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Dear Reader

In August, the National Labor Relations Board proposed to replace its current blocking charge policy, return to a 45-day notice and open period following voluntary recognition, and require extrinsic evidence of majority employee support to convert a Section 8(f) construction industry bargaining relationship to a Section 9(a) relationship. In its 113-page notice of proposed rulemaking, the Board majority (Member McFerran dissented) justified its regulatory approach, stating that “By establishing the new election bar standards in the Board’s Rules & Regulations, employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment’s notice (and possibly retroactively) through the adjudication process.”

The Board stated that the current blocking charge policy, the immediate imposition of a voluntary recognition election bar, and the establishment of a Section 9(a) relationship in the construction industry based solely on contract recognition language constitute an “overbroad and inappropriate limitation on the ability of employees to exercise their fundamental statutory right to the timely resolution of questions concerning representation through the preferred means of a Board-conducted secret ballot election.”

Labor and employment law practitioners note that the proposed amendments reflect previous Board decisional law and, in fact, a return to longstanding precedent on both the blocking charge amendment and the construction industry required proof of Section 9(a) relationships. To that end and subject, of course, to the impact of public comments, there is a good chance that the rules could be finalized without substantial change.

In our fall issue, we begin with an article discussing whether World Wrestling Entertainment wrestlers are truly independent contractors. The article comes on the heels of a popular March 31, 2019 episode of HBO’s Last Week Tonight with John Oliver, in which a segment addressed whether the wrestlers should actually be classified as employees.

Next, we turn to an article presenting a general synthesis of the “gig” labor panorama in Europe. The main labor conflicts that have arisen in France, Germany, UK, Spain and Poland are analyzed. Moving on, we feature an article that discusses the violation of labor rights in the context of the Bajaj Auto Strike in Pune, India. It argues that the workforce has been devalued post globalization, and as a result, employers have begun to violate workers’ basic rights.

Our next article examines sex and racial discrimination with respect to salaries paid to professors employed in business and law schools in British Columbia research universities. This article finds about a 6 percent to 8 percent male-female wage gap, but no evidence of wage disparity for professors who are members of a visible minority.

Finally, we close with an article about eDiscovery and the complex issues at play in In re: Broiler Chicken Antitrust Litigation case. The article covers transparency, “discovery-on-discovery” type disclosures, party-opponent validation in eDiscovery, and how to effectively use eDiscovery, rather than weaponizing it.

We hope you enjoy this issue of the Labor Law Journal.

David Stephanides
Managing Editor
WHO’S WHO IN LABOR

Since our summer issue, President Trump announced his intent to nominate Eugene Scalia, the son of deceased Supreme Court Justice Antonin Scalia, for Secretary of Labor. Scalia is currently a partner at the Washington, D.C. office of Gibson, Dunn & Crutcher. He co-chairs the firm’s Administrative Law and Regulatory Practice Group and is also a member of its Labor and Employment and Appellate and Constitutional Law Practice Groups. He co-chaired the Labor and Employment Practice Group for 12 years. He has a national practice handling a broad range of labor, employment, appellate, and regulatory matters. Scalia earlier served as Solicitor of the U.S. Department of Labor and in the U.S. Department of Justice as a Special Assistant to the Attorney General.

On August 1, the Senate confirmed the nominations of Sharon Gustafson to be General Counsel and Charlotte Burrows to be a Member of the EEOC. Gustafson replaces P. David Lopez, who resigned at the end of 2016. For 26 years she has practiced before the EEOC and federal courts in a variety of employment-related disputes, the White House noted when she was first nominated. Gustafson practiced at Jones Day for four years in the labor and employment group in Washington, D.C., before she went into solo practice in 1996.

In July, President Trump announced his selection of Burrows, a current Commissioner, whose term expired July 1, 2019, for a term expiring July 1, 2023. She has served on the Commission since December 2014. She was previously Associate Deputy Attorney General at the U.S. Department of Justice, where she worked on a broad range of civil and criminal matters. Before that, Burrows served as general counsel for Civil and Constitutional Rights to Senator Edward M. Kennedy on the Senate Committee on Health, Education, Labor and Pensions.

On July 10, the National Labor Relations Board announced both that the current Associate General Counsel for the Division of Advice, Jayme L. Sophir, will retire at the end of July, and that she will be replaced by Richard A. Bock. Bock joined the NLRB in 1996 as a field attorney in Region 29, Brooklyn. He became a supervisor in 2008 before being promoted to Deputy Assistant General Counsel in the Division of Operations-Management in 2012. Bock subsequently served as Assistant General Counsel in Operations-Management, Deputy Associate General Counsel in the Division of Legal Counsel, and as Deputy Associate General Counsel in Operations-Management.

Also at the NLRB, Alice B. Stock was named Deputy General Counsel, and Terence G. Schoone-Jongen was named the new Director of the Office or Representation Appeals. Before Ms. Stock appointment, she served as Associate General Counsel in the Office of the General Counsel. Most recently, Ms. Stock served as a Partner with Pryor Cashman LLP in New York City, a role she held from 2010 to 2018. Mr. Schoone-Jongen joined the Agency as an Honors Attorney in 2010, during which time he worked for the staffs of former Members Craig Becker, Mark Gaston Pearce, Terence F. Flynn, and Sharon Block. He joined the staff of the Office of Representation Appeals as Counsel in 2012 and was named Assistant Chief Counsel of that Office in 2015.

Finally, at the OFCCP, the agency has announced its first Ombudsman, Marcus Stergio. His LinkedIn profile says that Stergio is a mediator and Manager of Commercial & Corporate Programs at MWI, a nationally recognized dispute resolution firm based in Boston. According to the agency, the Ombudsman will work with a variety of OFCCP stakeholders nationwide, including federal contractors and subcontractors, contractor representatives, industry groups, law firms, complainants, worker rights organizations, and current and potential employees of federal contractors and subcontractors.
Wrestling With Employment Classifications: Are WWE Wrestlers Independent Contractors?

By Michael Conklin and Julia Goebel

On March 31, 2019, HBO’s Last Week Tonight with John Oliver aired a twenty-three-minute segment that addressed how the wrestlers working for World Wrestling Entertainment (WWE) are independent contractors but should be classified as employees. The video was also uploaded to YouTube and has been viewed over seven million times. It sparked a conversation on the issue that resulted in a response from the WWE claiming that John Oliver “simply ignored the facts.”

This article provides a background of the work WWE wrestlers perform, introduces relevant case law and legal standards for determining worker classification, and concludes by making a determination as to whether WWE wrestlers are independent contractors or employees.

There are well over 100 professional wrestlers under contract for the WWE, which is by far the most successful wrestling promotion. Professional wrestlers working for WWE have been classified as independent contractors since the company was founded in 1979. Annual base salaries of the top ten wrestlers range from $2 to $10 million. Additionally, wrestlers may also receive a share of merchandising, ticket sales, and pay-per-view purchases. While professional wrestling is certainly not a career known for its longevity, it fares pretty well when compared to other athletic careers. The average age for the top ten earning wrestlers is 39.5 years, which is significantly higher than the average NFL player age of 26. Naturally, most professional wrestlers never make it to top ten status. Some only make $100,000 a year, and wrestlers in WWE’s developmental league, NXT, make even less. As a percent of team revenue, WWE wrestlers are paid significantly less than most athletes. In 2017 the highest-paid NFL, NBA, NHL, and MLB athletes were paid 7.92%, 9.66%, 7.56%, and 6.48% of their team’s revenue, respectively. The highest paid WWE wrestler, Brock Lesnar, was paid only 1.65% of WWE revenue.

The WWE has final say on the often elaborate ring attire, props, and makeup worn by the wrestlers. However, the wrestlers frequently have to pay for these expenses on their own. Wrestlers are encouraged to collaborate with the WWE’s creative writers on storylines and character gimmicks. However, the final decision is always in the hands of the WWE. The WWE has forced wrestlers to go along with gimmicks against the wrestler’s objection such as becoming romantically involved with a mop.
The duration and end result of wrestling matches is pre-determined by the WWE’s team of creative writers, who sometimes also dictate certain occurrences that must happen leading up to that end result. But generally, the wrestlers are given a lot of freedom to choreograph the moves in their matches. Sometimes these choreography decisions are even made by the wrestlers in the middle of a match using a series of improvisationally communicated instructions, including subtle, verbal “calls” and physically telegraphed movements. Likewise, wrestlers are instructed on what the overall tone and specific points of their promotional videos need to be. But they are generally allowed to come up with their own dialogue as long as it is approved by the WWE first. Despite these freedoms, there are other times when it appears wrestlers are being highly micromanaged. During live broadcasts, viewers can sometimes hear someone off camera instructing wrestlers on seemingly mundane aspects like, “Hold up the belt,” and “Big smile.”

The freedom that wrestlers have inside the ring and during their promotional videos is always limited by the extensive set of WWE’s rules. Examples of these rules include no groin strikes without written approval, a detailed dress code even when they are just traveling, and no sneezing while on camera. Additionally, the WWE implemented a speech code that banned the words “belts” or “straps” to refer to the championship. The code also barred the words “acrobatics, DQ, feud, war, the business, interesting, me, [and] I.” In 2006 the WWE responded to public pressure and created a “wellness policy.” The policy implements random drug and steroid testing. However, many critics argue that the wellness policy is so lenient that it is essentially just a marketing gimmick.

Wrestlers for the WWE come from a variety of training backgrounds. In modern times, the majority come from the WWE feeder system, NXT, where they receive extensive training from WWE-appointed coaches. However, there are a few wrestlers who have been so successful building up their reputation in non-WWE promotions that when they are hired by the WWE they bypass the NXT training.

The WWE contracts that wrestlers sign are exclusive. Wrestlers cannot perform elsewhere without permission from the WWE (which is extremely rare). The contracts allow the WWE to negotiate on behalf of the wrestler for merchandising, endorsements, and personal appearances. The WWE maintains the rights to a wrestler’s ring name, likeness, personality, character, caricatures, costumes, and gestures during the booking contract. Wrestlers agree to indemnify the WWE from liability of bodily injury even if the injury is the result of negligence on the part of the WWE or other wrestlers. The WWE is allowed to terminate a wrestler’s contract if he or she cannot perform for longer than six weeks, even if the cause of the leave of absence is an in-ring injury. The WWE pays for all treatment and rehab costs associated with in-ring injuries. The contract explicitly states that “Nothing contained in this agreement shall be construed to constitute wrestler as an employee . . . Wrestler is an independent contractor . . . .”

The WWE’s travel schedule is more demanding than that of the NHL, NBA, NFL, and MLB, which all have an off-season and frequent home games. This extreme travel schedule is often cited as a contributor to the alarming death rate of WWE wrestlers. Wrestlers are twenty times more likely to die before the age of forty-five than professional football players. WWE CEO Vince McMahon has attempted to defend himself against the death rate of his wrestlers by pointing out that he has a vested interest in keeping wrestlers alive because “[i]f people die, they can’t perform for you.” Many wrestlers expressed their opinion that the abnormally high death rate is the result of the demanding work schedule, combined with constant pressure to “wrestle through” injuries, which drives wrestlers to abuse steroids and painkillers. While touring, the WWE pays for air transportation, but the wrestlers are responsible for their own ground transportation, food, and lodging.

The distinction between independent contractor and employee is an important one. Under the doctrine of respondeat superior, an employer is generally liable for torts conducted by an employee if the act was within the scope of employment. Workers legitimately categorized as independent contractors generally do not impose such liability on employers. Additionally, the employee/independent contractor distinction is relevant to the issue of collective bargaining. Independent contractors are unable to form a union. Classifying wrestlers as independent contractors also means that the WWE does not have to pay unemployment insurance, Social Security, or Medicare. Finally, the Family Medical Leave Act of 1993 (FMLA), Title VII of the Civil Rights Act, the Occupational Safety and Health Act (OSHA), and the Age Discrimination in Employment Act of 1967 (ADEA) do not apply to independent contractors.

Legal Standard

Labor law defines “employee” in a completely circular fashion. Because of this, courts continually struggle with determining whether a worker is an employee eligible for various protections or is an ineligible independent contractor.
Common law agency focuses on the employer’s/principal’s potential vicarious liability to third parties arising from the acts of its “servants” through the doctrine of respondeat superior. The common law multi-factor test for determining whether a worker is an employee or independent contractor is reflected in section 220(2) of the Restatement (Second) of Agency. This explanation focuses on the extent of control the business exercises over the worker.

The Internal Revenue Service (IRS) also uses its own test to determine whether a worker is an employee or independent contractor; that test focuses on whether the business has a right to direct or control how the worker does the work. In determining control, the IRS looks to three categories: behavioral control, financial control, and the type of relationship of the parties. Behavioral control involves what instructions the business gives to the worker, including when and where to do the work, what tools or equipment to use, what workers to hire or assist with the work, where to purchase supplies and services, what work must be performed by a specified individual, and the order the work should be performed.

Financial control involves looking at the type of training that the business gives to the worker. The guidance also looks to the type of financial control that the business exhibits over the worker, including the extent to which the worker has unreimbursed business expenses, the extent of the worker’s investment, the extent to which the worker makes his services available to the market, how the business pays the worker, and the extent to which the worker can realize a profit or loss.

Lastly, the facts that show the type of relationship between the business and the worker include whether there is a written control describing the relationship the parties intended to create, whether or not the business provides the worker with any type of benefits, the permanency of the relationship—meaning whether the relationship is indefinite or for a set period of time—and the extent to which services performed by the worker are a key aspect of the regular business of the company.

Various states have enacted more specific statutes to define who is eligible for various programs, such as workers’ compensation or unemployment insurance. For example, Colorado defines “employee” broadly for the purposes of unemployment insurance and uses a two-factor test. A worker is presumed to be an employee unless and until the company can show (1) that the worker is free from control and direction in the performance of the service and (2) that the worker is customarily engaged in an independent trade, occupation, profession, or business related to the services performed.

In interpreting this statute, the Colorado Supreme Court has held that whether an individual is an independent contractor must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the business. The court further determined there is no dispositive single factor or series of factors. Instead, determining whether a worker is an employee or independent contractor involves exhaustive fact gathering to understand the working relationship between the worker and business.

Applicable Case Law

There is no substantive case law regarding the proper classification of WWE wrestlers. While three former WWE wrestlers accused the WWE of employee misclassification in 2008, their case was dismissed on procedural grounds. However, there are workers in comparable situations to professional wrestlers whose classification can be looked at as a guide.

Perhaps the most analogous profession to WWE wrestlers is mixed martial artists. Much like how the WWE is the premier professional wrestling organization, “the Ultimate Fighting Championship (UFC) is the world’s premier professional mixed martial arts (MMA) organization.” Both the UFC and UFC control almost ninety percent of the revenue from their respective industries. MMA is a combat sport involving both stand-up and ground fighting, in which competitors utilize various techniques from disciplines such as wrestling, boxing, Muay-Thai kickboxing, Brazilian jiu-jitsu, judo, karate, and taekwondo. Additionally, just like WWE wrestlers, UFC fighters have historically been classified as independent contractors. Due to the low per-fight-pay and the few number of fights available to athletes, calls for a fighters’ union has recently intensified within the UFC community. Many argue that UFC fighters are misclassified as independent contractors. However, just like WWE wrestlers, UFC fighters will remain classified as independent contractors until a court determines otherwise.

The profession of an exotic dancer is also similar to that of a WWE wrestler. They both have a great deal of creative freedom as long as they ultimately work within their employer’s rules, they pay for their own attire, and they perform at a premises that was arranged by the employer. There have been numerous lawsuits where exotic
dancers have sued their dance clubs for failure to comply with the Fair Labor Standards Act and corresponding state wage and hour laws.57 In the vast majority of these cases, the dancers have won these misclassification rulings.58 A recent case determined that exotic dancers had been misclassified as independent contractors rather than club employees.59 The Fourth Circuit Court of Appeals applied the “economic realities” test.60 The court reasoned that the club exhibited a large degree of control over the dancers.61 Specifically, the “[d]ancers were required to sign in upon arriving at the club and to pay the ‘tip-in’ or entrance fee required of both dancers and patrons.”62

Additionally, “[t]he clubs dictated each dancer’s work schedule.”63 The clubs also “imposed written guidelines that all dancers had to obey during working hours” that were quite detailed and if not followed could lead to suspension or dismissal.64 The clubs also “set the fees the dancers were supposed to charge patrons for private dances and dictated how tips and fees were handled.”65 The clubs “personally instructed the dancers on their behavior and conduct at work.”66 The clubs also managed the “atmosphere and clientele by making all decisions regarding advertising, hours of operation, the types of food and beverages sold, as well as handling lighting and music for the dancers.”67

Another factor that led heavily in favor of classifying the dancers as employees was because the clubs controlled the investment and management of the clubs, not the dancers.68 Therefore, the dancers’ investment in the business was limited and the dancers’ “opportunities for profit or loss depended far more on the [clubs’] decision-making than the [dancers’].”69

Analysis

Given the details of the relationship between the WWE and its wrestlers described in this article, it would be difficult to argue for the independent contractor classification. Anyone trying to do so would likely emphasize how the wrestlers pay for some of their ring attire and props, they pay some of their traveling expenses, they have some creative freedom in their matches and promotional interviews, and their contracts explicitly stipulate that they are independent contractors. However, these factors do not produce a very strong case.

It is debatable just how much of the ring attire and props are paid for by the wrestlers, and the WWE always has the final say on what these can be. The WWE also pays some of the traveling expenses. While wrestlers have creative freedom in their matches and promotional interviews, it is only as much as the WWE’s rules allow. Finally, the fact that wrestler contracts stipulate an independent contractor status is far from dispositive by itself.

Determining worker classification is a totality of the circumstances test. The preceding factors that argue for independent contractor classification are weighed against the following factors that point to an employee classification. The majority of wrestlers now have risen up through the WWE feeder system, so it is the WWE who is largely in charge of their training. The WWE sets the hours and locations for work. There is an ongoing, continual relationship between the WWE and its wrestlers. Wrestlers are clearly integrated into the business of the WWE. As John Oliver comically pointed out, “Are wrestlers essential to World Wrestling Entertainment? . . . It’s not called World Totally Empty Ring Entertainment, so that might be a clue.”70 WWE contracts are exclusive; wrestlers cannot seek wrestling-related employment elsewhere and are generally kept too busy by the demanding WWE traveling schedule to seek unrelated employment. And finally, the WWE has total control as to terminating a wrestler’s contract for any reason.

While there is no case law on the employment classification of WWE wrestlers, case law from similar industries can be looked at for guidance. These holdings further support the notion that WWE wrestlers are employees, not independent contractors. The WWE might point to UFC fighters (who are currently classified as independent contractors) as justifying the same classification for its wrestlers. And while there are certainly many similarities between UFC fighters and WWE wrestlers, the totality of the evidence is that the WWE exercises more control over its wrestlers than the UFC does over its fighters. UFC fighters hire their own coaches, while the WWE is largely responsible for training its wrestlers. While the UFC gives financial bonuses to fighters who are more exciting in their matches,71 it does not instruct the fighters on what to do during their fights.

The WWE, however, controls the outcome, duration, and some of the moves of its wrestlers’ matches. Most UFC fighters only compete two to three times a year, while WWE wrestlers perform at multiple events per week. UFC fighters are generally paid per fight, while WWE wrestlers are paid a salary with year-end merchandising bonuses, which is more consistent with an employer/employee relationship. Finally, while UFC fighters are currently classified as independent contractors, this is not the result of a court adjudication. Rather, it is the result of a lack of any judicial involvement. It has been argued that UFC fighters are properly classified as employees.72

The WWE also exercises more control over its wrestlers than clubs exercise over their exotic dancers who have been adjudicated as employees. WWE employment contracts obligate the wrestlers to not perform for any competitor
for years. The traveling demands of wrestlers are notoriously demanding. Furthermore, with the added demands of a television schedule and complex storylines that must unfold in sequence, wrestlers have less flexibility in their schedules than exotic dancers.

Conclusion

John Oliver’s criticism of the WWE’s classification of wrestlers as independent contractors appears to be ultimately correct based on the applicable rules and analogous case law. However, he conveniently left out some aspects of WWE wrestling employment that challenge this notion. The fact that WWE wrestlers pay for some of their own travel expenses, have a great deal of freedom in choreographing their matches and interviews, and buy their own ring attire are all arguments in favor of independent contractor status. But in the end, the totality of the evidence is overwhelmingly in favor of wrestlers being more accurately classified as employees.

ENDNOTES

1 LastWeekTonight, WWE: Last Week Tonight with John Oliver (HBO), YouTube (Mar. 31, 2019), https://www.youtube.com/watch?v=m8UQ4O7UDs.
9 However, this is not a perfect comparison because the WWE does not have “teams” like the NFL, NBA, NHL, and MLB.
10 There is some debate as to exactly who pays for what. The WWE contract stipulates that wrestlers pay for their own “costumes, wardrobe, props and makeup.” Smith, supra note 7. However, others have pointed out that some of the props are elaborate and constantly destroyed; therefore, it is unlikely that the wrestler is paying out of pocket for these expensive, perpetual costs. For example, the wrestler Alias frequently comes to the ring with an acoustic guitar that inevitably ends up smashed by the end of the match. Ayuban Antonio Tomas, Triple Threat Match: Independent Contractors v. Employees v. Pro Wrestling - Part Fourteen, Avvo (Aug. 2, 2010), https://www.avvo.com/legal-guides/ugc/triple-threat-match--independant-contractors-v-employees-v-pro-wrestling---part-fourteen.
12 This was likely a punishment from WWE for a mistake the wrestler made. 10 Things You Didn’t Know About Perry Saturn, WhatCulture, https://whatculture.com/wwe/10-things-you-didnt-know-about-perry-saturn?page=11 (last visited May 11, 2019).
13 “A wrestler’s work is not completely controlled. While it is true the WWE books which wrestler wins, the wrestlers are given the freedom to perform the match as they see fit, with the exception of a few major spots for story line purposes.” Wrestlers United: The Case for a WWE Union, THELEGALBLITZ (Feb. 10, 2015), http://thelegalblitz.com/blog/2015/02/10/wrestlers-united-the-case-for-a-wwe-union/.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
32 Id.
33 Id.; Smith, supra note 7.
34 See, e.g., 42 U.S.C. § 2000e(b) (defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees” for purposes of Title VII); 42 U.S.C. § 12111(5)(A) (defining employer as same for purposes of the ADA); 29 U.S.C. § 2611(2)(A) (defining “eligible employee” for purposes of FMLA); 29 U.S.C. § 206(a) (requiring employers to “pay to each of his employees” minimum wages under the Fair Labor Standards Act); 29 U.S.C. § 157 (granting employees the right to self-organize under the National Labor Relations Act).
35 See Nat’l Labor Relations Bd. v. Hearst Publ’ns, Inc., 322 U.S. 111, 121 (1944) (“Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderline between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.”).
37 That subsection states: In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are Considered:
(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or Business;
WRESTLING WITH EMPLOYMENT CLASSIFICATIONS: ARE WWE WRESTLERS INDEPENDENT CONTRACTORS?

