

## **Antitrust Law: A Current Foe, but Potential Friend, of Workers**

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### **Introduction**

Properly applied, antitrust enforcement helps to ensure a balance of power between workers and employers. Antitrust law establishes that certain actions by employers against their workers, such as hiring cartels, are simply illegal.<sup>1</sup> At present, however, the Department of Justice (DOJ) and especially the Federal Trade Commission (FTC) largely ignore efforts by employers to concentrate control over labor markets, and instead use the antitrust laws to *target* efforts by workers and professionals to work collaboratively to promote their common rights and interests. The FTC, for instance, has filed numerous complaints against workers for engaging in collective bargaining and other joint action. Furthermore, the FTC has campaigned against state and local occupational licensing rules that can enhance workers' bargaining power and wages. The result is to reinforce and deepen inequality between the worker and the employer.

The DOJ and FTC should reorient their enforcement priorities, and focus on protecting workers from the market power of employers rather than on interfering with the basic rights of workers, professionals, and independent entrepreneurs to organize. The case for pro-worker antitrust action is clear. Many local labor markets are highly concentrated and characterized by anticompetitive practices on the side of the employer, leading to lower wages and less freedom for workers to find new jobs. The agencies should therefore, first off, begin to examine the labor market effects of corporate mergers and take action when a merger threatens adverse effects on wages and other terms of employment. Second, they should prosecute criminally anti-worker collusion between employers and prohibit the use of non-compete agreements that limit worker mobility and suppress wages. Under this proposed reorientation, antitrust law would serve its intended mission: to ensure that all Americans, including workers, professionals, and independent entrepreneurs, have access to open and competitive markets in which to sell their labor, products, and services.<sup>2</sup>

### **I. How the Antitrust Agencies Interfere with Practices and Policies that Strengthen Workers' Bargaining Power**

Instead of helping protect workers from powerful employers, the antitrust agencies, in particular the FTC, have adopted an anti-labor agenda. The FTC—under both Republican and

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<sup>1</sup> *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235–36 (1948).

<sup>2</sup> In the debate leading up to the passage of the Sherman Act, Senator John Sherman condemned monopoly for “command[ing] the price of labor without fear of strikes, for in its field it allows no competitors.” 21 CONG. REC. 2457 (1890).

Democratic administrations—has brought numerous cases against professional associations and other worker organizations for seeking to raise incomes through collective action. The FTC has also been an aggressive critic of occupational licensing rules, which can protect consumer health and safety and also raise wages. The present anti-worker application of antitrust law bears a troubling resemblance to the deployment of antitrust against labor unions in the decades immediately following the enactment of the Sherman Act,<sup>3</sup> an abuse that was supposed to have been corrected by the Clayton Act more than a century ago.<sup>4</sup>

Labor laws create and protect the rights of workers to organize and build power against employers in labor markets.<sup>5</sup> Unions are the classic example of workers' collective action. By banding together, individual workers who otherwise lack leverage against employers can exercise power and seek better terms of employment. Much like unions, professional associations can engage in collective action and enhance the bargaining power of their members. During the mid-twentieth century, labor unions empowered workers to strike a more equitable bargain with employers.<sup>6</sup> In today's concentrated labor markets, unions and professional associations are even more important, helping to create a more level playing field when bargaining with powerful employers.<sup>7</sup>

In addition to collective bargaining, labor market policies such as occupational licensing can aid workers. Licensing rules condition entry into a particular labor market on the completion of specified educational and training requirements. Along with protecting consumers from unqualified and fraudulent service providers, licensure—by restricting entry—can bolster the wages of licensed professionals. The wage premium of licensure is significant and of comparable magnitude to the premium from unionization.<sup>8</sup> As union density has steadily declined over the past four decades, licensing rates have steadily risen across the country.<sup>9</sup> In other words, licensing appears to function as a substitute for unionization. On top of these positive wage effects, licensing may mitigate gender and racial discrimination in labor markets.<sup>10</sup>

The government's antagonism to efforts by workers and professionals to organize is especially unfair to independent contractors and individuals who are classified by their employers

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<sup>3</sup> See generally Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. (forthcoming 2019).

<sup>4</sup> The Clayton Act's exemption for workers holds that the "labor of a human being is not a commodity or an article of commerce." 15 U.S.C. § 17.

