

RÉSUMÉ

**Nouvelles formes de négociations collectives:
adaptation à l'économie informelle et aux
nouveaux modes de travail**

Pat Horn

L'auteure tire des leçons de sa propre expérience de militante dans le mouvement ouvrier, tant dans celui des secteurs formel qu'informel en Afrique du sud; ainsi que l'expérience de l'Association féminine indienne des travailleuses indépendantes (SEWA), afin d'analyser les restrictions du système de négociations collectives actuelles. La réorganisation du travail a vu le transfert de nombreux emplois vers le secteur informel. Les travailleurs sont maintenant à leur propre compte ou dans des usines de sous-traitance sans la protection des structures nationales de négociation collectives ou des accords internationaux qui énoncent les normes minimales de travail. L'auteure recommande la réforme des structures de négociations collectives afin de les élargir pour que les ouvriers du secteur informel reçoivent une plus grande protection auxquels ils (elles) ont droit.

New forms of Collective Bargaining: Adapting to the informal economy and new forms of work

Pat Horn¹

The author draws on her own experience as a labour organiser in both the formal and informal sectors in South Africa, and the experiences of India's Self-Employed Women's Association to explore the limitations of the current collective bargaining system. The restructuring of the workplace has resulted in a large number of workers working on their own-account or in sub-contracting factories without benefiting from the protection accorded by national collective bargaining structures or international agreements establishing minimum labour standards. The author recommends expanding these structures to protect workers in the informal sector.

In today's world of global labour flexibility, statutory labour regulation is increasingly unable to keep up with the constantly changing labour market and its de-regulation. The result has been the emergence of myriad forms of non-standard work or informal work, especially own-account or self-employed workers². The large number of workers now engaged in these new forms of labour fall outside the institutions of labour regulation, most specifically the collective bargaining framework. The pressing question therefore is how do existing labour regulation systems need to be transformed to reflect changes in the global labour markets, now characterised by new forms of work and infor-

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²The informal economy, as discussed in the Conclusions on Decent Work in the Informal Economy reached at the 90th session of International Labour Conference in June 2002, consists both of traditional activities associated with informal work as well as new forms of work which have come about as a result of globalisation and changes in the labour market. Such new forms of work are referred to as "non-standard" because of their variation from the norm of regular secure employment, but are becoming increasingly standard and typical of the modern globalized labour market.

mal economies? How can these systems be reformed to make it possible for workers in the informal economy to organise and gain legal recognition as workers, and obtain the same basic rights and core labour standards as other workers?

The following article addresses these issues by drawing on lessons learned from many years of my own practice in South Africa, first organising black workers in the 1970s and 1980s when they were not yet part of the official labour relations system, and then in the 1990s applying many of the same collective bargaining principles when working with women engaged in the informal economy, including own-account workers. It further draws on the growing number of initiatives in this area, including the work of SEWA in India, and initiatives undertaken by the ILO.

Workers in the informal economy and in new forms of non-standard work worldwide are not recognised as workers in terms of labour legislation. Even trade unions perpetuate the myth that “they are not defined as workers in law – therefore we cannot organise them”. Many trade unions feel they can only organise workers who have been defined as workers in existing labour codes. On the contrary, workers can organise themselves whether or not they have been recognised as workers in the labour legislation – as long as they recognise themselves as workers. When they organise, they therefore need to organise not only for improvements in their working and living conditions, but also to shape new laws which will recognise and protect workers in the informal economy and new forms of work.

We have seen that in addition to organising through trade unions, victories have been facilitated for informal sector workers through the efforts of strong organizations exerting pressure on government and policy-makers. For example, the Self-Employed Women’s Association (SEWA) in India had actively lobbied for measures to address workers’ needs in the informal economy since 1972. India was thus able to demonstrate several new initiatives benefiting non-standard workers to the 90th session of the International Labour Conference in June 2002, on Decent Work in the Informal Economy (ILO 2002), especially in the area of social security. For workers in the informal economy and new forms of non-standard work in other countries, there is a clear message – do not wait for legislators and policy-makers, but get organised and start pressuring them to introduce appropriate laws

and policies.