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the Employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

See generally id., at cmt. e. See also RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(1) (AM. LAW INST. 2006) (“An essential element of agency is the principal’s right to control the agent’s actions.”).


McFeeley v. Jackson St. Entm’t, LLC, 825 F.3d 235 (4th Cir. 2016).

Application of the test turns on six factors: (1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker’s opportunities for profit or loss dependent on his managerial skill; (3) the worker’s investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer’s business.

Schultz v. Capital Int’l Sec., Inc., 466 F.3d 290, 304–05 (4th Cir. 2006).

McFeeley, 825 F.3d at 241–42.

Id. at 242.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id. at 243.

Id.

LastWeekTonight, supra note 3, at 9:37.


Abstract: The impact of the EU Charter of Fundamental Rights on new economic models is not always direct and its perimeter is often prone to inequality, which disproportionately affects vulnerable agents such as workers. The European Commission and Parliament have repeatedly expressed their concern about these risks and, especially, the lack of specific regulation that could benefit an inequality of conditions between the actors involved in this business model. It is necessary to analyze the effectiveness of the responses that European countries give to these threats and the recommendations given by the authors and other international institutions to seek appropriate guidance. The norm that technology evolves faster than the legal systems does not render fundamental rights violations justifiable.

I. Introduction

The collaborative economy is considered to be the “non-commercial social interaction between one person and another”, a concept framed in the digital era and applied to the activity of “companies that implement accessibility based on business models for markets of ‘p2p ‘(from’ person to person ‘or from’ equal to equal’) and their communities”\(^5\). However, this revolutionary concept, coined at the end of the 2000s\(^3\) and known by different alternative names (such as “peer-to-peer”, “gig” or “sharing” economy\(^3\)), has generated disagreement in legal literature.

Aside from the difficulty in finding an accurate official definition, the concept generally includes “potential consumers and providers [that] are connected via a digital platform that matches demand and supply, providing cheap access to information on a very large scale”\(^5\). Therefore, for defining purposes it is more appropriate to use the concept used by European institutions as “business models where activities are facilitated by online platforms that create an open marketplace for the temporary use of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and / or skills - these can be private individuals offering services on an occasional basis (‘peers’) or service providers acting in their professional capacity (‘professional services
providers’); (ii) users of these; and (iii) intermediaries that connect - via an online platform - providers with users and that facilitate transactions between them (‘collaborative platforms’). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.

Hand in hand with new technologies (the largest sector in terms of market capitalization, behind only the financial sector), this business model has experienced a growth of such magnitude in recent years that it has powerfully attracted the attention of institutions and the European academic community.

Many actors point out important advantages, such as banking entities themselves identifying efficiency in the use of resources, competitive improvements, environmental benefits or advantages in saving. The economic benefits that this model can produce derived from a better use of capacities have been estimated at 572 billion euros and even assimilate the social advance provided by it to date as the one generated by the industrial revolution of the 19th century. Also, prestigious economists such as Klaus Schwab observe an increase in the degree of corporate social responsibility in companies due to the efficiency in the use of assets and collaborative consumption platforms.

However, it is undeniable that there are manifest threats and risks to the conditions of workers that may be counterproductive. According to the European Parliament’s Committee on the Internal Market and Consumer Protection, with regard to the labor rights of workers involved in these collaborative business models, there is a “real risk that a detriment to fair working conditions will occur, minimum legal standards and adequate social protection”. The legal insecurity for many workers within this new business model is evident and the lack of adequate guidelines or specific regulations in the member countries of the European Union that chart the way forward means that, in many cases, these limits may be established by the courts of justice through the interpretation of a legal order that needs to be updated to the new reality.

The present article intends to be a general synthesis of the labor panorama in Europe that generates the most collaboration in Europe will also be exposed, as well as their position regarding the collaborative economy. The aim is to further systematize the scenario that this business model produces in the conditions of the workers as well as to seek uniformity in the best way to follow to achieve fair and adequate working conditions within it in European countries. The fundamental right to fair working conditions may be threatened on certain occasions in the context of collaborative economy models and it is necessary to strive for more nuanced regulations.

II. Entry of New Technologies in Europe: The European Labor Panorama

In the identification of the participants of the collaborative economy, the European Commission classifies the actors or “agents” that are part of this new business model into three categories: service providers, who share assets, resources, time and / or competences and that can be either individuals that offer services on an occasional basis (“peers”), or service providers that act on a professional basis (“professional service providers”); users of said services; and, finally, intermediaries that through an online platform connect the providers with the users and facilitate the transactions between them (“collaborative platforms”).

The fact that there is no express normative framework at European level that regulates all the legal vicissitudes of the relations between these agents and that the activity can be carried out “with or without profit” has further promoted the incorporation of agents who are “providers of professional services” and, especially, “collaborative platforms” producing an accelerated growth of such platforms (which will have an estimated impact on the economy of over 300 billion euros in 2025).

The most recent and complete research carried out to date while preparing this article on the impact of this business model in the EU was published by the European Commission in February 2018: “Study to Monitor the Economic Development of the Collaborative Economy at sector level in the 28 EU Member States, Final Report”. This research has measured the level of development of this business model by looking at the transport, accommodation, finance and online skills sectors, and has identified 651 collaborative platforms for the most part established specifically to operate based on the collaborative economy business model covering the transaction relation platforms (peer-to-peer - P2P - and peer-to-business-P2B--).
According to some of the results of this study, the turnover of the collaborative economy in the EU-28 in 2016 was estimated to be EUR 26.5 billion (roughly 0.17% of the EU-28’s total GDP) where the four main sectors of activity were finance (accounting for the largest revenues with EUR 9.6 billion), accommodation (EUR 7.3 billion), online skills (EUR 5.6 billion) and transport (EUR 4 billion).

In terms of employment, the study has analyzed people working for both platforms and service providers. The entire business model provides approximately 394,000 jobs across the EU. The most employment opportunities exist in the transport sector (124,800 persons employed), while the fewest are found in the finance sector (67,300 employees). Figure 2 below shows the share of total employment by country:

Looking at the most internationally known platforms, the study differentiates by sector and country. Highlighted in the accommodation sector are Wimdu (Germany) and HomeStay (Ireland); in the finance sector Funding Circle (UK), Ulule (France), Bondora (Estonia), and Twino and Mintos (Latvia); in the online skills sector, platforms are smaller in terms of their scale and size and operate in a maximum of one to three target countries; while in the transport sector, platforms include Delivery Hero and Foodora (Germany), Takeaway (Netherlands), Deliveroo and JustEat (UK), Blablacar (France) and Taxify (Estonia).

The results of this study have allowed us to assess the magnitude of this business model in the EU and its development in each of its states based on the responses of its governments. It was observed that the countries that have taken measures to eliminate market barriers are in a favorable position to further develop the collaborative economy (Czech Republic and France, for example); on the flip side, “where governments are rather neutral and the business environment is not as encouraging, the collaborative economy seems to be developing at a slower rate” (Bulgaria, Slovenia).17

Despite the positive inertia of the collaborative economy in Europe, it is clear that the regulatory fragmentation resulting from divergent regulatory approaches at national or local level that exists in the different EU states, according to the European Commission, “hinders the development of the collaborative economy in Europe and prevents the full realization of its benefits” 18. Furthermore, the controversies generated by the modus operandi of many of these platforms relating to workers, drawn from their working conditions (such as, for example, the lack of career prospects, pay levels, job security19 or dissatisfaction 20), have caused problems and demand before the courts the
protection of the scarce - in the majority of cases - regulations applicable to the effect.

Therefore, the main labor conflicts generated by this business model in the EU countries where it has had the greatest impact (France, UK, Spain, Germany, Poland), as well as the responses that have been proposed from European institutions to deal with these threats, will be analyzed below.

2.1 France

France leads the European Union in the use of digital platforms, according to the data provided by the last survey required by the European Commission (Flash Eurobarometer 438). In this survey it is pointed out that more than 36% of the respondents have used these collaborative economy platforms, ahead of Ireland (35%) and Latvia and Croatia (both 24%).

France not only leads the statistics in which the use of these platforms has been occasional (20%, ahead of Ireland -17% - and Croatia -13% -) but also in which there are fewer proportions of individuals who have never used them (64%, behind Ireland -65% - and Latvia -75% -) or who have never heard of them (14%, behind Croatia -28% - and Estonia -32% -)21.

According to data provided by European authorities, the highest values in 2016 in France in terms of revenues by sectors were generated by the finance sector (EUR 2.2 billion) and the accommodation sector (EUR 2.2 billion), followed by online skills and transport sector (both generated more than EUR 1 billion). In terms of employment, “the highest count of persons employed was achieved by the transport sector with 32,386 employees, followed by the accommodation sector with about 19,000. With comparable levels of employment also present in the finance and online skills sectors (14,300 and 9,000 persons employed, respectively)”22.

The first protests in France for working conditions on the digital platforms, according to the information analyzed, arose from Amazon’s headquarters at Chalon-sur-Saône, 12 years after the American e-commerce company arrived in France in September 2000. These were driven by salaried workers, related to excessive surveillance and monitoring of their productive process, overtime hours, frequent rotation and difficulties for the payment of sick leave, among other reasons23. The most controversial reason that generated the call for a strike on May 26, 2015, was work accident statistics. Almost 20% of workers analyzed in the warehouse of Saran (Loiret) were declared “fit for work with medical restrictions” according to which, it could be related to certain tasks such as carrying heavy loads or specific work situations (working at height, working in confined spaces or working at night)24.

In the transport sector, in which the greatest number of workers are employed, on July 3, 2015, the company UberPop — a private transport service designed by the US group Uber — was forced to suspend its activity after one year of service because of the entry into force of the Thévenoud Law. This regulation, endorsed by the French Constitutional Court, imposes two years in prison and fines of 300,000 euros for organizing systems that link clients with private drivers and for performing these without belonging to any transport company (the initial idea behind the UberPop service). Before the Thévenoud Law, this digital platform operated with drivers who did not have the necessary licenses or insurances. This measure was endorsed by the French government through Prime Minister Manuel Valls who pointed out that “it is a profession that needs rules, we are not in the law of the jungle and with a slavery that would be that of modern times”25.

Due to the controversies generated by these new forms of work in France, the country reacted by enacting one of the largest regulatory interventions on this business model in Europe, following the line of labor protection required by European institutions.

The concept of collaborative economy was included in French labor law. Through Law no. 2016-1088, of August 8, 2016 a new title was introduced within the Labor Code (article L.7341-1 of the Labor Code) that defines collaboration platforms by reference to article 242 bis of the General Tax Code (“companies, whatever their location is, which put two people in contact at a distance and electronically for the sale of a property, the provision of a service or the exchange or sharing of a service”). The articles that follow in this chapter relating to the social responsibility of platforms incorporate generic guarantees in the matter of accidents insurances, training, strike and association.

Subsequently, Decree no. 2017-774 of May 4, 2017 further specifies these generic guarantees introducing articles D7342-1 and those following it, which describes the responsibility of these platforms in assuming the contribution of insurance and training for self-employed workers in certain circumstances.

In the event that a self-employed worker provides services for several platforms, they must pay the aforementioned concepts in proportion to the time that this worker has provided services for the platform, taking into account the annual turnover of this worker. The self-employed worker must request reimbursement of their contributions to the platform. The process is carried out online and has no cost.

Almost a year after the publication of this decree, the draft Law for the Freedom to Choose Professional Future
was registered in the national assembly on April 27, 2018, which, after more than two months of debate and analysis of 2500 amendments, was approved on August 1, 2018. Among the measures introduced, the most relevant are: a 800 euros subsidy for self-employed workers in case of the company's bankruptcy; controls on the statistics of temporary contracts; improvements in unemployment subsidies; regulation of training in terms of financing and in terms of quality; the creation of a digital application called “Compte Personnel de Formation” (Personal Training Account) to monitor worker training; an increase in penalties for job insecurity (fines amounting from 2000 to 4000 euros for salary differences, as well as online publication of companies that use illegal tactics); the possibility of establishing a “statute” or “letter” that defines the rights and obligations between workers and platforms.

Despite this range of protection, the introduction of the latter term known as “the letter” through article 66 of the text adopted on August 1, 2018, was a concern for academic and trade union agents alike. This concept allows the employer to introduce in a contract a list of clauses relating to rights and obligations that regulate the relationship with the self-employed worker, in addition to the clause that indicates that “the establishment of the same (...) cannot characterize the existence of a link of legal subordination between the platform and the workers.” It thus separates the orbit from labor subordination and, therefore, the coverage of the work contract for self-employed workers, with the implied guarantees.

Therefore, the Constitutional Council, one month after submitting for approval, pronounces it as a “partial non-conformity” with the text repealing Article 66 in particular. This decision is based on the lack of link to the provisions of the draft law initially submitted to the National Assembly, which makes it a “legislative horseman” contrary to Article 45 of the Constitution. The final version of the law is published in the Official Gazette on September 6, 2018, in which the “letter” term, contained in article 66, is eliminated and all other guarantees are maintained. With this, in France, there is an adequate regulatory framework for guarantees, at least for employees, and there has also been considerable progress for self-employed workers.

The practical application of this new regulation was immediate on November 28, 2018, the Social Chamber of the Court of Cassation of France, through the sentence number 1737 was pronounced on the labor characteristics of a driver of one of these platforms. The Belgian company “Take eat easy” (a digital platform for the delivery of food from restaurants associated with the homes of the customers through the cyclist couriers), which fits appropriately in the definition indicated in the Labor Code article L.7341-1, was sued by a self-employed cyclist courier who requested recognition of the employment relationship of his contract with the company. After a complex procedure, in which lower courts were declared incompetent and in which the company entered bankruptcy proceedings, the Court of Cassation decided to assess the objective data of the relationship in order to rule on the nature of the contract.

The Court of Cassation valued the evidentiary elements of the relationship, considering its own jurisprudence, and not only the will of the parties reflected in the contract to determine the existence of subordination or not. Based on this data, the court was able to conclude that it was an employment relationship due to the existence of clear subordination elements in two circumstances of special importance:

a) On the one hand, the digital application was equipped with a geolocation system that allowed the company to monitor in real time the position of the courier and the total number of kilometers traveled, so that the role of the platform was not limited to linking the courier to the client and the owner of the restaurant.

b) On the other, the company had disciplinary power over the courier, findings that resulted from the existence of a power of direction and control of the delivery execution that characterizes the subordination link.

This sentence of the Court of Cassation is a pioneer in France in reference to the characterization of the relationship between an autonomous courier and a digital collaborative platform offering a way of coverage for this type of workers through the courts. The reforms on labor regulations in France in the last three years were adequate for the salaried workers of these business models but insufficient for the self-employed workers who, taking into account the European protectionist vision that the high courts in France are following, the only way out is to seek through these courts the coverage of their rights.

2.2 Germany

According to the latest data provided by European institutions regarding the awareness and frequency of use of collaborative platforms within the euro zone countries, Germany has a 20% rate of use of digital platforms among its population. This figure places the country above the European average (17%), ranked number 5, behind only France (36%), Ireland (35%) and Latvia and Croatia (both 24%).

According to the “Study to Monitor the Economic Development of the Collaborative Economy in the EU”, around 35,000 people are estimated to be working in
Germany’s collaborative economy in 2016. The largest sectors “are represented by the finance (EUR 1.33 billion) and accommodation (EUR 812 million) and this is mirrored in the count of persons employed, with roughly 18,000 people in the accommodation sector and 11,300 in the finance sector” 32.

The arrival of digital platforms in Germany was led, mainly, by the giant Amazon that arrived at the beginning of the 2000s and it was not until years later that the first worker and union protests for working conditions appeared. The German union Vereinte Dienstleistungs gewerkschaft (German United Services Trade Union, more commonly known as ver.di), has led various protests and demands since 2012 in which the high rate of temporary contracts, low wages and work accidents due to low protection were criticized, among other reasons 33. The protests, since its inception, have focused mainly on denouncing the lack of job security in the company and the need to improve working conditions 34, even proposing a strike in December 2018 in order to enforce these demands and obtain an adequate agreement through collective bargaining 35.

In the transport sector, Uber has also generated protests, related not so much to its employees’ working conditions but to its activity. In 2014, a few months after the start of its activity in Germany, a Frankfurt court ruled that UberPop (owned by the US platform based in Amsterdam) lacked the necessary legal permits to operate under German law since it used autonomous drivers with their own vehicles and without the necessary legal licenses to transport passengers 36. That same year the cities of Hamburg and Berlin banned the American transportation giant for not complying with the regulation on the authorization of their drivers 37.

For the same reason, in March of the following year, a Frankfurt court prohibited Uber from transporting passengers with unlicensed drivers, establishing considerable fines in cases of non-compliance. This decision was ratified by the Higher Regional Court of Frankfurt in 2016 38, and later by the Federal Court of Justice of Germany (Bundesgerichtshof). It has led to obtaining a license for all Uber drivers wishing to operate in Germany being compulsory.

In December 2018, the Federal Court of Justice of Germany (Bundesgerichtshof) again prohibited Uber from restarting Uber Black, its old limo service, since it had violated the Passenger Transportation Law. This law states, among other things, that a driver has to return to the base at the end of the trip and can only carry out the services initially contracted at the headquarters of the company. Taxi drivers, according to the court, can receive commissions directly from the passenger, cannot refuse unprofitable transportation and must offer stipulated fees. Uber has provided its services in Germany since 2016 through UberX with licensed drivers according to the rules of passenger transport, with insured vehicles and registered as rental cars, thus complying with all applicable regulations in Germany.

In this sector, there have also been major protests by workers from food delivery platforms Foodora and Deliveroo, demanding better wages and working conditions 39. In Germany, these companies, as in most of the countries in which they operate, have 75% of their workforce as “freelancers” claiming “flexibility” and “maximization and protection of their income” 40. Unofficial groupings of so-called “couriers” or “bikers” (as delivery people who work for these platforms in the indicated status) are increasingly active and demand adequate collective bargaining in which improvements in working conditions can be negotiated for salary purposes, organization, overtime or materials, for example 41. Despite these demands, the author has not been able to identify any significant changes by the German authorities with regard to workers in the collaborative economy, beyond their declarations of intent 42.

In general, small-scale regulatory policies of the collaborative economy tend to be restrictive in the transport sector (in terms of licenses) or accommodation (in cities such as Berlin the days rented by each owner according to the revision of the “Misappropriation Act” 43), but there are no specific regulations for the most vulnerable actors in this business model, which are self-employed workers.

2.3 United Kingdom

The collaborative economy is an important pillar for the British economy, yet its dimensions vary significantly depending on the parameters used. For example, it has been observed that, although the United Kingdom is the undisputed European leader in the finance sector, accounting for approximately 75% of the financial market with a transaction level of more than 3.2 billion GBP in 2015 44, the estimated frequency of use of collaborative economy platforms among the population is below the European average (8%, along with Finland, Belgium and Portugal according to date from the Flash Eurobarometer 438 published in 2016) 45.

Despite the above, it can be pointed out that according to the data collected by “Study to Monitor the Economic Development of the Collaborative Economy in the EU”, in terms of income and employment, “the United Kingdom distinguishes itself as one of the powerhouses for collaborative economies in the EU with a general market size of EUR 4.6 billion, (second only to France) and a number of 69,431 number of persons employed” 46.
Ranking second among EU countries in the number of people who are employed in this business model, the average profile of the worker in the UK is defined as a person of 34 years or less, male (46%) or female (51%) with a high educational level and even with university careers, with an average salary of between 10,000-30,000 GBP per year, working full time for the platform, living and working mainly in the London area in the delivery sector or in the demand for independent professional services (like PeoplePerHour or Fiverr). The most-used applications according to the users surveyed are Uber, PeoplePerHour, Deliveroo and Fiverr, among others.

Since Amazon’s arrival in Wales in the mid-2000s, there have been protests by workers on this platform regarding wage policies, union representation and collective bargaining that have spread to other companies. Also in the transport sector, part-time independent couriers working for Deliveroo UK supported protests against the new payment terms that the company tried to impose when changing the system of payment by hours to payment for tasks completed. Thanks to the protests and pressure from the government, they not only got the company to withdraw the measure, but also paid them the minimum salary they were in theory not entitled to because they were not legally within the company.

There have also been controversies in the transport sector with regard to working conditions, mainly by Uber workers. In October 2016, a UK Labor Court stated that Uber drivers were not self-employed workers and they should be classified as employed workers entitled to the minimum salary. Two years later, in December 2018, the England and Wales Court of Appeal (Civil Division) dismissed the appeal filed by Uber and confirmed the judgment of the lower court, stating a “high degree of fiction” in the content of the standard agreement between Uber and its drivers. According to the ruling, “for ULL (Uber London Limited) to be stating to its statutory regulator that it is operating to private hire vehicle service in London, and is a fit and proper person to do so, while at the same time arguing in this litigation that it is merely an affiliate of a Dutch registered company which licenses tens of thousands of owners of small businesses to use its software, contributes to the air of contrivance and artificiality which pervades Uber’s case.”

