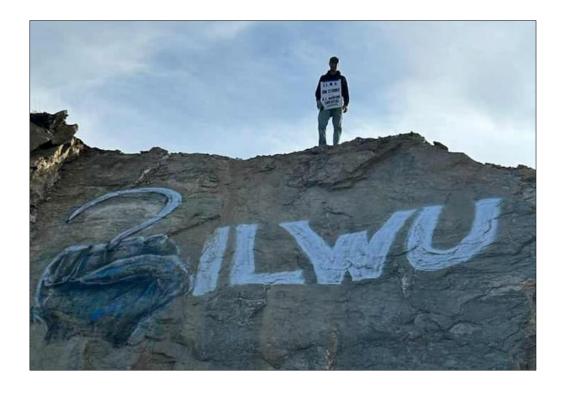


A post by a digital picket team member.

We set the picket line shifts at the same time as the business hours that our remote workers followed, which was 8am to 4pm. There were 2 shifts a day (8am to 12pm; 12pm to 4pm) with a minimum of 1 post per hour. We monitored the entirety of the digital picket line, checking in with the team members, providing updates to ILWU Canada leadership, logging each post into a spreadsheet, and relaying news when our digital picket line had been successful in preventing remote work from being performed. There were some workers who preferred to post on a continuous basis at regular intervals, while others followed their shifts as planned.

The team quickly settled into a rhythm, creating their own memes to use, which were first posted in the WhatsApp group for approval by the digital strike captains. The team also began posting photos of the physical picket lines they walked. The creative energy they fostered in this group chat was a means of encouragement and morale as the strike continued into its second week, which is when we saw an increase in posting fatigue.

We anticipated a degree of burnout and accommodated the members when they needed to take a break and step back for a time by arranging shifts to ensure coverage with the remaining team. We recruited additional team members by the second week to cover empty shifts. This ebb-and-flow structure allowed our team to maintain the energy of the digital picket to match that of the physical lines without the fear that a member taking a break would weaken our line.



A member poses in front of his painted mural on a picket line in Prince Rupert.

SUCCESS ON THE DIGITAL PICKET LINE

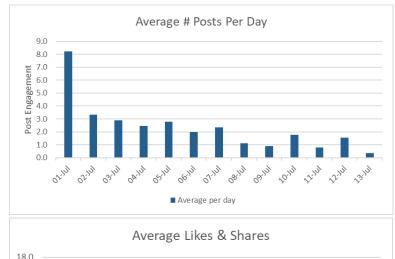
We measured our success in two ways. The first is whether any members of Local 500 or 517 performed work remotely, which we are proud to report that they did not. We learned from both Locals that members had notified their employers that they could not work remotely due to the digital picket line. We also heard that these employers were angry and threatened the Union with unfair labour practices, but these were idle threats and no complaints were ever filed.

Our second measure was the amount of engagement on the digital picket team's social media posts, using the #digitalpicketline tag as an indication of visibility. The data available to us shows that the efforts of each team member did indeed work to increase the level of engagement by the broader membership, notably during the second week of the strike.

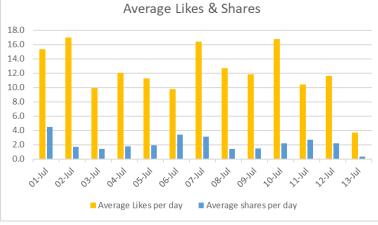
Our team made a total of 276 posts during the 13-day strike. These posts received a total of 3,279 likes and 694 shares. The first day of the strike, July 1, saw the highest engagement with 1,153 likes and 335 shares on that day alone. The last day of the strike saw the least amount of engagement, but this was expected. Interestingly, the total posts and post engagement saw a dramatic and unexplained decline on July 8, but engagement increased after July 9, likely due to the massive solidarity rally held July 9 at Jack Poole Plaza in Vancouver.

The overall trend of our team posts had a very strong start on the first week, then declined during the second as fatigue and burnout set in (graph 1). However, by the second week, the news of our digital picket had spread to enough people that there was no overall decline in the number of likes and shares that our posts received (graph 2). The collective energy of the membership buoyed the team members beyond what they could sustain on their own and we maintained a steady level of engagement.

Graph 1.



Graph 2.



DATA COLLECTION

The data were collected from the Facebook posts of the 9 digital picket team members over the course of the strike, between July 1 and July 13. The likes and shares on each post that used both the #digitalpicketline and #ilwucanstrike tags were tallied, but any likes and shares on a given post from fellow team members were subtracted from this total to more accurately represent engagement. Finally, only original posts by a team member were included, while reshares were excluded. Data was collected manually.

Team member posts were made to 3 social media platforms (Facebook, Instagram, Twitter), but only data from Facebook was included. This was due to several factors:

- 1. Facebook is the primary platform used by the majority of ILWU Canada's membership, where Twitter is not and Instagram skews to a younger demographic.
- 2. The Union frequently provides updates and information on its Facebook page and functions as a source of online information supplementary to its website, where Twitter and Instagram do not serve this purpose.
- 3. Engagement on Facebook posts is obvious as the likes and shares of a post are immediately visible, where Instagram shares and stories are not, and Twitter usage by members was too infrequent to provide useful data.

WHAT WE LEARNED

Posting on Facebook profiles was effective when post settings were "public", as this allowed a greater degree of visibility to the broader populace. Posting on a central business page and having team members share from this page may produce more accurate measures of reach. However, members of the team raised concerns during the second week over an apparent algorithmic decrease in post visibility, but there was no observable decrease in the overall engagement data. It is within Meta's algorithms to suppress repeated, similar content in their News Feeds⁷, and something to consider for future campaigns.

Creating and sharing memes was more work for the team but it was also an enjoyable experience, and posts with memes were more likely to be shared by others. Posting photos from the line with a caption about the #digitalpicketline generally produced more likes but fewer shares.

Organic engagement among the general membership increased during the second week, as well as within the broader labour ally community.

There is a definite benefit to signal boosting using profiles or pages with a high degree of engagement or visibility. For example, a member at large posted photos of a ILWU mural he painted with the caption: "A little Art Attack! #ilwucanstrike #digitalpicketline #FairDeal #ilwucanada #ilwulocal505". His post on its own received 125 likes and 15 shares. When the ILWU Canada Facebook page shared his post, it received 247 likes and an additional 6 shares.

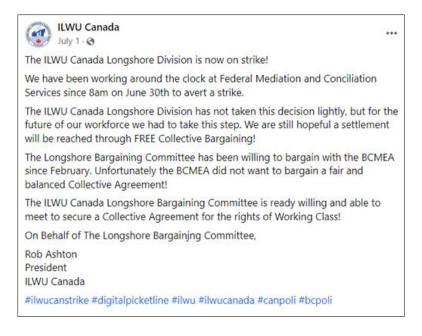
ILWU Canada's official Facebook page provided the ability to view individual post data in great detail, including the number of times it appeared in someone's Facebook News Feed ("reach"), and

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⁷ https://transparency.fb.com/features/explaining-ranking/

engagement, defined as "the number of times people engaged with your post through reactions, comments, shares, views and clicks". There were 2 posts from the ILWU Canada Facebook page with the hashtag #digitalpicketline:

Post 1: Announcement from President Rob Ashton that the strike had begun.



Caption: "The ILWU Canada Longshore Division is now on strike!

We have been working around the clock at Federal Mediation and Conciliation Services since 8am on June 30th to avert a strike.

The ILWU Canada Longshore Division has not taken this decision lightly, but for the future of our workforce we had to take this step. We are still hopeful a settlement will be reached through FREE Collective Bargaining!

The Longshore Bargaining Committee has been willing to bargain with the BCMEA since February. Unfortunately the BCMEA did not want to bargain a fair and balanced Collective Agreement!

The ILWU Canada Longshore Bargaining Committee is ready willing and able to meet to secure a Collective Agreement for the rights of Working Class!

On Behalf of The Longshore Bargaining Committee,

Rob Ashton, President, ILWU Canada

#ilwucanstrike #digitalpicketline #ilwu #ilwucanada #canpoli #bcpoli"

Results: 139 likes, 142 shares, 10,675 post reach, 535 total post engagement

Post 2: Pictures of Deltaport picket line.



Caption: "Picket line photos from ILWU Local 502 at Deltaport 0100 and 0800! Stay strong friends! Support your bargaining committee!

NEGOTIATE DO NOT LEGISLATE! #ilwucanstrike #digitalpicketline
#longshorevictory #ilwu #ilwucanada #canpoli #bcpoli @CBC Vancouver"

Results: 89 likes, 6 shares, 1,412 post reach, 379 total post engagement

LIMITATIONS OF DATA COLLECTION

Analytical inferences from the data collected are limited:

- The data comprises only original Facebook posts by team members using the #digitalpicketline and #ilwucanstrike tags, and therefore shows only first degree engagement. Given Facebook's privacy settings, it is not possible for someone to view the posts or shares of a person unless they are on that person's friend list or the post settings are public.
- The data presented here does not demonstrate the true reach of any single post, only the total likes and shares on the original post.

FINAL THOUGHTS

A digital picket line wrests control of online spaces away from the boss and back into the hands of the workers. It is an effective and accessible way for workers to build solidarity with each other and their communities and allows for the same creativity and joy of resistance that we see on physical picket lines. In a post-pandemic world in which remote work is commonplace, and gig labour is increasingly globalized and decentralized, digital pickets enable a greater proportion of the working class to participate in a strike.

As employers hone their strategies to better capitalize on weaknesses in the labour market, they will seek to control and silence digital spaces through litigation and legislation, making it a necessity for unions to understand how to respond without losing momentum or power. Turning the taps off at the means of production not only includes traditional profit streams, but also redirecting intangible assets that bosses normally rely on to exploit and divide the workers, such as time, expertise, and public narrative. Withheld or weaponized against the boss, these are the aspects of a strike that become particularly effective in the flattened hierarchy of digital spaces. ILWU Canada is just one example of the ability of workers to adapt and innovate resistance, be it through dispatch halls – or sharing memes online.

