

Having Their Cake and Eating It Too: Antitrust Laws and The Fissured Workplace

By David Seligman

The Fissured Workplace

In September 2017, *The New York Times* recounted the professional paths of two janitors. One cleaned offices for Kodak in Rochester in the 1980s. She worked directly for Kodak, earned decent wages and benefits, and had the opportunity to rise through the ranks of the company, eventually becoming its chief information officer of consumer products. The other cleans offices for Apple in the present day, but she doesn't work for Apple; she works for another company that provides Apple with cleaning services. Her wages are about the same as the Kodak janitor's, but she doesn't have anywhere near the same benefits, and she doesn't have the same opportunity to rise through Apple's ranks.¹

The differences between these two janitors are even more stark when considering what would happen if something went wrong in the workplace. If the Kodak janitor had been underpaid, gotten hurt on the job, terminated, or harassed, she'd have been able to hold Kodak accountable. If the same things happened to the Apple janitor, she'd likely have nowhere to turn but the staffing company. She may also be prevented from going to work full-time for Apple, even if Apple likes her work and would be willing to hire her on for more stable, long-term employment.

This story illustrates a broader trend described by David Weil, the public policy scholar and former Administrator of the U.S. Department of Labor's Wage and Hour Division, as "workplace fissuring."² Under pressure to cut costs, companies have increasingly offloaded functions once performed by their own employees to other businesses or independent contractors. The shift is pervasive. As Weil explains:

Firms typically started outsourcing activities like payroll, publications, accounting, and human resources. But over time, this spread to activities like janitorial and facilities maintenance and security. Still in many cases it went deeper, spreading into employment activities that could be regarded as core to the company: housekeeping in hotels; cooking in restaurants; loading and unloading in retail distribution centers; even basic legal research in law firms.³

Franchising, the use of temporary staffing agencies, and the increasing classification of employees as independent contractors are all examples of workplace fissuring.

¹ Neil Irwin, *To Understand Rising Inequality, Consider the Janitors at Two Top Companies Then and Now*, N.Y. Times, Sept. 3, 2017, available at <https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html?login=google>.

² David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done About It* (2017).

³ David Weil, *The Fissured Workplace*, available at <http://www.fissuredworkplace.net/the-problem.php>.

Most of the legal and policy debates regarding the fissured workplace concern whether firms that do not directly employ workers within a fissured workplace are nonetheless “employers” under state and federal labor standards. For example, can the similarly situated direct employees of multiple franchisees be part of a single bargaining unit to negotiate collectively with the franchisor?⁴ Are companies like Uber that outsource their primary functions to workers they classify as independent contractors on the hook for workers’ compensation and unemployment insurance premiums covering those workers?⁵ And is a company that outsources some functions to temporary staffing agencies jointly and severally liable for the wage-and-hour violations committed by those agencies?⁶

This issue brief, however, focuses on the relationship between workplace fissuring and a different legal framework: antitrust laws and competition policy. Businesses within a fissured workplace often strive to limit competition for and among workers within the fissured workplace. Franchisors, for example, often prevent employees of their franchisees from moving between franchisees to seek out better wages or working.⁷ Firms in the gig economy, like Uber, often set prices across their purported independent contractors, preventing their customers and contractors from shopping around for a better deal. And many businesses that use staffing agencies for their staffing needs agree with those agencies that they will not hire on as permanent employees the direct employees of the staffing agency who perform functions for the business, thus agreeing with the staffing agency not to compete over the labor of the staffing agency employee.

Through an antitrust lens, if these firms employed their workers directly, they could likely restrain those workers in analogous ways. The Supreme Court has explained that the officers and employees of a “single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.”⁸ Therefore, as a general matter, a single employer, acting unilaterally, can restrain its employees’ autonomy without fear of illegally “restraining trade” under the antitrust laws.⁹

In the fissured workplace, however, firms bend over backwards to create distinct legal entities under the same brand. While that approach may be helpful in evading application of the

⁴ See, e.g., Noam Scheiber, *Push to Settle McDonald’s Case, a Threat to Franchise Model*, March 19, 2018, available at <https://www.nytimes.com/2018/03/19/business/economy/mcdonalds-labor.html>.

