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"Overawed": Worker Misclassification as a Potential Unfair Method of Competition*

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* This Feature is derived from a speech Commissioner Bedoya gave on Feb. 2, 2024 as a keynote address at the Law Leaders Global Summit in Miami, Florida. While it is written in the voice of the commissioner, it reflects research, arguments and ideas developed together with Max M. Miller. The remarks are reproduced here with only minor changes to the text and substance of the speech. This is the third in a series of four lectures on labor antitrust. As of the time of writing, the fourth has not been delivered; it is scheduled to be delivered at New York University's Wagner Labor Initiative on November 18. *See also* Alvaro M. Bedoya & Bryce Tuttle, *"Aiming at Dollars, Not Men": Recovering the Congressional Intent Behind the Labor Exemption to Antitrust Law*, 85 ANTITRUST L.J. 805 (2024); Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n & Catherine Sanchez, Att'y Advisor to Comm'r Bedoya, Fed. Trade Comm'n, "Commanding the Price of Labor": Confronting the Human Cost of Labor Monopsony, Remarks at Twenty-Fourth Annual Loyola Antitrust Colloquium at the Loyola University Chicago School of Law (Apr. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/bedoya-commanding-price-labor-speech.pdf [https://perma.cc/KZ4B-ALXT].

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> "A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord."[1]

Introduction

Thank you, Mike, for that introduction, thank you to the organizers of today's conference, and thank you all for being here this early on a Friday morning in Miami. I'd like to express a special note of gratitude to former Federal Trade Commission ("FTC" or "Commission") chair Edith Ramirez for inviting me to speak with you today, as well as to my own team of Max Miller, Catherine Sanchez, Sunila Steephen, and Dalia Wrocherinsky.

Before I begin, I'll offer the standard but important disclaimer that I am here speaking for myself as a commissioner. I do not speak for the Commission, the chair, my fellow commissioners, or FTC staff.

I. The Tree Planters

It's been a while since I traveled to Florida for work—twenty-three years, actually. Twenty-three years ago, I got my first legal job at a law office in the small, sugarcane town of Belle Glade, which is about an hour-and-a-half north of here. I was nineteen, going into my junior year of college, and I'd gotten a summer job clerking for a farmworkers' rights lawyer named Greg Schell.

So, I show up, and for my first assignment, Greg points to a big stack of papers on a table. He tells me that we represent a group of tree planters who work for a major paper company. They work from dawn to dusk, bending over, digging a hole, and planting a new tree every fifteen seconds, for ten to eleven hours a day. And for all that, he explains, the guys got about two dollars an hour *before* accounting for expenses.[2]

The contractor who hired the men went broke. So, Greg says, "We sued the paper company."[3] But the paper company responds, "These guys aren't

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1. FTC v. Texaco, 393 U.S. 223, 227 (1968) (citing Shell Oil v. FTC, 360 F.2d 470, 487 (5th Cir. 1966) (Wisdom, J.)).
2. *See* Brief of Appellants at 21-22, Gonzalez-Sanchez v. Int'l Paper Co., 346 F.3d 1017 (11th Cir. 2003) (No. 02-12201) (citing hours, pay, and average of 2,500 to 3,000 seedlings planted per person per day).
3. *See* Complaint at 1-25, Martinez-Mendoza v. Champion Int'l Corp., No. 4:00-cv-00034-RV (N.D. Fla. Jan. 26, 2000).

our employees. They don't work for us. They work for that *independent contractor*."

"So, that's their story," Greg says. "But *these* contracts"—and he taps the paper on the table—"they tell a different story. I want you to read them and tell me *that* story."

So, I started reading the contracts. There were sixty-four of them. And Greg was right: The contracts *did* tell a different story. The contracts showed how the paper company controlled every aspect of the men's work—down to the inch, angle, and blade.

The paper company didn't just tell the men how deep to dig the holes or how far apart to dig them. The contract let the company decide the *angle* at which the seedling could be planted, the blade with which the hole could be dug, the clothes the men should wear, the size of each crew, the times at which the crew could plant. The company's supervisors could stop their work and start it, talk to the crew, correct the crew, and pull individual men off of it.

But there's more. The men couldn't dig a bunch of holes, take out all the seedlings, and plant them all at once. No, the men could only hold a maximum of *two* seedlings in their hands at any time. And even then, the men had to start with the *oldest* seedlings first. But there's even more. When the men planted a seedling and tamped down the dirt around it, the contract specified that their boot heels must dig no deeper than two inches into the dirt, nor should they get *closer* than two inches to the seedling itself. Apparently, that distance from the seedling was a little too close, and the company later changed it to four inches.

I wrote all of this up in an affidavit. But we lost; the tree planters lost. The court decided that despite this kind of total control, the paper company was *not* their joint-employer. The men were working *solely* for an independent contractor, and therefore, the court decided the paper company was not responsible for providing them with minimum wage and other benefits.[4]

Last year, I started to look into this issue of worker *misclassification*. That's when an employer classifies a worker as an independent contractor when they really should be classified as an employee. I see misclassification as a broader and overlapping problem that often encompasses the question of joint-employer liability. Indeed, the tree planters only had to make a joint-employer claim because the paper company misclassified the guy who hired

4. *Gonzalez-Sanchez*, 346 F.3d at 1023.

them as an independent contractor, who, in turn, apparently misclassified the tree planters as independent contractors.[5]

I called up Greg, some twenty years later, and I asked him, "How did it get to this? What happened here?" And he said (and I paraphrase):

> Well, the companies used to have their own crews. But about forty years ago, in the 1980s, they decided to bid all of that work out to contractors instead. The companies retained every bit of the control, but they could save a bunch of money by going with the lowest bidder. And it was just a race to the bottom from there. The contractors would bid low to get the work, break the backs of their guys to finish the job, stiff the men for their pay, and then skip town the next morning. And then when the guys went to the company, the company would just say those magic words—"independent contractor"—and wash their hands of the problem.

