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Purchasing Power and Buyers' Cartels – Note by the United States

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm>

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1. Introduction

1. In recent years, there has been growing concern in the United States that labor markets are vulnerable to anticompetitive behavior by employers. The debate has been stimulated by academic research, empirical evidence of stagnating wages, a number of public controversies relating to employment practices, and an increasing reliance on independent contractors. Earlier this year, a report from the U.S. Treasury Department identified several ways in which unfair competition and market concentration harms workers.¹ The Antitrust Division of the U.S. Department of Justice (“DOJ” or “Division”) and the U.S. Federal Trade Commission (“FTC”) (together, “the Agencies”) submit this paper to provide background on the debate in the United States and to describe the application of antitrust analysis to labor markets. Conduct in these markets may exhibit many of the characteristics of joint purchasing arrangements and even buyer cartels, and thus provide a good illustration of the issues covered in the *Purchasing Power and Buyers’ Cartels* roundtable.

2. The paper first discusses history and the academic and public debate. It then describes the relevant law and the Agencies’ experience with enforcement of antitrust law in labor markets. It concludes by describing the major legal issues, ongoing debates, and unanswered questions relating to “labor-side” antitrust enforcement.

2. The History of Labor-Side Antitrust

3. The idea that employers might collude to suppress wages dates back at least to Adam Smith, who complained that collusion among employers is “the natural state of things.”² Smith observed that despite its common occurrence, “we rarely hear ... of the combination of [employers].”³ That eighteenth century observation remained true into the twentieth century, even after the U.S. Congress firmly prohibited such combinations in the Sherman Act of 1890.⁴

4. The U.S. antitrust laws prohibit collusion and other anticompetitive conduct in all markets, including labor markets.⁵ The Sherman Act in broad terms prohibited any “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

¹ U.S. Dep’t of Treasury, *The State of Labor Market Competition*, (Mar. 2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

² ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 81-82 (London: printed for W. Strahan; and T. Cadell 1776), <https://quod.lib.umich.edu/e/ecco/004861571.0001.001/92:5.8>.

³ *Id.* at 35.

⁴ 15 U.S.C. § 1.

⁵ See *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (“The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”).

,” as well as any monopolistic conduct.⁶ Common law courts had long recognized agreements that limit employment opportunities, including covenants not to compete, as “restraints of trade.”⁷ In addition, section 7 of the Clayton Act makes unlawful any merger whose effect may be to lessen competition substantially or tend to create a monopoly, including in labor markets.⁸

5. The U.S. Supreme Court recognized that the Sherman Act prohibits collusion to suppress wages as early as 1926 in *Anderson v. Shipowners Association of the Pacific Coast*.⁹ Despite that case, which involved a conspiracy of ship owners to allocate seamen and fix their wages, antitrust challenges to anticompetitive labor market practices would remain extremely rare. Over the next 120 years of antitrust law in the United States, there would be only a handful of challenges, the most prominent of which took place in the context of sports leagues, where separately-owned teams publicly control player compensation.¹⁰

6. The limited number of antitrust challenges brought by employees against employers through much of the late nineteenth and twentieth centuries may be explained in part by the role that unions played in protecting employees. Unions aggregate the bargaining power of workers, enabling them to bargain for higher wages and other benefits. Unions used strikes and negotiations as effective tactics, and so unions may not have seen antitrust law as a useful tool. Indeed, unions were suspicious of antitrust law because in its early years, antitrust law was frequently used by employers to undermine unions.¹¹ This began to change in 1914, when the Clayton Act introduced the labor exemption, which immunizes union organization from antitrust challenges.¹²

7. Starting in the 1950s, American labor unions experienced a significant decline in membership.¹³ In recent decades questions have arisen as to whether antitrust law could be used more often to bring cases against employers who may engage in anticompetitive conduct affecting labor markets. At the state and federal level, attention has also turned to address non-compete clauses and no-poach agreements.