<sup>5</sup> See 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .").

<sup>6</sup> Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 532 (2011).

<sup>7</sup> Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 16 (2018).

<sup>8</sup> Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 ILR REV. 142, 169-70 (2016) (finding wage premia in both unionized and licensed labor markets but higher wage premia for unionized segments).

<sup>9</sup> Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 678-79 (2010).

<sup>10</sup> Peter Blair & Bobby Chung, *Occupational Licensing Reduces Racial and Gender Wage Gaps Evidence from Survey of Income and Program Participation* (2017), <https://ideas.repec.org/p/hka/wpaper/2017-50.html>.

as independent contractors. While workers classified as employees are entitled to a statutory antitrust exemption,<sup>11</sup> workers classified as independent contractors—a growing fraction of the workforce<sup>12</sup>—do not qualify for this exemption and can be prosecuted under the antitrust laws.<sup>13</sup> Rather than recognize this anachronistic gap in labor protections, the federal antitrust agencies (especially the FTC) have exploited it, targeting the collective action of independent contractors. In recent years, the FTC has sued the professional associations of electricians,<sup>14</sup> ice skating coaches,<sup>15</sup> music teachers,<sup>16</sup> organists,<sup>17</sup> and property managers<sup>18</sup> for collectively seeking to raise their members' incomes. It has also filed numerous lawsuits against doctors for bargaining collectively with often powerful private insurance companies.<sup>19</sup>

As part of its “competition advocacy,” the FTC has been a consistent opponent of occupational licensing regulations. The FTC’s campaign rests on questionable assumptions and a thin empirical record.<sup>20</sup> Reflecting a bipartisan consensus, the FTC has argued that licensing should only seek to protect consumers and so should be narrowly drawn to advance this objective.<sup>21</sup> The commission has either ignored or disparaged the benefits to workers from licensing. In a 2014 letter concerning the City of Chicago’s proposed ordinance to govern ride-sharing services, FTC staff contended that regulatory objectives besides consumer protection and safety are somehow illegitimate.<sup>22</sup>

If the antitrust agencies are to use their power in ways that fully and fairly recognize the interests of workers and professionals, they must reevaluate their enforcement and competition advocacy activities. They should respect the right of all workers, regardless of federal labor law classification, to organize and build power through collective action. Workers classified (or

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<sup>11</sup> *Spence v. Southeastern Alaska Pilots’ Ass’n*, 789 F. Supp. 1007, 1012-13 (D. Alaska 1990).

<sup>12</sup> Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Arrangements in the United States, 1995-2015* 2 (NBER Working Paper No. 22667).

<sup>13</sup> *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 145 (1942); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1032-33 (2016).

<sup>14</sup> *In re Prof’l Lighting & Sign Mgmt Cos.*, 2015 FTC LEXIS 44.

<sup>15</sup> *In re Prof’l Skaters Ass’n*, 2015 FTC LEXIS 46.

<sup>16</sup> *In re Music Teachers Nat’l Ass’n*, 2014 FTC LEXIS 68.

<sup>17</sup> *In re Am. Guild of Organists*, 2017 FTC LEXIS 76.

<sup>18</sup> *In re Nat’l Ass’n of Residential Property Managers*, 2014 FTC LEXIS 217.

<sup>19</sup> *E.g.*, *In re Praxedes E. Alvarez Santiago*, 2013 FTC LEXIS 66; *In re M. Catherine Higgins*, 149 F.T.C. 1114 (2010) *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

<sup>20</sup> *See generally* Sandeep Vaheesan & Frank Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 ANN. REV. L. & SOC. SCIS. (forthcoming 2018).

<sup>21</sup> *E.g.*, Letter from Tara Isa Koslov, Ginger Jin, & Tad Lipsky, Fed. Trade Comm’n, to Suzanne Geist, Nebraska Senate 7 (Mar. 15, 2017), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or/neb\\_ol\\_letter\\_to\\_senator\\_geist.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or/neb_ol_letter_to_senator_geist.pdf); Letter from Susan S. DeSanti, Joseph Farrell & Richard A. Feinstein, Fed. Trade Comm’n, to Loris Jones, Texas Board of Veterinary Med. Examiners 4 (Aug. 20, 2010), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf).