⁵ See generally Nat’l Employment Law Project, *Policy Brief: On-Demand Workers Should be Covered by Workers’ Compensation*, June 2016, available at <http://www.nelp.org/content/uploads/Policy-Brief-On-Demand-Covered-Workers-Compensation.pdf>.

⁶ See, e.g., *Reyes v. Goya Foods, Inc.*, No. 12-21799-CIV, 2013 WL 12133928, at *4 (S.D. Fla. Apr. 16, 2013)

⁷ Rachel Abrams, *Why Aren’t Paychecks Growing? A Burger Joint Offers a Clue*, N.Y. Times, Sept. 17, 2017, available at <https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html>.

⁸ *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984).

⁹ In some contexts, unilateral employer conduct may violate antitrust prohibitions against monopolization, including Section 2 of the Sherman Act. See *Standard Oil v. U.S.*, 221 U.S. 1 (1911). Those possibilities are beyond the scope of this paper.

labor and employment laws, it could create problems from an antitrust perspective when firms seek to restrain competition for and among workers within the brand. Fissured workplaces contain multiple independent entities pursuing separate economic interests. Thus, any firm seeking to restrain worker autonomy within a fissured workplace will necessarily have to operate concertedly with other firms or independent contractors that might otherwise make independent decisions about wages and prices. That concerted action necessarily satisfies the “contract, combination, . . . or conspiracy” element of Section 1 of the Sherman Act and state analogs.¹⁰ If the restraint is unreasonable by “suppress[ing] or even destroy[ing] competition,”¹¹ it could be an illegal restraint of trade.

The goal of this issue brief is not to argue that any particular restraint or set of restraints within a fissured workplace is illegal under the antitrust laws. Rather, this paper aims to initiate a discussion about the relationship between workplace fissuring and antitrust laws and competition policy. Scholars, courts, and policymakers rarely bring antitrust principles to bear on discussions about how employers fissure to avoid being classified as employers under the labor and employment laws; nor do they bring employment and labor laws and policies to bear on discussions about restraints within a fissured workplace, which are often (in antitrust terms) “intra-brand restraints” because they restrain competition within a single brand. It is beyond the scope of this paper to address these issues in a comprehensive way, but the paper aims to frame the issues for further discussion and highlight potential frameworks for policymakers and courts to apply when considering competition policy as it relates to the fissured workplace.

The Harms Caused by Anticompetitive Conduct in the Fissured Workplace

New research suggests that restraints on competition for workers within a fissured workplace can cause serious harm to wages and worker bargaining power. Orley Ashenfelter and Alan Krueger have explained, for example, that no-hire agreements among fast-food franchisees can have a dramatic impact on the number of potential employers within a labor market. If a worker could move between franchisees of a single franchisor, each franchisee would be a separate potential employer competing over labor through wages and working conditions. By eliminating workers’ right to move between franchisees, all the franchisees of a single franchisor are a single employer, dramatically reducing competition over labor. By way of example, Ashenfelter and Krueger, explain that no-hire agreements within the fast-food labor market in Rhode Island, have reduced the effective number of fast-food employers from 261 to six.¹²

One doesn’t need to be an economist, however, to appreciate the harm caused by these restraints. Employees of temporary staffing agencies, for example, frequently complain about agreements between those agencies and their clients that prevent workers from leaving staffing agencies for the permanent employers with whom they’re staffed. While there isn’t much empirical data on the pervasiveness of this practice, low-wage workers, who often find work in the temporary

¹⁰ See generally *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 191 (2010); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (“Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a ‘contract, combination ... or conspiracy’ between **separate** entities”).