Struggles and small victories help organizations strengthen their capacity to work together and develop their organizational and collective bargaining skills. Workers in the informal economy and new forms of non-standard work need to build alliances with traditional formal sector workers and their trade unions. Learning to work together effectively to run joint campaigns and win small victories would be an important step on the way to building a longer-term vision of full organizational and representational rights for all workers.

New Forms of Collective Bargaining:

Attempts have been made in some countries to address the increasing vulnerability of workers facing a changing labour market. A European Union study looked at the way non-permanent employment is dealt with by the industrial relations systems in different member states and Norway. It found in France, for example, that special pay provisions apply to non-permanent employees who receive financial compensation for the precarious nature of their employment status (EIRO, 2002). However, these attempts try to approximate standard work relationships as far as possible – and therefore are not able to deal with self-employed, own account or “independent” workers.

Yet it is inadequate to merely approximate established forms of collective bargaining originally created for permanent employees. Instead new forms need to be developed which can be applied even to workers who are not represented in the more established collective bargaining systems. However, the dynamics of power and control would need to be clearly understood in the development of new forms of collective bargaining. The following attempts to identify the key elements of a more appropriate collective bargaining system.

Identifying the appropriate negotiating partner:

An oft-quoted objection to the concept of collective bargaining in the informal economy is: “There is no employer with which to negotiate.” Employers may be present but difficult to identify, separated from workers by several intermediaries along the production chain, and bound by sub-contracting arrangements. However, workers in the informal economy, having defined their needs and transformed these into negotiating demands,

could then identify the entity or authority most responsible for the issues over which they wish to negotiate – and that entity must then be approached as the negotiating partner. This can encompass a wide-ranging set of institutions such as wholesalers, economic governance systems, state structures, and even social structures including family, clan, caste and traditional leaders (these negotiations would have to be less formal and blend in with custom and tradition, without surrendering control of the process).

This means approaching a range of negotiating partners to bargain collectively on different formulated demands. Workers' organizations must then develop the flexibility and diverse tactics to deal with different negotiating partners, either separately or together in one bargaining forum. In the case of street vendors, they usually need to negotiate with municipalities. However, many municipalities are not well organised to deal with street vendors through one dedicated department, requiring street vendors negotiate with different municipal departments around their different demands. Where certain local government functions have been privatised (an increasingly frequent occurrence these days) they may have to negotiate with private companies who have taken over certain management and marketing functions. They may have to conduct separate negotiations with police private security companies (or even the army in some countries) on enforcement, safety and security demands. Demands around social security require negotiations with labour or welfare government departments, whether at state or national level.

Ad-hoc negotiations often take place in crisis situations, especially between municipalities and street vendors. The most common problem experienced by workers in the informal economy is that after the crisis has passed, agreements reached in these situations are often reneged upon – and there is no real compulsion on either side to stick to agreements made in the heat of the moment. For this reason, organised workers in the informal economy need to press for the establishment of statutory bargaining forums consisting of the relevant institutions, to take this kind of collective bargaining to a more consistent and sustainable level – and to obtain stronger commitment to the implementation of agreements.

Recognition/accreditation of representative worker organizations:

A substantial problem is the paucity of workers organizations in the informal economy with the capacity to engage in a representative and consistent manner. No matter how sincere the intentions of the negotiating authority, it is impossible to achieve meaningful negotiation, or even dialogue, with unrepresentative leaders or organizations with limited negotiating skills. On the other hand, the poor capacity of organizations and associations of workers in these work sectors is also one of the most common excuses used by authorities to justify their failure to consult or negotiate, and instead make unilateral decisions on behalf of workers and operators in the informal economy and new forms of non-standard work.

There would have to be certain basic criteria for the recognition and accreditation of representative organizations of workers in these work sectors. These should recognise the nature and general characteristics of these new worker organizations. For example, they are often less centralised in their structures than standard formal sector trade unions. They have different membership recording systems, unlike those used by trade unions with check-off systems. The proportion of workers within a certain workplace or area represented by a particular organization is difficult to determine, as are workplace boundaries.

However, it is reasonable to require an organization be genuinely representative of the workers it purports to represent, in order to participate in collective bargaining on their behalf. For this, an organization should at least have a constitution which would show its scope of membership and representation, and it should be able to produce membership records in some form to verify its membership claims. It is also reasonable to require that the organization inform its negotiating partners of significant changes in membership from time to time, such as new members joining or resignations of former members – and that updated membership records be provided annually or bi-annually. In this way, there is an informed understanding during negotiations as to who each organization directly represents.