3. Monopsony Theory

8. Economists have recognized since the time of Adam Smith that labor markets can be cartelized or monopsonized. The British economist Joan Robinson coined the term “monopsony” for a buy-side monopoly and pointed out that labor monopsony causes harms

⁶ *Id.*

⁷ See generally Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 632–37 (1960).

⁸ 15 U.S.C. § 18.

⁹ *Anderson v. Shipowners Association of the Pacific Coast*, 272 U.S. 359 (1926).

¹⁰ See, e.g., *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021).

¹¹ For instance, in what became known as The Danbury Hatters case, the U.S. Supreme Court ruled that collective action by a union of hat makers to organize a retailer boycott of non-union manufacturers violated the Sherman Act. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

¹² Clayton Act § 4, 15 U.S.C. § 17.

¹³ Henry S. Farber et al., *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 Q. J. ECON. 1325 (2021).

very similar to monopoly.¹⁴ A monopoly can potentially raise prices above the competitive rate, which harms consumers and reduces output, or exclude competitors, reduce quality, or impose additional onerous terms of exchange. An employer, or cartel of employers with monopsony power, can potentially suppress wages below the competitive rate, reduce job quality, or impose additional onerous terms of employment. This situation harms both workers by causing a wealth transfer to employers, and the general economy by reducing output as workers drop out of the market in response to low pay. Thus, monopsony, like monopoly, causes a deadweight loss to society.

9. The distributive impacts of monopoly and monopsony are likewise similar. One of the ways monopoly can harm consumers is by requiring them to spread their limited budgets across fewer, more expensive, goods and services. Monopsony also harms consumers who depend mainly on their wages, as it reduces those wages, reducing the quantity of goods and services that consumers can afford.¹⁵

4. Modern Developments

10. Labor-side antitrust has generated increased interest in recent years as a result of parallel developments in the academic literature, policy debates, and antitrust enforcement. In academia, interest in labor monopsony began to grow in the 1990s and culminated in a group of empirical papers written in the late 2010s. These papers established three indicators of considerable importance for antitrust enforcement. First, they showed high concentration levels in thousands of labor markets in the United States, often having only two or three employers in a particular field or industry.¹⁶ Second, they provided evidence that, as industrial organization theory would suggest, labor market concentration suppresses wages.¹⁷ Third, several papers showed that millions of workers were subject to restrictive employment arrangements, including covenants not to compete and no-poach agreements.¹⁸

11. At the same time, awareness grew in academic and policy circles that wages were stagnating, and economic growth was low. Labor's share of national income in the U.S. has steadily fallen since the 1980s.¹⁹ Some scholars argued that monopsony power had risen during that period and could thus account for the decline in labor's share, but that claim has

¹⁴ JOAN ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 215 (1933).

¹⁵ See, e.g., José Azar et. al, *Labor market concentration*, 1 J. HUMAN RESOURCES 1218 (2020).

¹⁶ Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, 56 J. HUMAN RESOURCES 219 (2021); José Azar et. al, *Labor market concentration*, 1 J. HUMAN RESOURCES 1218 (2020); Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, J. HUMAN RESOURCES 0119-10007R1 (2020). Recent work has shown high levels of labor market concentration in European countries as well. See, e.g., Ioana Marinescu et al., *Wages, Hires, and Labor Market Concentration*, NBER (2020) (Working Paper No. 28084)); Andrea Bassanini et al., *Labour Market Concentration, Wages and Job Security in Europe*, IZA INST. ECON. (2022) (Discussion Paper. No. 15231).

¹⁷ See, e.g., Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021).

¹⁸ Evan Starr et al., *Noncompetes in the U.S. Labor Force*, 64 J. L. ECON. 53 (2021); Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. HUMAN RESOURCES S324 (2022).

