

## **THE HAVES AND THE HAVE-NOTS:**

**How American Labor Law Denies a Quarter of the  
Workforce Collective Bargaining Rights**



[www.americanrightsatwork.org](http://www.americanrightsatwork.org)

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## Executive Summary

The right to organize and bargain collectively under the protection of law is the bedrock upon which workers are able to form or join a labor union. American labor law has not kept pace with the changing nature and face of the modern workplace and increasingly excludes more and more workers from this legal protection. Increasing numbers of employees have a supervisory aspect or capacity of their work. More and more immigrants join the workforce, especially in the agricultural sector, and more people have been classified as independent contractors, whether by choice or by an employer's decision. As these changes take place, American labor law denies these workers their legally-protected right to form unions and collectively bargain by either defining workers as not employees or by expressly excluding them.

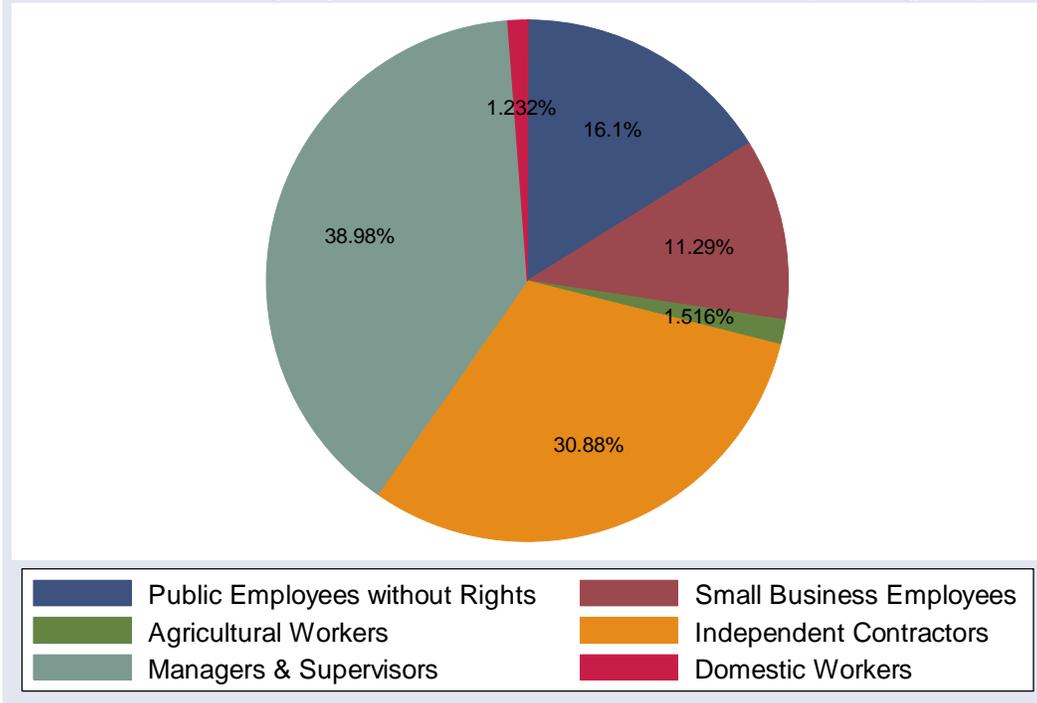
With the election of a pro-worker president and greater pro-worker majorities in Congress, the political conditions are ripe for addressing the problem of a diminishing population of workers with protected union rights. Congress could clarify or expand the definition of "employee" under the National Labor Relations Act (NLRA) to better reflect the realities of today's workforce. Several bills have been introduced that would restore collective bargaining rights to employees wrongly categorized as supervisors, independent contractors, and students, and would strengthen the law's protections of immigrant workers. Additionally, President-elect Obama could appoint members to the National Labor Relations Board and judges to the federal courts to better uphold the NLRA's mission to promote collective bargaining, and reverse the course of the Bush Administration to narrow the law's coverage.

This report provides an accurate, up-to-date analysis of the number and type of workers without collective bargaining rights, as well as recent trends in the workforce and legal rulings that have impacted that number. There are 140.5 million people in the civilian workforce. Our research found that of these employees, 33.5 million, or 23.8%, have no rights under the NLRA or any other labor law: no legally-protected right to join or form a union, no legally-protected right to bargain collectively for their wages and conditions of work, and therefore, effectively no freedom of association in the workplace.

The granting of collective bargaining rights differs by sector, industry, and state:

- The NLRA excludes various categories of workers from coverage: supervisors and managers, small business employees, independent contractors, agricultural workers, domestic workers, and most public employees.
- While workers in some of these categories have been granted rights under various state and local statutes, some recent Supreme Court decisions and choices by large employers in effect deprive more and more employees of collective bargaining rights or their meaningful exercise.
- Among public employees, 15.7 million (or 74.5% of all public employees) have been granted rights, whereas 5.4 million (or 25.5%) are without collective bargaining rights.
- Among private sector employees, 101.1 million (or 85%) have collective bargaining rights. By contrast, 17.8 million private employees (15%) have no right to collective bargaining with their employers.

## 33.5 million Employees Have No Collective Bargaining Rights



The number of workers who have either no collective bargaining rights, or no meaningful way to exercise these rights continues to grow. The Supreme Court ruling *Hoffman Plastics* made it more difficult for immigrant workers to receive restitution when their labor rights are violated. Additionally, decisions by the Bush Labor Board have excluded employees with minimal supervisory duties, disabled janitors, graduate student assistants, newspaper carriers, and other categories of workers from the law's protections. A growing number of employers like FedEx Ground are misclassifying their employees as independent contractors, thus increasing the number of workers who lack basic protection of their rights.

The broken labor law system in the United States denies too many workers the right to collective bargaining, or does not effectively protect them when they try to exercise this internationally recognized human right. The NLRA, passed decades ago, hasn't kept up with the dramatic changes in the American economy. It's time for lawmakers to reform this obsolete law to give employers and workers clarity in determining who is eligible to join or form a union. Until the law changes, millions of workers will continue being denied standard workplace protections, and more importantly, the chance to have a union and improve their standard of living.