Independence/autonomy of representative organizations:

Many organizations of workers in the informal economy lack capacity, and look to authorities or big business to assist

them with capacity-building. Such assistance can impact on their autonomy and independence, and ultimately on the ability to properly represent member interests, particularly when their interests eventually conflict with those of their benefactors. As Standing says, “the more representation is autonomous, the more meaningful the voice. Difficulties with (independent local unions) and unaffiliated unions include their financial vulnerability, and a tendency to suffer from the ‘golden handcuffs’ technique of management.” (Standing, 1999:385) Often local government structures, wishing to engage with street vendors but unable to identify representative organizations, go about establishing some sort of organization with which they can engage. Development consultants often advise authorities to help vulnerable workers establish organizations and build their capacity – without thinking through the contradictory logic of asking somebody to create and sustain an organization which, if it is going to be truly representative and give voice to conflicting interests, may at some stage have to be in opposition or even dispute with the authority which created it. This would also operate in the case of municipal authorities, where the relationship with street vendors constantly vacillates between harassment (on bad days) and paternalism (on good days).

There is certainly no “level playing field” (a necessary condition for proper collective bargaining) in a situation where the organization with which you are negotiating is dependent on you for its very existence.

Agreed organizational rights and responsibilities:

Workers in the informal economy and new forms of non-standard work have to first and foremost be able to enjoy the right to organise and join the organization of their own choosing without fearing victimisation. This may involve challenging syndicates or protection racketeers who are interfering in the freedom of association of operators or workers in areas of the informal or unregulated economy. Or it may involve educating ignorant subcontractors or intermediaries in control who are mainly in the business of dodging labour standards, employment law or trade unions.

Exercising organizational rights and responsibilities for the purposes of collective bargaining would in itself be a challenge to a well-established system of labour controls, particularly

in situations where autonomous democratic organizations are relatively new or unheard-of. Of the many controls in existence in a particular situation, those merely interested in enforcing acquiescence would become redundant in a collective bargaining context. Consequently, the elimination of these negative controls or their replacement with controls aimed at enforcing a collective bargaining system could provoke resistance, giving rise to a struggle over the exercise of organizational rights and responsibilities – similar to those experienced by trade unionists in the formal economy (Chen, 2002).

Gaining access to members in order to collect mandates and report-back to them, and undertake other democratic procedures, can be difficult for workers' organizations. Members are often difficult to reach collectively, sometimes requiring negotiations with authorities in charge of workplaces – such as the owner of a sweatshop, the head of a household, a temporary employer or intermediary, a land owner on which somebody is working – or a combination of these. The organization has to establish, if necessary through negotiation, the right to freely exercise these functions, and to take on the responsibility of properly carrying them out including ensuring that agreements reflect members' needs and wishes.

Disputes and dispute-resolution:

In any collective bargaining process there lurks the possibility of a deadlock, or the difficulty in reaching an agreement for a variety of reasons, and a dispute arises. In traditional trade union dispute procedures the parties are quite predictable, i.e. employees versus employer(s) and collective bargaining institutions include several dispute-resolution mechanisms.

A similar mechanism could be designed for informal sector negotiations especially since disputes in this sector can be complex and difficult to understand, involving several institutions. Even small disputes can seem more complex and impossible to resolve. Understanding the different forms and nuances of control is the key to the resolution of many conflicts and disputes (Chen, 2002). Many disputes can be resolved relatively easily, if a fair and just way was available to do so. One of the suggestions is that certain institutions could be harnessed to develop a dispute-resolution mechanism. For example, the policy and regulatory institutions governing individual commercial and labour con-

tracts could play a role of last resort if negotiations broke down or failed to produce results between the parties. A very basic dispute procedure along these lines could be designed for any party to invoke in the event of a dispute in any negotiation. The majority of disputes could thus be settled as long as all parties to a dispute saw the mechanism as a better option than unilateralism or anarchy.

Failure to resolve the dispute despite these mechanisms should be dealt with by formally acknowledging the deadlock, leaving both parties free to reassess their options, to exercise their legal rights or resort to other lawful unilateral measures to resolve the matter to their satisfaction.