Appendix 1: Infographic



What is a digital picket line?

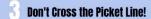
A digital picket line works much like a physical picket line, except it is online! The aim of the digital picket line is to communicate that we are on strike.





How does a digital picket line work?

Picket online by posting messages to inform others of the strike action and our demands and ask the public and other workers not to cross our digital picket line.



Crossing the digital picket line includes performing work for the employer from home that would normally happen behind the physical picket line.





Digital Picket Line Shift

Check in at the start of your shift with your digital picket captain by tagging them in your posts. Begin posting and post minimum 1x/hour.

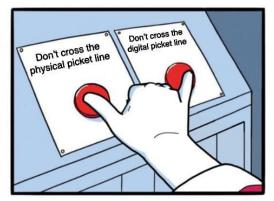
Use these hashtags

Always use these two hashtags whenever you post: #ilwucanstrike #diaitalpicketline



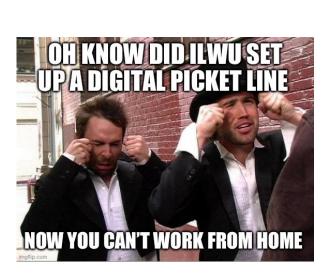
ILWU | An Injury To One Is An Injury To All

Appendix 2: Examples of Digital Picket Memes











NOTES

THE CYBERPICKET: A NEW FRONTIER FOR LABOR LAW

Down, but not out; bruised, but not beaten: U.S. labor law, though tired, can still put up the gloves. New strategies, born of the digital age and modern-day labor struggles, are reinvigorating the century-old legislative bases.¹ One innovation, the cyberpicket, promises to revive an aging doctrine and equip employees of online businesses with a powerful new tool to galvanize public support for their strikes and protests. For now, it's just a concept. But that could soon change, for the right to cyberpicket fits comfortably within labor law's current regime.

Admittedly, labor law doesn't ooze novelty. Most worker protections today still percolate from the National Labor Relations Act² (NLRA), a New Deal statute last updated by Congress during the Nixon Administration.³ Some labor activists hope for bold amendments;⁴ others seek reinvention of the current order.⁵ Yet given the current political gridlock,⁶ it's worth trying to breathe new life into old law.

Make no mistake, however: the NLRA isn't mummified. It's still a seminal statute with far-reaching effects, guaranteeing workers' right to organize and act collectively in their own interests. Situating the Act in historical context explains its staying power. Many of the same labor injustices that beset Depression-era workers afflict their great-grandchildren today. And just as the NLRA provided cover for the Greatest Generation, so too does it keep watch over the twenty-first-century labor force. Issues in the modern workplace that resemble the abuses that motivated the NLRA's authors have equal claim to the Act's remedial scheme. Nowhere is this clearer than in the realm of picketing.

As part of its package of protections, the NLRA permits employees to engage in peaceful picketing against their employers.⁸ It's a familiar form of protest, calling to mind workers, signs and pamphlets in hand, lining the entrance of a brick-and-mortar. Picketing pairs strong messaging with striking visuals: from suffragettes marching outside the

¹ See, e.g., Motor City Pawn Brokers Inc., 369 N.L.R.B. No. 132, at 7 (July 24, 2020) (recognizing social media as a protected medium through which employees can discuss unionization).

² 29 U.S.C. §§ 151-169.

³ See infra notes 23-26 and accompanying text.

⁴ See, e.g., Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 107 (2021).

⁵ See Kate Andrias, The New Labor Law, 126 YALE L.J. 2, 8-11 (2016).

⁶ Cf. Carl Hulse, Republicans Prepare New Rules, But Fixing Congress Isn't So Easy, N.Y. TIMES (Jan. 8, 2023), https://www.nytimes.com/2023/01/08/us/politics/house-republicans-rules.html [https://perma.cc/QK2B-3LR2] (describing the current congressional stalemate).

⁷ See The Right to Unionize, LAB. LAB, https://www.laborlab.us/the_right_to_unionize [https://perma.cc/CY63-UYWC].

⁸ See infra notes 62-69 and accompanying text.

White House⁹ to steelworkers patrolling their plants,¹⁰ these gripping scenes have long captured the public's attention and sympathies.

Consumer picketing¹¹ — this Note's focus — serves three main purposes: it informs the public about a labor dispute, dissuades customers from patronizing the business, and puts would-be shoppers to a symbolic choice — stand with workers, or cross against them. When successful in disrupting an employer's operations, picketing puts pressure on management to accede to the employees' demands, whether that means a return to the negotiating table, an agreement to comply with an existing contract, or a plan to improve workplace conditions.¹²

But having entered the digital age, many businesses now operate online. In the absence of a brick-and-mortar storefront, employees have nowhere to picket. This development jeopardizes labor law's delicate balance between employer interests and worker rights.

Luckily, there's a potential solution — first proposed by Professors Sharon Block and Benjamin Sachs — that doesn't require new legislation: the cyberpicket.¹³ Much like its in-person counterpart, a cyberpicket would alert potential customers to a labor dispute and put them to the choice of whether to continue transacting with the business. Instead of encountering rows of workers outfitted with signs and

⁹ See Matthew Costello, Picketing the White House: The Suffragist Movement During the Great War, WHITE HOUSE HIST. ASS'N (Apr. 14, 2017), https://www.whitehousehistory.org/picketing-the-white-house [https://perma.cc/C5XF-UQ6T].

¹⁰ See generally, e.g., Tom Juravich & Kate Bronfenbrenner, Steelworkers' Victory at Ravenswood: Picket Line Around the World, 3 WORKING USA 53 (1999).

¹¹ Some pickets target not consumers but coworkers, to dissuade them from strike-breaking. To avoid complication, any future mention of "picketing" refers to consumer picketing.

¹² A picket's objective can determine whether it's protected under law. The NLRA forbids, with few exceptions, nonunionized workers from picketing to "forc[e] or requir[e] an employer to recognize or bargain with a labor organization as the[ir] representative." 29 U.S.C. § 158(b)(7). This is called "recognitional" picketing. What's the Law?, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/whats-law/unions [https://perma.cc/ZS78-9LP4]. But these same workers can picket to "truthfully advis[e] the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization." 29 U.S.C. § 158(b)(7)(C). This is known as "informational" picketing. What's the Law?, supra. It applies equally to workers who are already unionized and want to, for example, draw attention to an impasse in contract negotiations. See Cap. Med. Ctr., 364 N.L.R.B. 887, 887, 899, 905 (2016), enforced, 909 F.3d 427 (D.C. Cir. 2018). When this Note mentions picketing, it means to invoke the informational, rather than the recognitional, variety — and specifically informational picketing against employers with whom workers have a primary (that is, direct) dispute. Cf. 29 U.S.C. § 158(b)(4)(i)(B) (prohibiting secondary pickets against neutral employers).

¹³ See Sharon Block & Benjamin Sachs, Clean Slate for Worker Power: Building a Just Economy and Democracy 64 (2020); see also Sharon Block, Benjamin Sachs & Tascha Shahriari-Parsa, A Path Forward for Amazon Workers: Digital Picketing, Onlabor (Nov. 16, 2022), https://onlabor.org/a-path-forward-for-amazon-workers-digital-picketing [https://perma.cc/Q3Y9-9HPA]. Block and Sachs use the term "digital picket" to describe their innovation. Because that's also what the New York Times Guild called their recent social media campaign, see infra note 56 and accompanying text, this Note prefers the term "cyberpicket" as a way of differentiating the two concepts.

pamphlets, however, e-shoppers would come across a notification that materializes at a site's landing page — the business's "entrance."

The technology needed to implement a cyberpicket breaks no new ground. In fact, it's already widely utilized by online businesses for compliance with the European Union's (EU) "Cookie Law," which requires that websites give visitors the right to refuse data tracking. ¹⁴ Socalled "consent banners" — now familiar fixtures for netizens across the pond ¹⁵ — present a tried-and-true template for the cyberpicket.

Not only is the cyberpicket a viable alternative to its in-person counterpart, it's a right owed to employees of online businesses. This Note sharpens the concept of a cyberpicket by expanding on its legal justification, expected benefits, and possible challenges. Part I outlines the NLRA's framework and argues that, though constructed long ago, it inherently extends to modern-day labor struggles. Part II supplies a doctrinal foundation, combing through case law to locate the right to cyberpicket. The focus here is on statutory precedents, temporarily setting aside constitutional considerations. Part III builds out the cyberpicket's mechanics, with inspiration from the EU's Cookie Law. It then offers next steps for interested workers. Part IV confronts the obstacles posed by the First and Fifth Amendments. Although the bleeding edge of constitutional law looks ominous, there's reason to test its boundaries.

This Note's goal isn't to engage in abstract statutory analysis but rather to inspire workers to test the limits of what's possible under the NLRA and thereby hold employers to their legal obligations. Labor law yearns for a spark; the cyberpicket promises to ignite one.

I. LABOR LAW'S INFRASTRUCTURE: SCAFFOLDING FOR THE CYBERPICKET

The NLRA, the nation's foundational labor statute, was forged from the industrial unrest and political agitation of a past era. Today, it's up to the modern National Labor Relations Board (NLRB) — more specifically, the agency's five-member committee that oversees implementation of the Act (the Board) — to recognize that the NLRA's heirloom protections still have purchase in the digital economy.

A. A Framework Revisited

Close to a century ago, the NLRA rewrote the rules of engagement in the battle for workers' rights. The result of labor unrest during the Great Depression, it dramatically altered the common law employment

¹⁴ See Council Directive 2002/58/EC, 2002 O.J. (L 201) 25 [hereinafter ePrivacy Directive], last amended by Council Directive 2009/136/EC, 2009 O.J. (L 337).