If all of this is shocking to you, what is more shocking is the modern breadth of misclassification. Misclassification isn't limited to tree planting or agriculture. It's in construction. It's in trucking. It's in in-home

5. While I will focus on the issue of misclassification, I believe that many of the issues I will discuss apply equally to joint employment and workplace fissuring more broadly.

healthcare,[6] in-home cleaning,[7] and janitorial work.[8] Anywhere people work in isolated settings or where people bid for work, you can find misclassification.[9] And it isn't limited to the tree farms of the South—it is *everywhere*.

The money at stake is staggering. Studies suggest that ten percent to thirty percent of employers misclassify one or more of their employees as

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6. *See*, *e.g.*, Lee's Indus., Inc., 355 N.L.R.B 1267, 1268-69 (2010) (describing the status conversion of an in-home healthcare worker from employee to independent contractor, despite the job staying the same); David J. Rodwin, *Independent Contractor Misclassification is Making Everything Worse: The Experience of Home Care Workers in Maryland*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 47, 48 (2020) (identifying "widespread misclassification of home care workers as independent contractors" as one of the "existing problems in the American health care system" that were "exposed and magnified" by the COVID-19 pandemic); Mason v. Helping Our Seniors, LLC, No. SA-21-CV-00368-ESC, 2022 WL 7380059, at *2 (W.D. Tex. Oct. 13, 2022) (explaining that a business alleged that it had fewer than fifteen employees, and that its workforce of about seventy caregivers were independent contractors), *aff'd sub nom.* Mason v. Helping Our Seniors, L.L.C., No. 22-51041, 2023 WL 5970941 (5th Cir. Sept. 13, 2023).

7. *See*, *e.g.*, John Schmitt, Heidi Shierholz, Margaret Poydock & Samantha Sanders, *The Economic Costs of Worker Misclassification*, ECON. POL'Y INST. 4 (Jan. 25, 2023), https://files.epi.org/uploads/The-economic-costs-of-worker-misclassification-1.pdf [https://perma.cc/N8ZC-K3HJ]; Tracey Lien, *Homejoy Shuts Down Amid Lawsuit Over Worker Misclassification*, L.A. TIMES (July 17, 2015), https://www.latimes.com/business/technology/la-fi-tn-homejoy-shuts-down-20150717-story.html [https://perma.cc/QT2C-S4T6].

8. *See*, *e.g.*, Schmitt et al., *supra* note 7, at 4; Press Release, Off. of the Att'y Gen. for D.C., AG Racine Sues Janitorial Companies for Misclassifying Workers and Denying Them Hard-Earned Wages and Sick Leave (July 13, 2022), https://oag.dc.gov/release/ag-racine-sues-janitorial-companies-misclassifying [https://perma.cc/CD8V-AB4S]; Ratna Sinroja, Sarah Thomason & Ken Jacobs, *Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries*, UC BERKELEY LAB. CTR. 2 (Mar. 11, 2019), https://laborcenter.berkeley.edu/pdf/2019/--CA-Fact-Sheet.pdf . [https://perma.cc/QS47-KPPL].

9. *See* Françoise Carré, *(In)dependent Contractor Misclassification*, ECON. POL'Y INST. 5-6 (June 8, 2015), https://files.epi.org/pdf/87595.pdf [https://perma.cc/PU34-X3SR] (noting several factors that incentivize or facilitate misclassification, including constantly bidding for contracts against other employers that do engage in misclassification, and participating in an industry "where workers operate in isolation").

independent contractors.[10] And when workers are misclassified, they aren't just denied the minimum wage. Their employers also don't pay for overtime, Social Security, Medicare, workers' compensation, unemployment insurance, healthcare, or retirement.[11] All told, depending on their profession, a worker may lose anywhere from $6,000 to $18,000 every year in wages and benefits because of misclassification.[12] Multiply that dollar amount by, say, 300,000 workers in Illinois, or half-a-million workers in Pennsylvania, or 700,000 workers in New York, and you get the picture: Misclassification takes *billions* from working people and gives it to lawbreakers.[13] It is a pervasive and national scandal.

Now, some of you may be thinking: "Yes, this is horrible. But it's an employment law issue, a labor law issue. Why are we discussing this here, at an event hosted by the Global *Competition* Review?"

Consider that in 1938, when Congress passed the Fair Labor Standards Act, the law that guarantees employees the minimum wage and overtime, they did so to make sure that honest employers would not have to compete with "chiselers and sweatshop operators" who pay below subsistence

10. *See Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP. L. PROJECT 2, 6-11 (Oct. 26, 2020), https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf [https://perma.cc/7HR9-FGHV] (summarizing national and state research findings).