This ruling could be an unprecedented measure for more than 40,000 Uber drivers who could see the nature of their contracts modified. Its subsidiary food delivery platform UberEats generated protests in 2016 relating to the salary conditions of its employees.

The most vulnerable actors of the transport sector within the collaborative economy, the so-called Cycle Couriers, began legal battles in mid-2016 against the companies Excel, City Sprint, Addison Lee and eCourier to demand decent working conditions and recognition of their status as employees.

The courts ruled against all companies that Cycle Couriers are not self-employed but employees and that they should enjoy rights as such. As indicated by the court, the worker “was under the direction of another and was not running his own business,” and that “during the time that [the worker] was signed into the system in the morning up to the time he logged off, the working relationship, looked at as a whole, was only compatible with his being a worker under ‘limb b’ – the “limb b” workers are known as persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else.” The court also pointed out that “the contractual documents demonstrate, as much as anything else, the inequality of bargaining power between the respective parties. The drivers were in a subordinate position, which is not surprising, but they cannot sensibly be viewed as contracting with a client of their driving business.”

Another similar transport platform, called Hermes (its activity consists in the delivery of articles ordered online for retailers through independent drivers using their own cars) were ruled by a Leeds Court that its couriers had incorrectly been classified as self-employed. This fact entitled the couriers to receive the minimum wage and holiday pay, and to reclaim unlawful deductions from their wages.

Due to these transcendent sentences on the conditions of the Cycling Couriers, the recommendations of the report made by Matthew Taylor (considered insufficient by some union sector) and the controversy generated by the death of a DPD worker (Mr. Lane, a self-employed courier for DPD who missed medical appointments to treat his diabetes), the working conditions of employees in the collaborative economy have gained special relevance in the UK, where the government has addressed a political strategy aimed at guaranteeing rights in this business model. According to then-UK Prime Minister Theresa May, it is necessary “to make sure we have the right structures in place to reflect those changes.”

After promising improvements throughout 2018 in matters of temporality, self-employment regulations, and vacation payments, on December 17, 2018 the Department for Business, Energy & Industrial Strategy, presented the “Good Work Plan”, a package of labor reforms that “will cement the UK’s status as a world leader in workers’ rights now and well into the future and will be the first country in the world to address the opportunities and challenges of the gig economy and the changing world of work, and its impact on a modern economy.”
Among these proposals, which will enter into force in 2019, are the provision of more resources for the Employment Agency Standards (EAS) Inspectorate, new powers to impose penalties for employers who breach employment agency legislation such as non-payment of wages, bring legislation to enforce holiday pay for vulnerable workers, salaried hours work and salary sacrifice schemes to ensure national minimum wage rules.

2.4 Spain

In Spain, according to the registered data for the last quarter of 2018, applications relating to the sale or rental of second-hand products were most popular among users (27%) ahead of private accommodation services such as Airbnb and Homeaway (13%) and long car journeys with private drivers (5.2%)61.

“The highest employee count in the online skills sector with 16,293 and matched closely by the accommodation sector with 16,164. In contrast, transport and finance platforms have a smaller impact with regards to employment, with 3,854 and 3,418 persons employed, respectively”. In terms of income, “the online skills and accommodation sectors generated the highest level, with more than EUR 1 billion each. By some distance, the finance and transport sectors are noteworthy, with figures of approximately EUR 454 million and EUR 118 million, respectively.”62.

This scenario places Spain among the main economic drivers behind this business model in Europe, in terms of employment, income and use of digital platforms. Correspondingly, there is labor unrest, which has boiled over predominately in the transport sector.

The Spanish subsidiary of British company Deliveroo has received several complaints from the Labor Inspectorate for using fraudulent contracts since its launch in November 2015. The company operates through digital platforms and hires the services of self-employed and economically dependent self-employed (or the so-called “TRADE”, a special hybrid in the Spanish system between self-employed workers and employees) for the delivery of food orders.

The unions, since the arrival of delivery platforms such as Glovo63, Deliveroo, Uber Eats or Stuart, have reported the use of certain fraudulent practices in hiring their staff. Specifically, they point out that they establish a fraudulent employment relationship through a false self-employed and economically dependent self-employed (or the so-called “TRADE”, a special hybrid in the Spanish system between self-employed workers and employees) for the delivery of food orders.

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intermediary company between drivers and users. However, a judgment of the Court of Justice of the European Union (CJEU) from December 20, 2017 considers that the activity of this company “is inseparably linked to a transport service and, therefore, has to be qualified as a service in the field of transport.” This suggests that Uber goes from being an intermediary agent or collaborative platform to a professional service provider and therefore its activity goes from mere intermediation in the transport service to the transport itself, which it outsources through third-party companies with authorized drivers. These third companies provide Uber with a worker to do the transport service and it is Uber who, through the application, provides the user with the payment method, service information and valuation capacity. It is clear, therefore, that the contractor supplies labor and that Uber absorbs employer functions.

From this point of view, it could mean a risk in the illegal transfer of workers by the contractor to Uber, however, it is necessary to analyze if all the requirements demanded by the Spanish regulations are fulfilled. In this case, although the contracting company may not exercise functions inherent to its employer status (because it does not have the necessary means to carry out the activity), it has its own activity (even if it is not to offer transportation services under that application) and a stable organization of its own, in which not only is a workforce produced but the contractor also contributes with the material elements that make up the business structure. Therefore, in Spain it cannot be stated that this tripartite activity by Uber could be classified as an illegal transfer of workers. Nor has it been possible to register, as of the date of this article, a ruling in Spain declaring the relationship between Uber and its drivers as employment, even though there are reports from the labor inspection suggesting that it is so.

Having analyzed the regulatory framework in Spain applicable to workers involved in digital platforms it can be concluded that there is no explicit distinction between collaborative economy workers and ordinary workers, as there is in France, for example. Compared to other countries, Spain has not formally registered significant advances in the regulation of these workers beyond tax reforms for large companies (in order to avoid tax fraud) and several legal proposals.

In December 2017, the Committee on Employment and Social Security of the Congress unanimously approved a non-law proposal in which it urged the government to identify the necessary reforms to labor regulations with respect to the collaborative economy, placing particular emphasis on self-employment, to address “the challenges of technological change in our productive system, as well as to digital platforms and their users.” In June 2018, the Popular Party (PP) presented during a plenary session of the Congress another non-law proposal to pursue practices that violate the rights of workers in the collaborative economy and especially on the controversy surrounding the figure of the self-employee, giving special prominence to labor inspections.

Through an amendment to this non-law proposal, PSOE, Ciudadanos and PDeCAT agreed to demand the creation of a working group within the government to determine the necessary reforms in order to adapt the current regulatory framework to the collaborative economy. However, at the time of writing, the aforementioned work team has not been created, nor has any proposal aimed at this end been proposed by any political party within its electoral programs presented for the regional, general and European elections to celebrate on April 2019.

2.5 Poland

40% of Poles say they have heard of the collaborative economy, while 26% attest to using it.

According to data from the “Study to Monitor the Economic Development of the Collaborative Economy in the EU”, Poland “ranks below the EU-average with regards to their number of platforms per 1 million population (0.74), but in contrast ranks high in the level of revenues compared to national GDP (0.66%), as well as its collaborative employment figures in relation to its total national employment (0.4%)”. According to the study, the 36 collaborative economy platforms registered in Poland were run in 2016 by about 50,000 employees, who collectively generated a revenue of around EUR 2.3 billion. According to the study, Poland ranks third in the European Union for workers employed in the collaborative economy (see Figure 2).

Poland has an important competitive advantage, despite not being at the head of the digitalization like other European partners, namely low costs and a well-educated workforce. Between 1998 and 2012, 7.2 million people graduated from higher education institutions in Poland, while labor costs in the ICT sector are between 47-70 percent lower than the Western European average. According to McKinsey estimates, digitization should increase the value of this sector in Poland in the next decade by 11% to 19%, potentially reaching a value of 5.6-9.4 billion euros.

Despite the positive forecasts indicated, the recommendations for regulating the collaborative economy (especially because of the positive effect it would have on female employment) and the existence of a ministry in the Polish government devoted specifically to digitization, the
modification or construction of a regulatory framework oriented to this new business model has not been carried forward in Poland.

There are complex and strict regulations in tax matters, pertaining to tax evasion, and there are specific legal limitations for certain activities, such as banking (limiting the free offer of certain services)\(^{81}\), but in labor matters no significant reforms have been made to protect workers from the collaborative economy.

Regulations to eliminate abuse towards non-standard workers were approved in 2016 in order to “reduce the asymmetry in terms of hiring and firing workers employed on permanent contracts and other types of contracts”. In the same way, regulations have also been approved regarding equating the rules of social insurance coverage of workers under civil law commission contracts with the applicable rules in the provision of employment under contracts of employment based on the Labor code. These provisions “reduced possibility to hire non-standard employees on very low base contract covered by social insurance and combine it with another one with higher base, not covered by social insurance”\(^{82}\).

In recent years Poland, the demands promoted by Polish unions have increased in terms of collective bargaining, privacy and monitoring of work, workplace conditions, intensification of work, work-life balance, new burdens or loss of jobs due to digitization\(^{83}\).

### III. Contributions in the Legal Literature

Legal literature (especially in Europe) has developed two different schools of thought relating to the type of response needed to address labor rights threats caused by this new business model in Europe. Looking for balance “between facilitating the robotic technological development and protecting the values that are desired by humans”\(^{84}\), different criteria can be observed regarding a greater or lesser flexibility in the regulatory intervention aimed at protecting the rights of workers in the collaborative economy.

On the one hand, there are advocates of investment in development policies of collaborative economy, from respect for labor rights but giving priority to flexibility in regulation. On the other hand, there are open defenders of a strict regulatory intervention of the public powers in favor of the guarantee of labor rights, which follow the majority trend of thought.

Some authors of the former persuasion, defend, for example that “rather than labor law, it would be more efficient to support workers directly through social policy, adapting to the evolving needs of both workers and those who would benefit from their skills”\(^{85}\). They focus on the development of active policies on digital skills training, so that, in an “adequate legal framework (…), technological advances are not constituted as an affront to labor rights (…) [and] the limits [in its regulation] are not of such importance that they could impede the advance itself”\(^{86}\).

It is observed that imbalances in the short term (unemployment, poverty, inequality, etc.) would be compensated in the medium and long term if there are adequate technological employability policies to cushion the losses in short and optimize the opportunities in the medium term, as well as continuous training policies\(^{87}\). It is also defended that “regulation, in a more continental sense, hard law, cannot be oriented from a defense perspective against robotic technological innovation, but rather coordinating measures that give certainty to all those involved, based on the principle of social robotics innovation and legally responsible”\(^{88}\).

On the other hand, the second and main current of thought – warning of the growth of inequality\(^{89}\) – is in favor of a strict regulatory intervention in this business model to guarantee labor rights, defending to increase “protection of workers without suddenly increasing the costs for platforms”\(^{90}\). It is pointed out that “it does not help that the approach of the European Commission, as well as in many member states, has focused on removing regulatory barriers and has ignored the threat to pay and working conditions”\(^{91}\).

Among the measures proposed is the establishment of a minimum wage based on the average time of completion of a task\(^{92}\) or the implementation of the obligation to hire third party liability insurance\(^{93}\). Also proposed is “the in-depth reform of the employment training system (…), inclusion of minimum permanence period and non-competition clauses in the contracts (…), a mechanism for regulating the time of work (…), better telecommuting policies in the ICT sector (…), collective treatment of wages in the sector”\(^{94}\).

A particularly important issue for workers in digital platforms is the reputational mechanism\(^{95}\). It is pointed out that this mechanism “represents a personal portfolio of credibility and professionalism [and] it must be ‘portable’ and indeed should be the property of the worker”. Therefore, what is proposed aims to “ensure adaptability and interoperability with the digital careers built over time on other platforms. In this regard, it is necessary to remove any exclusivity clauses binding workers or, in case they are still to be applied, to consider them as genuine non-competition clauses, which must be compensated”\(^{96}\). The only drawback that arises is that “workers that
are available on-demand, 24/7, supplied by IT channels, don’t have a face and there is the danger that they could be expected to run as flawlessly and smoothly as a software. Only this has the drawback that if something goes amiss (which might not be in the worker’s area of responsibility, like a power outage), the worker receives unfavorable reviews on the platform, which could severely impede his ability to be hired for future work on this platform.97

Within this current which sits in favor of incorporating the necessary filters into the collaborative economy, most of the trade union actors that speak on the subject are integrated. Some of them defend measures such as disincentives and penalties for the unjustified temporality employment, the improvement of training and qualifications, the enhancement of the institutional capacities of Public Administrations or the improvement of collective bargaining (measured in which practically all European union actors agree98,99).

Regarding the latter, the European Trade Union Confederation (ETUC) approved, at the meeting of its executive committee held on October 25 and 26, 2017, an important resolution on “how to deal with new digital challenges for the world of work, particularly collaborative work”. It reflected the concern for the protection of the self-employed, who are under-represented and unduly qualified as workers as a result of organization of these business models that follow subcontracting chains100.

The ETUC published in September 2018 an article in which it set out in detail how concrete steps can be taken to achieve this vision of collective bargaining in collaborative economy. The article analyzes some of the obstacles that are presented to collective bargaining (such as the platform resistance, the dispersed workforce or new demands from the workforce), the steps to be followed to consolidate it (organization, information and consultation) and the main cross-cutting issues that should addressed by this (such as ratings, pay periods, conflict resolution, data protection and deactivation)101.

Also in December 2016, the “Frankfurt Paper on Platform-Based Work” was published, as a joint statement on the conclusions of the first International Workshop on Union Strategies in the Platform Economy that convened staff members from different international organizations (Austrian Chamber of Labour, Austrian Trade Union Federation, Danish Union of Commercial and Clerical Workers, German Metalworkers’ Union, International Brotherhood of Teamsters Local, Service Employees International Union and Uniones) on 13-14 April 2016 in Frankfurt (Germany). This document reflected the biggest concerns of the signatory unions in the collaborative economy, highlighting that “such platforms are often classified by platform operating companies as independent contractors, and are therefore typically excluded from the legal and social protections established for employees over the last hundred years”. All of them indicated as a key point, and first of many measures to be taken, that “online labor platforms must comply with applicable laws, including existing tests of employment status (i.e., employee vs. independent contractor)”, as well as “in the strongest possible terms of the central importance of workers’ right to organize”102.

Within this line of thought, some authors analyze the application of measures of special social interest, such as the establishment of a universal basic income or the taxation by the companies of the “robots” incorporated into the workforce103. These suggestions, despite having been defended by some authors104 and picked up by some politicians in their regulatory proposals105, in view of the results of the investigations carried out to prove their effectiveness (in the case of universal basic income106) have had their detractors107 and have not been adopted by European institutions.

It seems that most of the legal literature, regardless of whether it adopts strict or flexible thinking in the regulatory intervention of the collaborative economy, always considers the abuse of the figure of self-employed worker in this business model as a priority. In addition to other consequences such as the violation of privacy in labor relations108 or notes of precariousness109, the concern for the vulnerability of self-employees has a settled consensus110 as the most obvious damage of the collaborative economy.

For collaborative economy workers, their “classification as independent contractors is advantageous for platforms as it restricts their liability and negates all protections afforded by employment laws.”111 The solution to this problem, therefore, could lead to a significant improvement in working conditions that would eliminate a significant chunk of the legal costs, though that creates a significant disadvantage to platforms who lose control over freelance and contract workers.112

There are several solutions proposed to this principle threat. Standout among them is “to review the social structures in place, salaried employee versus self-employed, and to evolve- creating an (additional) hybrid status which combines reasonable social coverage with the flexibility the ownership of a business requires”. This is because the appearance of new forms of employment implies the extension of the definition of “subordination link” - a crucial element for the employment contract that includes criteria such as the possibility for employers to give instructions regarding how, when and where work will be executed, the possibility for employers to sanction employees and the possibility for
employers to control employees – by the insertion of additional criteria taken into account by the courts - such as the level of integration, degree of financial risk, salary payment, freedom of organization of work, ownership of the business and provision of material - and this “has resulted in more contractual relationships being deemed to be employment relationships”. Therefore, “it is certain that, given the deficit of most social welfare systems, the new category of regulated workers would need to be self-supportive in respect of social welfare benefits; they would probably be required to fund a specific program (via pooling)” 113.

Another solution proposed to solve the problem of self-employees in the collaborative economy is to reinforce existing regulations so that “platform workers should thus be treated as employees and given access to employment-based rights, including the right to bargain collectively with regard to their remuneration” 114.

Undoubtedly, collective bargaining is one of the main remedies upon which most of the legal literature 115 and trade union actors agree in order to solve the problem of self-employed workers. However, despite being a recognized right in Article 28 of the EU Charter of Fundamental Rights, in most of the countries in the European Union there are clear obstacles (especially due to the nature of their contract 116 and the limitations on competition matters that exist in each of the states) that cause self-employed individuals to be unable to conduct collective bargaining or to be accommodated by neither traditional trade unions nor employer associations 117.

According to the research conducted by Gemma Newlands, Christoph Lutz and Christian Fieseler using cluster analysis on representative data from across 12 European countries, it is observed “that a substantial proportion of European sharing economy providers welcome trade unionization, think it is feasible to organize collectively and already take part in online communities. However, the majority of providers think they should be classified as independent contractors rather than employees, limiting more organized forms of collective action. Rather than approaching providers as a pre-existing collective which merely needs an organizational catalyst, [the] findings indicate that a multi-focal and differentiating approach is required, which takes into account the inherent fragmentation and heterogeneity in the experiences and attitudes of providers” 118.

**IV. Recommendations of the European Institutions**

The European Commission in its communication to the European Parliament in June 2016 entitled “A European agenda for the collaborative economy” points out the advantages of this business model, in terms of flexibility, but also highlights the drawbacks. The communication indicates that it “may create uncertainty as to applicable rights and the level of social protection [due to] the border between self-employed and employed workers is increasingly diffuse, and there is an increase in temporary and part-time work, and multiple employment” 119.

The European Commission has identified the three main political objectives addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights, namely: “coverage (ensuring that everyone in employment or self-employment has formal and effective access to social protection and related employment services); transferability (preserving social protection rights when workers change jobs, sectors of activity, forms of employment, move to or from self-employment) and transparency (ensuring access to user-friendly information on rights and obligations to social protection, irrespective of employment situation)” 120.

In the report “Study to Monitor the Economic Development of the Collaborative Economy at sector level in the 28
EU Member States,” commissioned by the European Commission, it is suggested to give the necessary regulations and remove the unnecessary market barriers at the same time. It is stated that “if the Commission and Member States want to facilitate the internationalization and growth of EU-origin collaborative economy platforms, the Commission could encourage the collaborative economy platforms to organize and, as an example, establish European associations. These could prove highly effective in facilitating dialogue between national authorities (i.e. discuss how market barriers can be removed), transferring good practices, especially regarding safety and service quality related concerns, and enhancing and ensuring sufficient consumer protection.”

Eurofound, the European Foundation for the Improvement of Living and Working Conditions, suggests solutions to threats through legislative changes without exposing any specific measure, in a 2015 study. It indicates that “it can therefore be assumed that these forms of employment – in general – are a necessary element of modern labor markets and they are unlikely to disappear. Those that pose inherent danger for working conditions and the labor market should be addressed through legislation or regulation.”

In several reports, funded by the European Parliament, some of the main labor disadvantages caused by the collaborative economy have been identified. Among others, it is pointed out that workers are exposed to work accidents, lack of insurance coverage and social benefits (due to outsourcing of service), lack of association rights or high penalties for questionable reputation mechanisms. In addition, it is pointed out that “the design and application of ratings systems can directly impact the interests of service providers — in particular their access to future work or risk of ‘deactivation’."

Moreover, the European Parliament through the Report on a European Pillar of Social Rights on January 17, 2017, calls for the framework directive on decent working conditions to also ensure that relevant existing minimum standards are ensured in certain specific relationships, in particular relating to work intermediated by digital platforms and other instances of dependent self-employment. It asks for “a clear distinction – for the purpose of EU law and without prejudice to national law – between those genuinely self-employed and those in an employment relationship, taking into account ILO Recommendation No 198, according to which the fulfilment of several indicators is sufficient to determine an employment relationship”.

Some suggestions included in a 2016 report financed by the European Parliament titled “The situation of workers in the collaborative economy” through the Policy Department A on Economic and Scientific Policy include: minimum earning requirements; information exchange with platforms to determine earnings of workers to improve tax declarations; address the special need for protection of workers for these platforms (e.g. measures against unfair deactivation of their platform account); extension of collective agreements to categories beyond “employees”; create a third category, an intermediate status between self-employed and employee, e.g. the “dependent contractor” or “independent worker”; including sharing economy providers in the scope of the general rules applicable to self-employment, and complementing this approach, to allow platforms to develop their own benefits policies that could compete with insurance options otherwise available; review all the labor-market relevant legislation, sectoral and otherwise, to verify how far it should be extended to cover platform workers; to be able to take one’s data (ratings, reviews, pictures, income statements etc.) with you when switching platforms (“data portability”) and finally creating and supporting codes of conduct addressing labor protection in the collaborative economy.

The European Parliament, after the publication of different reports related to the collaborative economy from the European Union, pointed out in its May 11, 2017 Report on a European Agenda for the collaborative economy that despite the fact that “the collaborative economy is opening new opportunities and new, flexible routes into work for all users, especially for the self-employed, for those who are unemployed (…) however, in some circumstances, this development can also lead to precarious situations”. The Parliament “highlights that all work in the platform economy must be classified accordingly by the Member States; stresses the need for such a clarification, also with the aim of preventing bogus self-employment and ensuring the protection of the social and labour rights of all workers in the platform economy, irrespective of their official status as employed or self-employed”. It also states the need to ensure that “self-employed workers and professionals (…) receive professional-level pay and are guaranteed secure time-frames for payment.”