# The NLRA and Its Have-Nots: How Many People Do Not Have Collective Bargaining Rights

Passed in 1935, the federal National Labor Relations Act (NLRA), also known as the Wagner Act, gave U.S. workers the right to bargain collectively with their employers over wages, hours, and other terms and conditions of employment. While the NLRA was meant to apply to “employees” in general, it also excluded a number of categories of workers from the provision of these rights. So did amendments to the Act and decisions by the Supreme Court and by the National Labor Relations Board (NLRB) on the scope of the NLRA’s coverage.<sup>1</sup> Thus, the major groups excluded from NLRA coverage, whether in the Act itself or via amendments and judicial interpretation, are:

1. agricultural workers
2. domestic workers
3. small business employees
4. independent contractors
5. supervisors and managers
6. public employees

Federal, state, and local statutes have been adopted – and some revoked – to give or deny employees in some of these groups collective bargaining rights. For instance, some states grant agricultural workers collective bargaining rights, and others allow some public employees to bargain collectively. A review of these categories, the numbers of workers affected, and the impact of recent Board and Supreme Court decisions, as well as statutes, follows.

As of February 2005,<sup>2</sup> there were 146,715,996 people in the workforce. Of these, 6,178,980 people were classified as self-employed but not independent contractors: this group is largely comprised of sole proprietors to whom collective bargaining rights do not apply as they are not employees.<sup>3</sup> Our focus is on the total civilian workforce of 140,537,016 people who are “employees.” This 140.5-million civilian workforce had about 21 million in public and about 18.8 million people in private employment.

## Public vs. Private Employment

Access to protection for collective bargaining rights differs by whether one’s employer is a private entity or a public one because the NLRA does not apply to public employees and this group only gets coverage if the state government affirmatively takes steps to provide it. More private employees are protected than are public ones (see charts A and B below).

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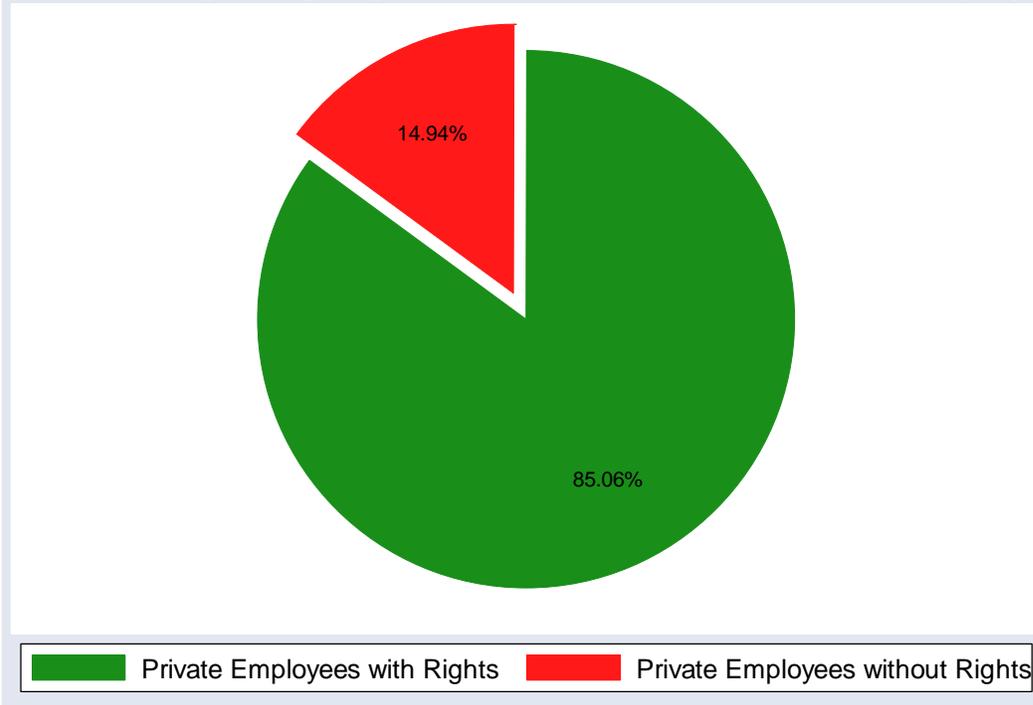
<sup>1</sup> GAO. 2002. GAO-02-835. *Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights*. Washington, DC: United States General Accounting Office.

<sup>2</sup> This is the latest year for which data are available. For data sources and methods, refer to the Methodology section at the end of this report.

<sup>3</sup> Note that a person can be a self-employed independent contractor – such as a consultant, a freelance writer, a FedEx driver, etc. – in which case the person has an employer to bargain with. Those who are self-employed and not independent contractors are usually sole proprietors who do not have an employer.

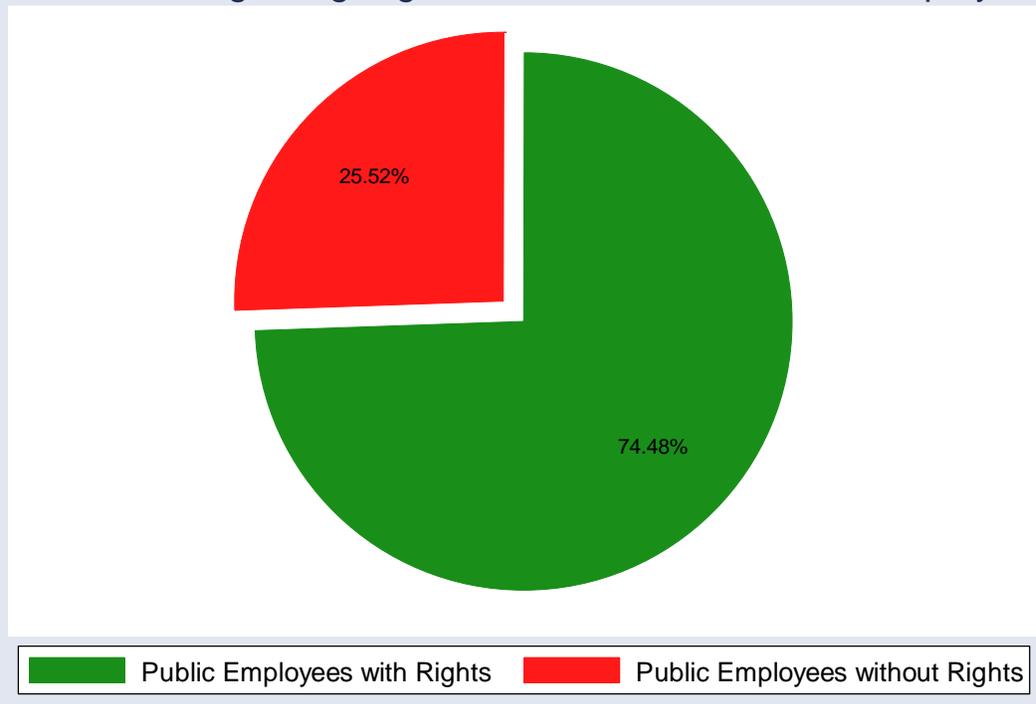
A: Among private employees, about 85% had and 15% did not have collective bargaining rights:

### Collective Bargaining Rights of the 118.8 million Private Employees



B: Among public employees, 74.5% had collective bargaining rights and 25.5% did not:

### Collective Bargaining Rights of the 21 million Public Employees

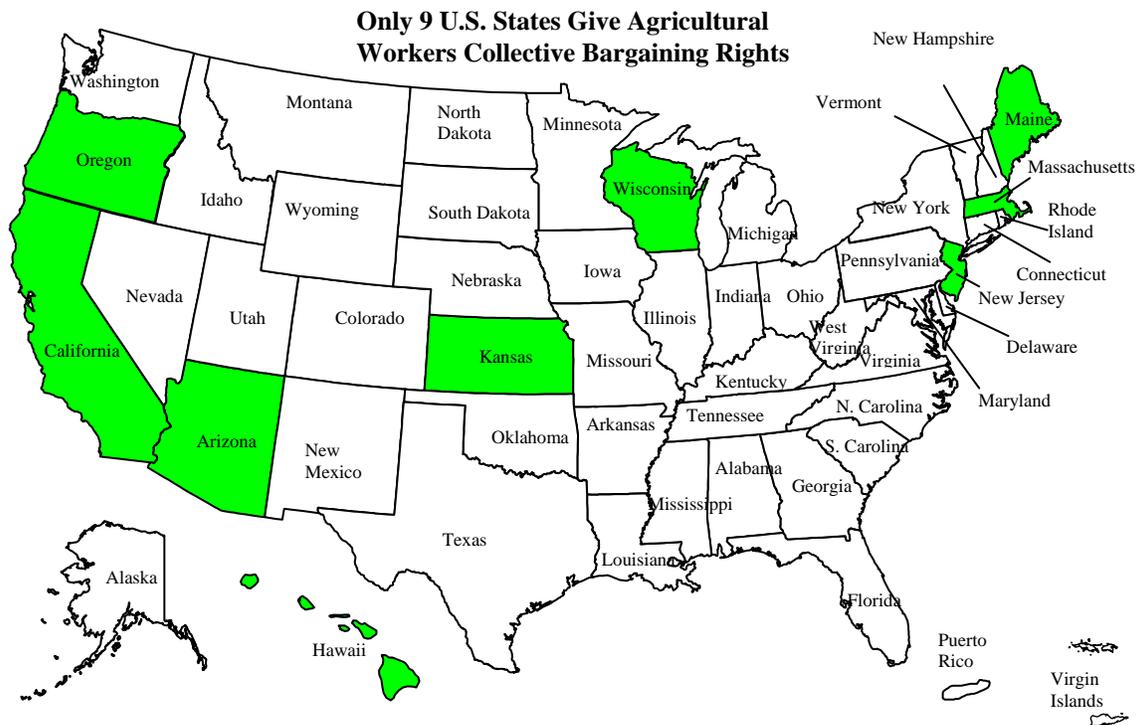


# Workers Excluded from U.S. Labor Law

## Agricultural Workers

From its inception, the NLRA excluded “agricultural laborers” from collective bargaining rights. Subsequently, this category was expanded to also exclude other workers who work on a farm, even if not directly involved in the production of crops (for instance, those packing produce on a farm). However, there are nine states in which agricultural workers have some collective bargaining rights. In some cases, the state granted them in a separate agricultural labor relations act. In others the state passed legislation providing collective bargaining protections to private employees, including agricultural workers.<sup>4</sup>

States granting rights in an agricultural labor relations act	Arizona California Maine Oregon
States granting collective bargaining rights to private workers, including agricultural workers	Hawaii Massachusetts New Jersey Wisconsin
Both	Kansas
<b>TOTAL</b>	<b>9 states</b>



<sup>4</sup> GAO-02-835

In February 2005, there were a total of 676,469 agricultural workers in the U.S.<sup>5</sup> Of these, 168,772 (or about 25%) resided in one of the nine states where agricultural workers have collective bargaining rights. Thus, 507,697 agricultural workers, or 75%, were without rights.

### **Farmworkers need unions to protect themselves from workplace hazards**

Few workers face as many health and safety dangers as farmworkers. A Bureau of Labor Statistics report identified some of these occupational hazards:<sup>6</sup>

- Exposure to pesticides and other hazardous chemicals
- Limited access to sanitation facilities in the fields
- Limited access to drinking water in the fields
- Excessive bending, stooping and lifting
- Long hours, working six to seven days a week during planting and harvesting seasons

The State of California is investigating whether the deaths of six farmworkers between May and August 2008 were heat-related.<sup>7</sup> One woman fell ill and later died after picking grapes in 111 degree heat.<sup>8</sup> In California, agricultural workers have the legal right to organize. Yet farmworkers in 41 states have no right to form unions to protect themselves from unsafe working conditions.

### **Domestic Workers**

Both the NLRA and most of the states that have enacted labor relations acts expressly exclude domestic workers from collective bargaining rights. As of February 2005, there were 583,914 domestic workers in private households. Of these, 171,446 were wage employees working as independent contractors: a group we leave aside for consideration under the independent contractor category. Thus, there were 412,468 people without collective bargaining rights by virtue of their status as domestic workers.