11. Carré, *supra* note 9, at 3.

12. Schmitt et al., *supra* note 7, at 4.

13. *See* Michael P. Kelsay, James I. Sturgeon & Kelly D. Pinkham, *The Economic Costs of Employee Misclassification in the State of Illinois*, NAT'L ALL. FOR FAIR CONTRACTING 5 (Dec. 6, 2006), https://faircontracting.org/wp-content/uploads/2019/06/Illinois-Employee-Misclassification.pdf [https://perma.cc/LDF2-6YXB] (noting the estimated number of misclassified employees in Illinois); *Public Hearing in re: House Bill 2400 – Misclassification of Employees as Independent Contractors: Hearing Before the Lab. Rels. Comm.*, 2007-2008 Leg., Regular Sess. (Pa. 2008) (statement of Patrick Beaty, Deputy Secretary of Unemployment Comp. Programs, Department of Labor and Industry); Linda Donahue, James Ryan Lamare & Fred B. Kotler, *The Cost of Worker Misclassification in New York State*, CORNELL UNIV. 2 (Feb. 2007), https://ecommons.cornell.edu/server/api/core/bitstreams/23a8b200-41c8-4a81-9e35-0be244cb1894/content [https://perma.cc/Y8YN-Q55R] (noting the estimated number of misclassified employees in New York).

wages.[14] And when it wrote the Fair Labor Standards Act, Congress declared in the statute that those practices are "an unfair method of *competition* . . . ."[15]

U.S. Treasury officials have recognized the competitive disadvantage that honest businesses face when they go against businesses that misclassify workers.[16] State officials in Ohio, Indiana, Tennessee, Georgia, and elsewhere have said misclassification is unfair to honest employers because it prevents them from being able to *compete*.[17] And state and federal courts

14. 81 CONG. REC. 7651 (1937) (statement of Sen. David Walsh).

15. Fair Labor Standards Act § 2(a)(3), 29 U.S.C. § 202(a)(3) (2018) (emphasis added). Indeed, when the Supreme Court heard cases under the Fair Labor Standards Act, it pointed to that language to ratify the idea that when an employer subjects employees to substandard labor conditions, the savings such an employer reaps would "be reflected directly into competitive costs" and give it a "competitive advantage." Roland Elec. Co. v. Walling, 326 U.S. 657, 668-70 (1946). Professor Kati Griffith's research has revealed that, in early drafts of the law, Congress "explicitly recognized that a major enforcement challenge would be that some businesses would misclassify true employees as independent contractors . . . ." Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 568 (2019) (internal quotation marks omitted).

16. OFF. OF INSPECTIONS AND EVALUATIONS, U.S. DEP'T OF THE TREASURY, 2018-IE-R002, ADDITIONAL ACTIONS ARE NEEDED TO MAKE THE WORKER MISCLASSIFICATION INITIATIVE WITH THE DEPARTMENT OF LABOR A SUCCESS 1 (2018) (misclassification "plac[es] honest employers and businesses at a competitive disadvantage").

17. *See, e.g.*, OHIO ATT'Y GEN., REPORT OF THE OHIO ATTORNEY GENERAL ON THE ECONOMIC IMPACT OF MISCLASSIFIED WORKERS FOR STATE AND LOCAL GOVERNMENTS IN OHIO 2 (2009), https://iiiffc.org/images/pdf/employee_classification/OH%20AG%20Rpt%20on%20Misclass.Workers.2009.pdf [https://perma.cc/4JLR-Z2HB] (explaining that misclassification "creates an uneven playing field within many industries, with all law-abiding businesses being left at a competitive disadvantage by their very compliance with the law"); S. SUBCOMM. ON EMPLOYEE MISCLASSIFICATION, THE FINAL REPORT OF THE SENATE SUBCOMMITTEE ON EMPLOYEE MISCLASSIFICATION, 2015-2016 Leg., Reg. Sess., at 1 (Ga. 2015) ("[C]ompanies that misclassify gain unfair advantages when businesses are involved in competitive bidding on projects."); Michael P. Kelsay & James I. Sturgeon, *The Economic Costs of Employee Misclassification in the State of Indiana*, NAT'L ALL. FOR FAIR CONTRACTING 2 (Sept. 16, 2010), https://faircontracting.org/wp-content/uploads/2019/11/Indiana-Misclassification-Report.pdf [https://perma.cc/W634-UTX3] ("Firms that misclassify workers can bid for work without having to account for many normal payroll-related costs."); TENN. BUREAU OF WORKERS' COMP., ANNUAL REPORT ON EMPLOYER COVERAGE

in California have observed that employers' misclassification of workers can be a form of unfair competition.[18]

The FTC's original mandate, under our founding statute, is to stop "unfair methods of competition."[19] Most state attorneys general also have the statutory power to stop unfair methods of competition.[20] And yet, to my knowledge, it is almost unheard of for the government to allege in court that misclassification is, in fact, an unfair method of competition.

The Department of Labor and the National Labor Relations Board have recently issued strong rules that will help combat misclassification.[21] Thanks to their work, we're in a far better place today to fight this problem, and I'm thrilled that under FTC Chair Lina Khan, our agencies work more closely than they ever have before.[22]

COMPLIANCE 6 (2019), https://www.tn.gov/content/dam/tn/workforce/documents/injuries/2019ComplianceAnnualReport.pdf [https://perma.cc/T3LY-B5TH] ("Compliant employers are . . . disadvantaged, when their competition chooses to not follow the law. Law abiding employers are unable to competitively bid for work as the non-compliant uninsured employer can offer a lower price for a job because of their non-compliance."); Press Release, Off. of Minn. Att'y Gen. Keith Ellison, Attorney General Ellison Forms Task Force on Worker Misclassification (July 6, 2023), https://www.ag.state.mn.us/Office/Communications/2023/07/06Taskforce.asp [https://perma.cc/A4Z5-34QS].

18. Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074, 1090-91 (N.D. Cal. 2019) (holding that worker misclassification can satisfy the unfairness prong under California's Unfair Competition Law); Dynamex Operations W. v. Superior Ct., 416 P.3d 1, 32 (Cal. 2018) ("California's industry-wide wage orders are also clearly intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices.").

19. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2018).

20. Samuel Milner, *From Rancid to Reasonable: Unfair Methods of Competition Under State Little FTC Acts*, 73 AM. U. L. REV. (forthcoming 2024).

21. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 29 C.F.R. pts. 780, 788, 795 (2024); Standard for Determining Joint Employer Status, 29 C.F.R. pt. 103 (2024).

22. In the last two years, Chair Khan signed new memoranda of understanding with both the National Labor Relations Board and the Department of Labor to encourage and facilitate interagency exchanges. *See* Fed. Trade Comm'n & Nat'l Lab. Rels. Bd., Memorandum of Understanding Regarding Information

I think the next step in confronting misclassification is making sure that we use every tool in our toolbox to fight it, including competition law. And so, today, I want to make the case for using the existing statutory prohibitions against unfair methods of competition to examine closely allegations of misclassification.

I want to make that case by discussing two industries where misclassification is allegedly endemic: (1) the construction industry, and (2) port trucking.

II. What Is an Unfair Method of Competition?

Let's start at the beginning. The Federal Trade Commission Act ("FTC Act") was passed in 1914. That law created the FTC and charged us, under Section 5, with prosecuting "unfair methods of competition."[23] So what *is* an "unfair method of competition"?

It's important to underscore that when it passed the FTC Act, Congress took a different approach than it did in other competition laws. It was worried about too-narrow readings of the Sherman Act that had sharply limited its effectiveness.[24] At first, Congress drew up a list of the specific practices it considered to be unfair methods of competition and drafted a bill to ban them.

This was similar to what it did in the Clayton Act, in which Congress named specific conduct and prohibited it (e.g., price discrimination, interlocking directorates, and, of course, certain mergers and acquisitions).[25]

Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest (July 19, 2022), https://www.ftc.gov/system/files/ftc_ gov/pdf/ftcnlrb%20mou%2071922.pdf [https://perma.cc/UB9S-X5AG]; Dep't of Lab. & Fed. Trade Comm'n, Memorandum of Understanding (Aug. 30, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/23-mou-146_oasp_and_ftc_ mou_final_signed.pdf [https://perma.cc/G75P-RZZK].

23. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2018).

24. *Statement of Commissioner Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act*, Fed. Trade Comm'n 2-3 (Nov. 10, 2022) [hereinafter *Bedoya Statement on Unfair Methods*], https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStmtBedoyaStmt.pdf [https://perma.cc/9WHZ-L2KK].

25. Clayton Act, 15 U.S.C. §§ 12-27 (2018), 29 U.S.C. §§ 51-53 (2018).

But then Congress changed gears. It chose to avoid lists of specific prohibited practices. Instead, it enacted a broad prohibition against "unfair methods of competition."[26] The Supreme Court would later wryly explain its reasoning: Congress was worried that a too-specific definition of "unfair methods of competition" today "would not fit *tomorrow*'s new inventions in the field."[27] The Court emphasized that "there is no limit to inventiveness in the field."[28] The congressional record and debates also make clear that Congress wanted to stop practices that violated the spirit, not just the letter, of antitrust laws,[29] and that it wanted to stop unfair practices "in the embryo," *before* they did their damage.[30]

And so, if you're asking yourself, "Why would we need to work on the same problem as the Labor Department or the National Labor Relations Board?" it's partly because our authority allows us to stop unfair practices in their *incipiency*, before harms to workers and other market actors are cemented. In this way, our agencies' authorities are complementary, not duplicative.

That said, while Congress deliberately drafted the term "unfair methods of competition" broadly, the Supreme Court—and appellate courts considering unfair-methods cases—offered two key criteria to figure out when a method of competition was unfair. Here is how the Commission recently summarized those criteria:

> First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions. This

26. For more on Congress's change of heart, see *Bedoya Statement on Unfair Methods*, *supra* note 24, at 1-3.

27. Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 708 (1948).

28. *Id.*

29. *See* E.I. du Pont de Nemours v. Fed. Trade Comm'n, 729 F.2d 128, 136-37 (2d Cir. 1984) (citing Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972)).

30. 51 CONG. REC. 12030 (1914) (remarks of Sen. Francis Newlands) ("We want to check monopoly in the embryo. Monopoly commences in insidious ways, by practices that are against good morals and constitute violations of individual rights for which the individual can have an action at law or in equity but rights which the individual, because of his poverty or of his insignificance, is often unable to assert against these great organized powers.").