Negotiated agreements and their implementation:

The greater flexibility in the informal sector can affect negotiated agreements. Workers' organizations have to remain sufficiently strong to ensure their agreements are properly implemented. If the other party notices weaknesses or chinks in their armour, they are quick to take advantage and opportunistically ignore parts of agreements which do not really suit them. Thus organizations have to continually build their capacity so they can continue representing their members but especially to monitor and implement agreements. Monitoring protects collective bargaining, and empowers workers as it gives them an avenue to (re) assert positive control over certain aspects of their working lives in a more sustainable way than do ad-hoc acts of resistance.

The flexibility of the informal economy and the instability of organizations often results in organizations splitting or dividing, putting negotiated agreements in jeopardy. Municipalities can be re-structured after elections, thereby changing the legal entities of the organizations involved. This would throw into question the legal status of any agreement. Mechanisms in the form of clauses within agreements need to be included to cater for such eventualities and ensure continuity.

Unilateral pressure – last resort:

Workers in the formal economy usually have recourse to strike action as a last resort. This possibility does not exist in most cases for workers in the informal economy, or for workers in many new forms of non-standard work, especially own-account or self-employed workers as 'employers' would often be

only too glad if those workers were to withdraw their labour – especially in instances where they are popularly perceived as being a nuisance and efforts are made to evict them from their place of work, or where their competitors are only too happy to step in and take over their work opportunities. It rests with organizations of workers in the informal economy to think of other creative ways to create similar pressure.

These include legal action or public demonstrations with a well-worked-out media strategy for maximum publicity. Media publicity works particularly with municipalities and other government structures sensitive to public opinion. Solidarity action by other organised interest groups could also be effective - this would require effective alliance-building to be able to call up allies and sustain alliance relationships.

Collective bargaining institutions

Collective bargaining institutions can be adapted to the less centralised nature of informal sector and own-account workers. In contrast to the centralised nature of collective bargaining forums and organisations within the formal economy, work in the informal sector is often de-centralised and located on the periphery of large centralised industries. Grass-roots workers' organization may have some level of central co-ordination, but tend to operate at a relatively de-centralised level in order to democratically engage member participation. This requires de-centralised collective bargaining structures which can be better placed to involve the participation of workers in the informal economy and non-standard work and their representatives.

Street vendors for example could benefit from a multi-lateral approach to negotiations as it can bring together a number of parties with a common agenda to negotiate jointly with a particular authority. There are often many associations of street vendors active in the same city or area. The municipality may not want to have separate bi-lateral negotiations with all of them. If they did, these agreements may not be consistent with one another, and could lead to confusion and even conflict. Instead multi-lateral negotiations between the municipality and all the different organizations representing street vendors in the city would provide better protection for that group of workers.

Informal traders typically face multiple authorities and economic actors (e.g. municipality, suppliers, enforcement agen-

cies, etc.) exerting control over their work and lives. Under such circumstances it often makes sense to enter into multi-lateral negotiations in a joint collective bargaining forum where multiple layers of controls can be simultaneously addressed. In multi-lateral negotiations, the biggest challenge for the different worker organizations is to be able to put aside their differences and focus on common issues, and presenting a common front in relation to the negotiating partners. Divisions between similar organizations give the other negotiating parties the opportunity to play organizations off against each other and avoid the issues they do not want to confront. Regular workers' caucuses held prior to meetings and during adjournments are the best way of preparing and consolidating the joint positions of organizations facing the same negotiating partners. Organizations of workers in the informal economy need to build this capacity so they are not outnumbered and overrun, but able to participate effectively in multi-forum collective bargaining.

The challenge for workers and their organizations is to maintain de-centralised highly participatory engagement, but at the same time, maintain highly effective connections and communications – to match the strength of the hierarchy of the many institutions with whom they negotiate.

Statutory collective bargaining forums are needed at all levels: As mentioned before, for meaningful labour regulation, there have to be appropriate statutory collective bargaining structures with simple clear rules of engagement, whose agreements are ultimately adopted as regulations or legislation. This can, and should, happen at all levels where labour regulations occur including local, provincial, national, or international and be the product of negotiations between organizations' representing workers in the informal sector and local-level institutions.

At the national level, existing national tripartite negotiating forums need to be restructured so that workers and employers in the informal economy play a meaningful part in shaping policies and determining agreements – not merely as an “add-on” to the agreements between workers and employers in the formal economy.