¹⁵ Many Americans will recognize consent banners, too: "As of October 2022, 45% of Fortune 500 websites were utilizing [them]." David A. Zetoony, *How Many Websites Now Have Cookie Banners?*, NAT'L L. REV. (Dec. 7, 2022), https://www.natlawreview.com/article/how-many-websites-now-have-cookie-banners [https://perma.cc/BRP5-RZMS].

relationship and set a national policy in favor of collective bargaining and industrial democracy. Congress tasked the NLRB — an independent regulatory agency — with enforcing the new regime. These reforms catalyzed rapid labor mobilization and sharp union growth.

The great NLRA experiment quickly felt the hand of correction. Responding to corporate interests and union abuses, Congress enacted the Taft-Hartley Act¹⁹ in the wake of World War II.²⁰ It reconfigured the labor-capital balance of power.²¹ Union arsenals shrunk; managements' strength grew.²² And labor law's landscape once again looked different.

Taft-Hartley not only dealt a blow to the labor movement but also marked one of Congress's last updates to the NLRA. Legislators addressed union corruption in 1959²³ and expanded the Act's coverage to nonprofit hospital workers in 1974,²⁴ but neither amendment worked a major shift in the labor-capital relationship.²⁵ Nor has any new legislation otherwise "modernized" labor law.²⁶ As a result, workers today must rely on a statute from a bygone era for their organizational rights. The workplace has changed, and labor law hasn't kept pace.

B. The NLRA Today

Still, the NLRA is far from a dead letter. Many workers (and employers) continue to seek refuge in its protections.²⁷ While the rate of unionization declined last year, the total number of union members grew,²⁸ as did workers' willingness to engage in collective action against

¹⁸ See Andrias, supra note 5, at 16. The gains realized by workers were not evenly distributed. See, e.g., IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 53–79 (2005) (exposing the racist exclusion of agricultural and domestic workers from the statute's coverage).

²³ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

¹⁶ Andrias, *supra* note 5, at 13–14, 16.

^{17 29} U.S.C. § 153.

¹⁹ Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187) (amending the NLRA).

²⁰ See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 272-81 (1950) (detailing the history of the Taft-Hartley Act).

 $^{^{21}\} See$ Andrias, supra note 5, at 18.

 $^{^{22}}$ Id. at 18–19.

 $^{^{24}\,}$ Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified as amended in scattered sections of 29 U.S.C.).

²⁵ See Andrias, supra note 5, at 27 & n.127 (noting that the Landrum-Griffin Act "tinker[ed] with" the NLRA); Ira M. Shepard, Health Care Institution Amendments to the National Labor Relations Act: An Analysis, 1 AM. J.L. & MED. 41, 53 (1975) (lamenting that the health care amendments, while "ambitious," ultimately "fall[] short" of providing "essential" safeguards).

²⁶ See Andrias, supra note 5, at 27-28.

²⁷ See Unfair Labor Practice Charges Filed Each Year, NAT'L LAB. RELS. BD., https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges [https://perma.cc/QFK₃-V6₄Q] (recording that individuals, unions, and employers collectively filed 17,998 unfair labor practice charges with the NLRB in 2022).

²⁸ News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Union Members — 2022 (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/6C2Q-7QAS].

uncooperative employers.²⁹ Tens of thousands — from graduate students to baristas — exercised their statutory right to strike in 2022.³⁰ Unions are also winning more elections, despite forceful company-led countercampaigns.³¹ Clearly, then, the rank-and-file still rely on the NLRA to justify and effect their self-empowerment.

And they currently have a powerful ally in NLRB General Counsel Jennifer Abruzzo, who bears responsibility for prosecuting unfair labor practices.³² Early in her tenure, Abruzzo vowed to challenge questionable Board precedents that hamstring workers' statutory entitlements, including their picketing rights.³³ So far, she has kept her promise.³⁴

Yet Abruzzo's efforts have yielded little from the Board, despite its enjoying a Democratic majority that many hoped would revitalize labor law's doctrinal landscape.³⁵ Decisions under "Biden's NLRB" have been slow to emerge, with crucial cases seemingly left on the back burner.³⁶ A flurry of labor-friendly activity at the close of last year offers hope for a more active 2023.³⁷ But the outlook for workers remains hazy: even with its recent bump in funding, the Board still faces budgetary constraints and an ever-expanding backlog of cases.³⁸

Separate from these practical limitations lies an issue that can't be fixed with an appropriations bill or efficiency gains: the Board's politicization. Members are appointed by the President, with Senate consent,

²⁹ See Rani Molla, How Unions Are Winning Again, In 4 Charts, VOX (Aug. 30, 2022, 6:00 AM), https://www.vox.com/recode/2022/8/30/23326654/2022-union-charts-elections-wins-strikes [https://perma.cc/P5K4-UJNH].

³⁰ Marick Masters, Worker Strikes and Union Elections Surged in 2022—Could It Mark a Turning Point for Organized Labor?, THE CONVERSATION (Jan. 5, 2023, 8:25 AM), https://theconversation.com/worker-strikes-and-union-elections-surged-in-2022-could-it-mark-a-turning-point-for-organized-labor-195995 [https://perma.cc/5NKW-MSGK].

³¹ See Molla, supra note 29; Andrea Hsu & Alina Selyukh, Union Wins Made Big News This Year. Here Are 5 Reasons Why It's Not the Full Story, NPR (Dec. 27, 2022, 10:01 AM), https://www.npr.org/2022/12/27/1145090566/labor-unions-organizing-elections-worker-rights-wages [https://perma.cc/P7G8-EM8K]. Unions aren't just popular among their members; they enjoy high approval ratings from Americans generally. See Justin McCarthy, U.S. Approval of Labor Unions at Highest Point Since 1965, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/G2TV-CC55] (reporting that "[s]eventy-one percent of Americans now approve of labor unions").

^{32 29} U.S.C. § 153(d).

³³ See Memorandum from Jennifer A. Abruzzo, Gen. Couns., Office of the Gen. Couns., Nat'l Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge & Resident Officers 1, 7-8 (Aug. 12, 2021).

³⁴ See, e.g., Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision at 20–62, CEMEX Constr. Materials Pac., LLC, No. 28-CA-230115 (N.L.R.B. Div. of Judges Dec. 16, 2021) (seeking to overrule decades of probusiness precedents).

³⁵ See David Dayen, Coalition Asks: Where Is Biden's NLRB?, AM. PROSPECT (Dec. 8, 2022), https://prospect.org/labor/coalition-asks-where-is-bidens-nlrb [https://perma.cc/4QZB-P9YM].

³⁷ See Paul King Jr., Landmark NLRB Decision Expands Labor Violations, NAT'L L. REV. (Jan. 17, 2023), https://www.natlawreview.com/article/landmark-nlrb-decision-expands-labor-violations [https://perma.cc/5M5J-QJ7A].

³⁸ See Press Release, Nat'l Lab. Rels. Bd., Off. of Pub. Affs., Statement on NLRB Funding in the 2023 Omnibus Bill (Dec. 29, 2022), https://www.nlrb.gov/news-outreach/news-story/statement-on-nlrb-funding-in-the-2023-omnibus-bill [https://perma.cc/MYR8-L2J5].

to five-year staggered terms, meaning each administration can effectively reconstitute the Board.³⁹ The legislators who dreamt up the quasi-judicial body imagined that its constituents would be "nonpartisan and neutral."⁴⁰ After only two decades, however, politically motivated appointments began to splinter the Board.⁴¹ Today, shifting majorities create doctrinal whiplash, as probusiness Republicans blow one way, while prolabor Democrats sweep the other.⁴² Even if labor secures a victory in the picketing context, the rights might not stick.

Setting a precedent still carries weight, however. The Board must later justify a departure in a reasoned decision.⁴³ In the meantime, labor enjoys stronger protections and generates a proven template for future cases. It's therefore crucial that workers continue to assert their statutory rights, striking while the iron is perhaps lukewarm, but hopefully heating up, under the Biden Board.⁴⁴ Depending on the results of the next presidential election, it may soon turn stone-cold.

C. Digital Dilemma, Cyber Solution

One of labor law's new frontiers, the internet, challenges the NLRA to prove its continued vitality. For most of the Act's lifespan, Americans shopped in brick-and-mortar stores.⁴⁵ Take the once-prominent department chain Sears.⁴⁶ If, during the retailer's mid-twentieth-century heyday,⁴⁷ its employees were to picket, Sears's customers would ipso facto learn about the underlying labor dispute. Shoppers would then have to make an informed decision about whether to keep spending there, a symbolic act that expresses a lack of solidarity with the workers.⁴⁸

³⁹ See 29 U.S.C. § 153(a).

 $^{^{40}}$ James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMPAR. LAB. L. & POL'Y J. 221, 243 (2005).

⁴¹ See Joan Flynn, A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000, 61 OHIO ST. L.J. 1361, 1365 (2000).

⁴² See Dayen, supra note 35. Political approximations for Members' tendencies to support decisions seen as prolabor or probusiness aren't perfect, but they roughly align with what Presidents look for in appointees and thus capture general trends. See Brudney, supra note 40, at 248–50.

⁴³ See Shaw's Supermarket v. NLRB, 844 F.2d 34, 35 (1st Cir. 1989).

⁴⁴ See supra notes 35-36 and accompanying text.

⁴⁵ The first known sale of an item over the internet took place in 1994. *See* Shahed Nasser, *The History of Ecommerce: 1979 to 2023*, MEDUSA (Mar. 9, 2023), https://medusajs.com/blog/ecommerce-history [https://perma.cc/HVF4-9CH6].

⁴⁶ See Vicki Howard, Essay, How Sears Industrialized, Suburbanized, and Fractured the American Economy, ZÓCALO PUB. SQUARE (July 20, 2017), https://www.zocalopublicsquare.org/2017/07/20/sears-industrialized-suburbanized-fractured-american-economy/chronicles/who-we-were [https://perma.cc/K7E9-L4SK].

