



The Labor Antitrust Exemption and Independent Contractors

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This May, Massachusetts certified the first ride-hail drivers' union in the country.¹ The certification follows a 2024 ballot measure that democratically carved out an antitrust exemption for independent-contractor (IC) drivers in Massachusetts, representing a major win for gig workers in the state.² The Massachusetts certification, however, comes only after a string of failed attempts to allow IC unionization in the city of Seattle and the states of California and New York.³

As the number of IC gig workers continues to increase across the country,⁴ some scholars have argued that there is an urgent need to clarify the antitrust legality of IC unionization at the federal level. Direct changes to labor antitrust law or its interpretation, however, may not be the best means to address worker welfare problems associated with the rise of independent contracting. Other policy approaches, such as portable benefits and the enforcement of existing worker-misclassification laws, are beyond the scope of this brief but may be better suited to addressing worker welfare concerns.

Legal Background

For the past 100 years, specific union and nonunion employee activities have been protected under the statutory “labor antitrust exemption” derived from the Clayton Antitrust Act, the Norris-LaGuardia Act, and the National Labor Relations Act. The exemption has the following effects:

- **Shields labor union collective-bargaining activity** from federal antitrust law
- **Protects union and nonunion employees** from federal court injunctions directed at stopping peaceful self-help activities such as strikes, boycotts, and picketing during labor disputes
- **Shields union and nonunion employees** when they act independently as a bona fide organization to push for better wages, hours, or working conditions.

Up to now, these worker protections have extended only to employees, not to ICs. Employees work under the direct supervision and behavioral control of an employer, whereas ICs manage their own methods, tools, and schedules. Yet ICs may face some of the same problems as employees when it comes to their market power, working conditions, and so forth. Therefore, coinciding with the recent growth of IC activity in the economy, two approaches to extending the antitrust exemption to ICs have materialized: (1) legislative change and (2) changes in statutory interpretation.

These two approaches confront different types of challenges. Legislative change faces political roadblocks and exposure to special interests. Changes in statutory interpretation risk muddling distinctions between types of workers and undermining the rule of law.

The Limits of Legislative Change

Proposals for legislative change either shift the definition of ICs or attempt to carve out new exemptions for ICs under the antitrust laws. For instance, American legal scholar Eric Posner has argued in favor of redefining worker classification based on market-power distinctions by characterizing all workers facing employer monopsony power as employees,⁵ and therefore extending to them the labor exemption.⁶ Such a solution would also address the concern that the misclassification of employees as ICs harms workers and social insurance systems.⁷

Alternatively, antitrust scholars Steven Salop and Douglas Melamed propose new legislation creating joint negotiating enterprises that would allow independent contractors to form their own unions under a new statutory exemption.⁸ The new specialized exemption is attractive since it would apply only in cases of high monopsony power, and it would include safeguards against monopoly behavior of the IC unions themselves.⁹

Legislative solutions, however, face significant hurdles. The Trump Department of Labor's 2026 proposed rule reversion to pre-2021 regulatory distinctions between employees and ICs is at odds with Posner's suggested redefinition of worker classification.¹⁰ By returning to a simplified "core factors" test for worker classification, largely centered around economic dependence, the reversion suggests that a switch to market-power-defined employment classification is politically unlikely in the near term.¹¹

Furthermore, new legislatively created antitrust exemptions could be subject to special interest capture, as seen with several previous antitrust exemption extensions.¹² Moreover, uncertainty about specific legislative goals (reflecting a current lack of scholarly consensus), combined with interest-group lobbying,¹³ would be unlikely to yield clear, unambiguous statutory language. The result could be inconsistent judicial readings of new legislative provisions, yielding a new round of costly uncertainty for firms and workers—the antithesis of desirable legislative clarification.

The Limits of Interpretive Change

As an alternative to problematic legislative change, the second approach to extending the labor antitrust exemption is a shift in statutory interpretation.