¹¹ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

¹² Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, Sep. 2017, available at <https://dataspace.princeton.edu/jspui/handle/88435/dsp014f16c547g>.

staffing industry, frequently discuss it. In many cities, most hotels use temporary staffing agencies to perform functions like cleaning and cooking, and anecdotally, most temporary staffing agencies have no-hire agreements of some form with their hotel clients. These agreements can effectively prevent employees of temporary staffing agencies who have been staffed to work in several hotels from ever obtaining employment with a client hotel that is likely to provide meaningful opportunities for advancement, higher wages and benefits, and better working conditions.

Consider also how no-hire agreements in a fissured workplace impede professional advancement within a brand. An employee of a franchisee who is covered by an intrabrand no-hire agreement would be barred from moving to another franchisee to take on a management position, no matter how much special expertise and skill she might have developed in that brand. And while the *Times* story about the two janitors doesn't discuss this issue, it's likely that the contract between Apple and the staffing agency providing it with janitors includes a provision that prevents the janitor from being hired on by Apple. If this is the case, it's not just the fissuring itself that undermines the Apple janitor's ability to advance within Apple as the former Kodak janitor was able to do within Kodak, but an express restraint on her mobility among firms within the fissured workplace.

These illustrations of the harm these restraints exert on workers also help to explain why entities within a fissured workplace may be so intent on restraining competition for and between workers. Restraints undermine the competitive leverage that workers might have to bargain for better treatment and higher wages. That can reduce labor costs and increase profits for all the entities within a fissured workplace. There may be some procompetitive justifications for intrabrand restraints, but as discussed below, the restraints on workers within the fissured workplace often stretch far beyond those purported justifications.

To be sure, these same restraints could be imposed by a single firm employing these workers directly. Kodak never *had* to promote the Kodak janitor through its ranks, and a large restaurant chain that owns all its restaurants—as opposed to franchising them—wouldn't *have* to allow transfers between restaurants for those interested in advancement. Along these lines, some competition scholars have expressed skepticism about the distinction the antitrust laws draw between unilateral and multilateral conduct. From a consumer's perspective, they have reasoned, what's the difference between a single large firm setting supracompetitive prices for itself and multiple smaller firms within a single brand setting prices at that same amount? In either case, the merchants benefit from the supracompetitive prices and the consumer suffers.¹³

Putting aside the question of the wisdom of the distinction the antitrust laws draw between intrafirm and intrabrand restraints on competition over consumers, there should be no doubt that there is a critical distinction between intrafirm restraints on workers (like large employers that prohibit transfers) and intrabrand restraints on workers (like franchisors that prohibit employees of franchisees from moving to other franchisees).

A firm exercising restraints on its own employees is responsible for those workers as an employer, and its employees have access to the bundle of rights and privileges vis-à-vis that employer that come from the employment relationship. In acting as a single entity, the firm may

¹³ See, e.g., Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. Rev. 5, 49–50 (2004) (transaction cost economic theory “reveals that antitrust’s distinction between unilateral and concerted action rests upon a shaky foundation when it comes to intrabrand restraints”).

exercise some amount of monopsony power over its workers, particularly in a highly concentrated labor market,¹⁴ but at the very least, it would be responsible to those workers as an employer, and its workers would, in theory, be able to act concertedly with each other under federal labor laws to serve as a counterweight to that monopsony power.¹⁵

A firm exercising those restraints on employees of other firms within a fissured workplace, on the other hand, may argue that it is not responsible for those workers as an employer. In doing so, that firm is having its cake and eating it too—it exercises monopsony power without being responsible for its workers and without the counterweight of worker concerted conduct that is protected by American labor law.