At the international level, the chief international mechanism is the ILO (International Labour Organization). To be more effective in this area, the ILO's Workers Group should become more consistently representative of workers in the informal econ-

omy and new forms of work than at present. The Employers Group needs to become more representative of employers and employer intermediaries in the informal economy. The Workers Group introduced this issue during the International Labour Conference of 2002 in the committee on Decent Work in the Informal Economy (ILO, 2002). A concerted attempt was made by national union centres in some countries to have informal economy representatives directly represented. Additional representatives from international organizations working with workers in the informal economy also participated in the work of the committee – resulting in a well-informed set of ILO Conclusions on Decent Work in the Informal Economy. This participation demonstrated the possibility of bringing in these new actors but it was an exception, rather than the rule in ILO conferences. It should become the norm in all ILO policy-making and regulation-setting, and even be extended to the organization’s Governing Body. This will require an examination, particularly by the Workers Group and the Employers Group, of the internal dynamics which has traditionally resulted in them being the exclusive representatives of the formal economy. It also requires a commitment to achieving sustained and significant levels of representation by workers and employers in the informal economy.

Emergent Labour Organizations:

Workers in the formal economy and their trade unions are not the most suitable representatives for workers in the informal economy and non-standard work. In the words of an informal worker at a seminar held in Lusaka, Zambia, in 2001 to determine the representational needs of workers in the informal economy, “If you want to know what a crocodile eats, you don’t ask a monkey.” The most appropriate organizations are trade unions and workers’ organizations that have organised these workers as their members, and in which informal economy and non-standard workers regularly elect their own representatives. Formal sector unions can genuinely represent informal and non-standard workers only when they too start actually organising them and having them elect their own leadership in their unions.

For workers in new forms of work and the informal economy to be able to participate in labour regulation, they will also need to be organised in independent, democratic organizations controlled by, and accountable to themselves. These workers’

organizations may need to have different characteristics and organising strategies from traditional trade unions. They will need to be democratically run by, and accountable to, their members - who elect their own spokespeople to represent them in collective bargaining and social dialogue.

Other forms of organizations currently involved in organising in the informal economy might better fit the bill such as community unions, citizenship associations, social movement unionism and associational unionism.

Associations are often easier for un-unionised workers to join, but do not normally have a strong collective bargaining tradition. In addition, they may not have strong traditions of accountable membership-controlled leaders. They are often characterised by leadership which negotiates on behalf of members, but not always able to separate their own self-interest from the collective interests of the constituency they purport to represent. Negotiated deals may be on an ad-hoc basis. Associations often lack the fighting spirit needed to defend gains, qualities that form part of trade unions' basic philosophy and practice. Membership-based associations need to acquire the capacity to engage in collective bargaining effectively, a capacity common to trade unions. A good way to do this is to ally with trade union organizations and gain access to trade union education and training on collective bargaining and negotiation skills.

Co-operatives do not have a strong tradition of collective bargaining, yet they are built on the collective principle of mutual accountability that is compatible with democratic and accountable collective bargaining. The level of institutional development in effective co-operatives would also allow make them capable of monitoring the implementation of agreements and enforcing developmental plans and policies. An alliance between co-operatives and trade unions can assist co-operatives with negotiating skills and the develop their fighting spirit, making their collective bargaining more effective, while assisting trade unions achieve their developmental goals.

It would be naïve to imagine there is a correct organizational recipe to create an organization capable of participating in collective bargaining and labour regulation. It is more likely that those trade unions, co-operatives and associations already in the field are going to continue to adapt their organising strategies to the changing labour market and the informal economy. They will

need to sharpen their understanding of the essential components of collective bargaining in the informal economy and new forms of non-standard work, and develop a precise understanding of the kinds of controls operating in these sectors of the economy, in order to evolve the organizational forms most suited to effective systems of voice regulation for the informal economy and new labour markets.

The substance of collective bargaining in non-standard work and the informal economy is necessarily different and more varied than the standard negotiation over wages and working conditions in the formal economy. The range of issues to be negotiated would be partly determined by the range of controls over workers in the informal economy. This includes the policy and regulatory environment; the physical environment and work space; prices and transaction costs; market opportunities and market information. Issues of social security form part of the longer term issues of collective bargaining as it can improve the material position of workers who do not otherwise have income security.