In 2022, in *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños*, the US Court of Appeals for the First Circuit ruled that IC horse jockeys could be included in the labor antitrust exemption. This decision was the first time a federal court allowed IC unionization in all instances of “labor disputes,” regardless of worker classification.¹⁴ Although the Supreme Court denied a petition for review,¹⁵ the case sparked new conversation surrounding the meaning of the antitrust statutes and of previous labor antitrust cases such as *Columbia River Packers*.¹⁶

Specifically, among proponents of interpretive change, *Jinetes* left behind an unresolved question of *which* characteristics of a disagreement should delineate “labor dispute” status—and by extension, unionization rights—if the IC antitrust distinction is to be abandoned. The court failed to provide a legal test differentiating “wages for labor” from “prices for goods” or services.¹⁷ In 2025, the outgoing Biden-era Federal Trade Commission (FTC) issued a policy statement supporting the First Circuit’s reasoning to extend the exemption for ICs and platform or gig workers, but its definition of “labor disputes” adopted the same vague terms as the First Circuit.¹⁸ Both Republican FTC commissioners issued dissenting statements about the policy as representing the views of the outgoing Biden FTC, and the new Trump FTC has yet to put out its stance on the issue.¹⁹

The interpretation debate attempts to create a new dividing line between labor and nonlabor disputes that better captures all workers who face market power imbalances. The problem is that a perfect line does not exist. Some have suggested that “labor dispute” status should be delineated based on market power.²⁰ Others have said the distinction should be between fungible and non-fungible business capital.²¹

Even the current employee-centered labor antitrust exemption exists as an arbitrary compromise. Many independent entrepreneurial businesses face significant market power imbalances greater than those faced by employees. Furthermore, certain knowledge workers classified as employees may hold significant market power even without unionization, as demonstrated by the recent reverse acquihire trend.²²

Among ICs themselves, interpretive change likely will not resolve market power issues because market power imbalances hinge greatly on worker-specific circumstances. ICs vary widely in their financial reliance on IC arrangements, whether the workers are gig drivers or new AI data trainers.²³ In fact, for AI data-training contractors, who may come from a variety of professions, their reliance on the IC arrangement—and, by extension, their vulnerability to buyer market power—may primarily depend on outside worker-specific unemployment pressures in their primary professions, rather than on a feature of the contracting arrangement itself.²⁴

The result is that the market power imbalances often faced by ICs do not depend on the labor arrangement itself, but rather on outside factors such as employment rates in the broader economy. An AI contracting arrangement for freelance artists may involve significantly greater market power imbalance than the same arrangement for lawyers, and this market power imbalance cannot be resolved simply through changing the interpretation of which worker characteristics delineate “labor dispute” status.

When we understand the labor antitrust exemption as an inherent compromise that cannot fully encompass market power imbalances, interpretive theories that squeeze in more workers under the umbrella of “labor disputes” verge on a Nirvana fallacy—the informal fallacy of comparing actual things with unrealistic, idealized alternatives.²⁵

The original intention of the Norris–LaGuardia Act was to provide a predictable rule to cleanly exempt employees from antitrust injunctions against collective bargaining, with the aim of forestalling “judicial attempts to narrow labor’s statutory protection.”²⁶ Interpretive theories that extend labor disputes to vague wage/price or fungible/nonfungible capital standards are attempts to extend the market-power focus of the statutes, even though a rule-based capture of all power imbalances solely through worker characteristics is impossible. What such interpretations do instead, by introducing vague standards for labor disputes, is undermine the labor antitrust exemption’s original goal of providing a predictable exemption that is durable under the rule of law.

The current employee-contractor distinction is not a perfect proxy for market power, but it provides a level of predictability against judicial interpretation that protects workers by preventing protracted litigation battles, allowing efficient and equal enforcement, and making clear which types of employment allow unionization while providing transparency to misclassification debates.²⁷

IC Worker Welfare Beyond Antitrust

Whether pursued through legislative change or interpretative change, attempts to extend the antitrust labor exemption encounter limitations. The Massachusetts initiative is likely not the last effort to extend collective bargaining rights to independent contractors. As policymakers consider similar proposals, they should recognize the limitations of using antitrust law to address problems that arise from changing labor-market arrangements. Antitrust fundamentally deals with competition, and the labor antitrust exemption was an imperfect compromise to allow a certain class of economic actors a necessary leg up in competition, affirmed by a predictable rule.

As working arrangements change, and as flexibility is valued more in the labor market, modern solutions to worker welfare problems, such as the introduction of portable benefits and more stringent misclassification enforcement, provide more direct means of addressing worker welfare

concerns than changes to antitrust law.²⁸ Addressing those concerns through policies designed for that purpose is preferable to stretching the antitrust laws beyond their intended function.

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Notes

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