⁴⁷ See id.

⁴⁸ See Kim Kelly, Opinion, Crossing the Picket Line: What You Need to Know About Strikes, TEEN VOGUE (Sept. 1, 2020), https://www.teenvogue.com/story/strikes-and-picket-lines-explained [https://perma.cc/F₃AB-8AEZ].

But what if there's no physical storefront? E-commerce as an industry, which earned over a trillion dollars in the United States in 2022,⁴⁹ threatens workers' ability to picket. Consider Amazon's business model. Although the company now operates several brick-and-mortar outlets,⁵⁰ the plurality of its retail sales come from its online marketplace.⁵¹

Last year, Amazon's Staten Island warehouse successfully unionized following a historic election.⁵² Despite this, the e-commerce giant has refused to engage in contract negotiations, no doubt violating its statutory duty to bargain in good faith.⁵³ The legal remedies available to the union are "too weak to offer . . . much hope of forcing Amazon to come to the table . . . any time soon."⁵⁴ Suppose the Staten Island workers, instead of taking to the courts, wish to exercise their right to picket. Sure, they can line the entrances of a local Amazon grocery outlet, if there's one nearby. But customers can continue to shop on the company's website, blissfully unaware of any labor dispute. These patrons don't have to make the difficult choice of whether to cross the picket line because there's none in sight: no patrolling, chanting, or signs.

Workers can try to publicize labor disputes to online audiences through other means, such as social media, but that's no substitute for traditional picketing.⁵⁵ Members of the New York Times Guild recently initiated what they called a "digital picket," taking to sites like Twitter to urge consumers not to engage any of the newspaper's platforms until

⁴⁹ See CENSUS BUREAU, U.S. DEP'T OF COM., CB23-22, QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2022 (2023), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf [https://perma.cc/P8GG-DCP6].

⁵⁰ See, e.g., Veronika Bondarenko, Amazon's New Brick-and-Mortar Store Concept Is Now Open for Business, THESTREET (May 25, 2022, 1:15 PM), https://www.thestreet.com/investing/amazon-first-retail-fashion-store [https://perma.cc/PXK8-YUAH].

⁵¹ See Amazon.com, Inc., Annual Report (Form 10-K), at 67 (Feb. 3, 2023).

⁵² See Karen Weise & Noam Scheiber, Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor, N.Y. TIMES (Apr. 1, 2022), https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html [https://perma.cc/5VDX-GKLG]. "Amazon's fulfillment centers are the engine of the company — massive warehouses where workers track, pack, sort, and shuffle each order before sending it on its way to the buyer's door." Colin Lecher, How Amazon Automatically Tracks and Fires Warehouse Workers for "Productivity," THE VERGE (Apr. 25, 2019, 12:06 PM), https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations [https://perma.cc/HDP7-YPEE]. Each location boasts thousands of employees, who do their best to meet Amazon's tall demand. See Our Facilities, AMAZON, https://www.aboutamazon.com/workplace/facilities [https://perma.cc/7YZJ-KZEP].

⁵³ See 29 U.S.C. § 158(d); Ananya Bhattacharya, Amazon Refuses to Make Peace with Unions Even After They've Won the Right to Organize, QUARTZ (Dec. 1, 2022), https://qz.com/amazon-refuses-to-make-peace-with-unions-even-after-the-1849839810 [https://perma.cc/AB3J-92EQ].

⁵⁴ Block, Sachs & Shahriari-Parsa, supra note 13.

⁵⁵ Because social media companies are privately held, they can arbitrarily limit the reach of union-led campaigns by suppressing or rejecting posts. *Cf.* Sofia Grafanaki, *Platforms, The First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 133–34 (2018). This threat alone counsels against relying on such platforms to supply workers' picketing rights.

it reached an agreement with the union.⁵⁶ The call-to-action went viral, garnering much interest (and some criticism) from the public.⁵⁷ Yet it could easily have gone unheeded by those without an active online presence. Social media word-of-mouth can serve as a powerful adjunct to traditional forms of economic pressure, but it looks more like a sign above a freeway than a banner beside a building's entrance — those who *walk* to the store miss the message.

More importantly, labor law doesn't end where the World Wide Web begins; employers can't escape the NLRA's reach by doing business online. The Act's broad language, as interpreted by the Board, naturally supports the right to cyberpicket.⁵⁸ The basic idea, first sketched elsewhere,⁵⁹ is simple enough. Each time someone navigates to a cyberpicketed business's landing page, a banner will appear on screen. It will describe the labor dispute and encourage the visitor not to transact with the company until the workers' demands have been met. To continue to the site, customers must click a box indicating that they agree to cross the picket line. Nothing on the landing page itself will change; once past the cyberpicket, the visitor will encounter a shopping experience that's identical to the one they're familiar with.

So conceived, cyberpickets aim to achieve the same goals as their inperson counterparts: educating visitors about ongoing labor disputes, discouraging customers from doing business with the employer, and forcing patrons into the same tough decision that confronted the midtwentieth-century Sears shopper.⁶⁰ And ultimately, employees seek a similar outcome: applying enough economic pressure through reduced sales and bad press to push the employer into meeting their demands.

The right to cyberpicket, then, not only fits naturally into the NLRA's scheme but also signals that the Act will stand as a bulwark against novel encroachments on established labor protections and keep online businesses accountable. The Board should take note, for the rise of e-commerce is precisely the kind of "changing industrial practice[]" meant to factor into its "adapt[ive]" interpretations of the Act.⁶¹

⁵⁶ Nicholas Clairmont, Opinion, *Tweeters of the World, Unite Around the* New York Times and *Its "Digital Picket Line,"* NEWSWEEK (Dec. 9, 2022, 2:11 PM), https://www.newsweek.com/tweetersworld-unite-around-new-york-times-its-digital-picket-line-opinion-1766052 [https://perma.cc/PZS8-BCF4]

⁵⁷ See id. (critiquing the class-based dimension to the digital picket).

⁵⁸ When this Note speaks of "online businesses," it refers not only to fully virtual e-commerce sites but also to brick-and-mortars that sell in-person services on the internet. For instance, most people book travel online. *See Online Travel Booking Statistics 2020–2021*, CONDOR FERRIES, https://www.condorferries.co.uk/online-travel-booking-statistics [https://perma.cc/233T-SHAA]. A hotel that offers getaways for purchase on its site can be cyberpicketed. (Indirect booking through travel agencies presents a different question, but one best suited for future research.)

⁵⁹ See sources cited supra note 13.

 $^{^{60}}$ See supra notes 11–12 and accompanying text.

⁶¹ See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).

II. FROM PAVEMENT TO PIXELS: PICKETING RIGHTS IN THE DIGITAL AGE

The Board has constructed a comprehensive scheme of picketing rights from the NLRA's text. Putting constitutional objections aside for the moment, the right to cyberpicket fits neatly within the case law.

A. Statutory Regime

Peaceful picketing holds special significance in labor law jurisprudence, both constitutionally and statutorily. When it occurs on *public* property like parks and sidewalks, the First and Fourteenth Amendments grant participants broad protections.⁶² Even some *private* property — namely, company towns — must conform to the constitutional guarantee of free expression.⁶³ In most cases, however, picketing on an employer's premises is governed exclusively by the NLRA.⁶⁴

Section 7 of the Act supplies picketing its statutory anchor. It states that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." These protections embrace the right "to criticize or complain about [one's] employer or [one's] conditions of employment, and to enlist the assistance of others in addressing employment matters." Further still, workers may "solicit[] support not only from fellow employees but also from nonemployees such as customers and the general public, "67 including through primary picketing. Employers, in turn, "commit an 'unfair labor practice' in violation of the Act when they 'interfere with, restrain, or coerce employees in the exercise of' their Section 7 rights."

Sometimes Section 7 rights run up against employer property interests. When that happens, the Board must "seek a proper accommodation between the two," meaning with "as little destruction of one as is consistent with the maintenance of the other." Over time, the Board has developed certain presumptions to aid in its task. One, first

⁶² See Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968), overruled on other grounds by Hudgens v. NLRB, 424 U.S. 507 (1976).

⁶³ See Marsh v. Alabama, 326 U.S. 501, 508-09 (1946).

⁶⁴ See Hudgens, 424 U.S. at 513, 521.

^{65 29} U.S.C. § 157 (emphasis added).

⁶⁶ Quicken Loans, Inc. v. NLRB, 830 F.3d 542, 545 (D.C. Cir. 2016) (citing Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491 (1978); Stanford Hosp. & Clinics v. NLRB, 325 F.3d 334, 343 (D.C. Cir. 2003); Tradesmen Int'l, Inc. v. NLRB, 275 F.3d 1137, 1141 (D.C. Cir. 2002)).

⁶⁷ Cap. Med. Ctr. v. NLRB, 909 F.3d 427, 430 (D.C. Cir. 2018) (citing *Stanford Hosp. & Clinics*, 325 F.3d at 343).

⁶⁸ Cf. 29 U.S.C. § 158(b)(4)(i)(B) ("[N]othing contained in this clause . . . shall be construed to make unlawful, where not otherwise unlawful, any . . . primary picketing.").

⁶⁹ Cap. Med. Ctr., 909 F.3d at 430-31 (quoting 29 U.S.C. § 158(a)(1)).

⁷⁰ Cent. Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).