The European Parliament thus “calls on the Member States to carry out sufficient labor inspections with regard to online platforms and to impose sanctions where rules have been breached, especially in terms of working and employment conditions and specific requirements regarding qualifications; calls on the Commission and the Member States to pay special attention to undeclared work and bogus self-employment in this sector, and to put the platform economy on the agenda of the European Platform Tackling Undeclared Work; calls on the Member States to provide sufficient resources for inspections.”
Regarding reputation mechanisms, the European Parliament also “underlines the importance of collaborative platform workers being able to benefit from the portability of ratings and reviews, which constitute their digital market value, and the importance of facilitating the transferability and accumulation of ratings and reviews across different platforms while respecting rules on data protection and the privacy of all parties involved; notes the possibility for unfair and arbitrary practices regarding online ratings, which may affect the working conditions and entitlements of collaborative platform workers and their ability to obtain jobs; believes that rating and review mechanisms should be developed in a transparent way and that workers should be informed and consulted at the appropriate levels, and in accordance with member state law and practices, on the general criteria used to develop such mechanisms; it also considers that many intermediating online platforms are structurally similar to temporary work agencies” separating adequately both structures.

Regarding these reputation mechanisms, the ILO highlights its importance in a 2018 study and indicates certain recommendations that should be taken into account in order to regulate them within the platforms: “workers’ accounts will only be closed for violation of the platform terms of service or other contractual obligation; platform operators will provide a clear, understandable reason to workers whose accounts are closed; workers have access to a procedure for contesting account closure that includes review by a third party; workers will receive a payout for all funds in their worker account in the event of a deletion; in the event of a deletion, workers will be given an opportunity to download and archive a human and machine-readable copy of their work history, and all contributed content such as forum posts, profile content, and messages sent to other platform users.”

At the request of the European Parliament’s Employment and Social Affairs Committee a report was published by researchers from the University of Leeds in the UK that investigated the social protection of workers in the platform economy. The report makes recommendations concerning arrangements for the provision of social protection for workers in this growing sector of the economy. The report’s analysis of the legal issues in the social protection of platform workers observed that “the key legal issue affecting the degree of social protections for platform workers is that they are likely to be categorized as self-employed contractors rather than employees or workers”. It notes that, as the CJEU has ruled, there is no one definition of what constitutes a “worker” and “the categorization as self-employed can leave these workers outside the scope of social protection”.

The report points out (page 95) that the objective of European directives governing the protection of atypical employment workers (such as Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work, Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work or Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work) is, besides the providing protective guarantees, to “stimulate wider labor market reforms with an emphasis on increasing flexibility.” It is indicated that “the European Commission recently began to consult with the Social Partners concerning plans to broaden the scope of the (1991 Directive on the information to be supplied to employees) to include ‘new forms of employment’ including platform work” (so that no one is left behind” (p. 93).

The report makes special reference to the classification of collaborative economy workers’ contracts, because “Member States acknowledge the ‘primacy of facts’, meaning that the courts will look beyond the labels applied by the parties and will base their conclusions on the way that the relationship works in practice. Even in the absence of statutory presumptions, certain factors may prompt the courts to presume that a contract of employment exists” (p. 82). It is suggested, “one way to bring those who provide services through platforms into protective regimes is to expand the definition of employment relationship” (p. 84).

They also make special reference to collective bargaining in which they point out that the “service providers can find themselves in a weak bargaining position” since “contracts are often drafted individually (rather than collectively) and according to the assumption that employment rights and other social protections do not arise” (p. 75). It is stated that “legal barriers to collective bargaining amongst service providers through platform work should be evaluated and reconsidered. Furthermore, emergent forms of collaboration and representation that draw on the same technological and social possibilities as existing platforms should be supported” (p. 101).

The report establishes a number of recommendations based on the results of the research aligned with some of those put forward by the European Parliament in their resolution of June 2017, which are, among others: that measures should be put in place to ensure that labor platforms supply the relevant authorities with appropriate and sufficient information concerning the paid work that they mediate; simplifying enforcement procedures for individuals; reversing the burden of proof in determining employee status; ensuring that enforcement of legal employment status is conducted by an independent authority.
(as is already the case in some member states), rather than by piecemeal rulings from the courts; providing full and easily accessible information to all workers; integration of the self-employed into existing collective bargaining arrangements; trade unions need access to platform workers to inform them about their policies and to potentially organize them; and more severe penalties for companies that flout previous rulings against them (p. 103).

The research has identified considerable targets for reform of social security systems to adapt platform workers along with other types of workers and avoid the risk of not being covered by social protections. Some of the recommendations in social security, among others, include: membership of state old age security systems to be compulsory for all workers; continuity of social insurance and workers’ rights when moving from one job to another; reduce or abolish minimum income thresholds for access to social protection schemes, such as health insurance; reduce or abolish requirements for continuity of employment for eligibility to social protections; promote moves away from contribution-based systems, towards systems based upon general taxation (p. 104).

The report also proposes end-tax incentives for self-employment, the replacement of tax on employment by tax on labor, encouraging moves away from cash-payment for work and stronger enforcement and penalties needed for companies that evade or avoid taxes. They are important because tax policies affect social protections in the sense that “uneven taxation levels across different types of employment currently leads to growing numbers of people being excluded from social protections. (…) and as a consequence, these uneven tax rates contribute towards reducing the tax-base that might be used to finance social protections” (p. 105).

The report states that standards should be established for platforms, among which it recommends: introduction of independent mediation panels for settlement of platform-worker grievances; provision of information to platform workers concerning employment rights; that task pay terms be clear; that where payment per task is permitted, platforms should review task instructions before work is allocated; strict rules to govern non-payment for tasks performed; customer non-payment rates should be made visible to workers choosing tasks; in the event of technical problems with a task or platform, workers should not pay the cost for lost time or work; workers should be able to contest non-payment, work evaluations, and qualification test outcomes; workers should know who their customers are and the purpose of their work; tasks that may be psychologically stressful or damaging should be clearly marked; workers should have a legally binding way to make their needs and desires heard to platform operators, such as union membership, collective bargaining, and, in countries with such structures, works councils and co-determination rights and worker account deactivations should be reviewed by a human platform employee (p. 107).

V. Conclusions

The results of the study of the labor consequences that the collaborative economy causes in Europe, according to the controversies generated in each one of the countries and the recommendations of the European and academic institutions, point to the fact that autonomous workers are the most vulnerable within this model of business.

In addition to the existing threats to ordinary workers, such as low job stability, the risk of work accidents (including increased work stress due to the demands of “on demand” or immediate work) or inadequate collective bargaining and professional classification, European institutions and legal literature coincide in accentuating the risk of precariousness in which many of the contracts of self-employed workers of the platforms may incur due to being improperly classified. This circumstance is evidenced by the appearance of transcendent labor conflicts arising in member states’ respective labor markets.

Looking at the five main member states analyzed according to the level of employment and income produced in the collaborative economy (France, England, Germany, Spain and Poland), major protests by workers and, especially, self-employed workers (well through their unions --- UGT in Spain, CGT in France or Vereinte Dienstleistungsgruppe in Germany, for example- or directly --Deliveroo or Uber Eats UK or Glovo in Spain--) related to improvements in job security, collective bargaining or salary conditions are common. The responses to these threats from these countries have been manifested through the inspection and judicial bodies that have sanctioned the practice of these platforms with these workers.

It has been observed that in three of the five countries analyzed, digital platforms have been brought before the courts, mainly by self-employed workers. The issues dealt with in these proceedings refer to the qualification of the nature of the relationship of this kind of worker with the platforms, salary claims and the need for proper negotiation and collective grouping. The courts have ruled in favor (except in some Madrid rulings) of considering the contractual relationship between workers and these platforms as a working relationship, as well as the need for them to have adequate remuneration and the right to group and negotiate collective. These pronouncements
have had such a social impact that they have provoked proposals for regulatory reforms within some member countries (the “Good Work Plan” in the UK or non-law proposals in Spain) with the aim of protecting workers in the collaborative economy (with autonomous workers as the main protagonists), although no results have yet been achieved.

Undoubtedly, the legal literature and the European institutions are not mistaken when they focus their efforts on inculcating adequate forms of classification of workers, to protect the self-employed especially, for whom it is demanded, better social protections, greater grouping capacity as collective to facilitate a negotiation with platforms, insurance coverage against accidents or training.

However, for practical purposes, few countries have incorporated the recommendations emanating from the European Parliament and the Commission in order to increase the protection of workers in the collaborative economy. In Europe, France is the member state that has taken the lead on these recommendations and the first to apply major reforms on its labor regulatory system through laws such as the Law on labor and the modernization of social dialogue or the Law for freedom to choose one’s professional future. Through these steps new concepts and proposals have been incorporated into regulations that have proved to be very effective and positive for ordinary workers in the collaborative economy. These measures include the mandatory contracting of insurance to cover accidents at work, controls in the statistics of the average length of time for workers in the workforce, intensification of training through tools created ex profeso and increase of the sanctioning regime due to the precariousness of labor. However, it has had very little effect on the self-employed, falling short of the expected results and leaving aside more than half of the recommendations of the Commission and the European Parliament. In this sense, the governments of the UK and Spain have, having observed the social impact of the decisions of the Courts and the insistence of European institutions and academics, focused their proposals (even without results) on the protection of the self-employed.

With all this in mind, it is important to note that, until now, the most effective methods to provoke a change of social conscience that results in a normative change have been to request the help of the Courts of Justice or for the inspecting bodies to enforce the law that, in many occasions, companies, with the screen of the badly applied “collaborative economy”, avoid complying. However, a change of base in the policies of the member states is necessary in light of the manifest threats that this business model causes on working conditions. A compendium of all the recommendations officially issued by Europe and of the most effectively supported by the doctrine is needed, based, all of them, on the experience that has resulted from the responses that some member countries have mustered to these threats. For this, an effective tool is a common strategy of the member states in the collaborative economy (which has already been argued for by some MEPs in the European Parliament133) approved by the European Commission or the European Council. These types of tools, very effective in other situations to coordinate common objectives and deadlines for certain concrete actions (some examples of effective results are the EU Drug Strategy 2005-2012, European Union Strategy for sustainable development of 2001 and EU Strategy for Combating Terrorism of 2005) can be used to identify the priority areas in which the Member States should intensify their efforts to achieve progress and guarantee the rights of the agents and citizens involved in the collaborative economy.

This collaborative economy strategy should include the measures suggested by the institutions to the member countries and those contributed by the doctrine, taking into account the most common conflicts that have emerged in the labor scenarios of the member states and the answers given for these. In this sense, based on the analysis made in this study, it would be transcendental to include measures of the European Commission regarding: guaranteeing that both workers and self-employed workers have effective access to social protections; maintain properly reputational mechanisms, respecting the data protection and privacy rules of all parties involved when workers change their platform, work, sector of activity or become self-employed; develop mechanisms that allow transparency and the right to information and replicate in reputational mechanisms to enjoy these of transcendental importance; impose severe penalties for the use of workers’ qualification mechanisms that may be questionable; provide adequate information to workers regarding their employment contracts and rights and obligations regarding social protection; motivate the digital platforms to organize themselves, establishing, for example, European associations, in such a way that it is easier to start a joint dialogue.

It is also necessary to include recommendations put forward by the European Parliament and its studies commissioned as: the introduction of minimum salary and income requirements; the increase of labor inspections on digital platforms for the control and imposition of sanctions when the law is violated, especially in terms of specific requirements to determine the qualification of the contract and working conditions; introduction of the debate on the extension of the concept of employment relationship to create a third intermediate category between ordinary
worker and self-employed worker; increase the coverage of collective agreements to categories that go beyond that of ordinary employee; introduce the debate of reversing the burden of proof in the procedures for classifying the work contract; introduce an independent authority that guarantees the qualification of the nature of the contract (as in some member countries); allow unions to interact with platform workers to inform them about organizational capacity and policies; introduce guarantee mechanisms for complaints and claims by workers. Regarding doctrine, penalties by relevant administrations for the high temporality rates in contract must also be included.

With all this, a joint strategy that takes into account these recommendations can cushion the process of adapting the labor market to this new business model by reducing the times and consequently the damages, even though finally (as is the case in most cases) there is full adaptation to the collaborative economy.

ENDNOTES

4 Even though these concepts have been identified by these authors as erroneous since “seems to reflect efforts to cast these new phenomena as something inherently positive, which is not helpful to keeping the policy debate evidence-based and free of any pre-conceived biases”, Jan Dra­hokoupil & Agnieszka Piasna, Work in the Platform Economy: Beyond Lower Transaction Costs, S2 Interconomics 333, 335 (2017) https://www.cep.eu/system/files/IForum62017_2.pdf
7 Proof of this is that half of the ten most important companies in the world have their main activity in this industry, See PWC, Global Top 100 Companies by market capitalisation, 4 (2017), https://preview.thenewsmarket.com/Previews/PWC/DocumentAssets/477067.pdf.
13 See European Commission, supra note 6, at 3.
16 According to the report, the finance sector of the collaborative economy, financial services and products are provided from peers to other peers on an individual basis or to businesses or larger projects (crowdfunding); online skills include on-demand household services (offered by ‘crowd-based’ marketplaces, enable households to have access to various household services provided by individuals) and on-demand professional services (consist of individuals providing professional services to other individuals and businesses); accommodation sector includes home renting (P2P transactions, where personal providers rent out their homes or spare rooms to other people looking for short-term accommodation), home sharing (Largely non-monetary, P2P transactions, where personal providers offer a space -a couch- in existing properties to share with other peers.) and home swapping (P2P and cost-sharing transactions, where peers can swap -trueque- their properties thereby sharing costs as they do not pay for accommodation); and transport sector includes P2P vehicle rental (CarTogo), Ridesharing (blablacar), Rides on demand (Uber, Lift, Cabify, Taxify), see id. 44-74.
17 See id. at 159.
18 See European Commission, supra note 6, at 2.
European Commission, Second Phase Consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights, 158 (November 20, 2017), https://ec.europa.eu/social/BlobServ let?docid=18596&langid=en


Carolina San Martín Mazzucconi, Generalización Tecnológica: efectos sobre las condiciones de trabajo y empleo, Plataforma Digital Inte

See European Commission, supra note 15, at 134.


Responsible for the state policy in the field of computerization, the development of electronic public administration services, civil security in cyberspace, infrastructure and the use of modern technologies, whose manager is Marek Zagórski, see https://www.premier.gov.pl/ludzie/marek-zagorski.html

PWC Polska, (Współ)dziel i rząd! Prawno
teknologies, whose manager is Marek Zagórski, cyberspace, infrastructure and the use of modern public administration services, civil security in Poland and Europe: A Tool for Boosting Female Employment_2016).pdf

See Drahokoupil & Piasna, supra note 4, at 339.


Professor Baylos Grau, in line with the interpretations of the ILO, propose the need to extend union action to subjects whose work is not inserted within the circle of salaried work, thinking of figures like self-employed workers, see Antonio Baylos, El futuro de las normas del trabajo que queremos, Plataforma Digital Inte


European Commission, supra note 13, at 37.

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Cristobal Molina Navarrete, Derecho y empleo, Plataforma Digital Inte

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According to the results provided by the survey conducted by Kela, there was high percentages of people who received universal basic income that showed signs of stress (approximately 1 in 4 people), see KELA, Preliminary results of the basic income experiment: self-perceived well-being improved, during the first year no effects on employment (February 8, 2019) https://www.kela.fi/web/en/news-archive/-/asset_publisher/IN08GY2n1rZo/content/preliminary-results-of-the-basic-income-experiment-self-perceived-wellbeing-improved-during-the-first-year-no-effects-on-employment. The OECD published a report in 2018 that analyzed the implementation of a universal basic income. The conclusions suggest that without a substantial reform of the tax system it would be very difficult to implement this measure since it would have a negative effect on the lowest levels of society when the subsidy is financed only with the current budget for social aids, see OECD, Basic income as a policy option: Can it add up? (May, 2017) https://www.oecd.org/employment/emp/Basic-Income-Policy-Option-2017.pdf

See San Martin Mazzucconi, supra note 86.


Stefan Neringz, The ‘Uberization’ of the labour market, 17 ERA Forum, 245 (September, 2016).

See Drakoukili & Piasna supra note 4, at 338.


In this model "not only are providers distributed geographically, their separation is also inbuilt into platform architecture where the only forms of worker rationality are comparison metrics", see Newlands, Lutz & Fieseler supra note 110, at 253.

Id at 252.

Id at 262.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a European Agenda for the Collaborative Economy, 11 (June 2, 2016) https://ec.europa.eu/transparency/regexp/rep/1/2016/EN/1-2016-356-EN-F1-1.PDF.

Id. at 12.

Id.

Id.

Id. at 13.


See Schmid-Druner supra note 89, at 15.


See Schmid-Druner, supra note 89, at 20.


See Forde supra note 19.

The U.S. Supreme Court has ruled that the Federal Arbitration Act (“F.A.A.”) bars orders requiring class action arbitration when the arbitration agreement is ambiguous and unclear about the procedure.1 The Court, in a previous 2010 case in which the Court ruled that a court may not compel arbitration on a class action basis when the agreement itself is silent on the availability or specific provision for such arbitration procedure.2 The Court ruled that the Federal Arbitration Act “requires an affirmative contractual basis to compel a class arbitration, which was indisputably absent” in the Lamps Plus case.3

Background

A class action suit is one which a group of plaintiffs with the same or similar injuries caused by the same product or action sue a defendant as a group. People making claims in class action suits when their injuries have been caused by defective products, other consumer products, medical devices, class actions may include consumer fraud, corporate misconduct, securities fraud and employment practices. Persons affected by a court’s decision are entitled to notice that the action has been commenced. Those affected then have the opportunity to join the action, ‘opting in’ or may ‘opt out’. The class action suit brings together and disposes of thousands of claims at one time that are impractical to litigate individually, making the process more efficient.4

The Case

An employee commenced a class action suit against the employer for negligence and other claims after a hacker secured employees tax information from the employer. Some 1300 employees were affected and filed fraudulent income tax returns in the employee’s name. Lamps Plus moved to compel arbitration and dismiss the law suit. The District Court granted the employer’s motion but authorized arbitration on a class action basis, rather than an individual basis requested by the employer. The Ninth Circuit Court of Appeals affirmed.
Supreme Court’s Holding

The issue before the court was whether, consistent with the Federal Arbitration Act, an ambiguous agreement, can provide the necessary “contractual basis for compelling class arbitration.”5 The court held it cannot.

In writing for the Court, Justice Roberts wrote that class arbitration is significantly different from traditional individualized arbitration “that was contemplated by the F.A.A. It further undermines the important benefit of familiar arbitration. The statute, wrote Roberts, requires more than ambiguity to ensure that the parties in fact agreed to arbitrate on a class wide basis”.6 The F.A.A. further requires the courts to enforce arbitration agreements according to their terms.7

The Court pointed out,

Consent is essential under the F.A.A. because arbitrators yield only the authority they are given… they derive their power from the parties’ agreement to forego the legal process and submit their dispute for private dispute resolution.8

But that is precisely what the lower court did. The Ninth Circuit required class arbitration on “the basis of a doctrine that does not help. To determine the meaning of the two parties gave to the words, or even the meaning, that a reasonable person would have given to the language used. Such approach is inconsistent with the fundamental principle that arbitration is a matter of consent.”9

The Court went on to explain individual arbitration allows for lower costs, greater efficiency and speed, as well as the ability to select arbitrators who are experts. On the contrary, class arbitration is slower, more costly, and can raise issues of due process, such as litigating rights of absent class members without the right to appellate review.10

The Court referenced the Ninth Circuit’s conclusion based on California law that ambiguity in a contract should be construed against the drafter, also known as “contra perfectum.”11 Such rule applies only when the meaning of a provision becomes unclear and ambiguous.

The Court stated,

Class arbitration, to the extent it is manufactured by state law, rather than consent, is inconsistent with the F.A.A…. We recently reiterated that courts may not rely on state contract principles to “reshape traditional individualized arbitration by mandating class wide procedure without the parties’ consent.”12

The Court went on to state, “Like silence, ambiguity does not provide a sufficient basis to conclude that parties to each arbitration agreement agreed to sacrifice the principle advantage of arbitration.”13

Dissent

In the dissent, Justice Sotomayor and Kagan wrote the Court was leading the FAA to preempt the neutral principle of state contract law… The majority reached its decision without agreeing the contract was ambiguous.14 Justice Kagan wrote, “The arbitration agreement Lamps Plus wrote is best understood to authorize arbitration on a class wide basis, but even if the Court is right to view the agreement as ambiguous, a plain vanilla rule of contract interpretation as applied in California law and every other state, requires making it against the drafter…and so permits the class proceeding in the case.”15

Conclusion

Bloom and Buddish assert that the Court’s decision reaffirms the intent of the F.A.A. in interpreting the arbitration agreement. “It also reinforces and strengthens the importance over state law principles that conflict with its fundamental principles.”16

Roger Bates argues, “the case’s principle dispute is the result of an unnecessarily ambiguous arbitration agreement that, if properly drafted, could have explicitly waived class arbitration… The lesson for employers is to periodically review their arbitration agreements to ensure that class arbitration is expressly waived, as any ambiguity or silence on an issue could result in unnecessary litigation.”17

ENDNOTES

4 Find Law.com, “Class Citation Suits”
5 See EN1, Lamps Plus v. Varela, at 4
6 See, Epic Systems Corps v. Lewis, 138 S.Ct. 1612 at 1621
7 Lamps Plus at 5
8 Id. At 7
9 Id.
10 Id.
11 See Bloom/Buddish at 3
12 See EN1 at 7. See also Epic Systems, 138 S.Ct. at 1623.
13 Lamps Plus at 6.
14 Id. at 14.
15 Id.
16 See Bloom/Buddish at 4.
17 Bates, Ryan “Supreme Court Holds that Agreement to Class Arbitration Must be Explicit,” HUNTON EMPLOYMENT, LABOR PERSPECTIVE, 4/29/19.
Neoliberalism and the Dignity of Labor in the Indian Automobile Industry – A Case Study of the Bajaj Auto Strike, Pune

By Simran Jain

Introduction

The genesis of resistance across the world with respect to industrial mechanization dates back to 1779. This movement, known as the Luddite movement, involved, among others, English workers in the weaving and textile industry. They objected to the introduction of the mechanized loom, as they perceived the new machinery to be a threat to their livelihood.¹

In the 19th century, Karl Marx propounded the Conflict theory. He emphasized that in a capitalistic setup, the reason for conflicts is the power differential among societal classes. According to the Trusteeship philosophy of Mahatma Gandhi, employers are supposed to look after the welfare of employees. The Pluralistic theory of industrial relations emphasizes that industrial relations theories and policies seek ways of achieving a workable and equitable balance between the goals of workers, employers, and the larger society.² Excessive corporate power creates substandard wages and working conditions, which can burden society with welfare-reducing social costs.