¹⁹ David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645 (2020).

been hotly contested.²⁰ Meanwhile, other traditional legal protections for workers have eroded. Minimum wage laws did not keep up with inflation.²¹ Protections for unions have eroded as well, possibly accounting for some of the decline in union membership.²² In addition, many firms began to rely more heavily on independent contractors or gig workers, who do not receive many of the same labor law protections as traditional employees.²³

12. To the extent that the erosion of wages and economic output are connected to labor market concentration, antitrust law enforcement should be one way to address these issues. The Agencies have each brought an increasing number of enforcement actions. Workers have also brought cases directly in courts.²⁴ Congressional bills have been proposed to strengthen antitrust law to be more effective against employers engaged in anticompetitive labor practices.²⁵

13. President Biden issued an executive order in July 2021 directing the Agencies and other federal agencies to give priority to labor market abuses.²⁶ Several state attorneys general have also brought actions challenging non-compete and no-poach agreements in recent years.²⁷ Some states have also passed legislation restricting the use and enforcement

²⁰ *Id. Compare* Rinz, *supra* note 17, with Ben Lipsius, *Labor Market Concentration Does not Explain the Falling Labor Share* (2019) (unpublished dissertation), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/153467/blipsius_1.pdf?sequence=1. For skepticism, see generally Gene M. Grossman & Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share*, 14 ANNUAL REV. ECON. 1 (2022).

²¹ Congressional Research Service, *The Federal Minimum Wage: Indexation 3* (2016) <https://crsreports.congress.gov/product/pdf/R/R44667>.

²² Farber et al., *supra* note 13. *See also* Prager & Schmitt, *supra* note 17.

²³ *See, e.g.*, Lawrence F. Katz and Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, 72 ILR REVIEW 382 (2019); Treasury Report at 13, *supra* note 1. *See also*, Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306 (1st Cir. 2022) (“The key question is not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor.”).

²⁴ *E.g.*, *Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521-SAG, 2020 WL 5544183, at *1 (D. Md. Sept. 16, 2020); *Le v. Zuffa, LLC*, 216 F. Supp. 3d 1154 (D. Nev. 2016).

²⁵ *See, e.g.*, S. 225, 117th Cong. (2021–2022), <https://www.congress.gov/bill/117th-congress/senate-bill/225> (Competition and Antitrust Law Enforcement Reform Act of 2021); S. 3847, 117th Cong. (2021–2022), <https://www.congress.gov/bill/117th-congress/senate-bill/3847> (Prohibiting Anticompetitive Mergers Act of 2022).

²⁶ Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

²⁷ *E.g.*, Press Release, Illinois Attorney General, Madigan Announces Settlement With Jimmy John’s For Imposing Unlawful Non-Compete Agreements (Dec. 7, 2016), https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html; News Release, Washington State, Office of the Attorney General, AG Ferguson announces fast-food chains will end restrictions on low-wage workers nationwide (July 12, 2018), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers>; Press Release, NY Attorney General, Attorney General James Ends Harmful Labor Practices at One of Nation’s Largest Title Insurance Companies, Puts in Place Policies to Protect Workers (Sept. 9, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-ends-harmful-labor-practices-one-nations-largest-title>.

of non-compete and no-poach agreements.²⁸ And, in March 2022, the Treasury Department issued a report on the state of labor market competition, highlighting several ways in which unfair competition is hurting workers.²⁹ The report notes that many labor markets in America display very high levels of concentration, and mergers can make this concentration even worse, further lowering wages, reducing benefits, and degrading working conditions.³⁰

5. The Agencies' Experience with Antitrust in Labor Markets

14. While both Agencies have histories of enforcement actions in labor markets, attention to these markets has accelerated in recent years.