<sup>22</sup> *See* Letter from Andrew I. Gavil, Deborah L. Feinstein & Martin S. Gaynor, Fed. Trade Comm’n, to Brendan Reilly, Chicago City Council 4 (Apr. 15, 2014),

[https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf) (“Any restrictions on competition that are implemented should be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact.”).

misclassified)<sup>23</sup> as independent contractors should not be sued for attempting to build bargaining power. Along with ending this anti-labor enforcement activity, the federal antitrust agencies should immediately suspend their anti-licensing campaign. Not only are such campaigns outside the purview of their missions and expertise, they are contrary to the interests of workers and professionals.

## II. How the Antitrust Agencies Could Check Employers' Power Over Workers

Although antitrust economists generally assume labor markets to be competitive, local labor markets in the United States are, on average, highly concentrated (as defined in the Horizontal Merger Guidelines)<sup>24</sup> and have become more concentrated since the late 1970s.<sup>25</sup> Due to this concentration, many workers have only a handful of prospective employers in the city or county where they live. Labor market concentration is an especially serious problem in rural areas.<sup>26</sup> Recent empirical research has found that this concentration lowers wages<sup>27</sup> and has contributed to the multi-decade stagnation in wage growth.<sup>28</sup> In parts of the country where manufacturers are in direct competition with imports from China, this import competition serves to reinforce the power of local employers who then further drive down local wages.<sup>29</sup> Concentration can also affect workers further up the supply chain, as powerful buyers squeeze suppliers who in turn seek to reduce costs by holding down wages.<sup>30</sup>

In addition to having structural power, employers also often engage in practices that further tilt the balance of power in their favor. In a number of industries, employers have colluded to suppress wages. This can be true even for the most educated of employees. For instance, over a multi-year period starting in 2005, Apple, Google, Intel, and other leading tech companies agreed not to recruit, or “poach,” each other’s software engineers and other skilled professionals.<sup>31</sup> Steve Jobs and Eric Schmidt were among the principal conspirators in this anticompetitive, anti-worker agreement.<sup>32</sup> In several cities across the nation, hospitals have been accused of conspiring with each other to hold down the wages of nurses.<sup>33</sup> Moreover, nearly 30 million workers are bound by non-compete agreements with their employers.<sup>34</sup> These non-compete clauses restrict workers from

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<sup>23</sup> Danny Vinik, *The Real Future of Work*, POLITICO, Jan. 4, 2018, <https://www.politico.com/magazine/story/2018/01/04/future-work-independent-contractors-alternative-work-arrangements-216212>.

<sup>24</sup> José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* 10 (2017), <http://www.marinescu.eu/AzarMarinescuSteinbaum.pdf>.

<sup>25</sup> Benmelech et al, *supra* note 7, at 3.

<sup>26</sup> Azar et al, *supra* note 24, at 10.

<sup>27</sup> *See id.* at 19 (estimating in one model that “[g]oing from the 25th percentile of market concentration to the 75th percentile of market concentration is associated with a decline in wages . . . of 17%).

<sup>28</sup> Benmelech et al, *supra* note 7, at 23-24.

<sup>29</sup> *Id.* at 24.

<sup>30</sup> Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213 (2018).

<sup>31</sup> Mark Ames, *Revealed: Apple and Google's Wage-Fixing Cartel Involved Dozens More Companies, Over One Million Employees*, PANDO, Mar. 22, 2014, <https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/>.

<sup>32</sup> *Id.*

<sup>33</sup> *E.g.*, *Cason-Merenda v. VHS of Michigan, Inc.*, 296 F.R.D. 528 (E.D. Mich. 2013); *Fleischman v. Albany Medical Center*, No. 06-cv-0765, 2008 U.S. Dist. LEXIS 57188 (N.D.N.Y. July 28, 2008).