⁷¹ *Id.* at 544 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)).

developed in the context of workplace organizing but later applied to picketing cases, made its way to the Supreme Court. In *Republic Aviation Corp. v. NLRB*,⁷² the Justices confronted an employer's rule that prohibited solicitation of any kind — union-related or not — at its plant.⁷³ Agreeing with the Board's reasoning below, the Court approved a presumption that blanket no-solicitation rules unreasonably impede employees' Section 7 right to self-organize unless necessary for discipline or production.⁷⁴ Hence, employers can't prohibit off-the-clock workers from passing out pro-union pamphlets on company property, whether during rest periods, on lunch break, or after hours.⁷⁵ This holding rested on a simple truth: to effectively exercise their right to self-organization, employees must have an opportunity to communicate about unionization, and the job site is uniquely conducive to such interactions.⁷⁶

The Board has extended the *Republic Aviation* presumption to certain restrictions on worker picketing. It once found that a business committed an unfair labor practice by "calling the police" and "causing the arrest" of off-duty employees who were picketing in front of a store's entrance.⁷⁷ A similar result obtained when a hospital tried to ban like activity outside its front lobby doorway.⁷⁸ These cases establish that off-duty employees have a statutory right to picket on nonworking areas of company property, in turn saddling employers with the heavy responsibility of showing business necessity for any imposed constraints.⁷⁹

The NLRA's protections go further still, underscoring Section 7's breadth. Employees of, say, a Walmart in Atlanta are legally entitled to picket not only at their assigned store but also at the nearby Decatur branch.⁸⁰ In this scenario, Walmart's corporate structure serves as the unifying entity — the individual locations need not maintain a close relationship, support each other's inventories, or sell the same products:

⁷² 324 U.S. 793 (1945).

⁷³ See id. at 794-95.

⁷⁴ *Id.* at 803 & n.10.

⁷⁵ See id. at 803 n.10 (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943), enforced, 142 F.2d 1009 (5th Cir. 1944)); cf. Eastex, Inc. v. NLRB, 437 U.S. 556, 572–74, 574 n.23 (1978) (applying Republic Aviation presumption to restrictions on at-work distribution of union newsletter that not only discussed purely organizational matters but also other protected Section 7 activity).

⁷⁶ See Republic Aviation Corp., 324 U.S. at 801 n.6 (quoting Republic Aviation Corp., 51 N.L.R.B. 1186, 1195 (1943)).

⁷⁷ See Cap. Med. Ctr., 364 N.L.R.B. 887, 889 (2016) (citing Town & Country Supermarkets, 340 N.L.R.B. 1410, 1413–14 (2004)), enforced, 909 F.3d 427 (D.C. Cir. 2018).

⁷⁸ See id. at 887-88, 891.

⁷⁹ See id. at 888–90. True, "Section 7 does not itself speak of access rights." ITT Indus., Inc. v. NLRB, 251 F.3d 995, 1000 (D.C. Cir. 2001). But "the Board's reasonable interpretation[s] of ambiguous NLRA provisions" call for deference from federal courts. Cap. Med. Ctr., 909 F.3d at 433 (citing ITT Indus., Inc., 251 F.3d at 999–1000; Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984)).

⁸⁰ See ITT Indus., Inc., 341 N.L.R.B. 937, 941 (2004), enforced, 413 F.3d 64 (D.C. Cir. 2005); Hillhaven Highland House, 336 N.L.R.B. 646, 648–49 (2001), enforced sub nom. First Healthcare Corp. v. NLRB, 344 F.3d 523 (6th Cir. 2003).

"[I]f [an employer] is essentially a single enterprise, in its operations, its employees have the right to picket geographically separated parts of its operation in support of a primary dispute in one part, without proving that there is a direct relationship between the parts at the local level."81

Off-site employees aren't relegated to picketing on a distant public sidewalk; they too have a right to engage in Section 7 activity on company property. Part of this holding's significance lies in the fact that it was never inevitable. Off-site employees could've been treated like nonemployee union organizers, who enjoy very limited access rights. Indeed, if store employees are reasonably accessible off the property, a business may treat nonemployee organizers as trespassers and bar or evict them from the premises. If Critically, any access privileges nonemployee organizers enjoy "deriv[e]" from the workers' right "to exercise their organization rights effectively. That's not true of off-site employees, so concluded the Board. Their access rights spring directly from Section 7 as part of protected "concerted action," for the employees ultimately aim "to increase the power of the [ir] union" and "improve the working conditions for the onsite and offsite worker alike."

Other strands of NLRB case law strike a different, less worker-friendly balance between employees' Section 7 rights and employers' private property interests, yet none map as cleanly onto the cyberpicketing context as, well, the Board's picketing precedents. One decision in particular — Caesars Entertainment⁸⁸ — might have the look of a management trump card, but the analogy folds under scrutiny. There, the Board interpreted Republic Aviation narrowly to hold that employees, in most cases, aren't entitled to use their company's email system to communicate about Section 7 activity.⁸⁹ Today's workers, the Board

⁸¹ Teamsters, Loc. Union No. 560, 248 N.L.R.B. 1212, 1214 (1980) (citing Int'l Bhd. of Teamsters, 128 N.L.R.B. 916, 919 (1960); Retail Clerks Int'l Ass'n, 122 N.L.R.B. 1264, 1270 (1960); Madden v. Steel, Metals, Alloys & Hardware Fabricators, 22 F. Supp. 635, 638 (N.D. Ill. 1963)).

⁸² See, e.g., Hillhaven, 336 N.L.R.B. at 648–49. The Board has modified slightly the Republic Aviation framework to account for the fact that employers "may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights." Id. at 648.

⁸³ See Lechmere, Inc. v. NLRB, 502 U.S. 527, 538 (1992).

⁸⁴ See id. at 539 (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)) (citing NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948)) (permitting access in limited contexts, such as logging camps).

⁸⁵ Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 206 n.42 (1078).

 $^{^{86}}$ See, e.g., Hillhaven, 336 N.L.R.B. at 648.

⁸⁷ First Healthcare Corp. v. NLRB, 344 F.3d 523, 533 (6th Cir. 2003) (citing *Hillhaven*, 336 N.L.R.B. at 648). Another "critical distinction" for the Board "is that employees are not strangers to the employer's property, but are already rightfully on the employer's property pursuant to their employment relationship, thus implicating the employer's management interests rather than its property interest." Town & Country Supermarkets, 340 N.L.R.B. 1410, 1414 (2004) (citing Hudgens v. NLRB, 424 U.S. 507, 521 n.10 (1976); Eastex, Inc. v. NLRB, 437 U.S. 556, 571–73 (1978)).

^{88 368} N.L.R.B. No. 143 (2019).

⁸⁹ See id. at 7–8.

submitted, can usually discuss union-related matters either face-to-face or through digital mediums like social media; thus, a company could prohibit nonbusiness use of its IT resources without unreasonably impeding the exercise of its employees' self-organizational rights. 90

The Board's decision in *Caesars* doesn't spell doom for cyberpicketing. For one, a landing page isn't akin to an email system — it's the functional equivalent of a storefront. In this sense, temporarily occupying business property for a cyberpicket is more like standing outside a retail outlet to engage with would-be shoppers (protected) than typing to coworkers on internal company servers (not protected). And even if employees of online businesses can meet in a break room or connect on LinkedIn to discuss Section 7 activity, these same avenues aren't available (and certainly aren't adequate) for communicating with potential customers or the public at large about a labor dispute. Hence, *Caesars* neither applies of its own force nor succeeds by analogy. The Board's picketing cases supply a much sturdier foundation on which to rest a decision about the right to cyberpicket.

B. Closing the Click-and-Mortar Gap

The NLRA's broad regime of picketing rights has not yet made its way online, choking off an important stream of worker power at the source. Nothing in the Board's decisions recognizing the right of employees to access nonworking areas of company property — such as parking lots, gates, and storefronts⁹¹ — for Section 7 activity suggests a carveout for online businesses. Nor does the text of the NLRA, which broadly permits "concerted activities" for "mutual aid or protection."⁹² Traditional conceptions of picketing, however, deprive e-commerce workers of a valuable tool for applying economic pressure against their employers, who gain an unfair advantage just by operating on the web. Settling for a watered-down version of the NLRA would leave Amazon's Staten Island warehouse employees to either picket one of the company's relatively inconsequential brick-and-mortars or shout into the void of social media.⁹³ But there's a better path forward.

Employees of online businesses have a statutory right to cyberpicket, the functional analog of an in-person picket. The Board's precedents, fairly read, make that clear. To illustrate why, it will help to first revisit

⁹⁰ Id. at 8.

⁹¹ See Tri-County Med. Ctr., 222 N.L.R.B. 1089, 1089 (1976).

^{92 29} U.S.C. § 157.

⁹³ See supra notes 49–51 and accompanying text. Conceivably, the workers could picket their own warehouse, but because customers don't shop there, the message wouldn't reach its intended audience. The NLRA doesn't relegate workers to such an enfeebled form of picketing. Cf. Teamsters, Local Union No. 560, 248 N.L.R.B. 1212, 1214 (1980) (upholding workers' right to picket "geographically separated parts" of a "single enterprise"); Scott Hudgens, 230 N.L.R.B. 414, 415–18 (1977) (protecting right of striking warehouse employees to picket adjacent to employer's retail outlet in shopping mall).

the Walmart hypothetical — typecast here as a chain of brick-and-mortars — before comparing it with Amazon's e-commerce business. Assume Walmart has refused to bargain in good faith with the Atlanta workers' union. Under Board precedents, not only do those employees have the right to picket at the entrance of their "home" store, but they can also line the gates of the nearby Decatur location — or the Miami Walmart, for that matter. ⁹⁴ Every potential customer to these outlets must witness the picket and decide whether to proceed inside anyway.

Now consider Amazon's online marketplace. Despite its intangibility, it too is a bona fide store. The shop's entrance is not a revolving door but rather the landing page. From there, customers can peruse products, put items in their carts, and even ask for help from a "live agent." Indeed, scrolling through goods on one's phone closely resembles thumbing through a grocery outlet's selection of produce. Amazon's web banner might look different from Walmart's bright-blue storefront lettering, but the activity inside is the same: retail shopping.

Although Amazon's online marketplace operates much like Walmart's physical stores, ⁹⁶ employees of the e-commerce giant miss out on a crucial Section 7 right due to the lack of effective picketing options. The cyberpicket promises to fill the gap. Its contours may still seem blurry, but for now think of it as a banner-like notification that materializes when a webpage is loaded. Conceiving of the cyberpicket in broad strokes at this early stage can help illustrate how it fits into the NLRA's scheme without getting bogged down in nitty-gritty mechanics.