Treatment under the Antitrust Laws

While workers and government agencies seek to hold fissured firms responsible under employment and labor laws for their workers, there has also been some litigation under the antitrust laws regarding restraints on competition across the fissured workplace. For example, employees of franchisees have sued franchisors for so-called “no hire” agreements in franchise contracts that prevent employees from moving across franchisees.¹⁶ And Uber customers filed a lawsuit against Uber for fixing prices across its purported independent contractors.¹⁷ These cases have tended to highlight that the defendants could have avoided application of the antitrust laws had they not embraced the model of the fissured workplace and instead structured themselves as single entities responsible to their workers as employers.¹⁸

Enforcement of this sort presents promising possibilities, but it also faces practical obstacles. For one, these cases will be difficult and expensive to prosecute where courts decide that the restraints at issue should be subject to a “rule of reason” analysis as opposed to a *per se* rule of illegality.

In general, to decide whether a restraint of trade is unreasonable under the antitrust laws, courts apply the “rule of reason,” which often requires the plaintiff to identify competitive harm to a discrete market. The Supreme Court has made clear, however, that some conduct is so obviously anticompetitive that it is illegal *per se*. In these cases, there is no need to establish anticompetitive harm to determine liability. Naked price fixing (or wage fixing) among horizontal competitors is a

¹⁴ See generally José and Marinescu, Ioana Elena and Steinbaum, Marshall, Labor Market Concentration, December 15, 2017, available at <https://ssrn.com/abstract=3088767> or <http://dx.doi.org/10.2139/ssrn.3088767>.

¹⁵ This is not to say, of course, that our labor laws, as currently applied are sufficient to supply a counterweight to corporate monopsony power in practice. See, e.g., *Epic Sys. Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018).

¹⁶ Full disclosure, one of the authors of this article is plaintiff’s counsel in one of those cases—a lawsuit against Carl’s Jr.

¹⁷ *Meyer v. Kalanick*, 174 F. Supp. 3d 817 (S.D.N.Y. 2016)

¹⁸ See, e.g., *Bautista, et al. v. Carl Karcher Enterprises, LLC*, BC649777 (L.A. Super. Ct., Feb. 8, 2017), Compl. at ¶ 3, available at <https://www.scribd.com/document/338799473/CKE-Complaint> (“CKE Compl.”).

classic example of conduct that is *per se* illegal.¹⁹ And in general, naked no-poach or no-hire agreements among competitors should be subject to *per se* treatment too.²⁰

The restraints we've discussed here would normally fall into the *per se* category. But their treatment is complicated by the fact that the entities subject to a restraint in a fissured workplace aren't always horizontal competitors. For example, a franchisor could argue that it doesn't compete with its franchisees over workers. A court accepting that argument might decide that the franchisor fixing wages or prohibiting its franchisees from competing over employees doesn't amount to a horizontal restraint of trade and is thus not subject to a *per se* rule of illegality.²¹ Similarly, a staffing agency and its customer could argue that they aren't horizontal competitors and that any restraint on worker mobility is an ancillary and necessary aspect of their legitimate customer-client agreement and should therefore be assessed under the rule of reason.²²

In many contexts, these arguments will fail. For example, in the franchise context, some restraints on franchisees hiring each other's workers are clearly horizontal restraints, particularly where the franchisor should be competing with franchisees over workers, as is the case when the franchisor owns and operates its own locations.²³ This could also be true in cases where multiple employers agree (either expressly or tacitly) to enter into similar agreements with a single staffing agency to prevent employees of that staffing agency from moving into permanent employment. Because the employers are direct competitors over labor, kind of agreement would be subject to *per se* treatment under the antitrust laws.²⁴

Furthermore, many of the restraints discussed here would be unreasonable under a rule of reason. Businesses within a fissured workplace may contend that restraints on competition for and among workers within a fissured workplace serve procompetitive justifications. For example, franchisors may argue that they force their franchisees to enter into no-hire agreements to encourage investment in training employees by franchisees without those franchisees fearing that others will free-ride off the investment by poaching their best workers. And temporary staffing agencies may argue that their investment in hiring and placing workers would be undermined by their clients hiring those employees out from under them.