### **Small Business Employees**

According to U.S. labor law, there are certain employers that are too small to fall under the federal jurisdiction of the NLRB. Since the 1950s, the Board has held that it would exercise its federal jurisdiction only over businesses that have a “pronounced impact” on interstate commerce, and has set standard measures of this impact in terms of yearly sales volume. Thus, generally, retail employers with sales under \$500,000 annually and non-retail employers with sales under \$50,000 annually do not fall under the Board’s jurisdiction and their employees have no collective bargaining rights under the NLRA.<sup>9</sup>

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<sup>5</sup> Note that there is an inherent difficulty in counting agricultural workers: their number fluctuates significantly throughout the year, for obvious reasons. In the month of February, when these data are collected, the number of agricultural workers is at a low point. Thus, this number may be an underestimate.

<sup>6</sup> Bureau of Labor Statistics. “Agricultural Workers,” *Occupational Outlook Handbook, 2008-09 Edition*. <<http://www.bls.gov/oco/ocos285.htm>>

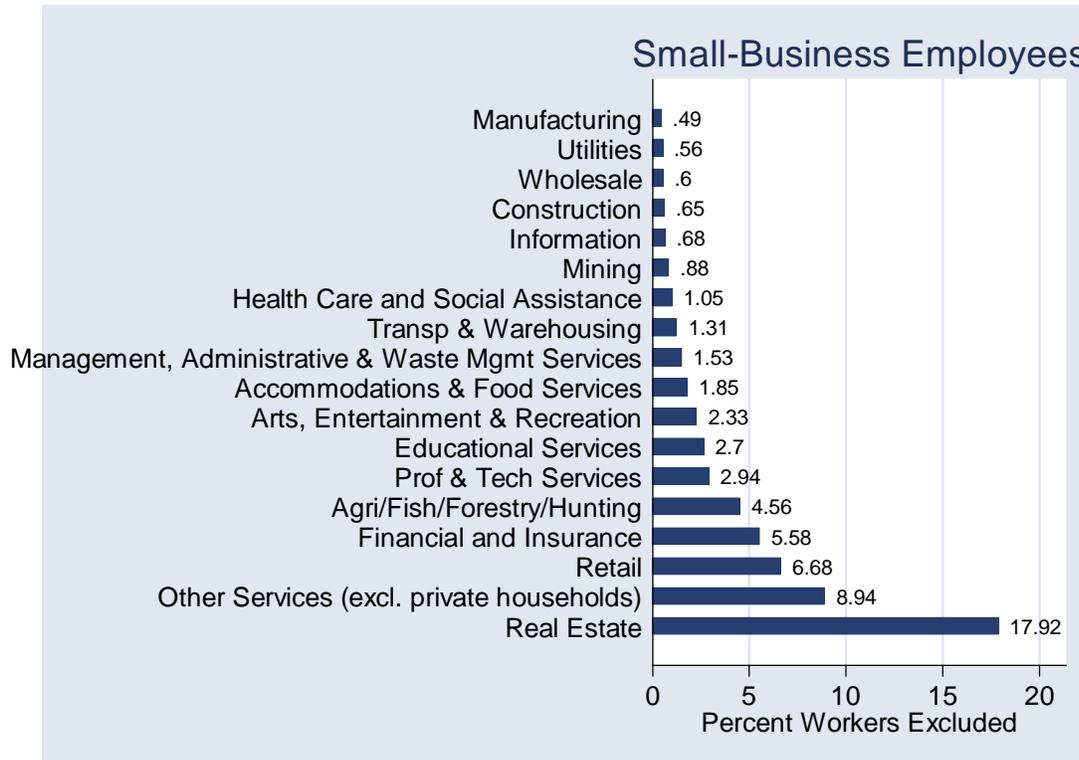
<sup>7</sup> Ferriss, Susan. “In California’s fields, risks rise with the temperature,” *Sacramento Bee*, 21 Aug 2008.

<sup>8</sup> United Farm Workers of America, website accessed 8 Sept. 2008. <<http://www.ufwaction.org/campaign/heatdeath15>>

<sup>9</sup> GAO-02-835

In 2005, there were about 4 million workers (3,780,889) without collective bargaining rights because they were employed by businesses too small to fall under the jurisdiction of the NLRB. They represent about 3.3% of all private sector employees and about 2.8% of the total workforce.

The exclusion of small business employees differs by industry. For instance, in Construction, Information, Mining, and Manufacturing, it was less than 1% of employees. However, in Real Estate it was almost 18%; in Services, about 9%; in Retail, close to 7%; in Professional and Technical Services, close to 3%; and in Agriculture, close to 5%.<sup>10</sup>



### ***Independent Contractors***

The Taft-Hartley Amendment to the NLRA, passed in 1947, excluded independent contractors from collective bargaining rights coverage. Independent contractors are generally defined as workers who have control over how their contracted services are performed, decide the time and place their work is performed, supply their own tools and instruments, bear the risk of financial profit or loss, and use skills not ordinarily used in the course of the business that contracts their services. Traditionally, the NLRB and the Supreme Court have determined whether workers are independent contractors, as opposed to employees, by considering factors such as the autonomy of the workers' decisions and where they perform their work.<sup>11</sup>

<sup>10</sup> For a table specifying the cut-off annual volume of sales for each industry, and for an explanation of how data were disaggregated by industry, refer to the Methods section.

<sup>11</sup> GAO-02-835

In February 2005, 10,342,430 workers were classified as independent contractors, comprising close to 9% of the private sector and about 7% of the total civilian workforce. These 10.3 million workers were without collective bargaining rights.