15. In 1992, the FTC charged several nursing homes with an illegal agreement to boycott a nurse registry that attempted to raise prices for short-term nursing services. Nurse registries supply nursing personnel on a temporary basis. This boycott and a threatened boycott of other registries eliminated competition among the nursing homes for the purchase of nursing services. The order prohibits the nursing homes from agreeing to boycott the registries, or from interfering with prices charged by such registries.³¹

16. In 1995, the FTC secured a settlement with the trade association representing most of the nation's best-known fashion designers and the organization that produces the two major fashion shows for the industry each year. The settlement included provisions that would prohibit the two groups or their members from attempting to fix or reduce modeling fees as alleged by the FTC, and also would require them to take steps to educate fashion designers that price fixing is illegal. The Commission thus made it clear that antitrust laws prohibiting price fixing apply to modeling services just as they do to other products or services.³²

17. In 1999, the Division challenged a merger between health insurance providers Aetna and Prudential, in part because of the potential impact of the merger on labor markets. Aetna and Prudential had few competitors in the market for health care plans in Dallas and Houston, Texas. The complaint alleged the merger would substantially reduce competition to sell health care plans to consumers and to buy health care services from physicians. The complaint's focus on the effect on consumers was conventional; the focus

²⁸ *E.g.*, S.B. 672, 102nd Gen. Assemb. (Ill. 2021-2022), <https://legiscan.com/IL/text/SB0672/2021> (amending the Illinois Freedom to Work Act) (governing covenants not to compete).

²⁹ U.S. Dep't of Treasury, *The State of Labor Market Competition*, (Mar. 2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>.

³⁰ In the FTC's recent challenge of a hospital merger in Rhode Island, Chair Khan and Commissioner Slaughter would have supported a Clayton Act claim regarding the potential effect of the proposed transaction on competition in relevant labor markets. *See* Concurring Statement of Commissioner Slaughter and Chair Khan regarding FTC and *State of Rhode Island v. Lifespan Corporation and Care New England*, at 1-2 (Feb. 17, 2022), <https://www.ftc.gov/public-statements/2022/02/concurring-statement-commissioner-slaughter-chair-khanregarding-ftc-state>.

³¹ *In re Debes Corp.*, 115 F.T.C. 701 (1992), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-115/ftc_volume_decision_115_january_-_december_1992pages_670-773.pdf#700.

³² *See* Press Release, Fed. Trade Comm'n, FYI: FTC Approves Consent Agreement with The Council of Fashion Designers of America and 7th on Sixth, Inc. (Oct. 20, 1995), <https://www.ftc.gov/news-events/press-releases/1995/10/fyi-ftc-approves-consent-agreement-council-fashion-designers>.

on the market for physician labor was novel. The parties settled after the merged entity agreed to divest some of its assets in Dallas and Houston so that competition in both product markets would be maintained.³³

18. In 2010, the Division sued Adobe Systems Inc., Apple Inc., Google Inc., Intel Corporation, Intuit Inc., Pixar, Lucasfilm, and eBay, alleging that they agreed not to poach one another's software engineers. All of the companies settled.³⁴ The Division subsequently sued two railroad equipment manufacturers for entering a no-poach agreement, and they settled as well.³⁵ Starting in December 2020, the Division has brought six criminal indictments against individuals and companies for participating in no-poach or wage-fixing agreements.³⁶

19. In 2014, the FTC brought a case against ski equipment manufacturers Marker Völkl and Tecnica, alleging the companies agreed not to compete with each other to secure endorsements by professional skiers. Specifically, the FTC alleged that Marker Völkl agreed not to solicit, recruit, or contact any skier who previously endorsed Tecnica skis, and Tecnica agreed to a similar arrangement with respect to Marker Völkl's endorsers. In addition, the complaint states that in 2007, the companies expanded the scope of their no-solicitation agreement to cover all of their employees. The order settling the case bars each firm from engaging in similar anticompetitive conduct in the future.³⁷

20. In 2017, Anthem and Cigna, the second and third largest insurance companies in the country, sought to merge. The Division sued to block the merger alleging: (a) harm to consumers of health insurance products (i.e., employers); and (b) harm to healthcare providers, including physicians, who negotiate to participate in health insurance networks. Although the district court blocked the merger without addressing alleged harm to

³³ Dep't of Justice, *U.S. v. Aetna and the Prudential Insurance Company*, <https://www.justice.gov/atr/case/us-v-aetna-and-prudential-insurance-company>.