Employers may argue that recognizing a right to cyberpicket will swing the pendulum too far in the direction of workers, upsetting the NLRA's fragile balance. For Atlanta Walmart employees to picket the entrances of a Los Angeles store, they'd need to buy plane tickets for a multihour flight. All told, that could cost thousands of dollars, take up valuable time, and exhaust participants, weakening resolve. Granted, nationwide pickets aren't uncommon — off-duty pilots recently instituted

⁹⁴ See supra notes 80-81 and accompanying text.

⁹⁵ This analogy is more than intuitive — it's making its way into other areas of law, as well. Several courts of appeals have determined that websites can be places of public accommodation. See Randy Pavlicko, Note, The Future of the Americans with Disabilities Act: Website Accessibility Litigation After COVID-19, 69 CLEV. ST. L. REV. 953, 962-63 (2021).

⁹⁶ Although Amazon consolidates its marketplace into one online site available to shoppers nationwide instead of operating region-specific domains, the analysis remains the same. Walmart couldn't escape pickets by maintaining a single "superstore" in California, to which customers from around the country flocked for ultradiscounted goods. East Coast employees who manage and ship the inventory would retain their Section 7 rights. The same goes for Amazon's Staten Island warehouse workers: they can stage a cyberpicket visible to customers beyond New York, even without a direct connection to their purchases. *Cf. Teamsters*, 248 N.L.R.B, at 1214.

one,⁹⁷ as did Starbucks workers.⁹⁸ But these protests involve immense coordination with local employees, who typically do not travel to new locations but rather man the entrances of their own stores.⁹⁹ Cyberpicketers — armed with nothing but a keyboard — could theoretically engage in a potent form of collective action from thousands of miles away, at home, fast asleep. They need not carry signs, patrol, or chant. This ability arguably gives employees a powerful *new* weapon against employers, instead of restoring to them an old one.

But making the exercise of Section 7 rights too easy doesn't trigger the same concerns as a complete forfeiture. Nothing in the NLRA forbids employees from devising ways to make their picketing more efficient or less burdensome. And there's no requirement that says workers must endure arduous conditions — they may picket in sunny Los Angeles or snowy Boston.¹⁰⁰ Even if the Board disagrees, all hope isn't lost. It's possible to "geofence" the cyberpicket, such that only customers shopping within a defined area see it.¹⁰¹ Reasonable time limits might also be appropriate.¹⁰² It will be up to the Board to set parameters, if it so chooses.¹⁰³ Even if subject to limitations, the cyberpicket should remain a viable option for interested workers.

III. CONSTRUCTING THE CYBERPICKET: MECHANICS AND IMPLEMENTATION

While cyberpicketing promises to shake up labor law, its proposed mechanics are unremarkable. Many websites — particularly

⁹⁷ Pilots Nationwide Picketing for Change After Summer of Airline Woes, CBS (Sept. 1, 2022, 8:09 PM), https://www.cbsnews.com/newyork/news/pilots-nationwide-picketing-for-change-after-summer-of-airline-woes [https://perma.cc/6F3D-ZGY7].

⁹⁸ Matt Bloom, Starbucks Workers in Colorado Join Nationwide Strike as Union's Contract Negotiations Stall, CPR NEWS (Nov. 17, 2022, 11:35 AM), https://www.cpr.org/2022/11/17/starbucks-workers-in-colorado-join-nationwide-strike-as-unions-contract-negotiations-stall [https://perma.cc/B4GJ-V6MY].

⁹⁹ See, e.g., id. (reporting on local logistics of nationwide Starbucks picket).

¹⁰⁰ The picket is one of workers' most valuable economic weapons, but employers have equally powerful arms at their disposal. For example, they can stop furnishing work to employees, known as a lockout, which diminishes unions' perceived power. See 29 U.S.C. § 158(d)(4); Ellen Dannin & Ann C. Hodges, The Supreme Court Empowers Employers to Lock Out Workers, TRUTHOUT (May 23, 2013), https://truthout.org/articles/the-supreme-court-empowers-employers-to-lock-out-workers [https://perma.cc/4RPQ-5D6M].

¹⁰¹ Geofencing is a "location-based service" that uses GPS and other data "to trigger a preprogrammed action" when a device "enters or exits a virtual boundary set up around a geographical location." Sarah K. White, *What Is Geofencing? Putting Location to Work*, CIO (Nov. 1, 2017), https://www.cio.com/article/288810/geofencing-explained.html [https://perma.cc/7YAH-PJBL]. It's a popular marketing tool: for instance, "[i]f you download a grocery [store] app, chances are it will register when you drive by to prompt an alert, trying to get you to stop in." *Id*.

¹⁰² Cf. ²⁹ U.S.C. § 158(b)(7)(C) (requiring workers who initiate recognitional picketing to file an election petition within thirty days).

¹⁰³ See Hudgens v. NLRB, 424 U.S. 507, 521 (1976) ("[T]he task of the Board . . . is to resolve conflicts between § 7 rights and private property rights").

those available to users in Europe — already include a similar feature. This model provides the jumping-off point for the cyberpicket.

A. The Blueprint

The cyberpicket need not reinvent the wheel; there's a template from which it can draw inspiration. The EU's ePrivacy Directive sets ground rules for data protection in the digital age.¹⁰⁴ It's not self-executing, so each member state devises its own means for implementation, but the end goal is common to all. 105 One of its provisions, the so-called Cookie Law, requires that websites give visitors the opportunity to refuse certain data tracking and collection. 106 To remain in compliance, online businesses that wish to reach EU audiences have designed "consent banners" that ask for permission to use the visitor's cookies. 107 These banners, overlaid across the main webpage, vary in shape, size, and functionality. Sites can freely customize them so long as they are compliant with the law. 108 The banners most relevant to cyberpicketing are known as "modal dialogs," which are effectively pop-ups that prevent users from accessing a webpage's content until they've either "accepted or declined the cookie collection."109 That is, users can't ignore the banner and go on using the site — they must first interact with it.

Cyberpickets should look similar to consent banners and function like modal dialogs. To access the landing pages' contents and shop as desired, visitors must decide whether to "cross" the cyberpicket line. That means featuring a binary choice. For example — as suggested by Block and Sachs — an introductory prompt might read, "There is a strike occurring at this [business]; do you still want to proceed?" Clicking "yes" would close out the dialog box and give the customer

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¹⁰⁴ See generally ePrivacy Directive, supra note 14. The closest U.S. analog is the California Consumer Privacy Act (CCPA), CAL. CIV. CODE §§ 1798.100–.199 (West 2022), which applies to businesses that serve the state's residents. See id. § 1798.140(d)(1)–(4), (i). Unlike the ePrivacy Directive, the CCPA doesn't require that companies obtain affirmative consent from e-visitors before collecting their data, but sites must include opt-out mechanisms and privacy notices. See Phillip Walters, A Cookie Banner Isn't Enough for CCPA Compliance, TRUEVAULT: BLOG (Oct. 27, 2022), https://www.truevault.com/blog/a-cookie-banner-isnt-enough [https://perma.cc/MRX8-FHVS]. So, mandated digital disclosures aren't foreign to U.S. law, businesses, or consumers.

¹⁰⁵ See Types of Legislation, EUR. UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en [https://perma.cc/KP5J-TK3K].

¹⁰⁶ See ePrivacy Directive, supra note 14, at 25. Cookies are "small text files that websites place on your device as you are browsing," which "can store a wealth of [personally identifiable] data." Richie Koch, Cookies, The GDPR, and the ePrivacy Directive, GDPR.EU, https://gdpr.eu/cookies [https://perma.cc/S2FG-Q23B].

¹⁰⁷ See Cristiana Santos et al., Are Cookie Banners Indeed Compliant with the Law?, 2 TECH. & REG. 91, 91 (2020).

¹⁰⁸ See id.

¹⁰⁹ See Sheri Byrne-Haber, Cookie Banners and Accessibility, MEDIUM: UX COLLECTIVE (Aug. 25, 2020), https://uxdesign.cc/cookie-banners-and-accessibility-d476bf9ee4fc [https://perma.cc/O3TZ-D3DS].

¹¹⁰ See BLOCK & SACHS, supra note 13, at 64.

¹¹¹ Id.

immediate access to the site's contents; clicking "no" would return the customer "to the last page they visited."¹¹² This mechanism would put online customers on equal footing with the twentieth-century Sears patron, who had to make an informed decision about whether to advance past the protesting workers and into the store.

B. The Specifications

Online businesses ought to have flexibility to determine a banner's configuration, meaning its dimensions, positioning, and appearance. This suggestion will likely trigger objections from both sides, but it's a sensible approach. Employers may protest that they must not only host the cyberpickets but create them too. Generally, workers can't expect their employer to finance Section 7 activity. If they want prounion signs, they have to bring their own. The company must lend only its premises; it need not open its pocket book. This argument sounds not only in the NLRA but also in the Constitution — a topic addressed in Part IV. Suffice to say here, employees must pay for their cyberpickets, including hosting fees and labor costs, but preliminary estimates suggest that these expenses won't be prohibitively high. This allocation of financial responsibility should allay employers' concerns.

112 Block, Sachs & Shahriari-Parsa, *supra* note 13. Admittedly, in-person patrons need not *announce* their intention to cross the picket line; they can quietly duck their heads and scurry past. But even that requires an affirmative choice to disregard the workers in front of them. It would needlessly corrode the cyberpicket's function, then, to allow employers to insist on non-modals, by which "[u]sers can still interact with the background content" without engaging with the overlay. See Ryan Neufeld, *Modal vs Page: A Decision Making Framework*, MEDIUM: UX PLANET (Mar. 2, 2020), https://uxplanet.org/modal-vs-page-a-decision-making-framework-34453e911129 [https://perma.cc/3F7L-HWUL]. Some workers may favor this less confrontational method to reduce the risk of alienating visitors from the union, but that's a preference, not a requirement.