Globalization is now deeply rooted in the world economy. It has created a huge potential for business development across world and has resulted in the birth of a new global economic map. It is a major driver of economic growth via international trade in goods, services and capital flows through foreign direct investments (FDIs) and portfolio investments.

The introduction of technology across the world has spread far and wide, which is quite often not in tandem with domestic technology. In the last few years, global capitalism has led to significant restructuring. One major aspect of this is the transnationalization of production, i.e., the separation and segmentation of production processes across different regions or factories all over the globe. This phenomenon is often described as the ascendancy of global production networks (henceforth GPN).³

As a consequence, global and local markets are more competitive than ever before. Competition has increased between multinational companies to tap into new markets, use cheap labor to exploit economies of scale, and reduce the cost.
of production. Governments of developing nations keep their labor laws flexible in order to attract foreign capital, which places an increasingly downward pressure on wages and union bargaining power. This also has an impact on domestic companies as competition increases for them as well, and they have to keep up with the changing industrial landscape. This process adversely affects the interests of labor. Thus, the rights of workers end up being a matter of consideration and importance.

Conditions in the Automobile Industry
Globalization has played a vital role in the growth of the Indian automobile industry. A nation’s industry becomes global when foreign firms begin to enter in the domestic markets. Such a development has taken place in the Indian automobile industry. Till the ‘80s there were only two domestic companies that manufactured a limited number of products. However, after globalization, global auto doyen companies from US, Japan and Europe have had significant presence in India. This did not happen on its own. There has been 100% FDI in the automobile industry in India since 2002. Other reforms and measures have also been implemented in India, which has resulted in a booming automobile sector. However, in a bid to keep their interests in place, the companies have consistently ignored the needs of the workers.

Another issue of importance is that a significant strand of the literature tends to treat capital as autonomous, if not all powerful, in its ability to shape the entire process, rendering the agency of labor almost negligible. In other words, the agency of labor has been inadequately accommodated. Thus, the phenomenon of globalization has proved to be beneficial only for the companies and consumers and has affected the workers disproportionately.

One such example that demonstrates the deplorable conditions of the workers and a blind eye to their demands is the Bajaj Auto Strike in Pune. The dispute arose in 2013 with respect to the issue of wage revision in the industry. Collective bargaining between the union and the management of Bajaj Auto for settling the issue of wage revision failed and the workers’ union called for a strike. Another contention was the pending issue of eight workmen who were dismissed from services for various acts of misconduct in 2013-14. The workers have demanded reinstatement of those dismissed workers who, according to the company, “did not report at the place of transfer/deputation in spite of court orders” and a wage review process.

The four major issues in this case are related to increase in wages, granting of shares of the company to the employees, regarding working conditions in the industry and recognition of the trade union.

This paper seeks to examine and analyze these following issues, as well as the violation of labor rights in the context of the Bajaj Auto Strike in Pune. It argues that the agency of labor has been devalued post globalization. As a result, employers have begun to violate the basic right of workers such as wage revision and ensuring safe working conditions in the establishment.

Bajaj Auto Strike Pune: History, Issues and Recent Developments

Bajaj Auto Limited is an Indian company that produces motorized vehicles. The said company is a unit of Bajaj group, which was founded in the 1930s by Jamnalal Bajaj in Rajasthan. The company is presently based in Mumbai, Pantnagar (Uttarakhand) and its biggest plant is in Chakan, Pune (Maharashtra, India).

The Chakan plant lies in the Special Economic Zone (SEZ) which is promoted by Maharashtra Industrial Development Corporation. The said plant was set up in 1999.

The Pantnagar plant workers had started an agitation in May 2012 after getting a poor increment. The Pantnagar workers approached Vishwa Kalyan Kamgar Sanghatana (VKKS) to support their agitation. Since the workers of Pantnagar were skeptical that the union could be registered in Uttarakhand, they requested VKKS for membership. Considering their situation and request, VKKS gave them membership to the majority of workers from Pantnagar.

The management of Bajaj Auto argued that the registration of VKKS was only for Maharashtra, and they did not have the right to take up any membership from outside Maharashtra. The union claimed that the management refused to recognize the union and indulge in collective bargaining. The VKKS referred this matter to the Uttarakhand High Court.

The judgment of the High Court directed the labor department of Uttarakhand to start the conciliation process with VKKS.

The Pantnagar workers had to join VKK due to harassment by the local management and low increments. Eventually, a new union came up at Pantnagar, and a fresh agreement was signed between them and the Bajaj Auto management.

However, the decision of VKKS to extend membership to the workers at the Pantnagar plant changed the relationship between Bajaj Auto management and the workers at
the Chakan plant. It caused the general atmosphere in the industry to vitiate.

The workers at Chakan were given impossible targets. Consequently, due to failure in complying with the unreasonable demands of the management, the employees started getting warning letters, show cause notices and suspension threats. There were cases of suspension, pending enquiry and dismissal. Their demand for a scientific time study based on ILO norms was not accepted by the company. Further, there was failure to review the increment in wages as per the settlement reached between the parties in 2010. The workers then terminated the long-term settlement and stopped work from July 25, 2013.

From September 2012 and June 4, 2013, nine meetings were held between the company and union at Chakan, with no resolution to any of the conflicts.10

**Major Issues and Their Legal Analysis**

1. **Increase in Wages and Share of Profits**

On June 25, 2013 about 950 workers at the Chakan plant of Bajaj Auto demanded improved wages and working conditions. This demand was responsible for the major controversy in the issue.

The company is the world’s most profitable two-wheeler manufacturer.11 The VKKS has alleged that the compensation paid to the workers was not in tandem with the rising profits of the company. Its claim was that for each Pulsar motorcycle that is produced, the workers get only Rs 300, while shareholders and managerial staff get Rs 16,700 and the dealers, and government get Rs 10,000 each. Further, inflation in Pune as per the consumer price index for industrial workers grew by 11.7% in 2010 over 2009.12

**Judicial Intervention in Cases of Wage Demand**

In Indian labor law jurisprudence before 1947, a case was dismissed outright if a trade union demanded higher wages. This was on the grounds that a court does not have the power to alter the contractual obligations between the parties.13 Then in 1949, the Federal Court held in the case of *Western India Automobile Association vs. Industrial Tribunal*4 that in the interest of social justice, and with a view to secure peace and harmony between the employer and employees, industrial adjudication can impose new obligations and abolish redundant ones. Subsequently, this opinion of the Federal Court was adopted by the Supreme Court, in the case of *Bharat Bank Ltd. Vs. The Employees of Bharat Bank Ltd.*15

The International Labor Organization conceptualized the concept of minimum wages for the first time in 1928. This was done in order to protect from exploitation those workers, who were working in industries where wage levels were substantially low. This left the workers very vulnerable and since they were not well organized, they were also left with minimal bargaining power.16

A draft bill considered by the Indian Labor Conference in 1945, was introduced in the Indian Parliament in 1946. This led to the adoption of Minimum Wages Act in 1948, which was enacted to secure the well-being of workers working in a competitive market with menial wages.17

The act defines wages as inclusive of all remuneration that is capable of being expressed in monetary terms. It would be payable by the employer to the employee after the latter fulfills the terms of contract of employment.18 It represents the level below which the wages cannot be permitted to drop.19

**Issues in Minimum Wages Calculation in India**

The Minimum Wages Act only lays down the procedure to fix and revise minimum wages. It does not provide for fixed amount of wages, but the basis on which it should be calculated. Generally, for the said calculation, the fixing authorities consider principles laid down in resolution of the 15th Indian Labor Conference, which is also not strictly adhered to. As a consequence, there is evident variation in the minimum wage rates, even in the same occupation. Often, it does not even reflect the necessary cost of living.20 Another issue is related to gender disparity in minimum wage. However, there are a few indicators based on international experience, which can be used while calculating minimum wages. They are estimates of cost of living for workers and their families, number of people directly affected by minimum wages, etc.21

Since the calculation of minimum wages is itself contentious, workers in the industries must not be compelled to subsist on wages, which are often erroneously calculated. Thus, they must be able to raise demands for an increase in wages.

The judicial principles of wage fixation are derived partly from both the management and economic theory. They are further blended with the tenets of equity and fairness. For this, it is imperative to look at the Indian jurisprudence with respect to the demand of increase in wages by the workers working in an establishment.
Thus, it is clear from the case laws mentioned that during adjudication, the Court has sought to balance the claims of social justice with the situation of the national economy and of capital for reasonable profits. The Court is of the opinion that the matters related to wage fixation are not static and are subjected to change. The paying capability of the employer has to be taken into account while assessing the issue. In the present situation, VKKS had contended that there was substantial profit incurred by the company, thus their wages should be increased. Once the matter is taken to the Court, it should look into the facts and if increase of wages is within the paying capability of the employer and will still keep the company financially stable in the future, then the wages of the employees should be raised.

2. Owning Company Shares
The union asked for equity shares, also known as employee stock ownership plan (ESOP). It was asked to be given to the workers at Re 1 a share. While this practice is still prevalent in information technology (IT) companies and in a few other fields, this was the first instance of such demand in India made by workers from the assembly and production floor.

This demand for ESOP was dismissed immediately. The MD of Bajaj Auto, Rajiv Bajaj stated that if the workers began to demand like wayward children, the company, like a parent, had to be “fair but firm.”

He also declared unambiguously that the company did not believe that loyalty of people could be bought by throwing shares at them. The management further said that ESOPs are a legitimate demand only in the IT industry or where capital is an issue. Even those automobile companies that issue shares, issue it to only those in the top managerial positions in their research and development (R&D) wing and not to workers.

An almost indignant response from Bajaj’s side shows the chasm between how managements view workers’ role and how the latter sees it.

The president of the union explained the reason behind the demand for cheap equity shares. He said that since they were the ones producing wealth, they must have a share

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<table>
<thead>
<tr>
<th>No.</th>
<th>Name of Case</th>
<th>Year</th>
<th>Bench Strength</th>
<th>Ratio</th>
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<tbody>
<tr>
<td>1.</td>
<td><em>Express Newspaper (P) Ltd. v Union of India</em>&lt;sup&gt;1&lt;/sup&gt;</td>
<td>1959</td>
<td>5 judge bench</td>
<td>Demand for increase of wages should not be forced upon the employer unless it is ascertained that the employer has the capacity to pay. Thus, both financial ability and stability are the necessary conditions to be seen. The establishment has to be secured financially for the future as well and, thus, stability becomes an essential criterion.</td>
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<td>2.</td>
<td><em>Indian Oxygen Ltd. v Workmen</em>&lt;sup&gt;2&lt;/sup&gt;</td>
<td>1963</td>
<td>5 judge bench</td>
<td>In this case, wage revision was decided on the basis of facts. Since there was material change in circumstances since the time wages were fixed in 1949, the Court held that it called for a revision in the year 1962.</td>
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<td>3.</td>
<td><em>Airlines Hotel (P) Ltd v Workmen</em></td>
<td>1963</td>
<td>3 judge bench</td>
<td>The financial position of the company was taken into consideration while deciding whether to increase the wages. It was held that considering the profit that the company had acquired over the last few years, increase in wage would result in wiping out entire profit. Hence, wage revision was not done.</td>
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<td>4.</td>
<td><em>Workmen v British India Corporation Ltd.</em>&lt;sup&gt;3&lt;/sup&gt;</td>
<td>1965</td>
<td>3 judge bench</td>
<td>The Apex Court held that while considering the issue of wage revision, sections of workers in different departments of industry have to be seen differently and their wages have to be decided accordingly.</td>
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<td>5.</td>
<td><em>Workmen v Orient Paper Mills Ltd</em>&lt;sup&gt;4&lt;/sup&gt;</td>
<td>1969</td>
<td>3 judge bench</td>
<td>While considering the minimum wages, including basic wages, dearness allowance and product bonus should be considered and the increase is justified, only then the total wages can increase.</td>
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<td>6.</td>
<td><em>Press Trust of India and another v Union of India</em>&lt;sup&gt;5&lt;/sup&gt;</td>
<td>1974</td>
<td>2 judge bench</td>
<td>Fixation of the wage scale depends upon the paying capacity of the employer. The financial capacity of the employer has to be taken sufficiently into consideration. Further, there is a requirement of proper material evidence to assess the paying capacity of the employer while considering the question of increase in wages.</td>
</tr>
<tr>
<td>7.</td>
<td><em>Tata Consulting Engineers v Workmen</em>&lt;sup&gt;6&lt;/sup&gt;</td>
<td>1980</td>
<td>3 judge bench</td>
<td>It was held that it is the fundamental jurisdiction of the Industrial Tribunal to revise the wage scale. Tribunals have full liberty to propose an ad hoc increase of wages as a part of the revision.</td>
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<tr>
<td>8.</td>
<td><em>Mahatma Phule Agricultural University v Nasik Zila Sheth Kamgar Union</em>&lt;sup&gt;7&lt;/sup&gt;</td>
<td>2001</td>
<td>2 judge bench</td>
<td>The increase in wage is not a one-time exercise. It is a permanent increase that will vary as the basic starting wage and dearness allowance will vary. The Court in this case held that universities not following this practice are indulging in unfair labor practices.</td>
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<sup>2</sup>1963 Supp (2) SCR 736.  
<sup>3</sup>(1965) 2 LLJ 433.  
<sup>4</sup>(1969) 1 SCR 666.  
<sup>5</sup>(1974) 4 SCC 638.  
<sup>7</sup>(2007) 7 SCC 346.
in its profit. They also contended that since management was not paying fair wages and was refusing to review the wage agreement, they thought demanding that shares via the share dividends of the company would result in fair exchange. The union was demanding individual, not group shares. This would have given the workers a stake in management and selling off shares would not be as easy as would be in the case of individual shares.  

The workers’ demand for shares in the company was mainly to ensure proper compensation for work, which had been inadequate in the wage agreements that were negotiated from time to time. The last wage agreement was for a period of nine years (ending in 2019), with a revision every three years. The workers nullified this agreement and asked for shares in the company. 

ESOPs are most commonly used to provide a market for the shares to motivate and reward employees. In almost every case, ESOPs are a contribution to the employee, not an employee purchase. As early as the early 1990s, the Bharat Electronics Limited Union in Bangalore sought shares for workers. In this context, Bhowmik raised some pertinent points with respect to worker-shareholders and how it has the potential to alter the relationship between workers and management and between workers and the union themselves. It was the fear of a changed worker-union relationship that has made some unions apprehensive of such schemes. 

Upon considering the comparative analysis, the ESOPs have been successful in the US with respect to the number of companies that have implemented such plans of making workers shareholders of the companies they work in. In India, however, this idea is contested most with respect to the public sector companies, as it is seen as a move to privatize the public sector by the said distribution of shares. 

The ESOPs have been successful in USA mainly because of the laws that are in place. Companies are given tax benefits if they enroll in the ESOPs scheme. The workers are also allowed to borrow capital and form trusts in order to purchase shares collectively. These two provisions make ESOPs possible for the workers and lucrative for the companies. 

On the other hand, Canada has had a different experience. The workers have established cooperatives with the help and support of the government and unions. These cooperatives continue to enjoy the support of the union. The whole process has exposed workers to the techniques of management and built up their awareness. Both of these are important if workers are to eventually organize production. 

ESOPs in India have been generally offered in the IT sectors. It is typically offered to middle and higher management employees at bonus or at discounted prices. This is done as a part of a strategy to retain talent by giving the workers shares in the company. Infosys is one such company that has been able to carry out this process with success. In 2014, Flipkart, Housing.com and Snapdeal offered ESOPs to its employees. 

In 2018, Eastman Auto and power, an automobile company in Gurgaon decided to grant ESOPs to hundreds of its employees, in order to reward them for their contribution. 

The Managing Director was of the opinion that this measure would go a long way in inculcating a sense of ownership among employees and make them partners in achieving professional excellence. The company’s employees have also welcomed the initiative. They believe that ESOP is a noble initiative which has made them feel valued and an integral part of the company. They believed that it will motivate them to perform better. 

Thus, it is evident that granting of ESOPs in India is not limited to the IT industry anymore, contrary to the argument of management. Granting ESOPs to the workers will ensure their share in the profits of the company. The workers will not have to wait for management to revise the wages and in failure to do so, take recourse of litigation. 

Since this issue will no longer be required to be taken up by the union, it could exercise collective bargaining with respect to other matters in the establishment. 

3. Working Conditions Within the Establishment 

The union pointed out that the speed of assembly lines had gone up from 42 seconds per motorbike to 28 seconds in the last six years. This had resulted in production of about 1,028 two-wheelers daily. Many young workers started suffering from kidney stones because of the unrelenting pace of the assembly line and a fall in the number of relievers. From about five to seven relievers, which were required for the workmen to drink water or to go to the toilet; the number was reduced to three. 

N. Vasudevan of NTUI drew a parallel of this situation with that of Maruti Suzuki workers’ struggle. In both places, young workers, most below 35 years, have health issues because they have to work at tremendous speed that treats them more as machines than humans. The response of the Bajaj Auto management after being asked the reason for reducing the relievers, was that they followed the Kaizen technique of constant improvement. There used to be seven relievers, which were now reduced to three or four. 

The VKKS said that management was upset with it as it espoused the issue of workers at the Pantnagar
Court upheld that: Mills was due to force majeure, they were not liable. According to which, inasmuch as the partial closure of the factory was due to shortage of water, the workers demanded compensation for loss of wages and dearness allowance.

VKKS also stated that the management of Baja Auto had suspended 22 workers in Chakan plant after the strike in June 2012. It also denied to revise the wage agreement. According to the agreement in 2010, in case employees of Baja Auto were given a higher increment than that mentioned in the wage agreement, this higher increment would be applicable to those covered by the agreement as well. According to the union, this clause was violated by the management.

The VKKS was recognized in 2007 after a long period of struggle. Initially, management had responded to the demands of formation of VKKS by closing down the Akurdi plant. The production was shifted to units at Aurangabad and Uttarakhand in September 2007. Finally, after an order of the court, the Bharatiya Kamgar Sena, which was backed by Shiv Sena, was derecognized, and the VKKS was deemed as the majority.

The Supreme Court of India, during the 1950s, decided the industrial disputes by interpreting both the contractual obligations and the legislation literally.

In 1957, Justice Bhagavati, in the case of Nirmala Textile Finishing Mills Ltd., v Second Industrial Tribunal, Punjab, asserted the notion of social justice. He remarked that the ultimate objective of industrial adjudication is to bolster the growth of the national economy and to promote industrial peace.

In the case of Rastriya Mill Mazdoor Sangh v Apollo Mills Ltd., Justice Hidayatullah observed that tenets of social justice are not dependent on contractual relations and are not to be enforced according to the principles of contract of service. It is something beyond those principles and is invoked to render justice even when there is no contractual backing.

The dispute arose due to the closure of a mill for certain days due to the shortage of water. The workers demanded compensation for loss of wages and dearness allowance. The Court upheld the decision of the Industrial Court of granting wages to the workers. It also upheld the Industrial Court’s decision of not applying the Standing Orders Act according to which, inasmuch as the partial closure of the Mills was due to force majeure, they were not liable. The Court upheld that:

“Adjudication does not, in our opinion, mean adjudication according to the strict law of master and servant. The award of the Tribunal may contain provisions for settlement of a dispute which no Court could order if it was bound by ordinary law, but the Tribunal is not fettered in any way by these limitations. In Volume 1 of Labor Disputes and Collective Bargaining by Ludwig Teller, it is said at page 536 that industrial arbitration may involve the extension of an existing agreement or the making of a new one or, in general, the creation of a new obligation or modification of old ones, while commercial arbitration generally concerns itself with the interpretation of existing obligations and disputes relating to existing agreements. In our opinion, it is a true statement about the functions of an Industrial Tribunal in labor disputes.”

This has been the settled position since this case and has been later affirmed by various HC judgements, Ahmedabad Sarangpur Mills Company Ltd. v Industrial Court Ahmedabad and Anr.

India’s automobile industry is the one of the largest in the world. There are four belts in this industry, with Delhi-Manesar being the largest one. Over the years there have been reports of workers’ meeting with serious accidents in the industry, which often results in permanent disabilities or considerable deterioration in the working efficiency of the employees.