But those justifications should not be accepted at face value. Many of the restraints on competition for and among workers within a fissured workplace extend far beyond what any of these arguments might justify. For example, franchisors can't on the one hand argue that they're merely encouraging investment in training by franchisees when the franchisors themselves provide much of the brand-specific training within a brand.²⁵ And restraints on mobility between staffing companies and their customers might be justified by their purported procompetitive benefits if the customer could purchase the contract of the employee for the costs incurred by the staffing agency

¹⁹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

²⁰ U.S. Dep't of Justice & Fed. Trade Comm., *Antitrust Guidance for Human Resources Professionals* (2016), available at <https://www.justice.gov/atr/file/903511/download>.

²¹ *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

²² Federal Trade Comm. & U.S. Dept. of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (2000).

²³ CKE Compl. at ¶¶ 75-81.

²⁴ *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).

²⁵ CKE Compl. at ¶ 84.

in hiring and placing the employee. But no-hire agreements between staffing companies and clients often specify liquidated damages that far exceed those costs.²⁶

Even where private plaintiffs can make these arguments successfully, however, they'll face the same obstacles that they face in bringing other kinds of private enforcement actions, including mandatory arbitration requirements and the difficulties of class certification and ascertaining damages. In many contexts, it will be up to public enforcement officials, including state attorneys general and the Department of Justice and Federal Trade Commission, to lead enforcement efforts.²⁷

This is all to say that the antitrust laws provide a powerful and important tool for addressing restraints within fissured workplaces, and they may ultimately be effective in addressing many of the most problematic practices that we've discussed here. But because the practical impediments and costs of bringing these cases, we're unlikely to see an explosion of antitrust cases in the fissured workplace, and those cases that are brought might have mixed results.

Policy and Legal Framework Going Forward

While these issues are litigated under current antitrust and employment laws, policymakers should also explore policy solutions that recognize that employers cannot exert monopsony power over workers within the fissured workplace, as they'd be able to if they were a single firm, without also being subject to the employment and labor laws—they cannot, in other words, have their cake and eat it too. The potential policy ramifications of that core principle are wide ranging, they can be sorted into two general categories that should guide thinking about restraints in the fissured workplace.

First, policymakers could address the restraints directly under antitrust and competition policy by expressly prohibiting certain of the restraints that frequently arise in the fissured workplace. One possibility along these lines has already been introduced in the U.S. Senate by Senators Booker and Warren. The “End Employer Collusion Act” would prohibit no-hire agreements of any kind between separate entities. Among other things, it would prohibit employers from outsourcing their functions to staffing agencies or franchisees while agreeing with those entities that they will not hire on for permanent employment any of their workers.²⁸

²⁶ In some cases, it may not be enough to dispute the procompetitive justifications for a restraint. Workers may also need to establish a “market definition” and establish harm to that particular labor market. *Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir. 1978). This could be difficult, especially for low-wage workers, if courts assume that low-wage workplaces are fungible and low-wage workers can move easily between fissured workplaces. But this assumption is false. Labor market concentration along with other labor market frictions often prevent workers from moving between fissured workplaces, and low-wage workers often develop skill sets that are specific to certain fissured workplaces and do not translate easily to others. *See* CKE Compl. 104-17 (explaining that for restaurant-based managers, employment with non-Carl's Jr. brands is not a reasonable substitute for employment with Carl's Jr.).

²⁷ As just one example of these procedural hurdles squelching important antitrust enforcement efforts, Uber was able to compel its price-fixing case into individual arbitration. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017).

²⁸ S.2480, 115th Cong. (2017-2018).

Analogous approaches are already in place at the state level. For example, Illinois’s Day and Temporary Labor Services Act prohibits temporary staffing agencies from charging their clients more than the costs of hiring and placement when those clients hire a worker for permanent employment.²⁹ The cap on liquidated damages is meant to compensate the agency for the true value of their recruitment and placement services without unreasonably interfering with an employee’s ability to move between employers. Additionally, some states’ laws regulating covenants not to compete apply to any agreement—not just to those between employers and employees—and thus prohibit some forms of no-hire and no-poach agreements, including those within a fissured workplace.³⁰

Second, policymakers and courts could address these problems through the labor and employment framework by considering competition policy more explicitly in deciding the scope of the employment relationship in the fissured workplace. Currently, the fact that a firm controls workers’ ability to move between entities within the fissured workplace would likely be a factor counseling in favor of employer status, but it would not be dispositive. Policymakers and courts could conclude that firms that impose restraints of this sort should be considered employers, at least for the purposes of certain protections.