The group lacking rights under the “independent contractor” category has been growing in number due to actions taken by some employers to reclassify workers previously considered regular employees as independent contractors. For instance, the FedEx Corporation’s Ground division classifies its 15,000 drivers as independent contractors and is vigorously contesting their attempts to join labor unions.<sup>12</sup> Although recently the courts have affirmed that FedEx drivers are employees, not independent contractors, the FedEx model is appealing to employers who may seek to reduce their labor costs and in the course of this, deprive more workers of their collective bargaining rights by misclassifying them as independent contractors. As the Government Accountability Office (GAO) articulated in a 2006 “Employment Arrangements” report:

[E]mployers have economic incentives to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers’ compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans.<sup>13</sup>

### ***Supervisors and Managers***

The original text of the NLRA, which did not specify whether supervisors and managers were excluded from collective bargaining rights coverage, spurred much debate on this point. Early NLRB rulings interpreted the Act to exclude this category; early Supreme Court decisions held that supervisors and managers were entitled to collective bargaining rights. Finally, the 1947 Taft-Hartley Amendment to the Act expressly excluded supervisors from coverage. Since then, the NLRB and the courts have continued to interpret the Act as excluding managers in addition to supervisors, and have focused their attention on which workers should be considered supervisors and managers.<sup>14</sup>

This is an important question because, as of February 2005, supervisors and managers were the largest category of workers without collective bargaining rights. Under this category, 13,054,970 workers were excluded in the private sector and 3,407,147 federal, state, and local government workers were excluded. The 13 million private sector supervisors and managers comprised about 11% of the private sector workforce. The 3.4 million government supervisors and managers comprised about 16% of the public sector workforce.

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<sup>12</sup> Johansson, Erin. “Fed Up with FedEx: How FedEx Ground Tramples Workers’ Rights and Civil Rights,” American Rights at Work and the Leadership Conference on Civil Rights, Oct. 2007.

<<http://www.americanrightsatwork.org/dmdocuments/ARAWReports/fedupwithfedex.pdf>>

<sup>13</sup> GAO-06-656

<sup>14</sup> GAO-02-835

As with small business employees, the percentage of those excluded from collective bargaining because they are supervisors or managers differs across industry. For instance, fewer than 10% of workers in agriculture, forestry, fishing and hunting, as well as in health care and social assistance are excluded. However, it approaches a staggering one-fifth in utilities, mining, and the finance and insurance industries:



In order to determine supervisory status and therefore bargaining rights, the NLRB had traditionally used a test that depended in part on whether a worker exercised “independent judgment” in performing work. The Board had held that employees were not supervisors if they used ordinary professional or technical judgment, rather than using independent judgment, to direct less-skilled employees. However, in response to a Supreme Court ruling overturning this precedent, the NLRB issued a revised supervisory test through three decisions issued in 2006, collectively known as the *Oakwood Healthcare* decisions.<sup>15</sup> The Republican majority of the Labor Board held that the determination of supervisory status should be based not on the type of judgment (professional, technical, or independent), but rather on the degree of judgment exercised by the employee. The dissenting members of the Board wrote that the result of this new supervisory test “could come as a rude shock to nurses and other workers who for decades

<sup>15</sup> National Labor Relations Board. “NLRB Issues Lead Case Addressing Supervisory Status,” press release, 3 Oct. 2006.

<[http://www.nlr.gov/About\\_Us/News\\_Room/template\\_html.aspx?file=http://www.nlr.gov/shared\\_files/Press%20Releases/2006/r2603.htm&size=38](http://www.nlr.gov/About_Us/News_Room/template_html.aspx?file=http://www.nlr.gov/shared_files/Press%20Releases/2006/r2603.htm&size=38)>

have been effectively protected by the NLRA, but who now may find themselves treated, for labor-law purposes, as members of management.”<sup>16</sup>

Since this ruling, the notion that some more senior nurses and other professional and skilled staff should be reclassified as supervisors has been challenged.<sup>17</sup> In the modern workplace, more and more experienced employees are called upon to help build up the collective knowledge and organizational learning of their companies and organizations. In the course of this, they may find themselves directing the work of less experienced coworkers. However, the Board’s decision in the *Oakwood Healthcare* cases threatens to reclassify them as supervisors because of this. While it is difficult to estimate the number of employees in the American workforce who could be affected by this ruling, it stands to exclude many employees from the right to collective bargaining.

## ***Public Employees***

In 1935, the NLRA excluded federal, state, and local government workers from collective bargaining rights coverage. Today, many of these employees have such rights granted in federal and state statutes. 26 states provide rights to public employees; 12 states reserve these rights to certain groups of public employees, like firefighters and those employed in education; and 13 states do not grant collective bargaining rights to any of their public employees.

The Federal Service Labor Management Relations Statute provides these rights to many federal employees, particularly a large portion of the executive branch agencies. A slim majority of states also have statutes providing these rights to one or more categories of public employees.

As of November 2006, the following 25 states—as well as the District of Columbia—provided collective bargaining rights to all public employees: Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Massachusetts, Maine, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin.

The following 12 states provided rights to some of their public employees, such as firefighters and teachers: Georgia, Idaho, Indiana, Kansas, Kentucky, Maryland, Missouri, Nevada, North Dakota, Oklahoma, Tennessee, and Wyoming.