Laws regarding workplace safety are in place in legislations such as The Factories Act. Chapter IV of the Act is devoted to ensure safety of the workers, and Part III to ensure a healthy working condition for the workers. The latter includes provisions of cleanliness, ventilation, drinking water, latrines, urinals, ensuring fencing of machinery, prohibition of employment of young persons near dangerous machines, etc. Section 8 of the Act provides for appointing a Chief Inspector by the State Government. The Chief Inspector, subject to the control of the State Government, has the power to issue orders to the owner of the premises in respect of the carrying out of the provisions. Since the Chief Inspector is subjected to the control of the government, the government itself may have policies which may favor the owners of the factories. Hence, there is a possibility that the workers’ interest may get undermined here due to the lack of initiatives and apathy by the government. The Act provides no mechanism for the workers to approach an adjudicatory body directly in case of violation regarding their safety conditions. The Chief Inspector mandatorily acts as an intermediary. In case the inspector issues certain directives, the contravention of
same results in penal consequences under section 92 of the Act. However, there is no stringent punishment or penalty prescribed under the Act. The maximum period of imprisonment of the employer is two years. There is absence of robust institutional mechanism that could support their implementation. This has resulted in hazardous working conditions, as the employers have no fear of sanction and, thus, do not invest in alleviating the safety conditions in the establishments. There are grossly inadequate provisions for post-accident treatment, compensation and rehabilitation in the Act. The injured workers are mostly left with long-term psychological and physical damage, with obvious financial adversity.47

It is imperative for the legislature to realize that the Factories Act was formulated in 1948, and since then there have been considerable changes in the industrial landscape; both with respect to technology and structure of the economy. Many of these changes were unfa- thomable back then. Hence, there is a pressing need to amend the Factories Act according to the current times. It is suggested that there should be a clear demarcation between different sectors of industries, such as automobile, cement factories, pharmaceutical etc. Guidelines related to safety requirements should be concisely provided in the Act, depending on the suitability and requirements of the particular industrial establishment. In absence of a robust legislative mechanism enabling the workers to assert for better working conditions, there is a need for courts to step in. Based on the decisions of Rashtriya Mill Mazdoor Sangh and Nirmala Textile Furnishing, the courts can decide in the favor of the workers in Chakan plants, and should increase their breaks during the work hours.

4. Recognition of the Trade Union

Another reason that leads to frequent strife in the automobile companies in India is the unwillingness of managements to recognize unions.48 Thus to oppose the capitalists, assert their rights, and oppose the increasingly declining share of labor in the value-added economy, indulging in collective bargaining becomes a major challenge for the workers working in these establishments. With the dismantling of the welfare state in India post-liberalization in 1991, the deregulation process accelerated the weakening of labor power in India. This also resulted in decline of wage share.

Collective bargaining, however, is a powerful tool in the hands of the workers to assert their rights and get into negotiation with the employer.

In India, there are multiple trade unions in the workplace. They are formed on the basis of region, caste, gender etc. It is not possible for employers to bargain with every union. There is no statute in India that lays down procedure for recognition of trade unions, through which a sole bargaining agent could be chosen for the purpose of getting into negotiation with the employer. The attempt for statutory recognition came in 1978-88. In 1988, it was suggested that there should be a bargaining council, and the sole bargaining agent should be from an elected bargaining council. Trade union recognition and the Unfair Labor Practices Act 1971 stated how this council was to be elected. However, this Act was never notified. Today, about six states in India have a trade union recognition act. West Bengal and Kerala follow a secret ballot method. Others, including Maharashtra, chose the verification method.

In the case of Rail Coach Factory Men’s Union vs. Union of India,49 it was held that only a recognized union had the power to get into negotiation with the employer, and that the prominent method for recognition is to be adopted. Indian Labor Commission’s Code of Conduct came in 1962, and it was enforced on all TU’s part of the ILC. Once the procedure is initiated, everyone has to consent to the recognition process. Labor jurisprudence gives more importance to consensus than to law.

In Automobile Products of India Employees Union vs. Association of Engineering Workers,50 the court held that once there is agreement between management and a recognized union, generally, the Industrial Court does not interfere in the agreement entered by the trade unions even if the statute mandates otherwise.

In Balmer Lawrie Workers’ Union vs. Balmer Lawrie and Co. Ltd,51 the court held that there is need for recognition of trade unions in order to avoid conflict in industry. Even though a recognized trade union has the exclusive right to get into bargaining, the minority union under the Industrial Disputes Act can also raise dispute in the form of individual demand. The Court felt workmen had to make some compromises to get better living conditions. According to the law in Maharashtra, the majority union has exclusive rights to get into settlement.

In MRF united workers’ union v government of TN52, the division bench of the Madras High Court said recognition is an important concept for implementation of statutory rights. Also, the right to be associated with a trade union is a fundamental right. The argument of discretion of management with respect to recognizing the majority union, or it cannot be accepted.

Thus, based on the cases mentioned above, as per the MRF United case, the management of Bajaj Automobile ought to have recognized VKKS. Management’s unwillingness to recognize the union and subsequent use of coercive methods amount to unfair labor practices. Had there been
recognition of the union since the beginning, the matter would not have escalated as it did, and the subsequent agitation was completely avoidable.

Conclusion

For the labor class in India and their leaders, the major challenge is to keep up with their morale at a time when inflation is at a high and even the prices of essential items is soaring. Job opportunities have become scarce. There is general apathy from management whenever workers raise their demands. Instead of getting into negotiation, workers are met with coercive actions. This is also what the management of Baja Automobile did; it threatened to shift the plant from Chakan to elsewhere, when the workers unionized and demanded their rights. Despite the judicial mandate for management to give recognition to the majority trade union that had been elected, management flouted it. This worsened the situation. Incidentally, when workers went on strike, it was during the time when the automobile industry in that region was looking at actively cutting production costs and, thereby, resulting in loss of jobs. This made the situation even more difficult for VKKS.

In 2014, the Company revised the wages of the workers and the permanent employees got a hike of Rs. 10,000 a month. With respect to the demand of the trade union for increase of wage, if the employer has the financial capacity to pay them out of the profits, the precedents direct us towards an increase in wage share of the employees. The employees can approach the Court for revision of wages, if unsatisfied with the rise in wages by the employer. The employer would have to materially prove its inability to pay for the Court to pronounce the decision in their favor. Further, the demand of ESOPs in the industry should be fulfilled by the employer. It shall ensure the share in profit by the workers. Further, management cannot refuse to acknowledge the majority union, the VKKS, and as a result, refuse to enter into negotiation with them.

The issue of dismissal of six workers from the Pune plant is pending in the Labor Court. The struggle of VKKS in Chakan has led to certain revelations about the reaction of the community in general. Even during the 50 days of a hunger strike of VKKS in 2013 at the Chakan plant, there was no support from the civil societies or an industry wide action. Even the media coverage was very limited. The state government was a mute spectator. The labor minister just called one meeting and that, too, was unsuccessful.

During the strikes in 2014, management threatened the workers, stating that they would shift the production facilities to other plants. Bajaj Auto has the flexibility to be able to move production out of Chakan to other plants located in Pantnagar and Aurangabad in a short time. Management also stated that, once the production shifted to the other plants, the striking workers would be not needed and may have to content themselves with the benefits under the Voluntary Retirement Scheme. With no indication of management yielding, and not enough support from the rank and file of the employees, pressure from suspended employees and wage losses ultimately resulted in the strike being called off by the workers after 50 days. This is one of the many instances of management victimizing the workers.

Today the wage share of the Indian working class is substantially lower than even in other so called emerging economies in the global South. As noted earlier, this phenomenon has accelerated after the economic restructuring post 1990. In the absence of a legislative mandate, there is blatant ignorance by management to even endure safe working conditions for the workers. On the other hand, management refuses to get in negotiation with the employees and instead threatens them.

The majority of the existing labor laws in India were framed when India was under British rule. Therefore, the major objective of these laws was not to give protection to labor but to protect the interests of the colonial ruler. There is a pressing need for these laws to keep pace with changing needs of the time. A few flexibilities in the laws have been introduced, but they are applicable only in limited areas, such as export processing zones (EPZs) and special economic zones (SEZs), etc. Further, the existence of large number of laws along with multiple legal bodies has also added complications to proper functioning of such laws.

Thus, it can be concluded that the agency of labor has been devalued post-liberalization. The primary focus of employers is to garner profit for themselves and exclude the workers from the profit sharing system. The legal system also has not facilitated the rights of discourse of the workers by providing safeguards and remedy. Therefore, the landscape is such that the workers have to unionize themselves and constantly struggle in the apathetic environment created by employers and the dearth of initiative by the government. The three social partners namely the political authority, labor unions and employers should pursue harmony in the industrial establishment as their primary goal. They should undertake exercises in order to restore social and industrial peace.
Wage Discrimination in British Columbia Business and Law Schools: An Empirical Analysis

By Kenneth Wm. Thornicroft

Abstract

This study, utilizing a unique dataset constructed by the author, examines sex and racial discrimination with respect to salaries paid to professors employed in business and law schools in British Columbia research universities. The estimated wage equations control for various factors that would presumptively affect salary levels such as the relative quality/reputation of the employing institution, discipline (business versus law), whether the individual has a senior leadership position, rank, educational qualifications, teaching performance and research output. This study finds about a 6% to 8% male-female wage gap but no evidence of wage disparity for professors who are members of a visible minority.

I. Introduction

Wage discrimination, based on race and sex, is a much studied phenomenon. A Google Scholar search of the terms “wages”, “discrimination” and “gender” generates a list of over 33,000 articles published since 2010 (and a further 25,000 if “sex” is used in place of “gender”). A similar search using the terms “wages”, “discrimination” and “race” returns a list of over 30,000 articles. Although the male-female wage gap has diminished over the past several decades, it nonetheless stubbornly persists. For example, as of January 2019, the average hourly wage for Canadian employees aged 25 years and older was $29.11, but there was a significant gender gap – the average male wage was $29.25 versus $25.45 for females (i.e., a 14.9% wage gap).1 This gap shrinks dramatically if one examines the male-female wage gap for unionized employees, but a gap nonetheless persists – for example, in 2018 the male/female gap for permanent employees in unionized workplaces aged 24-54 years was $33.02/$31.16 or about 6%.2 The voluminous gender-based wage gap literature establishes at least four conclusions: first, the male-female wage gap has been shrinking over the past several decades; second, smaller gaps are reported in studies utilizing more sophisticated statistical methods and a larger number of explanatory variables; third, the magnitude of the wage gap varies across different industries and occupations; and fourth, notwithstanding the increasing sophistication of explanatory models, a male-female wage gap persists.
Visible minorities — even those who are highly educated — also appear to be disadvantaged in the Canadian labor market. Statistics Canada 2016 census data showed that members of visible minorities earned, on average, lower wages compared to Canadians who were not members of a visible minority, and that this disparity was greater for female, compared to male, visible minority individuals. For example, in 2016, a visible minority person aged 25 to 54 with a bachelor degree or higher in “business administration” earned, on average, $60,545 versus $105,876 for a person who was not a visible minority (a 74.9% wage gap). For individuals with a degree in “the legal professions and studies”, the comparative average salaries were $59,996 versus $101,833, a 69.7% wage gap.

A recent Statistics Canada report shows that much of the current overall gender wage gap is attributable to the comparatively large gap within the top 10% of all income earners. This latter study examined the wage gap across all employment sectors, whereas in this study I examine the wage gap within a single but comparatively well-paid sector, namely, post-secondary education (and indeed, within a narrow subset of this sector — business and law schools).

Women have made significant inroads into academia over the past several decades. For example, Statistics Canada reports that in 1970, only 13% of all full-time academic positions were held by women; by 2017, this percentage had increased to 40%. However, as of 2017 women were underrepresented at the highest (and most highly paid) academic ranks (associate and full professor) and continued to be paid lower average salaries than their male colleagues across all ranks. This latter fact is a troublesome labor market phenomenon.

Various studies have demonstrated that gender-based wage discrimination exists in both U.S. and Canadian universities but these studies typically examine wage gaps across all disciplines. However, separate disciplines (and classes of institutions) constitute separate labor markets. For example, according to a 2019 report issued by the College and University Professional Association for Human Resources, elite private U.S. research institutions paid salaries that were, on average, about 46% higher than salaries paid to faculty at liberal arts colleges. Further, faculty in professional schools (such as law, business and engineering) earned considerably more than faculty in the humanities — for example, the average salary for an assistant professor in business was nearly double that of an assistant professor in English or history. Similar patterns prevail in Canada. In this study, I examine wage discrimination based on sex and race/ethnic origin for faculty members employed in business and law schools at British Columbia’s six research universities.

Faculty in business and law schools at research universities are a relatively elite and well-paid cohort — highly educated and unlike many faculty in the liberal arts/humanities, they have highly remunerative occupational opportunities outside academia (for example, business professors can seek employment as managers or consultants; law professors can enter private or public practice). One might surmise that there would be little, if any, evidence of wage discrimination within this group. However, this study demonstrates that this assumption, insofar as it relates to sex, appears to be incorrect.

II. Data and Methods

There are 14 public four-year institutions in British Columbia offering undergraduate degrees (not all offer graduate degrees) of which only about six could be fairly characterized as research institutions (i.e., schools that offer a broad range of undergraduate and graduate programs, including doctoral programs. Faculty members at these latter institutions are generally expected to be actively involved in research. Certain attributes of the six institutions involved in this study are described in Table 1. These universities are members of “The Research Universities Council of British Columbia” — the Council says its mandate is “to provide a single voice on behalf of the six major universities on public policy issues including funding, research, accountability, admissions and transfer.” The faculty members at these institutions represent the most highly educated, accomplished (in terms of research output) and highest paid within the entire British Columbia post-secondary education sector.

All six universities have collective bargaining agreements with their respective faculty associations. However, these agreements are more like those negotiated in professional sports than collective agreements negotiated in most other unionized workplaces in that faculty members’ salaries (and to a degree, other working conditions such as teaching loads) are individually bargained. Insofar as wages are concerned, faculty associations typically negotiate minimum salary “floors” for each rank as well as annual percentage increases that will be paid to all faculty over the term of the contract.

All six universities have business schools and three have law schools (the only law schools in the province). As previously noted, this study focuses exclusively on the faculty in the business and law schools at each of the six research universities. Although all of these institutions may be fairly characterized as research universities, as Table 1 demonstrates, there are important distinctions among the six in terms of institutional resources as well as research focus and productivity.
Table 1: Selected Attributes of the Institutions (dollars in millions CDN)

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<tr>
<td>University of British Columbia (UBC)</td>
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<td>34/29/51</td>
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<td>$115</td>
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<td>$2</td>
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<tr>
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<td>3,500</td>
<td>$93</td>
<td>$10</td>
<td>601-800/ NR/NR</td>
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</tr>
</tbody>
</table>

*Times Higher Education/U.S. News & World Report/QS World University (NR = Not Ranked)
Source: Compiled by the author from the universities’ annual financial and budget reports

With a few exceptions, post-secondary colleges and universities in Canada are publicly-funded and employees of such institutions are considered to be public sector employees. The British Columbia Financial Information Act and the accompanying Financial Information Regulation mandate the annual reporting of all public sector employees’ compensation above $75,000. The most recent searchable database is for the year 2015 and the salary data used in this study is drawn from this database. The reported salaries do not include any value for employee benefits (such as extended health, dental and disability insurance or pension), nor do they include monies paid on account of work-related expenses (for example, conference travel and related expenditures).

In addition to the institutional dummy variables and faculty members’ salaries, this study included several other control dummy variables including the individual’s home faculty (business school = 1; law school = 0), professorial rank (full professor, associate professor, assistant professor and instructor), whether the faculty member held a senior administrative position (Dean, Associate Dean or Director/Department Chair or Head), the individual faculty member’s sex (1 = female; 0 = male), whether he or she was a member of a visible minority (1 = visible minority; 0 otherwise), and their highest degree (Ph.D. or equivalent = 1; master/bachelor degree = 0).

Individual faculty members’ salaries may reflect not only institutional-specific compensation practices (faculty at research universities are generally paid more than those at primarily teaching institutions), but also labor market-driven compensation levels for particular faculties (for example, professors in business and law schools tend to be paid more, on average, than professors in the humanities). Since faculty at research universities typically have both teaching and research responsibilities, relatively higher achievement in these areas may also impact their compensation. In this study, I have included admittedly crude measures of both teaching (published student reports) and research achievement (scholarly output as measured, principally, by journal article publications).

Research achievement is difficult to quantify given that scholarly output can take many forms including books, articles, commentaries, reports or other scholarly works. Within university faculties, an article is typically assessed based on the perceived “quality” of the journal in which it is published. Often an article has multiple authors, and thus determining an individual co-author’s contribution can be hard to discern. For both books and journal articles, there may be an extended period from original submission to final appearance in print. Faculty members may be credited, for purposes of an annual salary review, for scholarly works that have been accepted but are not yet in print, or are at an advanced stage of review (for example, the journal editors may have invited the author(s) to “revise and resubmit” an article). Thus, it may not be appropriate to conclude that a faculty member’s current compensation reflects only scholarly works published in the immediately preceding year.

In this study, I have not attempted to differentially weight scholarly works by “quality” or by the number of authors. The principal research output measure used in this study is simply the total number of books (excluding textbooks) or articles published in a peer-reviewed journal (-authored or co-authored) during the period from 2010 to 2016. This information was obtained by reviewing each individual faculty member’s institutional webpage and was cross-referenced using the Google Scholar database. As an alternative measure, I also utilized three different iterations of faculty members’ “Hirsch-index” scores (commonly known as the “h-index”). These four measures were strongly intercorrelated.
Challenging as it is to assess individual faculty members’ research output, it is considerably more challenging to individually assess their teaching performance. Each of the six universities has a process in place, principally based on course evaluations completed by students, to measure their faculty members’ teaching performance. Notwithstanding the well-documented problems regarding the reliability and validity of student evaluations (discussed in Ryerson University, 2018), they continue to be the main source of information for evaluating faculty members’ teaching performance. However, regardless of their relative merit, British Columbia privacy legislation, as well as individual university policies, and in some cases collective agreement provisions, prohibit the public release of faculty members’ individual teaching evaluations. Thus, it is not possible to access faculty members’ actual teaching evaluations completed by their students.

Of course, we now live in a world dominated by social media and various internet sites rate everything from restaurants to the quality of medical care. University professors are not exempt from public scrutiny. Unfortunately, the validity and reliability of these “rate your professor” sites is very much a matter for debate. Nevertheless, in an effort to obtain at least some measure of teaching performance, I included data (based on a 5-point ordinal Likert scale) regarding individual professors’ “teaching quality” ratings from various websites (and where more than one rating site rated an individual professor, the rating utilized is the weighted average). Missing data and small samples (I excluded all summative rating scores based on fewer than 6 raters) reduced the sample size by about 15%.

In the following section of this article, I present both descriptive statistics as well as the results of multivariate analyses (using ordinary least squares, or “OLS”, regression) of the data.

III. Results

There were 450 faculty members identified in the salary database – 351 in the six business schools and 99 in the three provincial law schools. Approximately one-third of the faculty members were women (but one-half of the law school faculty) and about one-fifth were members of a visible minority (predominantly from China and India). Women were underrepresented within the six universities’ business schools. Overall, the proportion of visible minority faculty was about equal to their representation in the Canadian population (about 22%), although visible minorities were underrepresented in the law schools (11%) and overrepresented (25%) in the business schools. Women occupied about 40% of senior administrative positions but at the highest level (Dean), men outnumbered women by more than a 2:1 ratio. Visible minorities held about 18% of all faculty academic administrative positions, but over 4/5ths of these individuals occupied the lowest administrative positions (directors/department chairs or heads).

In terms of mean (average) salary, as set out in Table 2, business school salaries were about 8% higher compared to law schools, and at all ranks men earned more than women (although the gap for full professors was 4% and only 1% for assistant professors). The overall male-female wage gap was about 16% but this wage gap varied markedly by rank (about 29% for instructors but only 1% for assistant professors). Male visible minority faculty earned, on average, about 20% more than female visible minority faculty and, overall, visible minorities earned nearly 3% less than non-visible minority faculty members, although this latter difference is not statistically significant (p = .52).

![Table 2: Mean Salary by Employment Category – Descriptive Statistics](image-url)
These differences are statistically significant as follows: *p < .05; **p < .01; ***p < .001 Note: The mean salary figures by academic rank and visible minority status exclude the 41 administrators.

Simple averages do not, of course, reveal the true situation as there may be many factors, other than sex or race, that account for observed wage gaps. Accordingly, the data were analyzed using OLS multiple linear regression (see Table 3). The dependent variable for all three equations summarized in Table 3 is the natural log of each faculty member's 2015 salary. All three equations have significant explanatory power with R^2 values ranging from .514 to .547.

<table>
<thead>
<tr>
<th>Table 3: OLS Regression Results (Dependent Variable = lnSalary)</th>
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<tr>
<td>Variable</td>
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<tr>
<td>Intercept</td>
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<td>Teaching Evaluations</td>
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<td>No. of Publications</td>
</tr>
<tr>
<td>F value</td>
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<tr>
<td>R^2/Adjusted R^2</td>
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<tr>
<td>N</td>
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</table>

* p < .05; ** p < .01; *** p < .001 The reference category for each of the following groups of variables is: Institution = “UNBC”; Administrative Position = “Chair, Director or Department Head”; and Rank = “Instructor”.

The first equation in Table 3 includes all faculty members while the second and third equations exclude the 41 senior administrators. The second equation excludes the teaching and research performance measures, whereas these two metrics are included in the third equation, although including these latter variables reduced the population (due to missing data) by nearly 15%, from 409 to 349 observations.

Not surprisingly, faculty members’ salaries were strongly influenced by the status of their employer institution. UBC, being an elite globally-recognized research institution, attracts high performing scholars and pays them accordingly – more than 25% compared to the other five institutions. Equally unsurprising, faculty salaries increase as one progresses through the professorial ranks – full professors earned about 15% more than associate professors; associate professors earned about 15% more than assistant professors; and assistant professors earned about 6 to 15% more than instructors/lecturers. Business schools paid salaries that averaged about 13% higher than salaries paid to law school faculty.