³⁴ Final Judgment, *United States v. eBay, Inc.*, No. 12-cv-5869 (N.D. Cal. Sept. 2, 2014), ECF No. 66; Final Judgment, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-1629 (D.D.C. Mar. 18, 2011), ECF No. 17; *see* Final Judgment, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-2220 (D.D.C. May 9, 2011), ECF No. 6-1; Press Release, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.

³⁵ 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>.

³⁶ Indictment, *United States v. Jindal*, No. 4:20-cr-00358 (E.D. Tex. Dec. 9, 2020); Indictment, *United States v. Surgical Care Affiliates, LLC*, No: 3-21-CR0011-L (N.D. Tex. Jan. 5, 2021); Indictment, *United States v. Hee et al.*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 30, 2021); Indictment, *United States v. DaVita, Inc.*, No. 21-cr-00229-RBJ (D. Colo. July 14, 2021); *U.S. v. Patel, et al.*, 21-cr-220 (D. Conn., 12/15/21); *U.S. v. Manahe, et al.*, 22-cr-13 (D. Maine, 1/27/22).

³⁷ *In re Marker Völkl (International) GmbH and Tecnica Group, SpA, C-4476 and C-4475* (complaints May 19, 2014) (File No. 121 0004), <https://www.ftc.gov/legal-library/browse/cases-proceedings/121-0004-tecnica-group-matter>.

healthcare providers, this case illustrated the Agencies' continued commitment to enforcing Section 7 of the Clayton Act in the context of labor markets.³⁸

21. In 2018, the FTC required global healthcare company Grifols S.A. to divest blood plasma collection centers in three U.S. cities, among other conditions, as part of a settlement resolving charges that Grifols' acquisition of Florida-based Biotest US Corporation was anticompetitive and violated antitrust law. The acquisition would have given Grifols a monopoly in three local markets for collection of human blood plasma. Plasma collection centers typically compensate donors by paying them a per-donation fee.³⁹ Also in 2018, the FTC reached a proposed settlement regarding a wage-fixing agreement between home health care staffing agencies. The FTC alleged that the company Your Therapy Source, LLC, a provider of therapist staffing services to home health agencies in Texas, its owner Sheri Yarbray, and Neeraj Jindal as the owner of Integrity Home Therapy entered into an agreement to lower wages to their contracted therapists and invited four other competitors to collude on these rates. The Commission alleged that their agreement was per se illegal and harmed competition. The case settled.⁴⁰

22. In 2021, the Division sued to block Penguin Random House's acquisition of Simon & Schuster. Penguin Random House is the largest book publisher in the world. The DOJ alleged that the acquisition would substantially reduce competition for the acquisition of manuscripts written by authors. That case is pending.⁴¹

23. In the FTC's disclosure of its investigation into the proposed merger between Aveanna Healthcare and Maxim Healthcare Services, the FTC expressed concern that the proposed agreement would have an anticompetitive impact on the markets both for nursing services and for private duty nursing care. The Agency closed the investigation in 2020 after the agreement was abandoned.⁴²

24. In a 2020 advocacy initiative, the FTC opposed two hospital mergers in Texas because of the potential anticompetitive impact on the market for registered nurses. FTC staff provided written comments, through a public comment process, to the Texas Health & Human Services Commission (HHSC) opposing two Certificate of Public Advantage (COPA) applications that, if approved, purported to confer antitrust immunity on two separate hospital mergers that FTC staff believed raised antitrust concerns. In addition to potential price and quality effects, both mergers carried a high likelihood of resulting in

³⁸ Dep't of Justice, *U.S. and Plaintiff States v. Anthem, Inc. and Cigna Corp.*, <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-anthem-inc-and-cigna-corp>.

³⁹ *In re Grifols, S.A., and Grifols Shared Services North America, Inc.*, C-4654 (complaint Aug. 1, 2018) (File No. 181 0081), <https://www.ftc.gov/legal-library/browse/cases-proceedings/181-0081-grifols-sa-grifols-shared-services-north-america-inc-matter>.