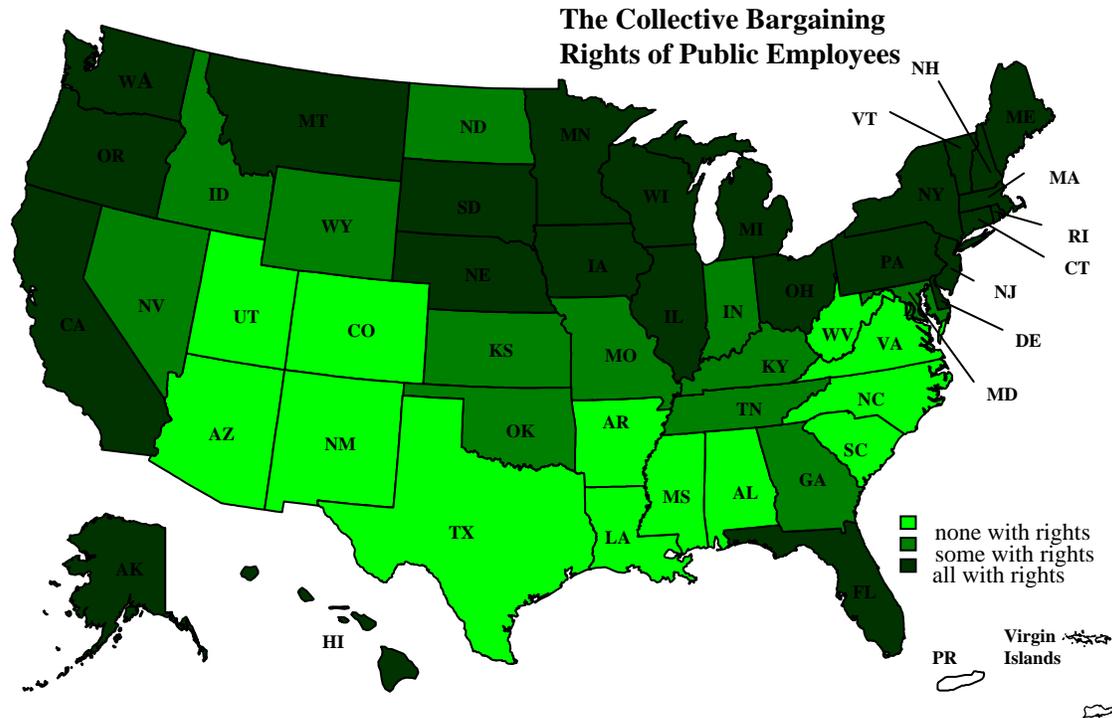
By contrast, the following 13 states did not grant collective bargaining rights to their public employees: Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, West Virginia, and Utah.<sup>18</sup>

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<sup>16</sup> *Oakwood Healthcare*, 348 NLRB No. 37 (2006).

<sup>17</sup> For instance, in March 2007, Reps. Robert Andrews (D-NJ) and Don Young (R-AK) and Sen. Christopher Dodd (D-CT) introduced the Re-Empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act, seeking to reverse the misclassification of skilled and professional employees as supervisors.

<sup>18</sup> For the source of information, as well as a discussion of how data were broken down by state, refer to the Methods section.



Most of those in the legislative and judicial branches, are automatically excluded from collective bargaining rights provisions under the NLRA. There are also expressly excluded agencies: the FBI, CIA, NSA, TVA, FLRA, FSIP, USSS, and the GAO (not all of which disclose how many people they employ).

The total number of public employees with no collective bargaining rights was 5,390,401, which comprised 25.5% of all public employees and about 4% of the entire civilian workforce.

## Collective Bargaining Rights and Union Membership

The exercise of collective bargaining rights should not be equated with membership in a labor union; access to legal protection when exercising the freedom of association is distinct from choosing to invoke that protection or exercise freedom of association rights. However, workers who lack this legal protection would be hard pressed to attempt to organize unions without it. Therefore, it is worth considering how union membership rates are affected by collective bargaining rights coverage and how such rates are calculated given the eligibility of different portions of the workforce to organize for collective bargaining.

Every year, the Bureau of Labor Statistics (BLS) releases its calculation of union membership. For 2005, the BLS calculated that 36.5% of public employees were union members and 7.8% of private employees were union members, for a total of 12.5% in the labor force.<sup>19</sup> In performing this calculation, the BLS uses “employed wage and salary workers” as the denominator against which to calculate the percentages of union memberships. As the BLS explains, “The group includes employees in both the private and public sectors, but, for the purposes of the union membership and earnings series, excludes all self-employed persons, regardless of whether or not their businesses are incorporated.”<sup>20</sup> As Jim Walker of the BLS explained in a phone interview, the survey asks respondents whether they were employed last week and gives them four employment options to choose from: government; private; non-profit organization; or self-employed. The self-employed are excluded from the union membership rates calculation; all the other three categories are included.<sup>21</sup>

The BLS calculation does not exclude all those categories of workers who are employed in the government, private, or non-profit sectors but do not have collective bargaining rights: domestic workers, agricultural workers, some public employees, small business employees, and managers and supervisors. The only category the BLS potentially excludes is independent contractors: to the extent that some independent contractors may report themselves to be self-employed, they would be excluded from the BLS calculations. The BLS is therefore including 33,488,855 additional workers in the pool of potential union members. In effect, then, the BLS calculates union membership rates on the basis of a total workforce number which is inflated because it includes categories of workers not eligible for collective bargaining rights. And because this total workforce number is the denominator (and the number of union members is the numerator) in the BLS calculation, the rates of union membership the BLS produces are deflated.

A more accurate calculation of union membership rates, which includes only those eligible and excludes the 33.5 million workers without collective bargaining rights, looks like this:

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<sup>19</sup> “Union Members in 2005,” BLS, available at [www.bls.gov](http://www.bls.gov). The BLS’s union membership numbers for 2006 are 36.2% of public employees, 7.4% of private employees, and 12.0% of the total workforce. However, the BLS also states that the numbers for 2006 are not directly comparable to those for 2005 and earlier years due to a change introduced in the source of the data, the Current Population Survey (discussion available at <http://www.bls.gov/news.release/union2.tn.htm>). Because the rest of the data in this report were collected in February 2005, also in the Current Population Survey, the BLS numbers used in the discussion are those for 2005, not the most recent available year, 2006.

<sup>20</sup> “Union Members in 2006,” Technical Note, <http://www.bls.gov/news.release/union2.tn.htm>

<sup>21</sup> Telephone interview with Jim Walker, BLS; August 2007.

140,715,996	total civilian workforce
- 6,178,980	self-employed not independent contractors
- 10,342,430	independent contractors
- 412,468	domestic workers
- 507,697	agricultural workers without rights
- 3,780,889	small business employees
- 13,054,970	supervisors and managers
- 5,390,401	public-sector workers without rights
= <b>107,048,161</b>	workers in the civilian labor force with collective bargaining rights, eligible to join a union, and the relevant denominator in a union membership rate calculation

For 2005, the BLS reports that 15,726,000 people were members of unions. This constitutes 14.69% union membership in the entire eligible workforce – not the BLS’ 12.5%.