113 Sachs has proposed a different mechanism for effecting a cyberpicket that doesn't engage employers at all, but his suggestion falls short of what's required by the NLRA and ultimately proves ineffective. He submits that "the Department of Labor [could] collect[] data on labor disputes" and then "mak[e] a browser extension available to consumers" that would trigger a DOL-designed notification when visiting a picketed site. Interview by Gizmodo with Benjamin Sachs, Cofounder, Clean Slate for Worker Power Project, transcribed in Whitney Kimball, The Case for Virtual Picket Lines, GIZMODO (Apr. 12, 2021), https://gizmodo.com/the-case-for-virtual-picket-lines-1846654139 [https://perma.cc/3RQL-X6QU]. While creative, the browser-extension approach requires an affirmative opt-in from users. It thus resembles the New York Times Guild social media campaign, reaching primarily those who wish to engage. See supra notes 55–57 and accompanying text. The NLRA empowers workers to engage in picketing that's far more robust and impactful.

¹¹⁴ Consider the alternative. Workers *could* configure the banner, but they'd likely need access to sensitive source code, and the design may not mesh well with the webpage's layout. A reasonable compromise might involve contracting with a third-party vendor. *See infra* note 116.

 115 While the NLRA prohibits employers from "interfer[ing] with . . . employees in the exercise of" their Section 7 rights, 29 U.S.C. § 158(a)(1), nothing in the Act's text speaks to mandatory funding or reimbursement. *Cf.* BLOCK & SACHS, *supra* note 13, at 83 ("Historically, labor unions in the U.S. have relied on dues and fees paid by employees to finance their operations.").

¹¹⁶ Costs per cyberpicket will vary by website — depending on visitor traffic, design elements, and security features — but a survey of third-party vendors that create and implement consent

Workers might prefer more control over the banners' specifications, but they too must yield. Consider a dialog box that occupies the customer's entire screen, eclipsing any part of the main webpage. That's arguably the most worker-friendly formulation of the cyberpicket, but it would raise several issues. For one, it's not analogous to what the twentieth-century Sears shopper would've seen when arriving at a picketed store. The protest might have wrapped around the building, but the company's name, blazoned near the top of its concrete structure, would've remained visible, lifted high above the workers' heads.

Apart from a broken analogy, there would be practical issues too. Potential customers must be able to tell that they're in the right place and didn't accidentally navigate to the wrong URL. To be sure, "[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard [Section 7 rights]."¹¹⁷ But the Board must seek a proper balance between worker and employer interests, ¹¹⁸ which seems best achieved by permitting businesses to retain agency in their web design while also enabling the use of cyberpickets. Of course, employers will have an incentive to minimize the banner's dimensions, so the Board must be proactive. On top of ordering corrective measures on a case-by-case basis, it should issue regulations that establish minimum specifications and other mandatory guidelines for banners.¹¹⁹

C. The Contents

Even if employers were to supply the vessels, workers would retain control over the contents. In-person pickets often include a mix of patrolling, chanting, and handbilling. Cyberpicketers could leverage analogous features to craft their message. For example, a banner could inform potential customers of a labor dispute through text, graphics, or both, standing in for the signs held by in-person picketers. A banner could also contain a link to an external website, managed by the

banners for businesses reveals modest pricing schemes. For only \$40 per month, one company will generate custom geotargeted consent banners, assertedly compliant with EU law, that can meet the needs of "large business[es] with high traffic." *Pricing & Plans*, COOKIEYES, https://www.cookieyes.com/pricing/#pricing-comparison [https://perma.cc/88LT-Q485].

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¹¹⁷ Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 n.8 (1945) (quoting LeTourneau Co. of Ga., 54 N.L.R.B. 1253, 1259 (1944)).

¹¹⁸ See Cent. Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).

¹¹⁹ See 29 U.S.C. § 156 (giving the Board rulemaking authority). The Board doesn't often promulgate regulations, but it's not an unprecedented practice. See Charlotte Garden, Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication, 64 EMORY L.J. (SPECIAL ISSUE) 1469, 1471 (2015); see also Press Release, Nat'l Lab. Rels. Bd., Off. of Pub. Affs., NLRB Issues Notice of Proposed Rulemaking on Fair Choice and Employee Voice (Nov. 3, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-notice-of-proposed-rulemaking-on-fair-choice-and-employee [https://perma.cc/5SUV-ACFC].

¹²⁰ In the "extremely unlikely event" that two distinct groups of (unionized) workers employed by the same company wanted to implement a cyberpicket and couldn't agree on a unified message, the ensuing banner may need to be partitioned and its space shared. Zoom Interview with Benjamin Sach, Cofounder, Clean Slate for Worker Power Project (Mar. 6, 2023).

picketing employees, that would offer more information about the protest to those interested.¹²¹ This URL would be equivalent to talking to passersby and distributing pamphlets to those willing to take them.

There's great potential for creativity with the more granular elements. These include wording, font, and level of detail.¹²² Images too: just as brick-and-mortars can't limit protesters to text-only leaflets, online businesses couldn't insist on text-only banners. In-person pickets are as visually striking as they are informative. The sight of bundled-up Cleveland Heights teachers braving snow to contest their district's contract offer injected pathos into their appeals.¹²³ Cyberpicketers might not face the same physical obstacles, but that doesn't mean they couldn't build sympathy through their visual depictions. There's power in putting a face to a labor dispute, particularly one where in-person protest is futile or impossible. Online businesses must allow for reasonable customization of the banner's contents to avoid the cyberpicket becoming an empty formality. Giving employers control over the banners' specifications doesn't smuggle in the authority to mute the picket's distinctive features or otherwise control its message.¹²⁴

D. The Placement

Although this Note has presented a business's landing page as the most appropriate place for a cyberpicket, some employees may seek a more impactful location. Imagine adding an item to your virtual Amazon cart, only to be met by a notification that the company is embroiled in a labor dispute. You might rethink that purchase decision. Or as you're about to "checkout," suppose you encounter an image of striking workers. The urge to click "place order" may quickly dissipate.

While enticing, these options likely won't pass muster under the NLRA. In-person picketers can't follow customers around while shopping or stand with them at the cash register. Employers can generally bar off-duty employees from engaging in Section 7 activity in *working*

¹²¹ Relatedly, the banner could give visitors the option to make a donation to the picketing workers. This approach might appeal to a wider audience, including those who may choose to cross the picket line but still want to support the employees in some way.

 $^{^{122}}$ Just as in-person picketers march with union-made signs, cyberpicketers can opt for a union-made banner, if they so wish.

¹²³ See Tony Bifulco, Cleveland Heights Teachers Strike in the Snow, Beating Austerity with Solidarity, LAB. NOTES (Dec. 11, 2020), https://labornotes.org/2020/12/cleveland-heights-teachers-strike-snow-beating-austerity-solidarity [https://perma.cc/7QGC-TFQF].

¹²⁴ Text and images are one thing; video is quite another. Consider a fifteen-second clip of employees staging an in-person picket at an online business's warehouse. Embedding it into the cyberpicket banner and programming it to auto-play wouldn't be an issue in itself. In-person pickets aren't just striking for their still frames; the chanting and patrolling influence patrons too. But to force customers to watch the entire video before accessing the site would be problematic. In-person picketers can't physically block customers from entering the store. *See*, e.g., Dist. 65, Retail, Wholesale & Dep't Store Union, 141 N.L.R.B. 991, 1001 (1963). Similarly, cyberpicketers would need to ensure that e-shoppers have the option to proceed quickly through the dialog box.

areas,¹²⁵ like grocery aisles and checkouts. The digital marketplace is no different. That's why the landing page, as the store's "entrance," readily lends itself to hosting the cyberpicket banner.

E. The Execution

The right to cyberpicket isn't self-executing; it requires recognition by the Board. Workers should start by creating a design and then contacting their employers to request implementation, providing clear steps for doing so. Predictably, the company will deny the request, as most are loathe to fulfill even clearly established legal obligations. Once that happens, the workers should file a charge with the NLRB, alleging that the employer has violated their Section 7 rights by refusing to permit protected activity on company property and petitioning for injunctive relief under Section 10(j). If the Board faithfully applies its precedents, it should order implementation of the cyberpicket.

IV. THE SUPREME COURT CONUNDRUM

Even if the NLRB swings in the workers' favor on statutory grounds, the game isn't over. The Supreme Court could step into the batter's box next, ready to make contact with two constitutional curveballs: the First Amendment's "compelled speech" doctrine and the Fifth Amendment's Takings Clause. Workers face disquieting odds, but balking guarantees that picketing won't ever make its way online.

A. Compelled Speech Doctrine

By far the most menacing obstacle, the compelled speech doctrine threatens the right to cyberpicket on multiple fronts. The First Amendment prohibits laws that abridge the "freedom of speech," a term that "necessarily compris[es] the decision of both what to say and what *not* to say." Simple in theory, but complex in fact. It's difficult to make sense of the doctrinal morass in the Court's compelled speech case law, whose broad principles and internal tensions defy easy categorization. 129

Here's the upshot: the right to cyberpicket lies at the intersection of several threads of compelled speech. Framed most favorably to employers, it seemingly requires online businesses to host and subsidize third-

¹²⁵ See Beth Israel Hosp. v. NLRB, 437 U.S. 483, 493 (1978) (working area); cf. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945) (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943)) (working time).

¹²⁶ See, e.g., Alana Semuels, Some Companies Will Do Just About Anything to Stop Workers from Unionizing, TIME (Oct. 13, 2022, 10:12 AM), https://time.com/6221176/worker-strikes-employers-unions [https://perma.cc/99ZM-E8SU].

¹²⁷ See 29 U.S.C. § 160(j).