> may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.[31]

And so, as I talk about the construction industry and port trucking, keep those words in mind: coercive, exploitative, collusive, abusive, deceptive, predatory, restrictive, exclusionary; and keep in mind that phrase about conduct that "foreclose[s] or impair[s] the opportunities of market participants, reduce[s] competition between rivals, [or] limit[s] choice . . . ."[32]

III. Joshua Lawson, Sandie Domando, and Misclassification in Construction

Let's first talk about misclassification in the construction industry. I want to start by talking about two people: (1) Joshua Lawson of Winston-Salem, North Carolina; and (2) Sandie Domando of Palm Beach Gardens, Florida, which is about an hour north of here. I learned about both Mr. Lawson and Ms. Domando from an extraordinary 2014 exposé led by Mandy Locke and Franco Ordoñez for McClatchy, who were working with reporters at outlets like the *Miami Herald*.[33]

Josh Lawson grew up in a rural county north of Greensboro.[34] Growing up, he always admired his great-uncle who built houses. That career allowed his great-uncle to build his own house and buy a good truck, four-wheelers, and a fishing boat. "I thought if I grew up to build houses, then I was going

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31. Fed. Trade Comm'n., Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act. 9 (Nov. 10, 2022) [hereinafter Policy Statement], https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/9ZUC-UP4A].

32. *Id.*

33. *See Contract to Cheat*, McClatchy DC, https://media.mcclatchydc.com/static/features/Contract-to-cheat [https://perma.cc/GU27-JQX3].

34. This discussion of Mr. Lawson draws from a news article and an accompanying video that were part of the investigation. *See* Mandy Locke & Franco Ordonez, *Contract to Cheat, Part 3: Once Solid, Job Safety Net Frays for Construction Work*, News & Observer, https://www.newsobserver.com/news/local/article10049651.html [https://perma.cc/7X3K-FSTR] (Sept. 13, 2014); McClatchy Washington Bureau, *"I thought if I grew up to build houses, I'd have a good life."*, YouTube (Sept. 3, 2014), https://www.youtube.com/watch?v=qbDYawGZmNE [https://perma.cc/L29B-YG7L].

to have a good life," Mr. Lawson told reporters. So, he found work with a local contractor who offered to pay him ten dollars an hour.

The contractor set Mr. Lawson's schedule, told him where to go, what jobs to do, and how to do them. It seemed alright, initially, but when it was time to file his taxes, Mr. Lawson realized that he was technically classified as an independent contractor and therefore owed a full year's worth of payroll taxes.

Mr. Lawson often worked fourteen-hour days and spent long stretches on the road away from his family. Yet after he deducted his expenses from his paycheck, Mr. Lawson would sometimes be left with around $200 for a week of work. According to the reporters, his family had to ask itself: "Do we not pay the electric bill? Or do we cut down on meals for our two daughters?" It got so bad that Mr. Lawson and his wife had to sell their wedding bands.

Then a pack of two-by-fours fell on Mr. Lawson's shoulder. He couldn't lift his arm. His employer refused to cover the medical expenses and informed Mr. Lawson that he alone was responsible for the costs of his recovery. The company hadn't bought a workers' compensation policy for him. "I about lost everything," said Mr. Lawson.

Experts estimate that after factoring in lost pay and lost benefits, people like Mr. Lawson can lose over $16,000 every year due to misclassification—easily a third of their earning power.[35] And it's not just money. Due to misclassification, one in three construction workers does not have health insurance. That's a rate three times as high as other workers, even though construction workers often face dangerous working conditions.[36]

It's hard for anyone to hear Mr. Lawson's story. Since we are at a competition conference, and I'm posing the question of whether the misclassification of people like Mr. Lawson constitutes an unfair method of *competition*, I think we should take a second to consider whether misclassification in this context is a "method of competition" to begin with.

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35. *See* Schmitt et al., *supra* note 7, at 4.

36. Ken Jacobs, Kuochih Huang, Jenifer MacGillvary & Enrique Lopezlira, *The Public Cost of Low-Wage Jobs in the US Construction Industry*, UC BERKELEY LAB. CTR. 1 (Jan. 2022), https://laborcenter.berkeley.edu/wp-content/uploads/2022/01/The-Public-Cost-of-Low-Wage-Jobs-in-the-US-Construction-Industry-FINAL.pdf [https://perma.cc/W96L-DYWA]. By classifying workers as independent contractors, employers are also not responsible for paying unemployment insurance, Social Security, Medicare, or workers' compensations premiums for the benefit of workers like Mr. Lawson. *See id.* at 2.

After all, our policy statement makes clear that "violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition."[37]

For this question, I would love to talk about Ms. Sandie Domando.[38] When the *Miami Herald* interviewed her, Ms. Domando was an executive vice president at a construction company in Palm Beach Gardens, Florida. For years, the company had a strong book of business with around 250 workers on its payroll. Most importantly, every worker was classified as an employee of the construction company with full benefits. For Ms. Domando, this was a matter of principle: "Our employees depend on us. There are families out there that depend on us," she told the *Herald*.

Then, during the recession in 2008, a lot of the company's referrals dried up, and Ms. Domando's company had to focus on bidding for government work paid for by stimulus funds. Usually, the company won around eighty percent of these contract competitions.

In these government competitions, the company won just thirty-five percent of its bids, less than half of its normal rate. Ms. Domando suspected it was due to her competitors misclassifying their employees as independent contractors. The *Herald* investigation seemed to support her suspicion, as investigators found that one in five companies who won these government projects misclassified their employees.

Ms. Domando estimated that she had to lay off around 100 workers. She now has "little interest" in bidding for government work. "[W]e know we don't have a chance on most of those government jobs," she told the *Herald*. "We were getting underbid by companies that were cheating."

