LABOR PULSE—Is the present pandemic the gig worker’s greatest opportunity?

By Dr. Jim Castagnera

“Labor Pulse” was inaugurated a year ago. My first installment in May 2019 was headlined, “As goes Uber, so goes the nation.” At the conclusion of that piece, I opined, “Whether rideshare drivers will successfully organize and win ‘employee’ status with the wages and benefits expected to follow, or Uber and its competitors will keep the organizing efforts at bay while automating the industry, will set the pattern for all sectors of America’s service-based economy.”

No reader of that article, nor I, foresaw what America—and much of the world—would be like a year hence. Sheltering in place, like tens of millions of my fellow citizens, I write this during an unprecedented period of our history. To find any parallel, we have to hark back a hundred years. The Spanish Flu of 1918 through 1920 is believed to have taken 40 to 50 million lives … including the twin sisters of a first-generation Italian American who happened to be my Dad.

Once one’s head is back there, another echo to be heard is the state of the blue-collar worker a century ago. “The 1920s marked a period of sharp decline for the labor movement. Union membership and activities fell sharply in the face of economic prosperity, a lack of leadership within the movement, and anti-union sentiments from both employers and the government. The unions were much less able to organize strikes.”

Sound familiar? Déjà vu?

From its zenith in the 1950s, private-sector union membership has steadily declined from one worker in three to fewer than one in ten today. This erosion has proceeded unabated, despite the continued validity of the National Labor Relations Act, the Norris-La Guardia Anti-Injunction Act, and the Fair Labor Standards Act.

Mention of these three statutes evokes images of the events that led to their enactment. The Great Depression and the New Deal sired the NLRA and its companion pieces of legislation. In their turn, these seminal statutes spawned the resurgence of organized labor during the 1930s,
40s and 50s. It didn’t hurt that from 1945 until the late 1960s, the United States enjoyed a near-monopoly on heavy manufacturing, while future rivals like Germany, Japan and China struggled to recover from eight years of devastating warfare.

But, then, starting in the early 1970s, American manufacturers chased the lowest wage rate … first to the right-to-work states of the south, then to Mexico, China, and finally Southeast Asia. In the course of this manufacturing out-migration, blue-collar unionists lost the wages, benefits, and pensions that had catapulted them into the vast middle class. In increasing numbers, they had to turn to low-paying, benefit-poor service jobs. And, since jobs were low or unskilled, and employers—such as retail chains—were decentralized, organizing prospects ranged from difficult to impossible.

Then, just when rock bottom seemed in sight, along came the gig economy. Minimum-wage service workers at least enjoy the possibility of such statutory safety nets as unemployment insurance and workers’ comp. Their wages, though often paltry, are usually guaranteed by the FLSA and comparable state wage hour laws.

The gig worker typically has enjoyed no such “floor,” simply because those workers have been classified as independent contractors. As I pointed out in my May 2019 “Labor Pulse,” this sorry state has been the subject of class-action challenges, particularly in the ride-share world of Uber, Lyft and their rivals. Results have been mixed, with settlements usually resulting in money changing hands but companies dodging the “employee status” bullet.

A 2019 California law, which makes it devilishly difficult to classify a worker as an independent contractor, has stimulated a new round of lawsuits. Hardly was the governor’s signature dry than a “longtime legal antagonist filed a class-action suit on behalf of drivers in federal court in California on Wednesday, accusing Uber of wrongly classifying drivers under the state’s employment test,” as the New York Times reported.

But fate was apparently unwilling to wait the two-to-six years such class-action suits require to meander through our court systems. It took a hand last month, waking everyone from the President of the United States down to the lowly Instacart “shopper” to the reality of a pandemic afoot upon the land.

**From unskilled gig grunts to an “essential” workforce**

During the present pandemic, the Occupational Safety and Health Administration classifies worker risk into four categories:

1. **Very High Risk:** Healthcare workers

2. **High Risk:** Healthcare support staff, healthcare deliveries, mortuary workers

3. **Medium Risk:** Frequent contact with people in travel situations or areas of community transmittal
4. **Low Risk:** Jobs with limited contact with other people

On this scale, gig workers would seem to fall into the “medium risk” category.

If so, then Vanessa Bain would take exception. “Bain has turned from an Instacart evangelist into one of the most effective agitators against the company, in what has become a timely test of how much leverage blue-collar on-demand workers can amass to win better treatment from growth-obsessed technology companies that keep them at a distance.” She reportedly heads a Facebook group of some 14,500 Instacart “shoppers.” On March 30th, she called for a nationwide work stoppage.