Overall, about 68% of the faculty members held a doctoral degree. An earned doctorate degree was not a significant predictor of salary, although that may be because its effect was captured in the “rank” variables. Nearly 90% of all “professors” (regardless of rank) held a
doctoral degree but only 20% of the “instructors” held a doctorate – in most cases, instructors held either a masters degree and/or a professional designation (such as “C.P.A.” for accounting instructors).

Notwithstanding the admittedly crude measure of teaching performance used in this study, the results nonetheless suggest that higher student evaluations predict higher salaries (although this result is not statistically significant, \( p = .13 \)). Research performance as measured, principally, by peer-reviewed journal output was consistently and significantly associated with higher faculty salaries (\( p = .033 \)). Generally, a faculty member could expect about a \( \frac{1}{2} \)% increase in salary for each journal article or book published within the 7-year period examined (2010-2016).

The estimated coefficients for “visible minority” are not statistically significant in any of the three equations, suggesting that salaries are not affected by a faculty member’s race or ethnic origin. I also re-estimated all three equations including a “sex x race” interaction term and this variable was not statistically significant in any of the equations. These are, of course, welcome results.

The same cannot be said about sex. Indeed, after controlling for relevant institutional factors as well as individual performance, female faculty members appear to bear a 6% to 8% salary disadvantage relative to their similarly situated male colleagues. This disadvantage, in turn, represents a substantial income loss – about $11,000 per annum based on the overall mean salary. This wage gap, in turn, if not rectified, represents a significant lifetime earnings loss and, upon retirement, will be reflected in a much lower pension for female relative to male faculty members.

IV. Analysis and Commentary

This study examined whether there is evidence of wage discrimination based on race/ethnic origin and sex in the business and law schools at British Columbia’s research universities. The results suggest that while there is no evidence of wage discrimination based on race/ethnic origin, that same cannot be said for sex-based wage discrimination.

The finding regarding sex-based wage discrimination is undeniably discouraging, but not necessarily surprising. A relatively recent report released by the American Association of University Professors (AAUP) showed that there was a male-female wage gap across all academic ranks, with the average gap being between 4% and 6%. A similar pattern prevails in Canada – the 2016-17 male-female wage gap across all Canadian universities averaged between 4% and 5% for each rank. These American and Canadian studies show that there are sex-based wage disparities based on an analysis across all academic disciplines.

My ex ante expectation was that there would be no sex-based wage discrimination in business and law schools, particularly given the fact that prospective female faculty members in business and law have equally (perhaps even more) remunerative labor market options outside academia than might, say, individuals with doctorates in the humanities. Further, business and law schools – traditionally male dominated faculties – have taken deliberate steps in recent years toward achieving gender balance within their faculties. The National Science Foundation reported that in 2017, 1,522 doctorates in business were awarded in the United States and women received 44.4% of these degrees. That being the case, women holding doctorates in business should be doubly advantaged – they represent a smaller proportion (relative to men) of earned business doctorates and are competing in a labor market where they are in relatively (again, compared to men) greater demand. Conventional economic theory suggest that, if anything, female faculty should enjoy a wage premium in business and law schools. But that is clearly not the status quo.

It is, of course, one thing to demonstrate that there is a male-female wage gap, but quite another to explain why it exists. A straightforward, but discouraging, explanation for the wage differential identified in this study is that it simply represents sex-based discrimination. It may be that, historically, there was a greater measure of sex-based wage discrimination and, for older faculty, this differential would increase in absolute dollar terms over time, even if male and female faculty members received identical annual wage increases (since year-to-year wage increases are typically percentage, rather than lump, increases). If this sort of discrimination is prevalent today, this would clearly constitute a contravention of section 12 of British Columbia’s Human Rights Code (as well as the human rights laws in all other Canadian jurisdictions) which prohibits paying “an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work”. The faculty member’s remedy, in this instance, is a complaint filed with the human rights tribunal or a grievance filed under the applicable collective bargaining agreement. I cannot find a single instance of such a complaint or grievance having ever been adjudicated in the province of British Columbia (although similar litigation was recently successfully pursued at one U.S. law school).

While this explanation cannot be wholly discounted, I believe the correct explanation is somewhat more nuanced, especially insofar as doctoral qualified faculty (i.e., assistant, associate and full professors) are concerned.
Newly minted PhDs are typically hired at the assistant professor rank and in my experience – having served on a large number of faculty search committees – entry level salaries are determined by reference to what “the competition” is paying. Applicants are well informed regarding the “market rate” for newly-hired professors in their discipline (often having been told what to expect by their dissertation supervisors and other faculty at the institution where they obtained their doctoral degree). 34 Salary offers are determined by a “market rate” without reference to the candidate’s race or sex. It is perhaps noteworthy, as set out in Table 2, that there was only a modest 1% difference in assistant professor (i.e., the typical entry level rank for newly minted PhDs) salaries as between men and women.

Although a newly hired faculty member’s salary may not be influenced by sex, post-hire year-to-year salary increases are an amalgam of at least three separate components. First, all faculty salaries increase each year by a fixed percentage set out in the applicable collective bargaining agreement. Second, individual salaries increase based on an internal “merit” review (typically based on the recommendation of an internal faculty committee). Third, individual faculty members may negotiate salary adjustments directly with the faculty’s dean (this adjustment is sometimes called a “retention allowance”). 35 Collectively bargained salary increases are applied without any consideration of the faculty member’s sex. However, it may be that the second and third components are influenced, perhaps in subtle ways, by a faculty member’s gender.

Annual merit increases, as noted, are generally awarded based on faculty committee recommendations. Even if one accepts that these committees do not overtly discriminate against female faculty members – and, in some cases, that assumption may be questioned36 – there still may be a “gender effect” underlying merit increase recommendations. Merit increases principally reflect the faculty member’s teaching performance and, to an even greater degree in research universities, the individual’s research output as measured by the number of journal articles published in leading peer-reviewed journals.

Teaching evaluations may reflect a gender bias against female instructors.37 To the extent that merit increases are based on teaching evaluations that are biased, the committee’s merit evaluation is itself equally – even if unwittingly – tainted by bias. A merit committee’s evaluation of research performance may also reflect gender bias; for example, by undervaluing female scholars’ work. 38 Or it may be that female faculty members are, in fact, comparatively less productive (which, in turn, may reflect societal norms – for example, regarding childcare responsibilities – that operate in a discriminatory fashion). Men, relative to women, appear to publish more papers.39 In this study, an ANOVA using research output as the dependent variable showed that male professors averaged 6.43 publications compared to 4.93 publications for female professors – a statistically significant difference (\(F = 2.85; p = .092\)).40 Similarly, the \(b\)-index scores favoured men relative to women across all three \(b\)-index measures – by way of example, the overall Google Scholar \(b\)-index mean score for men was 8.07 versus 5.45 for women (\(F = 4.35; p = .038\)).

Male-female research productivity differences may be explained, in part, by female professors’ time away from research due to child or elder care responsibilities (which continue to disproportionately fall on women’s shoulders). As noted in a 2019 study published by the C.D Howe Institute, “women who choose to take a step back from the labor market for childbirth can experience penalties upon their return in the form of delayed or missed career progression, gender differences in weekly hours worked and a lack of benefits and bonuses, relative to men.” Recent empirical evidence shows that the gender wage gap within relatively high skilled and well-paid occupations where there are significant economic returns to working long hours (such as management and law) have actually been increasing over the past few decades. 42 Productive academic researchers are required to work long, frequently unconventional (evenings/weekends), hours and child/elder-care responsibilities are difficult to juggle with an ongoing research agenda.

Additionally, and separate and apart from family responsibilities, female academics may also shoulder the greater share of university service obligations which, in turn, leaves less time available for research. 43 Even when female faculty members are fully committed to a research agenda, they may face disadvantages in their relative ability to secure the requisite funding.44 Thus, seemingly unbiased evaluations of a faculty member’s performance for purposes of determining merit increases may, in fact, be influenced by the faculty member’s sex.

I now turn to the third possible source of wage differentials, namely, direct salary renegotiation. As discussed above, collective agreements at British Columbia’s research universities fix salary floors but not an individual faculty member’s salary – this is determined by direct negotiation, usually with the faculty member’s dean.45 Are there sex-based differences in salary negotiation behaviour? Empirical research suggests that men, relative to women, fare better in zero sum negotiations, such as those involving salary,46 and are less likely to unilaterally trigger such negotiations. 47 With these (and many other similar) studies in mind, even if salary determination is gender-neutral at the point of hiring, propensity to negotiate, and later success in negotiation, may partially explain sex-based wage differentials that emerge over time.
V. Final Observations

As with most if not all research, this study has important shortcomings and, accordingly, some caveats must be noted. The measure used for teaching performance is deeply flawed. However, given the seemingly overwhelming problems involved in obtaining individual measures of teaching performance from the institutions, the quest for a better performance metric could well prove to be a quixotic endeavour.

The metric used in this study to assess research performance is also flawed, albeit not nearly to the same degree as the teaching performance measure, since it represents actual individual research output. The research productivity metric utilized does not separately assess individual journal quality nor does it differentially weight single versus multiple author articles. The h-index measures, at least to a degree, measure both productivity and research quality and impact. While it is certainly possible to construct a more complex metric, doing so is not an easy (indeed, it may be a herculean) task. In my experience, faculty committees do not generally undertake a sophisticated analysis of research output — single or multiple authored articles are treated equally; theoretical articles are placed on the same footing as empirical articles; and no distinction is drawn between studies based on secondary data versus studies where the author(s) has collected and collated the data used in the study. Evaluation committees typically undertake only a general, and not particularly rigorous, qualitative assessment of the overall “quality” of the individual’s research record (largely based on the number of articles published in leading journals).48 Despite the shortcomings of the research productivity metrics used in this study, they all nonetheless appear to be robust measures.

Ultimately, this study demonstrates that sex-based wage discrimination continues to be a fact of life in the academy, even within faculties where arguably it should not exist. While it might be possible to rectify the situation in British Columbia through a section 12 Human Rights Code complaint, subsections 12(2) and (3) seemingly insulate wage differentials based on “merit” and “quantity/quality”, and thus might prove to be insurmountable hurdles to a successful complaint.49 Accordingly, collective bargaining and proactive action by university administrations (for example, across the board “pay equity” wage increases for female faculty)50 are likely the best options to remove, or at least ameliorate, the sort of sex-based wage discrimination identified in this study.

ENDNOTES

1 Statistics Canada, Average usual hours and wages by selected characteristics, monthly, unadjusted for seasonality, Table 14-10-0320-01 (Ottawa, Ontario: Government of Canada, 2019), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?id=1410003201>.


3 In this study, I utilize Statistics Canada’s definition of visible minority persons: “persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour”. For further particulars see online: <http://www23.statcan.gc.ca/imdb/p3Var.pl?Function=DECII&id=257515>.

4 Statistics Canada, 2016 Census Data Tables (Visible Minority (15), Employment Income Statistics (7), STEM and BAHSE (non-STEM) Groupings, Major Field of Study - Classification of Instructional Programs (CIP) 2016 (16), Highest Certificate, Diploma or Degree (9), Immigrant Status (4A), Age (10) and Sex (3) for the Population Aged 15 Years and Over in Private Households of Canada, Provinces and Territories and Census Metropolitan Areas, 2016 Census - 25 % Sample Data (Ottawa, Ontario: Government of Canada, 2016), online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/td-td/10-eng.cfm?TABID=2&LANG=E&A=R&APATH=3&D=0&DETAIL=0&DIM=0&FL=1&FREE=0&GC=01&GL=1&ID=1325190&CK=1&GR=1&D=0&PID=111345&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2017&THEME=123&VID=0&VNAME=&VNAMEF=&D1=7&D2=6&D3=1&D4=3&D5=0&D6=0>.


7 Bichsel, Jacqueline; Li, Jingyun; McChesney, Jasper; & Pritchard, Adam (2019, March), Faculty in Higher Education Annual Report: Key Findings, Trends, and Comprehensive Tables for Tenure-Track, Non-Tenure Teaching, and Non-Tenure Research Faculty, Academic Department Heads, and Adjunct Faculty for the 2018-19 Academic Year, online: <https://www.cupahr.org/surveys/results/>.  

8 Canadian Association of University Teachers (Ottawa, Ontario: CAUT, 2019), Academic Staffs’ Tables online: <https://www.caut.ca/resources/almanac/3-academic-staff>.  

9 For a list of the top 50 research universities in Canada, see online: <https://researchinfosource.com/top-50-research-universities/2018/list>. The universities involved in this study (see Table 1) are ranked as follows: UBC/UBC-O (2nd); SFU (17th); Uvic (19th); UNBC (45th); TRU was not ranked within the top 50 research universities.

10 For further information about the Council, see online: <http://www.tupc.bc.ca>.

11 RSBC 1996, c 140.

12 BC Reg 371/93.

13 A “dummy variable” takes a value of 1 or 0. Thus, for the institutional variable “UBC”, a faculty member employed at UBC will be coded 1, and 0 for those employed at another institution. The two key variables in this study – sex and visible minority membership – are coded 1 for female and 0 for male, and 1 if the faculty member is a member of a visible minority and 0 otherwise.

14 For U.S. data, see Scott Jaschik, “What You Teach Is What You Earn” Inside Higher Ed [March 28, 2016], online: <https://www.insidehighered.com/news/2016/03/28/study-finds-continued-large-gaps-faculty-salaries-based-discipline>; for Canadian data, see Canadian Association of University Teachers (CAUT), Average Salaries of Full-time University Teachers by Subject Taught, Sex, and Rank, 2016-17 (Table 2.7) (Ottawa,
One could reasonably assume that women full professors are, on average, younger than male full professors. Since age data for each faculty member is not publicly available, this explanation remains conjectural.

Relationships are said to be “statistically significant” when there is a strong mathematical reason to believe the observed relationship is not due to random chance. Typically, a relationship is considered to be statistically significant if the associated p-value is 10 or less – in this latter case, the probability that the observed relationship occurred by mere chance is less than 10%. It should be noted, however, that estimated p-values are sensitive to sample size. I have selected a more rigorous .05 threshold level for the results reported in this study.

A mean is simply the unweighted average for an array of values; that is, the total value of all observations divided by the number of observations in the array. Standing alone, the mean does not say anything about the distribution of the observations – for example, are they “clustered” around the mean or are they bi-modal in nature? The standard deviation of the mean provides some information about the distribution of the observations. The lower the standard deviation, the more closely clustered the observations will be around the mean. In a “normal” or bell-curve distribution of values, 68% will lie within ± 1 standard deviation and 95% of the values will lie within ± 2 standard deviations.

The natural log transformation is utilized in multiple regression analyses to ensure that the residuals (i.e., the differences between the actual values of the dependent variable and the dependent variable values predicted by the regression equation) are normally distributed – if this is not the case, the estimated results may be inaccurate. Another advantage of the natural log transformation is that the estimated coefficients for the independent variables are readily interpretable as percentage changes – the estimated coefficient for an independent variable, multiplied by 100, represents the percentage change in the dependent variable attributable to a one-unit change in that independent variable. I also estimated the equations in Table 3 using the faculty members’ actual 2015 salary and the results as between the two separate sets of equations were remarkably consistent.

The “coefficient of determination” (or R²), which can range from 0 to 1, represents the proportion of the variance in the dependent variable that is explained by the independent variables. Thus, an R² of .5 means that half of the variance in the dependent variable is explained by the independent variables. The Adjusted R² reflects the number of independent variables in the model and should be used when comparing equations with different numbers of independent variables.

This result was very consistent regardless of the research performance metric utilized.

This formulation identifies the unique impact of being both a female faculty member and a member of a visible minority.

Simply by way of example, the present value of an $11,000 wage gap, subject to a 3% annual growth adjustment and calculated over 35 years, is about $236,500.


Canadian Association of University Teachers (CAUT), Average and Median Salaries of Full-time University Teachers by Rank and Gender, 2016-2017 (Table 2.1) [Ottawa, Ontario: CAUT, 2017], online: <https://www.caut.ca/resources/almanac/academic-staff>.

National Science Foundation (NSF), National Center for Science and Engineering Statistics, 2017 Doctorate Recipients from U.S. Universities (Alexandria, VA: NSF, 2018), online: <https://ncses.nsf.gov/pubs/nsf19301/>. Fewer business doctors are awarded in Canada. The most recent data (2016) indicates that of the 264 business doctorates awarded that year, 129 (or about 48.8%) were awarded to women: Statistics Canada, Postsecondary graduates, by institution type, status of student in Canada and sex (Table 37-10-0020-01) [Ottawa, Ontario: Government of Canada, 2016], online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?id=3710002001>. Neither the NSF nor Statistics Canada separately tracks earned doctorates in law, but given the relative dearth of doctoral programs in law – and the comparatively small number of students enrolled in these programs – the number of doctorates awarded in law each year in both Canada and the U.S. would likely be a small fraction of the number of business doctors awarded.


The leading university business school accreditation agency, the Association to Advance Collegiate Schools of Business (more commonly known as the AACSB), collects and publishes starting salary information for faculty hires at business schools in the U.S. and Canada. Salary offers for new hires closely track these figures, see J. Howard Finch, Richard S. Allen & H. Shelton Weeks, “The Salary Premium Required for Replacing Management Faculty: Evidence From a National Survey” (2010) 85:5 JEB 264, online: <https://doi.org/10.1080/08832320903449576>.

A retention allowance may be granted if, for example, the faculty member has an employment offer from another university at a higher salary but is willing to reject that offer and remain with their current employer in exchange for an increase in salary or other considerations. However, a job offer from another institution is not a pre-condition to this type of salary adjustment.

See, for example, Julia Gagnon, “Six female Amer-

There is a very large literature in this regard; some recent studies include: Lillian McNeill, Adam Driscoll & Andrea N. Hunt, “What’s in a Name: Exposing Gender Bias in Student Ratings of Teaching” (2015) 40:4 Innovat High Educ 291, online: <https://doi.org/10.1007/s10755-014-9313-4>; Anne Boring, “Gender biases in student evaluations of teaching” (2017) 145 J Public Econ 27, online: <https://doi.org/10.1016/j.jpubeco.2016.11.006>;


However, for full professors (where women represented only one fifth of the cohort – relative to more than one third overall – and where there was a relatively modest, and not statistically significant, 4% salary differential), female full professors actually published, on average, more articles than their male colleagues (11.2 versus 10.0), although this difference is not statistically significant (F = 0.18, p = .67). Does this result suggest that women, relative to men, had to be more productive in order to achieve promotion to the full professor rank?


This system of individual bargaining stands in marked contrast to wage bargaining conducted in British Columbia’s K-12 (i.e., elementary/secondary public schools) and college sectors, where a teacher’s or college instructor’s salary is fixed by a grid included in the collective bargaining agreement. The individual’s placement on the grid is typically based solely on their educational qualifications and teaching experience. In such a system, there is simply no room for sex- or race-based wage differentials. The current provincial agreement for the K-12 sector is online at: <http://www.bcsea.bc.ca/documents/teacher%20bargaining/PCA/00-PCA%202013-2019-FINAL%20November%202%202015.pdf>. The collective agreement covering eight provincial colleges is online at: <http://www.lrb.bc.ca/cas/VW/17/pdf>.


This appears to be a wide-spread practice (and problem) with respect to university faculty assessment systems, see Carlos A. Bana e Costa and Mónica Oliveira, “A Multicriteria Decision Analysis Model for Faculty Evaluation” (2012) 40:4 Omega 424, online: <https://doi.org/10.1016/j.omega.2011.08.006>.

Subsection 12(1) prohibits sex-based wage discrimination regarding work that is “similar or substantially similar”. However, subsections (2) and (3) protect compensation systems that allow for wage differentials based on an employee’s relative performance (for example, differentials attributable to differences in quantity and/or quality of work). Subsections 12(2) and (3) read as follows:

(2) For the purposes of subsection (1), the concept of skill, effort and responsibility must, subject to factors in respect of pay rates such as seniority systems, merit systems and systems that measure earnings by quantity or quality of production, be used to determine what is similar or substantially similar work.

(3) A difference in the rate of pay between employees of different sexes based on a factor other than sex does not constitute a failure to comply with this section if the factor on which the difference is based would reasonably justify the difference.

Substantially similar provisions exist in other Canadian jurisdictions’ human rights laws.

The University of Alberta, the University of Toronto, the University of Guelph, the University of Waterloo and Wilfrid Laurier University have all recently implemented modest wage increases for female faculty members that are designed to rectify historical wage discrimination. See, for example, Paola Longigo, “University of Waterloo boosts female faculty pay after wage gap uncovered”, The Globe and Mail (May 16, 2018), online: <https://www.theglobeandmail.com/news/national/university-of-waterloo-boosts-female-faculty-salaries-after-gender-pay-gap-found/article31272503/> and CBC News, “Laurier raises pay for female profs and gender equity analysis” (May 10, 2017), online: <https://www.cbc.ca/news/canada/kitchener-waterloo/wilfrid-laurier-university-gender-wage-pay-raise-1.4108265>.
“Transparency,” “Discovery-on-Discovery” Type Disclosures, and Party-Opponent Validation in eDiscovery

By Paul Weiner and Denise Backhouse

Introduction

The Special Master’s “Order Regarding Search Methodology for Electronically Stored Information” (“Protocol”) in the Northern Illinois District Court’s January 2018 decision in *In re: Broiler Chicken Antitrust Litigation* has received significant attention in eDiscovery circles. This is not surprising because “[d]isclosure of seed, training, or validation sets – including irrelevant documents and the responding party’s coding decisions – has become one of the most contentious issues related to the use of [Technology Assisted Review].” *The Sedona Conference TAR Case Law Primer*, 18 Sedona Conf. J. 5, 30 (2017).