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37. Policy Statement, *supra* note 31, at 8.

38. The discussion of Ms. Domando draws on two articles. *See* Mandy Locke & Franco Ordonez, *Taxpayers and Workers Gouged by Labor-Law Dodge*, MCCLATCHY WASH. BUREAU, https://www.mcclatchydc.com/news/nation-world/national/article24772648.html [https://perma.cc/HW5S-UNK9] (June 30, 2015); Nicholas Nehamas, *For Florida Companies that Play by the Rules, Success Is Tough as Nails*, SACRAMENTO BEE, https://www.sacbee.com/news/nation-world/article2608613.html [https://perma.cc/4MVA-5YGS] (Sept. 4, 2014).

After reading Ms. Domando's account[39] and a range of studies on this issue,[40] it is clear that, in the context of competitive bidding, misclassification can be *more* than a cost-savings strategy that hurts workers. It can also be a *method* of competition that allows lawbreaking employers to win business from honest employers.

Eventually, as appears to have happened with Ms. Domando, misclassification can worsen competitive conditions by taking honest employers off the playing field—and *out* of bidding competitions—when they realize they cannot compete with lawbreakers.[41]

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39. *See* Fort Worth Star-Telegram, *"Misclassification" of Workers Frustrates Employees*, YOUTUBE (Aug. 26, 2014), https://www.youtube.com/watch?v=M2X63Wg5_lA, [https://perma.cc/75GW-5AAJ] (featuring the account of Brian Anderson, the owner of a steel and rebar company in Mesquite, Texas); Mandy Locke, *In Dunn, NC, a Family Business Follows the Rules*, NEWS & OBSERVER, https://www.newsobserver.com/news/nation-world/national/article10049798.html [https://perma.cc/SM6W-9DWQ] (Sept. 4, 2014) (featuring the account of Jimmy Tyndall, the owner of a concrete and paving company in Dunn, North Carolina).

40. For more information on misclassification as a business model in contract construction, see *Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy: Hearing Before the H. Subcomm. on Workforce Protections of the H. Comm. On Educ. and Lab.*, 116th Cong. 34-41 (2019) (Testimony of Matt Townsend, Chief Exec. Officer, OCP Contractors); Laura Valle-Gutierrez, Russ Ormiston, Dale Belman & Jody Calemine, *Up to 2.1 Million U.S. Construction Workers Are Illegally Misclassified or Paid Off the Books*, CENTURY FOUND. (Nov. 12, 2023), https://tcf.org/content/report/up-to-2-1-million-u-s-construction-workers-are-illegally-misclassified-or-paid-off-the-books [https://perma.cc/K6MC-K6EY]; Mark Erlich, *Misclassification in Construction: The Original Gig Economy*, 74 ILR REV. 1202 (2020); and FRANÇOISE CARRÉ & RANDALL WILSON, THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN CONSTRUCTION (2004), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1042&context=csp_pubs [https://perma.cc/DEX5-HDGF].

41. Of course, given the wage losses of misclassified construction workers, there is also an argument that labor- market conditions were negatively affected as well. Another indication of the worsening competitive field is evident from accounts of what happens when misclassifying *businesses* are identified by the authorities or face organizing drives from labor. On many of these occasions, the contractors are revealed to be little more than shell companies. The Tennessee Bureau of Workers' Compensation reported in 2019, for example, that noncompliant businesses frequently "shut down" and then "reopen as a newly formed business entity that is a continuation of the closed business."

As for the other Section 5 criterion regarding conduct that is coercive, exploitative, abusive, et cetera, I will offer a few quotes from workers interviewed as part of the investigation who *knew* they were being misclassified but kept working anyway:

"I reckon I just have to go with it," said Adolph McNeill of Fayetteville, North Carolina.

"[I'm] just happy to be making anything," said a painter in Holt, Missouri.

"These days, you work for less or you don't work at all," said Armando Sanchez of Jacksonville, North Carolina.

IV. Samuel Talavera and the Port Truckers of Los Angeles

Bidding for construction contracts is one context in which the competitive dynamics of misclassification can be quite clear. Another example I would like to highlight draws on a 2017 *USA Today* exposé by Brett Murphy regarding port truckers in Los Angeles.[42]

The lead story for the piece features a gentleman named Samuel Talavera, Jr. After coming to this country thirty years ago from Nicaragua, he began working as a short-haul trucker for a company at the Los Angeles harbor. It was a decent job. He owned his own truck and earned enough to buy a house for his family and to take his kids to Disneyland.

Then, in 2010, the company informed him that he needed to trade in his truck as a down payment towards a new truck, which the company had purchased to comply with new environmental rules. The company would hold the title to the vehicle, and he would pay it down through a lease-purchase agreement. The same thing happened to other truckers working for other companies at the port.

Suddenly, Mr. Talavera's job was completely different. He was working up to sixteen hours at a time and up to twenty hours a day. Mr. Talavera and the other truckers interviewed as part of the exposé did not set their own

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TENN. BUREAU OF WORKERS' COMP., *supra* note 17, at 12. In one instance in 2007, a carpentry firm told the National Labor Relations Board that they "never employed any employees," and pointed to a group of fourteen subcontractors. When the National Labor Relations Board mailed subpoenas to those subcontractors, they were all sent back as "undeliverable." Erlich, *supra* note 40, at 14.