In December 2005, the AFL-CIO commissioned a nationally representative survey by Peter D. Hart Research Associates, in which 53% of non-union workers employed for pay responded that they would like to join a union. Based on this survey, the AFL-CIO states that 60 million people (53% of the 112,878,000 non-union wage and salaried workers reported by the BLS for 2006) would like to have collective representation and bargaining via a union, but do not.<sup>22</sup>

What this sizable group of 60 million workers includes is in fact two categories of workers: those who do not have the protected right to collective bargaining at all, and those who have it on paper but not effectively were they to start organizing. What does this mean?

In the most conservative estimate, we can assume that the group of 60 million non-union workers includes each and every employee who is not a union member who belongs to one of the categories excluded from collective bargaining coverage. This category of workers who have no legal protection for their right to collective bargaining contains 33.5 million workers. This, then, means that the rest of the 60 million workers – or 26.5 million – are perfectly eligible to join a union, as they have collective bargaining rights either under the NLRA, or under a separate statute, but have not been able to join one. It is well documented that American labor law currently fails these 26.5 million people who have the legal right to a collective voice in the workplace but not the ability to exercise it (e.g., Bronfenbrenner, 2000; Eaton and Kriesky, 2006; Human Rights Watch 2000; Lafer, 2005, 2006; Logan, 2006; Mehta and Theodore, 2005, among others).

Thus, American labor law fails both these groups of workers: those who are denied the right to collective bargaining altogether and those who have the right on paper but are thwarted in their effort to exercise it.

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<sup>22</sup> Logic from AFL-CIO *The Silent War* and most recent data from Sheldon Friedman, AFL-CIO, via email communication.

## Having and Exercising the Right to a Collective Voice: Are We Doing Better or Worse?

Why don't more people belong to labor unions? This is an often asked question in various debates and bodies of literature: the debate on the Employee Free Choice Act, which would make it easier for workers to join unions; the debate on globalization and its effects on the economy and, purportedly, on making unions obsolete; and the debate on firm productivity and gains when it comes to unions, to name but a few. Part of the answer lies in how broken the labor law system is in the U.S., failing workers who try to exercise their right to join or form a union. However, another important part of the answer has to do with having – before one can exercise it – a legally protected right to collective bargaining.

In the last few years, some workers have seen this right granted to them. For instance, child care workers – approximately 120,000 of them – have recently gained coverage. An estimated 330,000 personal assistants and home care workers have been provided a vehicle to bargain collectively as well.

However, more categories of workers have seen this right either taken away, or diminished by a slew of NLRB and Supreme Court decisions:

- The *Kentucky River* case on supervisors and similar NLRB cases, such as *Oakwood Healthcare*, *Golden Crest Healthcare*, and *Croft Metals*, stand to take away the collective bargaining rights of 8 million workers, according to an Economic Policy Institute estimate.<sup>23</sup>
- In *Brown University*, 342 NLRB 42 (2004), the NLRB took away the right of graduate students at private institutions – 882,000 of them in 2005, according to the Digest of Education Statistics 2005 of the National Center for Education Statistics<sup>24</sup> – to organize and bargain collectively.
- The *Brevard Achievement Center*, 342 NLRB 982 (2004) NLRB decision similarly affects 45,000 disabled workers in federal programs.<sup>25</sup>
- The *State Bar of New Mexico*, 346 NLRB 64 (2006), case threatens the rights of employees of quasi-public agencies, such as state bar associations. American Rights at Work research in July 2006, contacting such bar associations in the states, indicates that the rights of at least 2,800 employees are at stake.
- The misclassification of workers as independent contractors continues, with the latest NLRB decision being *Pennsylvania Academy of the Fine Arts*, 343 NLRB 93 (2004), which affects artists' models directly and other categories indirectly, making it impossible to measure its true impact.

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<sup>23</sup> *National Labor Relations Board v. Kentucky River Community Care, Inc.*, 532 U.S. 706 2001; *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); Eisenbrey and Mishel, EPI Issue Brief #225, 2006.

<sup>24</sup> Digest of Education Statistics 2005, National Center for Education Statistics, available at [http://nces.ed.gov/programs/digest/d05/tables/dt05\\_002.asp?referer=list](http://nces.ed.gov/programs/digest/d05/tables/dt05_002.asp?referer=list)

<sup>25</sup> The Honorable George Miller report, 13 July 2006.

Other categories of workers are seeing their ability to effectively participate in collective bargaining severely undermined:

- In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S.Ct. 1275 (2002), the Supreme Court reversed the NLRB's decision to award backpay to an undocumented alien worker who had been fired for union activity. The Court ruled that undocumented alien workers are not eligible for backpay under the NLRA because this remedy would conflict with federal immigration law. Although the Court did not explicitly exclude undocumented alien workers from NLRA protection of their collective bargaining rights, because backpay is one of the main remedies available to workers for violations of these rights, the *Hoffman Plastics* decision severely diminishes these workers' ability to exercise their rights and to effectively participate in collective bargaining. The Pew Hispanic Center, in a 2006 report, estimated there are 7.2 million of these unauthorized immigrant workers.<sup>26</sup>
- Similarly, 1,217,432 temporary agency employees had their collective bargaining rights undermined by the NLRB's decision in *Oakwood Care Center*, 343 NLRB 76 (2004).

Overall, almost a quarter (23.8%) of the American civilian workforce lacks, by law, the right to collective bargaining in the workplace. Over one-quarter of public employees are without collective bargaining rights. About 15% of private employees lack them, too. Additionally, more and more categories of workers are seeing this right either taken away, or effectively diminished. These negative changes are not offset by the smaller gains in coverage. And if we consider not only the right on paper, but the ability to exercise this right, the picture is grim.

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<sup>26</sup> Passel, 2006.

## Data Sources and Methods

The approach of this report loosely follows that of a September 2002 report by the GAO, “Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights,” commissioned by Senators Edward Kennedy and Paul Wellstone. Data sources, approaches to breaking data down by industry and category, and portions of the legal review of the NLRA and recent Supreme Court cases are loosely modeled on those provided by the GAO. American Rights at Work is also indebted to the GAO’s Charles Jeszeck and Paula Bonin, on the team responsible for the report, who provided invaluable insights into the methodology and the data collection. However, this report also departs from the GAO report in important ways. We have updated their findings, which are for 2001, with the most recent wave of data available, those for February 2005. We have also reclassified some states which have since changed their laws on the collective bargaining rights of public employees. We have added categories of workers – such as child care workers, graduate students at private institutions, etc. – which the GAO report did not consider. Finally, we have used alternative approaches to counting some groups (namely, supervisors and managers) in order to utilize micro-level data which are publicly available.