For example, courts, the NLRB, or Congress could decide that employers that act concertedly in setting wages or restraining worker mobility among themselves are necessarily joint employers under federal labor law. This would ensure that firms exercising joint monopsony power within a fissured workplace are countered by the protected concerted action of their workers.

In a different context, policymakers and courts could decide that a firm that fixes the prices that its purported independent contractors charge to customers should be considered the employer of those contractors—at least under certain employment and labor protections. For example, as legislatures around the country have considered bills pressed by the gig economy company Handy, which would explicitly carve out gig economy workers from workers’ compensation and unemployment benefit protections, Handy has argued that platforms like theirs are nothing more than mechanisms for consumers and workers to communicate—a kind of yellow pages for gig economy workers.³¹ Some policymakers and observers have noted, however, that unlike the yellow pages, gig economy companies often dictate how much gig economy workers are able to charge customers. While this feature of the gig economy is often considered as an illustration

²⁹ 820 ILCS 175/40 (“No day and temporary labor service agency shall restrict the right of a day or temporary laborer to accept a permanent position with a third party client to whom the day or temporary laborer has been referred for work or restrict the right of such third party client to offer such employment to a day or temporary laborer. A day and temporary labor service agency may charge a placement fee to a third party client for employing a day or temporary laborer for whom a contract for work was effected by the day and temporary labor service agency not to exceed the equivalent of the total daily commission rate the day and temporary labor service agency would have received over a 60-day period, reduced by the equivalent of the daily commission rate the day and temporary labor service agency would have received for each day the day or temporary laborer has performed work for the day and temporary labor service agency in the preceding 12 months.”).

³⁰ See, e.g., *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 654 N.W.2d 830 (Wisc. 2002).

³¹ Sarah Kessler, *Handy is quietly lobbying workers to declare its workers aren’t employees*, March 30, 2018, available at <https://work.qz.com/1240997/handy-is-trying-to-change-labor-law-in-eight-states/>.

of the control exercised by gig economy companies over their workers, policymakers should also more explicitly consider the relationship between this feature of the marketplace and competition policy. A company that exercises monopoly control over prices should not be able to avoid accountability to the agents of that pricing scheme under the employment and labor laws.

Along these same lines, competition policy should be part of the analysis in deciding whether purported independent contractors of gig economy companies can engage in concerted action without themselves violating the antitrust laws.³² By eliminating the ability these workers might otherwise have to price their product for themselves, these gig economy companies exercise a uniquely powerful form of monopsony power (over their workers) and monopoly power (over their customers). In these cases, it makes sense as a legal matter and is procompetitive for the workers subject to those restraints to be able to engage in concerted action that may serve as a counterweight to the much more powerful business imposing those restraints.

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The fissured workplace is increasingly prevalent, especially in the low-wage labor market. In this new paradigm it is essential to ensure that workers are protected both by the employment and labor laws and by the antitrust laws. The application of those laws to the fissured workplace is complicated and fact dependent, and this discussion does not aim to provide a comprehensive overview of those issues. Instead, it aims to urge advocates, policymakers, and courts addressing fissured workplaces to apply employment and labor protections with competition policy in mind and to apply antitrust laws with employment and labor protections in mind. Doing so should help to ensure that employers cannot have their cake and eat it to.

³² Marshall Steinbaum, *Antitrust Implications of Labor Platforms*, May 2018, available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/CPI-Steinbaum.pdf> (discussing Seattle ordinance governing Uber drivers' collective bargaining rights).