42. *See* Brett Murphy, *Rigged: Forced into Debt. Worked Past Exhaustion. Left with Nothing.*, USA TODAY (June 16, 2017), https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/ [https://perma.cc/E749-VDTB].

hours or pick their own routes; their companies decided who got the good routes and who got the bad ones, as well as when—or if—the truckers could go home at night.

In fact, Mr. Talavera *stopped* coming home at night to save time on his commute. He started sleeping in the cab of his truck.

Even though he was working longer hours, *the money got worse*—a lot worse. Although the company controlled nearly every aspect of Mr. Talavera's job, it continued to treat him like an independent contractor and deducted the cost of doing his work from *his* paycheck. The deductions from the truckers' paychecks weren't just for gas or tires. Some truckers were charged a fee to park their trucks on the company's lot. One company even charged truckers $2.00 a week for toilet paper and office supplies. Some weeks, Mr. Talavera would make as little as $33.00; one week he made $0.67.[43] *USA Today* identified seven companies at which truckers ended a week *owing* their company money.

Mr. Talavera drew down his savings. His wife took three separate jobs to help with the bills. Eventually, they filed for bankruptcy just to keep their house. Then, in October 2013, Mr. Talavera's truck broke down, and he couldn't afford the repairs. So, his company fired him and took back his truck, which he had paid $78,000 towards owning. Mr. Talavera's story, outrageous as it may be, is not unique. A trucker named Eddy Gonzalez took a week off of work to care for his mother and arrange her funeral when she passed away. The company he was working for fired him and took his truck. A trucker named Ho Lee paid $1,600 a month for two years toward his lease-to-own truck. Then he got sick, missed a week of work, got fired, and had his truck taken.

Is what happened to the port truckers a *method* of competition? And is it unfair under Section 5? These are fact- and law-specific questions, but speaking *generally*, there are compelling reasons to think that the answer to both of these questions might be "yes."

To answer the first question, vertical restraints are a paradigmatic method of competition. What might a vertical restraint look like in this context? It's when a company takes away the independence of an independent buyer or seller. It's when a company says, "You have no choice but to do what I say as part of this transaction." It's telling an "independent" tree planter how deep they can stamp a seedling. It's telling an "independent" trucker the hours they must work, the routes they must drive, and the exact truck they must drive.

43. *Id.*

Not all vertical restraints are illegal, but the Supreme Court has upheld the FTC's ability to curb problematic vertical restraints through its "unfair methods" authority.[44] Misclassification helps hide vertical restraints under a veneer of independence.[45]

Turning to the criteria of unfairness, what happened to the port truckers has worsened competitive conditions in the market. Before 2010, Mr. Talavera and most of his colleagues owned their trucks outright. They appear to have had the capacity to take their equipment, *which they owned*, to another port, or another job, should working conditions decline. In other words, they appear to have been bona fide independent contractors. What

44. There are canonical Section 5 cases in which the Supreme Court upheld the FTC's ability to curb vertical restraints through its unfair-methods authority. *See, e.g.*, Atlantic Refining Co. v. Fed. Trade Comm'n, 381 U.S. 357, 371 (1965); FTC v. Texaco, 393 U.S. 223, 228-31 (1968).

45. I am struck by the fact that the history of antitrust is full of instances in which companies hide their anticompetitive conduct behind a fiction of independence. When Congress first started enumerating the specific kinds of conduct that would constitute "unfair methods of competition"—a strategy it later dropped—the authors of the FTC Act expressly identified the use of "'bogus' independent concerns" as one such method. *See* 51 CONG. REC. 11108 (1914) (statement of Sen. Francis Newlands) (providing specific examples of unfair competition, such as local price cutting and organizing "bogus independent concerns . . . for the purpose of entering the field of the adversary and cutting prices with a view to his destruction"); *id.* at 11230 (statement of Sen. Joseph Robinson) (providing examples of unfair competition, including bogus independent concerns). The Robinson-Patman Act was inspired, in part, by large buyers' use of ostensibly independent "dummy brokerages," which suppliers were forced to retain and pay as "their" brokers, but which, in reality, were wholly owned by the buyers. *See* 80 CONG. REC. 8110 (1936) (remarks of Rep. Arthur Greenwood). And none other than John Rockefeller cut secret deals with the railroads to secure lower prices for Standard Oil against its competitors. *See* GREGORY WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 5-7 (2020) ("Rockefeller saw nothing improper in Standard Oil's deals with railroads, but neither did he want them publicized."). The Standard Oil trust was *itself* a secret; that secret trust agreement allowed its thirty-seven member companies to hold themselves out as ostensible competitors. *See* Horace Lafayette Wilgus, *The Standard Oil Decision: The Rule of Reason*, 9 MICH. L. REV. 643, 648 (1911) ("In 1879, a secret trust agreement was entered into by the 37 stockholders of the Standard Oil Company of Ohio . . . ."); *see also* WERDEN, *supra*, at 7 ("Rockefeller and his close associates saw a need for tighter control, which was complicated by the desire to continue to keep the secrecy of Standard's ownership of some of its companies.").

happened in 2010 and onwards took from those drivers any independence they had; instead, they became misclassified and unlawfully underpaid employees.[46]

Note the two distinct harms to competitive conditions. First, arguably independent market actors were effectively taken off the playing field and turned into misclassified employees. Second, that misclassification almost certainly negatively affected labor-market conditions. Experts estimate that misclassification *alone* can cost truckers between $9,000 and $18,000 a year in lost pay and benefits.[47]

While the nature of the port truckers' treatment may make their exploitation more than evident, their experiences reminded me of a passage from a canonical Section 5 case, the *Texaco* case, which the Supreme Court decided in 1968.