There are as yet very few tried and tested collective bargaining mechanisms in place in the informal economy. Organizations of workers in the informal economy wanting to extend labour regulation are faced with two basic institutional alternatives:

- (a) Extending existing systems to include workers in the informal economy: Where existing bargaining forums are effectively acting to develop legislation and regulations arising from collectively bargained agreements, it is worth examining the collective bargaining structures and investigating the possibility of re-organising or re-structuring them to include the informal economy and new forms of work centrally in the process. This means, firstly, putting the informal economy and new forms of work in the mainstream of the negotiating agenda, and secondly, including workers and employers from the informal economy and new kinds of work as negotiating partners. This involves not only opening the doors to them and their organizations, but analysing the obstacles to their participation in the current system; and systematically dismantling those obstacles.
- (b) Creating new bargaining forums: In many instances, however, it may be that the existing bargaining forums do not

lend themselves to addressing the issues which workers in non-standard work and the informal economy want to address. If this is the considered opinion of workers' organizations in the informal economy and new forms of work, they are then faced with having to create appropriate new bargaining forums. This means designing the rules of participation, the criteria for determining the issues for negotiation, envisaging how such new forums will engage in the wider policy-making and regulatory frameworks to become a meaningful part of an effective system of labour regulation.

A third option exists in India. In certain states, de-centralised Tripartite Boards have been formed to regulate welfare and social security for certain types of informal work. Although they have been established for the specific purpose of administering social security funds (Kanan), the structures would lend themselves to a wider range of functions. These include the establishment of basic work conditions and appropriate labour standards in the specific sector of work; policy-formulation, and preparation of recommendations from the particular work sector as input into broader labour and economic policy- formulation; and dispute-resolution. These could be adopted elsewhere and contribute to new forms of labour regulation for workers in the informal economy and new forms of work.

Different groups of workers have specific needs in the broadening of labour regulation mechanisms. Street vendors need to be represented by their own elected representatives in urban planning and policy forums, including those drafting legislation regulating street vending. They also need to be represented in municipal planning bodies that allocate and zone urban space, regulate urban activities and implement bylaws for the regulation of street vending. Finally, they also need to be represented in courts to settle summary arrest warrants, institute urgent interdicts or pre-planned test cases for establishment of good legal precedents, and other cases.

Home-based workers need to be represented by their own elected representatives in campaigns for fair trade and the establishment of codes of conduct; in labour negotiations with lead firms and intermediaries in global value chains to determine fair piece-rates, to formulate codes of conduct and monitor compliance, to pursue cases of infringement; and petition courts to file

cases of infringement against codes of conduct.

Non-standard contract workers need to be represented by their own elected representatives in existing bargaining forums in industries where casual and contract workers are habitually employed – to eliminate deepening inequality between permanent and temporary workers; in committees and negotiations for the allocation of (government) tenders; and in tripartite bodies determining and monitoring labour standards for all workers.

Conclusion

From the issues and factors considered in this chapter, it is possible to identify criteria to put in place new collective bargaining forums **or** transform and extend existing bargaining forums. It is clear that membership-based organizations with accountable elected representatives are best placed to participate effectively in labour regulation in the informal sector. These organizations need to be autonomous, at least independent of their negotiating partners, and have the organizational capacity to engage in multi-lateral collective bargaining forums.

Regulations and institutions that promote democratic and equitable policy-making and negotiation systems need to be developed and put in place. All negotiating partners should become sustainable credible representative organizations, with the capacity to monitor the implementation of agreements. Agreements should be gazetted and converted into statutory regulations for collective bargaining forums to become statutory institutions of labour regulation, and where necessary, include clauses ensuring continuity in the event of changes in the legal persona of negotiating parties.

My experience in organising both black workers in the 1970s and 1980s in South Africa, and informal workers in the 1990s, has shown that workers on the “inside” cannot properly represent workers on the “outside”. It is only through their own democratic worker-controlled organizations that all workers (formal or informal) can properly represent themselves in collective bargaining. Even when organising in the context of an inadequate legal framework, workers can organise and take the initiative – they do not have to wait for policy-makers. They can start by occupying ground in small steps until they eventually attain the rights to collective bargaining as envisaged in the core labour standards of the International Labour Organization.

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