<sup>34</sup> U.S. DEP'T OF TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 6 (2016).

leaving their current employer to join a competitor or establish a competing business for a specified period of time. While many employers do not enforce non-compete agreements against workers in court, the mere possibility of employers' bringing suit can deter workers from seeking new employment or starting new businesses.<sup>35</sup>

Even though the Supreme Court has long held that the antitrust laws apply to buyers of goods and services,<sup>36</sup> such as employers, the antitrust response to the problem of employer power has been either acquiescence or tepid action. When reviewing corporate mergers, the antitrust agencies appear to have *assumed* that the affected labor markets are competitive.<sup>37</sup> As a result, they have not examined the labor market effects of mergers and arguably enabled the consolidation of labor markets.<sup>38</sup>

When the DOJ has taken action against employers for entering into so-called “no-poaching” agreements, it has resolved the cases through weak civil settlements. It brought an action against Apple, Google, Intel, and other tech companies for their multi-year no-poaching conspiracy.<sup>39</sup> And in 2018, the DOJ brought a similar action against two rail equipment manufacturers for suppressing competition for workers.<sup>40</sup> Both cases involved horizontal collusion—a practice that the DOJ ordinarily prosecutes criminally.<sup>41</sup> Yet, the DOJ accepted settlements under which the companies agreed not to maintain or enter into no-poaching agreements and pledged to improve internal compliance procedures.

The antitrust agencies should change course and use their power to protect workers from powerful employers. Immediate steps should include:

- (1) They should consider effects on wages and other terms of employment when evaluating proposed mergers. When mergers risk strengthening employers' power in a relevant labor market, the agencies should be prepared to take action, including enjoining such mergers in court.
- (2) When tackling anticompetitive conduct in labor markets, the agencies need to take stronger action. Civil settlements that involve no monetary penalties or criminal sanction fail to

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<sup>35</sup> Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL'Y & ECON. 39, 49 (2012).

<sup>36</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

<sup>37</sup> Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power* 5, HARV. L. REV. (forthcoming).

<sup>38</sup> Benmelech et al, *supra* note 7, at 3.

<sup>39</sup> Press Release, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sep. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.

<sup>40</sup> Press Release, U.S. Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), <https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete>.

<sup>41</sup> *E.g.*, Bill Baer, Assistant Att'y Gen., Dep't of Justice Antitrust Div., Prosecuting Antitrust Crimes, Georgetown University Law Center Global Antitrust Enforcement Symposium (Sep. 10, 2014), <https://www.justice.gov/atr/speech/prosecuting-antitrust-crimes>. The Supreme Court has described horizontal collusion as “the supreme evil of antitrust.” *Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

deter employers' wage suppression conspiracies. Encouragingly, since 2016, the DOJ Antitrust Division, under both the Trump and Obama administrations, has vowed to apply a strong anti-collusion policy to labor markets and pursue criminal prosecutions against employers and managers who conspire to hold down wages.<sup>42</sup>

- (3) The antitrust agencies should regulate non-compete agreements that impair worker mobility and depress wages. Under Section 5 of the FTC Act, the FTC can outlaw "unfair methods of competition."<sup>43</sup> Pursuant to this authority, the FTC should restrict or prohibit the use of employee non-compete agreements through enforcement actions or a rulemaking.

### **III. Conclusion**

In recent decades, the federal antitrust enforcers have too often been a foe of workers. They have brought enforcement actions against professionals and other workers for engaging in collective conduct, such as joint bargaining. The agencies have also been consistent critics of occupational licensing rules that can raise wages and address gender and racial discrimination in labor markets. Through this enforcement and advocacy campaign, the DOJ and FTC have frustrated workers' efforts to build power and deepened disparities in bargaining power between the worker and the employer. Recent empirical research has found that concentration of power by employers significantly lowers wages. This underscores the need for the agencies to reorient their labor market enforcement and advocacy. They should refrain from attacking the collective action of workers and policies that aid workers. To advance an antitrust agenda that is fair to all Americans, the federal antitrust agencies should investigate and use their full legal authorities against corporate mergers and conduct that threaten to increase the already great power that employers enjoy over their workers.

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<sup>42</sup> Dep't of Justice & Fed. Trade Comm'n, Antitrust Red Flags For Employment Practices (2016), <https://www.justice.gov/atr/file/903506/download>; Eleanor Tyler, *Justice Dept. Is Going After 'No-Poach Agreements*, BLOOMBERG LAW, Jan. 19, 2018, <https://www.bna.com/justice-dept-going-n73014474358/>.

<sup>43</sup> 15 U.S.C. § 45. The Supreme Court has stated "the Federal Trade Commission does *not* arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (emphasis added).