The case involved an oil company that cut a deal with a tire manufacturer to force the oil company's ostensibly independent dealers to exclusively sell goods from that tire manufacturer. In deciding that case, Justice Black dwelled on the *power* that the oil companies held over their dealers, which allowed the company to force the arrangement upon them. He wrote for the Court:

> These dealers typically hold a one-year lease on their stations, and these leases are subject to termination at the end of any year on 10 days' notice. At any time during the year, a man's lease on his service

46. This result reminds me of a stark warning raised by the Supreme Court in an 1897 case analyzing the purpose of the Sherman Act. Justice Rufus Peckham, writing for the majority, warned that

> it is not for the real prosperity of any country that such changes should occur which result in transferring an independent businessman, the head of his establishment, small though it might be, into a mere servant or agent of a corporation . . . having no voice in shaping the business policy of the company, and bound to obey orders issued by others.

United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 324 (1897).

47. *See*, *e.g.*, Schmitt et al., *supra* note 7, at 4 (reflecting cost estimates to "light truck delivery drivers" and "truck drivers"); *see also* Rebecca Smith, Paul Alexander Marvy & Zon Zerolnick, *The Big Rig Overhaul: Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement*, NAT'L EMP. L. PROJECT 31 (2014), https://www.nelp.org/app/uploads/2015/03/Big-Rig-Overhaul-Misclassification-Port-Truck-Drivers-Labor-Law-Enforcement.pdf [https://perma.cc/MY8J-L2FR] (describing a 2014 estimate that found L.A. port truckers lost around $4,000 to $5,000 per month due to misclassification).

> station may be immediately terminated by Texaco without advance notice if, in *Texaco*'s judgment, any of the "housekeeping" provisions of the lease, relating to the use and appearance of the station, are not fulfilled. . . . The average dealer is a man of limited means who has what is, for him, a sizable investment in his station. . . . A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord.[48]

It is difficult for me to read those words and *not* think about Mr. Talavera, Mr. Gonzalez, and Mr. Lee—and how their trucks, and the tens of thousands of dollars they'd poured into them, were taken away at a moment's notice.

Conclusion

A few years after my summer in Belle Glade, I spent a year working as a researcher for the International Labor Organization's Special Action Program to Combat Forced Labor. I was based in Lima, Peru, and traveled around South America.

I coauthored reports on debt bondage and other kinds of forced labor in the cattle ranches of Paraguay, the illegal logging industry in the Peruvian jungle, and the annual Brazil Nut harvest in northern Bolivia.[49] I saw and

48. *Texaco*, 393 U.S. at 227 (quoting Shell Oil v. FTC, 360 F.2d 470, 487 (5th Cir. 1966)). Tellingly, Justice Black and the majority also foreclosed the tire company's competitors from selling their wares at the stores of the oil company's dealers. *Id.* at 229-30.

49. *See generally* Alvaro Bedoya Silva-Santisteban & Eduardo Bedoya Garland, *Servidumbre por Deudas y Marginación en el Chaco de Paraguay*, INT'L LAB. ORG. [ILO], ILO Dec./WP/45/2005 (2005), Int'l Lab. Off., Working Paper No. 45, 2005), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40declaration/documents/publication/wcms_081941.pdf [https://perma.cc/LFD7-B4DG] (discussing debt bondage and forced labor in Paraguayan cattle ranches); Eduardo Bedoya Garland & Alvaro Bedoya Silva-Santisteban, *El Trabajo Forzoso en la Extracción de la Madera en la Amazonìa Peruana*, ILO, ILO Dec./WP/40/2004 (2004) https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40declaration/documents/publication/wcms_082056.pdf [https://perma.cc/23BY-E5TE] (examining forced labor in the Peruvian logging industry); Eduardo Bedoya Garland & Alvaro Bedoya Silva-Santisteban, *Enganche y Servidumbre por Deudas en Bolivia*, ILO, ILO Dec./WP/41/2004 (2004) [Garland & Silva-Santisteban, *Bolivia*], https://www.ilo.org/sites/default/files/wcmsp5/

heard about things that shock me to this day. I was particularly struck by my conversations with families in the town of Riberalta, Bolivia. They would move to the jungle to harvest Brazil nuts for two or three months, and slowly see their meager earnings whittled away by charges at the company store for basics like rice, salt, sugar, or medicine. They would then leave the camp *owing* their employers money.[50] I never thought I would hear about similar working conditions in the United States.

People need to know that there are places here in America where people work sixty, seventy, or eighty hours a week and still have to pawn their wedding bands to get by, that there are places where people work so long that they choose to sleep in the back of their truck—even though their homes are just a drive away—only to make $0.67 a week, or worse, to end up *owing* their employer money.

Misclassification helps this abuse happen. The Department of Labor and the National Labor Relations Board are doing everything they can to stop it. It's time for competition authorities to step up to the plate.

Thank you for your time.

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groups/public/%40ed_norm/%40declaration/documents/publication/wcms_082055.pdf [https://perma.cc/GJU6-83EL] (discussing forced labor during Bolivia's Brazil-nut harvest).

50. Garland & Silva-Santisteban, *Bolivia*, *supra* note 49, at 27-33.