While parties may *voluntarily agree* to an eDiscovery protocol with such provisions, the level of process transparency, compelled disclosures about search efforts – often referred to as “discovery-on-discovery” – and party-opponent validation contained in the *Broiler Chicken* Protocol is not *required* by civil procedure rules nor is it a best practice. Thus, the Protocol should not be used for the proposition that a litigant is *required* to follow its provisions. See, e.g., *Rio Tinto Plc v. Vale S.A.*, (S.D.N.Y. March 2015) (Court’s approval of eDiscovery protocol that “is the result of the parties agreement … does not mean … that the exact ESI protocol approved here will be appropriate in all [or any] future cases that utilize [Technology Assisted Review].”).

For balance, parties should include provisions addressing *requesting*-party obligations that acknowledge the two-way nature of eDiscovery when negotiating such eDiscovery Protocols. *Broiler Chicken* is no run-of-the-mill lawsuit. It is a complex, high-stakes antitrust case about the U.S. “Broilers” market, allegedly worth over $30 billion in annual revenue. The docket exceeds 246 pages with over 1,200 entries and multiple, voluminous complaints.

Pleadings show that many of the Protocols in the case were heavily negotiated. For example, when denying Plaintiffs’ “Motion to Compel and Modify the ESI Protocol” the Court stated “the ESI Protocol represents a negotiated compromise of the parties’ opposing positions. … The process to which the parties agreed in the
ESI Protocol is not perfect, but, as with any compromise, it is good enough.” See Dkt. #1081, pp. 2 – 3 (July 18, 2018). This is the context in which the Protocol must be viewed.

While this article uses aspects of the Protocol as a springboard, nothing should be taken as a criticism of the Protocol, the parties or the positions they asserted, or the Special Master.

There is No Requirement to be “Transparent” in Discovery

Paragraph one of the Protocol states:

Transparency: With the goal of permitting requesting Parties an appropriate level of transparency into a producing Party’s electronic search process, without micromanaging how the producing Party meets its discovery obligations and without requiring the disclosure of attorney work product or other privileged information, the Parties will endeavor to be reasonably transparent regarding the universe of documents subject to targeted collections or culling via search terms and/or TAR/CAL.

While the parties may have determined it was in their best interest to incorporate a “transparency” provision, neither the rules of civil procedure nor industry guidance require “transparency into a producing Party’s electronic search process.”

The word “transparency” does not appear in the Federal Rules. Instead, discovery is self-executing and a party need not defend or disclose its processes or “prove” the reasonableness of its efforts. The Federal Rules contain specific disclosure and conferral obligations:

- Rule 26(a)(1) requires litigants to disclose witnesses, damages computations, insurance policies, and a “description … of all documents … [and] electronically stored information” that it “may use to support its claims or defenses ….”
- Rule 26(f)(2) requires parties to discuss preservation and develop a discovery plan including timing, subjects, privilege and clawback, and “any issues about disclosure, discovery, or preservation of electronically stored information, including the forms in which it should be produced.”
- Rule 26(g) requires attorneys or parties to sign discovery responses, certifying that after “reasonable inquiry,” a response is consistent with the rules and warranted by existing law or a nonfrivolous argument for changing the law.

Under Rule 37 a party can:
- be compelled to provide disclosure or discovery responses;
- sanctioned for failing to comply with a court order, failing to disclose or to supplement a discovery response, or to admit under Rule 36; or
- suffer curative measures for failing to preserve ESI.

Notably, nothing in these Rules requires “transparency into a producing Party's electronic search process.”

So where does the notion of discovery “transparency” come from? It stems from the concept of “cooperation.” At the urging of The Sedona Conference the word cooperation was recently added to the Committee Notes – not the rule itself – of Rule 1:

Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

That Note language was essentially taken from the Sedona Conference Cooperation Proclamation (July 2008), available at: https://thesedonaconference.org/publication/The_Sedona_Conference_Cooperation_Proclamation. The Sedona Conference consistently advocates for cooperation in discovery – a laudable goal. But for a full understanding of what “cooperation” means, it is instructive to look to Sedona’s own Case for Cooperation, The Sedona Conference’s Cooperation Proclamation, 10 Sedona Conf. J. 331 (Fall Supp. 2009), which defines “cooperation” as a two-tiered concept (emphases supplied):

Cooperation in this context is best understood as a two-tiered concept. First, there is a level of cooperation as defined by the Federal Rules, ethical considerations, and common law. At this level, cooperation requires honesty and good faith by the opposing parties. Parties must refrain from engaging in abusive discovery practices.

Then, there is the second level of cooperation. While not required, this enhanced cooperative level offers advantages to the parties. At this level, the parties work together to develop, test, and agree upon the nature of the information being sought. They will jointly explore the best method of solving discovery problems, especially those involving ESI.
The parties jointly address questions of burden and proportionality, in order to narrow discovery requests and preservation requirements as much as reasonable.

The voluntary nature of cooperation is reinforced in Sedona’s flagship Principles (emphases supplied):

- “[C]ooperation is fundamentally a voluntary endeavor that requires the development and maintenance of trust between two or more parties, and a relatively equal and balanced exchange of non-protected information. If both requesting and responding parties voluntarily cooperate to evaluate the appropriate procedures, methodologies, and technologies to be employed in a case, both may potentially achieve significant monetary savings and non-monetary efficiencies.” The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Volume 19 (2018), Principle 3, Comment 3.b., p. 78.

- “If both requesting and responding parties voluntarily elect to cooperatively evaluate and agree upon the appropriate procedures, methodologies, and technologies to be employed in the case, both may potentially achieve significant monetary savings and non-monetary efficiencies.” See id., Principle 6, Comment 6.b., p. 125.

While there are precisely defined disclosure and conferral obligations in the Federal Rules, and parties may voluntarily choose through cooperation to go beyond the Rules to achieve mutual benefits, there is nothing in the Rules that requires “transparency into a producing Party’s electronic search process.”

Courts reinforce this. For example, in the Northern Indiana District Court’s August 2013 decision in In re Biomet, the plaintiff demanded to work jointly with defendants to train a predictive coding tool, and sought to compel defendant to identify “seed” documents. The court held the Federal Rules did not require such “transparency”:

The only authority the [plaintiff] cites is a report of the Sedona Conference that has had a significant, salutary, and persuasive impact on federal discovery practice in the age of electronically stored information. Sedona Conference Cooperation Proclamation, 10 Sedona Conf. J. 331 (Fall Supp. 2009). [Defendant], the [plaintiff] says, isn’t proceeding in the cooperative spirit endorsed by the Sedona Conference …. But … the Sedona Conference [does not] expand a federal district court’s powers, so [plaintiff] can’t provide me with authority to compel discovery of information not made discoverable by the Federal Rules.

Likewise, in Hyles v. City of New York (S.D.N.Y. August 2016), the Court instructed:

[Plaintiff] is correct that parties should cooperate in discovery. I am a signatory to and strong supporter of the Sedona Conference Cooperation Proclamation, and I believe that parties should cooperate in discovery. The December 1, 2015 Advisory Committee Notes to amended Fed. R. Civ. P. 1 emphasized the need for cooperation. Cooperation principles, however, do not give the requesting party, or the Court, the power to force cooperation ….

There is No Obligation to Disclose Highly Detailed Information about Discovery Procedures – Often Referred to as “Discovery-On-Discovery” – Before Specific Deficiencies are Identified

Grounded upon its foundational “transparency” mandate, the Protocol goes on to require the producing party to disclose highly-detailed information about its search methodologies. With respect to technology assisted review (TAR) it states:

A producing party that elects to use TAR/CAL will disclose the following information regarding its use of a TAR/CAL process: (a) the name of the TAR/CAL software and vendor, (b) a general description of how the producing Party’s TAR/CAL process will work, including how it will train the algorithm, such as using exemplar, keyword search strings, or some other method, (c) a general description of the categories or sources of the documents included or
excluded from the TAR/CAL process, and (d) what quality control measures will be taken.

See Protocol, Dkt. #586, p. 3. With respect to search terms, the Protocol requires that the producing party:

- first provide “Search Software Disclosures” including what stop words were excluded, diacritics resolution, whether proximity-limited search terms are subject to an evaluation order, and whether the tool offers synonym searching;
- then follow a “First Phase Search Term Proposal” procedure, whereby it:
  - discloses its substantive search terms and explain “semantic synonyms and common spellings of the keywords proposed,” and “contextual examples” of false positives or “noise hits” it seeks to exclude;
  - within 12 days, the requesting party gets to provide revisions to the search terms;
  - within 8 days of receiving any such revisions, the producing party must provide information to support any objections; and
  - any disputes concerning the sufficiency of information in support of objections and/or the use of specific search terms are resolved by a Special Master.
- then, under a “Second Phase Search Term Proposal” procedure, the requesting party can:
  - propose yet additional search terms;
  - to which the producing party must provide information to support any objections to the new terms;
  - within 15 days the parties must meet and confer to discuss disputes and counter-proposals regarding the new search terms; and
  - any unresolved disputes are submitted to a Special Master.

See Protocol, Dkt. #586, pp. 3 – 6.

These provisions reverse the normal discovery process. Under the Rules, only after a showing of a deficient production or search process has been made – an exceptional circumstance – is such disclosure appropriate. The Protocol provisions essentially mandate discovery-on-discovery before any type of deficiency in a party’s process or production can arise. While the parties in Broiler Chicken may have wanted an inverse process, there are strong reasons why discovery-on-discovery does not make sense, from a practical or financial standpoint, in the vast majority of cases.


The “Introduction” to Principle 6 explains:

Principle 6 recognizes that a responding party is best situated to preserve, search, and produce its own ESI. Principle 6 is grounded in reason, common sense, procedural rules, and common law, and is premised on each party fulfilling its discovery obligations without direction from the court or opposing counsel, and eschewing “discovery on discovery,” unless a specific deficiency is shown in a party’s production.

Comment 6(b) goes on to underscore that “[r]esponding parties should be permitted to fulfill their [ ] discovery obligations without preemptive restraint,” analogizing to the First Amendment precept of no “‘prior restraint,’ i.e., just as speech cannot normally be restrained in advance, a requesting party should not normally be able to restrain the responding party’s discovery process to prevent an anticipated, but uncertain, future harm.”

Comment 6(b) further provides:

[T]here should be no discovery on discovery, absent an agreement between the parties, or specific, tangible, evidence-based indicia (versus general allegations of deficiencies or mere “speculation”) of a material failure by the responding party to meet its discovery obligations. A requesting party has the burden of proving a specific discovery deficiency in the responding party’s production. See Principle 7 (“The requesting party has the burden on a motion to compel to show that the responding party’s steps to preserve and produce relevant electronically stored information were inadequate.”). See also discussion infra regarding potential benefits of cooperation.

A responding party’s obligations under Rule 26(f) to meet and confer in good faith does not trump its right to evaluate unilaterally and select the procedures, methodologies and technologies appropriate for preserving and producing its own ESI. Those rights should be challenged only where a
requesting party demonstrates to the court a specific discovery deficiency in the responding party’s
discovery productions.

Strong reasons ground Principle 6:

- Under the American system, discovery is self-executing, and takes place with each party fulfilling its obligations without direction from the court or opposing counsel.
- Attorneys, as officers of the Court, are expected to comply with Rules 26 and 34 in connection with their search, collection, review and production efforts, and face consequences for failing to do so.
- The type of disclosures sought through notions of “cooperation” and “transparency” often reveal work product, litigation tactics, or trial strategy. See, e.g., Safeguarding the Seed Set: Why Seed Set Documents May Be Entitled to Work Product Protection, 8 Fed. Civ. L. Rev. 1 (2015) (Facciola, J.); Protecting Search Terms as Opinion Work Product: Applying the Work Product Doctrine to Electronic Discovery, 161 U. Pa. L. Rev. 2063 (2013). Protecting these well-settled privileges is essential to maintaining a just and functional legal system. See, e.g., Hickman v. Taylor, US Supreme Court, 1947 (establishing the work product doctrine and explaining: “Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests. … Were [work product] materials open to opposing counsel … [a]n attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.”).
- Because under the American system, the producing party pays for its own discovery, it is entitled and best positioned to make decisions that implicate those costs to comply with its obligation to conduct a reasonable search and to facilitate proportional discovery. To put such decisions in the hands of the opposing party could incentivize wasteful and costly discovery, either through a misunderstanding of the producing party’s specific IT systems, policies and practices, or a lack of sufficient technical competence about unique enterprise systems, or worse, as a litigation tactic.
- Companies make significant investments in structuring their information technology systems and information governance policies. Based on its knowledge of its systems, a producing party is better equipped than an adversary or the court to identify the best process for producing its own ESI, consistent with its obligations under the Rules. Some companies also have entire portfolios of litigation and should not be forced to do something in one case that could adversely impact others.
- Perfection in discovery is not the standard; rather, a producing party must take reasonable steps to identify, preserve, search for and produce relevant ESI. See, e.g., Fed. R. Civ. P. 26(g) (providing for “reasonably inquiry” certification of discovery responses); Fed. R. Civ. P. 37, 2015 Committee Note (“This rule recognizes that ‘reasonable steps’ to preserve suffice: it does not call for perfection.”). Setting the bar at “perfection” is also inconsistent with Rule 26(b)(1)’s limitation on discovery to that which is “proportional to the needs of the case,” and could exponentially increase discovery costs without a corresponding value (proportional or otherwise), thereby frustrating the mandates of Rule 1.
- If a responding party gets it wrong, it will suffer the consequences, such as compelled disclosures or more severe penalties for truly egregious misconduct. A responding party should get to choose how it takes on that risk.

The Southern District Court of New York’s November 2017 case of Winfield vs. City of New York, is instructive on these issues:

In keeping with these principles, this Court is of the view that there is nothing so exceptional about ESI production that should cause courts to insert themselves as the super-managers of the parties’ internal review processes, including training of TAR software, or to permit discovery about such processes, in the absence of evidence of good cause such as a showing of gross negligence in the review and production process, the failure to produce relevant specific documents known to exist or that are likely to exist, or other malfeasance.

The Winfield Court also denied the Plaintiff’s request for information about the Defendant’s TAR tool “ranking system” (namely, the cut-off used, and how many documents were deemed responsive and unresponsive at each ranking), reasoning:
It is also unclear how this information is even potentially relevant to the claims and defenses in this litigation as required under Federal Rule of Civil Procedure 26.

Likewise, in the Utah District Court’s October, 2018 case of Entrata, Inc. v. Yardi Systems Inc., the Court denied a plaintiff’s “Motion to Compel Production of TAR Information” which sought to compel the defendant “to produce the complete methodology and results of [its] TAR process,” reasoning:

[Plaintiff] has not provided any specific examples of deficiencies in [Defendant’s] document production or any specific reason why it questions the adequacy of [Defendant’s] document collection and review. Without more detailed reasons why production of [defendant’s] TAR information is needed, the court is unwilling to order [defendant] to produce such information.

From a practical standpoint, the type of “discovery-on-discovery” outlined in the Protocol can often lead to expensive, process-oriented disputes that drive up the cost of litigation not only for parties, but also for courts. See e.g., Judicial Modesty: The Case for Jurist Restraint in the New Electronic Age, Law Technology News, Feb. 2013, pp. 27 – 28 (Francis, J.) (“[T]he collateral proceedings required to obtain a judicial determination on a technical matter can be substantial. In one recent case, a judge devoted two full days of hearings to a dispute over a search methodology, at the end of which she encouraged the parties to reach agreement, which they did after numerous additional conferences with the court. That the parties were required to devote substantial resources to this dispute is not surprising. The judge had to be educated about the technologies at issue, and courts rightly demand expert testimony in such cases rather than relying upon the representations of counsel.”)

The Protocol continues:

- After requesting party review, the parties determine whether they “agree that the recall estimate, and the quantity and nature of the responsive documents identified through the sampling process, indicate that the review is substantially complete” – in other words, your adversary determines when your review is complete;
- If calculations indicate that Subcollections 2 and 3 “still contain a substantial number of non-marginal, non-duplicative responsive documents as compared to Subcollection 1,” the process is repeated; and
- If the parties cannot agree, disputes are submitted to a Special Master.

The Federal Rules of Civil Procedure do not specifically require parties to use statistical estimates to satisfy any discovery obligations.

Unlocking the e-Discovery TAR Black Box, Proposed EDRM at Duke TAR Guidelines, Judicature, Volume 102, No. 2, p. 67, n.7 (Summer 2018).

From a practical standpoint, protracted discovery disputes have been cited as a major cause of the dramatic decline in jury trials. See, Jury Trial Decline Wreaks Havoc On Profession, Judges Say, Law360.com, April 16, 2019 (“Since 2000, the annual number of federal civil and

Party-Opponent Validation is not a Federal Rule Requirement

The Broiler Chicken Protocol contains a highly detailed “Validation Protocol” requiring the producing party to:
- Partition documents into Subcollections;
- Draw samples from each Subcollection;
- Combine Subcollection samples into a Validation Sample;
- Conduct a “blind” review by a litigation subject matter expert (“SME”);
- Prepare a Table listing for each Validation Sample document: Bates number; Subcollection; SME responsiveness and privilege coding;
- Produce to the requesting party and a Special Master:
  - the Table;
  - responsive, non-privileged Validation Sample documents not previously produced; and
  - statistical calculations using “Method of Recall Estimation” formulas which are different for a “Process Involving TAR” and a “Review Process Involving Manual Review.”
criminal jury trials has dropped by more than 53%, while the number of new civil and criminal cases filed annually has increased 7.7%.”) Mandating any type of party-opponent “validation” in run-of-the-mill case will only acerbate this problem.

And such procedures – that are not required by the Rules – should never be foisted on a litigant. Accord, Hyles v. New York City, (S.D.N.Y. August 2016) (“The key issue in whether at plaintiff Hyles’ request, the defendant City (i.e., the responding party) can be forced to use TAR (technology assisted review, aka predictive coding) when the City prefers to use keyword searching. The short answer is a decisive “NO.” … Hyles’ counsel candidly admitted at the conference that they have no authority to support their request to force the City to use TAR. The City can use the search method of its choice. If Hyles later demonstrates deficiencies in the City’s production, the City may have to re-do its search. But that is not a basis for Court intervention at this stage of the case.

Ensuring Balance in eDiscovery Protocols and Avoiding Weaponizing eDiscovery Under the Guise of “Cooperation”

The voluntary nature of “cooperation” makes logical sense, as by definition “cooperation” is not unilateral and involves mutual effort to achieve a common benefit. See BLACK’S LAW DICTIONARY (6th ed. 1994) (“Cooperate. To act jointly or concurrently toward a common end.”); Webster’s Ninth New Collegiate Dictionary (“Co-oper-ate 1: To act with another or others: act together; 2: to associate with another or others for mutual benefit.”).

Conversely, eDiscovery can be improperly weaponized through one-sided demands premised on notions of “transparency” or “cooperation” not grounded in the Rules or Sedona’s definition of “cooperation,” especially where the playing field is not level:

While parties may be “better served by informally exchanging information regarding custodians, databases and other sources of information . . . transparency should not be morphed into an opportunity for unending questions and fishing expeditions[.]”


Moreover, such tactics undermine Rule 1’s goal of securing a case’s just, speedy, and inexpensive determination. Accord, Heyward D. Bonyata and Jarrett O. Coco, To TAR or Not to TAR, LegalTech News (Aug. 20, 2015) (“[I]t may become more difficult to reach a consensus on TAR disclosures, processes, or metrics…. not only among adverse parties, but [also] among co-defendants and co-plaintiffs as well, who may have diverging interests, varying discovery budgets, unique IT systems, and business processes…. It may be that efforts expended to achieve alignment among the parties (e.g., motions, hearings, expert testimony) could outweigh any potential benefits . . .”); Philip Favro, Predictive Coding Protocol Comes Under Fire as Judge Peck Appoints Special Master in Rio Tinto, Recomind.com (July 20, 2015) (“While the benefits to disclosure seem attractive, the Rio Tinto experience makes them more illusory than alluring….full disclosure by the parties through the Predictive Coding Protocol is now leading to protracted motion practice. While unfortunate, such a result is often predictable . . . Against the backdrop of potentially lower discovery costs loom several drawbacks with stipulated use protocols. The first and most obvious risk is the potential for excessive input from and wrangling with opposing counsel and the court over the process for searching, reviewing, and producing documents. […] which can offset the cost and time savings otherwise offered by predictive coding."

To avoid such issues, when negotiating eDiscovery protocols, the focus must be on both parties’ obligations, especially in asymmetrical cases. This balanced approach puts parties on equal footing, which Sedona recognizes is critical for “both [to] potentially achieve significant monetary savings and non-monetary efficiencies” through cooperation.

“Second-level-of-cooperation” provisions that provide balance could include the following:

Agreement to Requests for Production (RFPs) Specificity Subject to Protocol:

a. Requesting party RFPs will comply with the “reasonable particularity” mandates of Rule 34 and local rules (including the number allowed and timing).

b. Within 10 days of receipt, without waiving objections, the producing party provides pro-
posed revisions, including regarding reasonable particularity and proportionality (Rules 34, 26(b)(1) and 26(c)).

c. Within 8 days of receipt, the requesting party provides information to support objections to proposed revisions;

d. Parties meet and confer within 10 days to resolve disputes;

e. If disputes cannot be resolved, parties will jointly seek the court’s resolution. The producing party need not respond until the court rules.

Motions Precluded by this Protocol: The parties agree that a requesting party is precluded from moving to compel or for curative measures or sanctions based upon the producing parties’ adherence to the Protocol.

Provisions Apply to all Parties: This Protocol applies to all parties (i.e., responding plaintiff(s) and defendant(s) are “Producing Party”).

Conclusion

While litigants may achieve benefits when they voluntarily engage in what Sedona defines as a “second-level-of-operation” to negotiate an eDiscovery protocol, because transparency, “discovery-on-discovery” type disclosures, and party-opponent validation are not required by the Rules or industry guidance, they should not be forced on any party under the guise of “cooperation.” Moreover, to achieve the full benefits of cooperation, negotiated eDiscovery protocols should always include balanced provisions, including those that address requesting-party obligations.