### Data Sources

- The main source of data on categories of workers is the February 2005 Contingent Worker Supplement of the Current Population Survey (CPS) collected by the U.S. Census Bureau. Collected every four years, this supplement allows for the breakdown of the total civilian workforce by sector, industry, category, employment status, geographic location, etc.
- Industries and occupations are classified in the standard North American Industry Classification System (NAICS) and Standard Occupational Classification (SOC) system, available from Census and the Bureau of Labor Statistics. It should be noted that between 1990 and 2000, both of these systems were entirely redesigned, and although Census provides bridges for conversions (at <http://www.census.gov/hhes/www/ioindex/pdfio/techtabs02.pdf>; <http://www.census.gov/epcd/www/naics.html>; <http://www.census.gov/epcd/naics02/S87TON02.HTM>), calculations relying on them today can never be perfectly comparable to those using the old classification systems.
- For supervisors and managers, the GAO report “obtained NCS-based estimates of the supervisory level percentages for wage and salary employees with full-time status by industry” (p.30). NCS is the National Compensation Survey done by the Bureau of Labor Statistics. However, the micro-level data from the NCS on which the GAO estimates are based are not publicly available. Another way to supervisory estimates is to use SOC occupation classification codes (that is, which occupations are classified as managers, supervisors, or line workers, etc.), and this is the approach taken here.
- The starting point for the classification of states which give public employees collective bargaining rights is a survey by AFSCME, available upon request.

- Data on small business employees are from the Small Business Association, which provides figures on revenue by industry and sector. Cut-off sales volumes according to which small businesses are classified are provided in the following table:

**Minimum Annual Dollar Sales Volumes for Coverage under the NLRA**

Source: Hardin, P. (1992). *Developing Labor Law: The Board, the Courts, and the National Labor Relations Act*. Bureau of National Affairs.

<b>Industry / Economic Activity</b>	<b>Minimum Annual Sales Volume for NLRA Jurisdiction</b>
Nonretail industries	\$50,000
Retail	\$500,000
Office buildings and shopping centers	\$100,000
Public utilities	\$250,000
Newspapers	\$200,000
Radio and TV stations	\$100,000
Hotels, motels, apartments, and condominiums	\$500,000
National defense enterprises	Substantial impact on national defense, irrespective of whether other standards are met.
Employer association	If any member meets other jurisdictional standards or the combined operations of all members meet any such standard.
Single employer engaged in multiple enterprises	Overall operations meet any standard.
Instrumentalities links and channels of interstate commerce	\$50,000
Other transit systems (Local and suburban transit, interurban highway passenger transportation, and transportation utilities. The Board also extends NLRA jurisdiction to secondary employers involved in labor disputes.)	\$250,000
Restaurants and country clubs	\$500,000

- Additional data sources for categories of workers include: Census’s 2005 ASGE Survey of federal, state, and local government; the OPM’s FCWS Factbook; the websites of various agencies, such as the USPS, TVA, etc.; and the 2005 Digest of Education Statistics of the National Center for Education Statistics.

**Approaches to Data and Data Analysis**

It is worth noting again that data classification and collection issues prevent full comparability between this and previous years. Such caveats exist for almost all data sources used here: the

CPS in 2006 vs. previous years; the NAICS and SOC classifications; the NCS vs. SOC approaches to classifying supervisors and managers, etc. Thus, any observed gains or losses in collective bargaining rights over time are at least in part due to the way such changes are measured in surveys, and cannot be fully attributed to substantive changes in labor law.

In determining how many workers in the labor force have collective bargaining rights, we began with the assumption that all workers have rights and then subtracted the groups which have been excluded from this coverage under the NLRA. In doing so, the sequencing of the subtraction is important so as not to double-count workers who may belong to more than one excluded category. For instance, a domestic worker may also report to be an independent contractor. When using variables of the CPS, we ensured that workers are not counted in more than one category. The approach to public employees is the opposite: because they are assumed to have no collective bargaining rights unless expressly given such rights, we added those who have them, instead of subtracting all those who do not.

The definition of “bargaining rights” is an important issue which stands to affect the estimates in this report. That is, different laws, such as the NLRA as compared with state laws, define these rights in different ways, with the differences encompassing the scope of bargaining, remedies for violations of bargaining agreements, the right to strike, the use of binding arbitration, and so on. The definition used in this report relies on the concepts of union recognition and good faith bargaining: the right to collective bargaining largely means the right to join or form a union that the employer is required to recognize and bargain with, with the intent to reach an agreement. These are the key aspects of the rights granted under the NLRA. A different definition of collective bargaining rights would produce different numbers. For instance, a definition including the right to strike would be more restrictive and lower the estimates, while a definition including the right to “meet and confer” would be broader and would increase the estimates. However, because the NLRA is the main law governing collective bargaining rights and covers the largest number of workers, we espouse this definition.

The main focus of this report is on the legal right to collective bargaining, not on the exercise of this right, or on the adequacy of labor laws in fostering collective bargaining or protecting collective bargaining rights. That is, we were concerned with calculating how many workers in the labor force have the option to organize and bargain collectively if they chose to do so, not with how many workers actually engaged in collective bargaining. Further, the collective bargaining rights granted under other laws are not identical with those granted under the NLRA; some are broader and some are more restrictive than the Act. We were not concerned with these differences or with how effective such laws are, but, again, with how many workers have the option and legal protection to organize in the workplace. A body of academic and popular literature on the adequacy of the U.S. labor law system for allowing workers to exercise their collective bargaining rights by joining unions is available from American Rights at Work.

For questions on data sources and variables used, data analysis, and the comparability of this report to the GAO’s work, please contact Julie Martínez Ortega, Ph.D., J.D., Director of Research, American Rights at Work, at 202 822 2127 x103 or [jmartinez@americanrightsatwork.org](mailto:jmartinez@americanrightsatwork.org).

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