¹²⁸ Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988).

¹²⁹ See Eugene Volokh, The Law of Compelled Speech, 97 TEX. L. REV. 355, 356-57 (2018).

party speech on private forums. So understood, this statutory right resembles content-based speech regulation and thus awaits an inevitable showdown with the oft-fatal test of strict scrutiny.¹³⁰ But that's not the end of the road. Workers must contest the employer-friendly characterization of the speech interests at stake and, as a backup, make a case for satisfying strict scrutiny.

Compelling an online business to compromise its own messaging in favor of someone else's is a surefire way to raise the Supreme Court's suspicions. The Justices are especially wary of government laws that "alte[r] the content of [one's] speech."¹³¹ Websites certainly *look* like speech products. Much like parade organizers¹³² and newspaper editors, online businesses exercise control and judgment in curating their landing pages. Forcing them to include worker-made messages could be seen as intruding on their editorial prerogatives.

But in-person picketers don't trammel on a brick-and-mortar's free speech rights by visually disrupting company messaging on the building's exterior with their marching and signs. Neither do cyberpicketers inflict constitutional damage through their virtual protest at the threshold of an online marketplace. Unless the Court is willing to recognize a speech interest in a physical store's outer design, which could be partially obscured by shoulder-to-shoulder employees, it shouldn't extend comparable protections to the gateway for entering Amazon's marketplace. Cyberpicketers don't seek integration or commingling with a website's substantive content; they request a digital overlay, leaving what lies beneath untouched.¹³⁴

Without a speech interest in the threshold to their landing pages, online businesses will lay down a different First Amendment trump card: compelled subsidy. A brick-and-mortar doesn't pay for in-person pickets; nor does it incur ongoing costs (apart from lost business) by virtue of the workers' presence. Websites, though, have server fees. And creating a cyberpicket occupies IT resources. The Court hasn't taken kindly to coerced payments for labor-related causes. As long

¹³⁰ Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015) (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)).

¹³¹ Nat'l Inst. Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (first alteration in original) (quoting *Riley*, 487 U.S. at 795).

¹³² See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568–70 (1995).

¹³³ See Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

Online businesses may try to frame cyberpicket banners as occupying otherwise fillable space on customer screens — specifically on the "second layer," where dialog boxes sit — arguably amounting to a speech restriction. But a brick-and-mortar can't expel protesting workers from the property simply because it wishes to keep open the possibility of erecting a statue where they stand. And, again, a banner wouldn't interfere with any underlying content, over which the business would retain full control.

¹³⁵ See Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018) (prohibiting mandatory agency fees).

as workers pay the attendant costs, however, there's little to protest. 136 True, the business must dispatch staff to coordinate with the picketing employees and implement their request (unless the job is outsourced). But labor law is no stranger to these small asks. Consider employers' responsibilities with regard to representation elections. They must print out election notices, take time and resources to post them, and supply eligible-voters lists. 137 Neither the Board nor the union is expected to reimburse employers for these minimal costs.

Rounding out the employer's First Amendment laundry list is the charge of compelled hosting, as the cyberpicket requires some accommodation of worker speech. This doctrinal thread remains elusive, 138 though it's clear that the statutory right to cyberpicket doesn't stir up the same anxieties as other laws found impermissible by the Court. There's little risk, for example, that visitors to a website will mistake a cyberpicket — whose character is one of conflict, not synergy — for the owner's speech. Businesses could make that even clearer with a coterminous disclaimer. It's also difficult to imagine how the Court could cabin an employer-friendly decision to the cyberpicketing context. Unless willing to put all access rights on the chopping block, the Justices should approach the compelled-hosting argument with caution.

Even if strong-armed into strict scrutiny — which demands that content-based regulations be narrowly tailored to serve compelling government interests¹⁴⁰ — the statutory right to cyberpicket could survive. The federal government arguably has a compelling interest in ensuring that employees of online businesses can exercise effectively their Section 7 rights. And assuming employers have substantial control over the positioning and dimensions of banners, there's an argument for narrow tailoring too. Admittedly, this last-ditch effort faces tough odds, as few laws emerge victorious from the gauntlet of strict scrutiny.¹⁴¹ But the constellation of statutory and constitutional arguments available to workers provides enough of a foundation to press ahead.

¹³⁶ For a discussion of expected costs, see *supra* note 116.

¹³⁷ See 29 C.F.R. §§ 102.63(a)(2), 102.67(l).

¹³⁸ See Volokh, supra note 129, at 371-75.

¹³⁹ Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 576–77 (1995) (citing Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 87 (1980)) (worrying about message confusion with uninvited participants in parade).

¹⁴⁰ Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)).

¹⁴¹ See Note, Two Models of the Right to Not Speak, 133 HARV. L. REV. 2359, 2367 (2020). But cf. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178-82 (10th Cir. 2021) (finding that a law compelling speech survives strict scrutiny), cert. granted in part, 142 S. Ct. 1106 (2022).

B. The Takings Clause

Another potential issue — this one involving the Fifth Amendment's Takings Clause¹⁴² — threatens not just cyberpicketing, but picketing rights generally. In *Cedar Point Nursery v. Hassid*,¹⁴³ the Court ruled that a California regulation granting nonemployee union organizers limited access rights to farm property interferes with the employers' right to exclude and therefore constitutes a per se physical taking requiring just compensation.¹⁴⁴ Of course, the picketing rights discussed in this Note accrue to employees, not union organizers. Under a narrow reading of *Cedar Point*, employees merit an entirely different analysis, reflecting their (limited) license to be on the employer's property.¹⁴⁵ Yet the Court's opinion didn't dwell on the defendants' nonemployee status. Read expansively, it arguably requires just compensation to employers whose property is co-opted for picketing — or presumably any Section 7 purposes. That conclusion would mark a significant departure from the American labor law tradition, counseling restraint.¹⁴⁶

CONCLUSION

Workers' broad picketing rights under the NLRA don't disappear when a business moves online. Amazon can't hide behind the World Wide Web for insulation from its legal obligations. E-commerce sites might have revolutionized retail, but they aren't so different from brick-and-mortars as to evade the strictures of current law. These online marketplaces have entrances, aisles of products sorted by category, shopping carts, and even customer-service assistants. They operate like traditional retail outlets but don't have to contend with worker pickets — a protected activity under the NLRA. Cyberpicketing promises to restore to employees of online businesses a long-held tool of economic persuasion, resetting the careful balance of power between labor and capital. It's high time for these workers to reclaim what's rightfully theirs.

 $^{^{142}}$ U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

^{143 141} S. Ct. 2063 (2021).

¹⁴⁴ *Id.* at 2072, 2074.

¹⁴⁵ See Benjamin I. Sachs, Safety, Health, and Union Access in Cedar Point Nursery, 2021 SUP. CT. REV. 99, 101–02, 102 n.24 (2022).

¹⁴⁶ Look no further than the World War II–era case *Republic Aviation*, discussed *supra* notes 72–76 and accompanying text. Admittedly, however, the current Court sees no difficulty overturning longstanding precedent. *See*, *e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).





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Chapter 49.46 RCW

MINIMUM WAGE REQUIREMENTS AND LABOR STANDARDS

(Formerly: Minimum wage act)

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Office of Labor Standards

Home

TNC Driver Resolution Center (DRC) Funding

The <u>Transportation Network Company (TNC) Driver Deactivation Rights Ordinance (DRO)</u> protects TNC drivers, such as Uber and Lyft drivers, from unwarranted deactivation, an action that blocks drivers' access to the online platform that allows the driver to provide rides to customers. The law provides a venue for drivers to challenge those deactivations before a neutral arbitrator and creates supports for drivers to assert their rights.

Through a competitive Request for Proposal ("RFP"), announced in March under the Office of Labor Standards, <u>Drivers Union</u> was selected to deliver the first-in-the-nation Driver Resolution Center (DRC) services at no cost to TNC drivers and consistent with the requirements of <u>SMC 14.32</u>. Specifically, the organization will provide:

- Consultation and support services to drivers facing deactivation;
- Direct legal representation to drivers in deactivation arbitration proceedings;
- Outreach, education, and support to drivers about their rights; and
- Culturally and language-specific services to drivers in the primary languages that drivers speak.

Drivers Union will work with <u>Teamsters Local 117</u> as a contracted partner.

For information, please contact us at labor.standards@seattle.gov or call us at (206) 256-5297. If you prefer to communicate in a language other than English please tell us: your name, preferred language, and contact

number. Our office will then call you back with an interpreter from Language Line on the line.

2021 - 2022 Recipient

*18-month contract period from July 1, 2021 to December 31, 2022. The amount of project funding is contingent upon the certification of the availability of sufficient revenue by the City Budget Office and upon sufficient appropriation by City Council in 2021 and the 2022 adopted budgets. The length of contract, and funding amount may be subject to change.

	Amount Funded	Partner Information	Community of Focus
Drivers Union	\$5,025,000*	Teamsters Local 117	Eligible TNC drivers

Annual Reports

- o Drivers Union DRC 2021 Narrative Report
- o Drivers Union DRC 2021 Demographic Report

Community Resources:

More Information about legal protections

For more information about the TNC Driver Deactivation Rights Ordinance and the Deactivation Appeals Panel process, please visit our page by clicking here.

Help for Drivers

If you are a TNC driver and are looking for information about your rights or if you have been deactivated and are looking for help about your options/next steps, the Driver Resolution Center may be able to assist. The City of Seattle has contracted with Driver's Union to provide support and services to drivers, including free consultation and representation in deactivation disputes and outreach and education about Seattle labor standards.

Driver Resolution Center c/o Driver's Union

Email: <u>support@driversunionwa.org</u>

Phone: (206) 812-0829

Website: https://www.driversunionwa.org/deactivation

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Labor Standards

Steven Marchese, Director

Address: 810 3rd Avenue, Suite 375, Seattle, WA, 98104-1627

Phone: (206) 256-5297

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