In an [interview](...) that day, she listed the strikers’ demands as personal protective equipment (PPE), including hand sanitizer and disinfectant spray, five bucks per order in hazard pay, and an extension of the sick-pay benefits instituted by Instacart earlier in the COVID-19 outbreak. She also decried the multi-billion-dollar company’s announced plan to hire 300,000 more “shoppers,” essentially nearly tripling the food-delivery workforce. Calling this “particularly predatory,” she speculated the firm was “replacing existing shoppers, who will get sick because they have no protection” with laid-off, low-income folks, desperate to make next month’s rent payment.

Instacart quickly [reacted](...), extending sick-pay benefits, set to expire on April 8th, out another month, and making the sought-after PPE more readily available.

**Instacart strike the tip of the iceberg?**

Gig workers, like the Instacart “shoppers,” aren’t the only blue-collar laborers who are now “essential” workers. Nor are they the only ones out and about in the midst of the pandemic. While the likes of me and my wife, a K-12 reading specialist plying her trade online from our couch, are sheltering in place, many thousands of such essential workers are reporting for duty every day.

“They … include grocery store and fast-food staff, delivery people, warehouse employees, and other food-service-related workers who have seen the demand for their labor skyrocket in the last few weeks, while working conditions get more dangerous,” and as “online stores and delivery services like Amazon and Instacart have more users than ever, the conditions of workers who pack, ship, and deliver orders have also come under more scrutiny,” [reports](...) The Cut.

*The Cut* is one online publication doing the scrutinizing. And as of April 6th, it reports a spate of work stoppages across the fast-food, retail, and home delivery industries. These include:

- McDonald’s in Los Angeles and San Jose, Tampa and Miami, St. Louis and Memphis
- Domino’s Pizza in LA
- Family Dollar, Food Lion, and Walmart in North Carolina
- Amazon in Detroit, Chicago, and Staten Island
The gig industry’s intransigence on the “employee v. independent contractor” issue, as well as the fungibility of many low-level service workers and the decentralized geography of retail, fast-food, home-delivery, and ride-service enterprises all argue against successful organizing of this vast and mushrooming slice of the American workforce.

On the other hand, the coronavirus pandemic may be the organizers’ ace in the hole. In addition to Instacart’s nemesis Vanessa Bain, other people who seem to think so have joined her in forming a new entity calling itself the “Gig Workers Collective.” The GWC says of itself,

We are a pending 501(c)(3) organization of gig worker activists who have come together to form the Gig Workers Collective. This non-profit group, led by veteran organizer Vanessa Bain, will bring the time, resources, and focus to the fight for fair pay and better treatment for all gig economy workers, from Instacart Shoppers to Lyft Drivers.

This organization will be a diverse group of gig workers who bring a variety of perspectives to the conversation about how these companies have continually broken trust with the contract workers who form the backbone of their business model. Members of the group have a track record of activism within the gig space, organizing campaigns that have held gig platforms accountable for exploitation of their contracted labor force.

Gig Workers Collective will act as “first responders” to take the lead in organizing immediate action to new grievances, while also providing consistent organizing support and guidance to workers across all platforms, and identify new ways to support fellow workers in their own organizing efforts.

So nervous and vulnerable are the GWC’s founders, other than Bain, that some use pseudonyms when dealing with the media. With their 501(c)(3) application pending, they also say that fundraising is the next crucial order of business.

The power of an idea whose time has come

“Nothing is more powerful than an idea whose time has come,” wrote Victor Hugo, who (perhaps prophetically) also wrote Les Miserables.

Organized labor, as I noted above, struggled throughout the prosperous Roaring Twenties. Labor unions came into their own when a Great Depression threatened the very future of American capitalism. To coin another phrase, better the union devil we know than the communist devil we dread.

Dr. Anthony Fauci, the national-media face of the CDC, and many another expert predict a recurrence of COVID-19, perhaps this fall or in the wintertime. If the past is prelude, then the Spanish Flu’s evolved and more virulent second wave in the autumn of 1918 supports that prediction.
If that’s how it goes down, the current crop of heroes in our gig economy once again will be essential. They now have a neophyte labor organization to pull them together and give them a single, possibly very loud voice. Perhaps, indeed, their time has come.

**About the author.** Dr. Jim Castagnera, Esq., practiced labor, employment and intellectual-property law with a major Philadelphia-headquartered law firm for a decade before joining New Jersey’s Rider University as Associate Provost & Legal Counsel. Following 23 years in that role, he is now a partner and the chief consultant of Holland Media Services, a freelance writing, training, and consulting firm with offices in Los Angeles and Philadelphia. He also is an adjunct professor of law at Drexel University. His 21 published books include the *Employment Law Answer Book* (Wolters Kluwer, 9th edition 2018).