⁴⁰ *In re Your Therapy Source, LLC, Neeraj Jindal and Sheri Yarbray*, C-4689 (2019) (File No. 171-0134) (complaint Oct. 31 (2019)), <https://www.ftc.gov/legal-library/browse/cases-proceedings/171-0134-your-therapy-source-neeraj-jindal-sheri-yarbray-matter>.

⁴¹ Press Release, Dep't of Justice, Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster (Nov. 2, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>.

⁴² Press Release, Fed. Trade Comm'n, Statement of the FTC Chairman Regarding Announcement that Aveanna Healthcare and Maxim Healthcare Services have Terminated Their Acquisition Agreement (Jan. 30, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/01/statement-ftc-chairman-regarding-announcement-aveanna-healthcare-maxim-healthcare-services-have>.

depressed wage growth for registered nurses.⁴³ Despite the concerns expressed by the FTC, physicians, and others, the Texas HHSC approved both COPA applications in October 2020.⁴⁴ The hospitals consummated the mergers soon thereafter. The FTC is currently studying the effects of COPAs in healthcare markets, including the impact of hospital consolidation on employee wages.⁴⁵

25. In 2021, an FTC merger consent addressed the effects on the employment market for physicians. The FTC had alleged that DaVita's proposed acquisition of the University of Utah Health's dialysis clinics would reduce competition in vital outpatient dialysis services in the Provo, Utah market. The consent order required a divestiture of certain clinics and prohibited the merged firm from entering into or enforcing non-compete agreements and other employee restrictions.⁴⁶

26. The FTC and Division have also undertaken efforts to inform the public about their approach to labor markets. In 2016, the Division and FTC jointly issued Antitrust Guidance for Human Resources Professionals.⁴⁷ The guidance put firms on notice that, going forward, DOJ would criminally investigate naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between employers.

27. In 2021, the Agencies held a workshop on promoting competition in labor markets.⁴⁸ The workshop brought together lawyers, economists, academics, policy experts, labor groups, and workers, and covered recent developments at the intersection of antitrust and labor. Workshop sessions focused on mergers and unilateral conduct, union representatives' perspectives, contractual restraints on worker mobility, employer information sharing, building a whole of government competition policy, and collective bargaining.⁴⁹

⁴³ Fed. Trade Comm'n, Letter from FTC Staff to Texas Health and Human Services Comm'n Regarding Certificate of Public Advantage Applications of Hendrick Health Systems and Shannon Health Systems (Sept. 11, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhscopacomment.pdf.

⁴⁴ See Texas Health and Human Services, Certificate of Public Advantage, Approved COPAs (Oct. 2, 2020) (Shannon Health System, Hendrick Health System), <https://www.hhs.texas.gov/providers/health-care-facilities-regulation/certificate-public-advantage>.

⁴⁵ Press Release, Fed. Trade Comm'n FTC to Study the Impact of COPAs (Oct. 21, 2019), <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-impact-copas>.

⁴⁶ Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), <https://www.ftc.gov/newsevents/press-releases/2021/10/ftc-imposesstrict-limits-davita-incs-future-mergers-following>.

⁴⁷ DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

⁴⁸ Dep't of Justice & Fed. Trade Comm'n, Press Release, Public Workshop on Promoting Competition in Labor Markets (Dec. 1, 2021), <https://www.justice.gov/atr/events/public-workshop-promoting-competition-labor-markets>.

⁴⁹ Agenda, Fed. Trade Comm'n & Dep't of Justice, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6-7, 2021) https://www.ftc.gov/system/files/documents/public_events/1597830/making_competition_work_agenda.pdf. Transcripts and video recordings of workshop sessions are available at

28. In 2022, the Division and FTC jointly announced that the Agencies would revise the Agencies' merger guidelines, which currently do not explicitly address labor market issues. A key goal of this guidelines revision is to ensure the Agencies' merger investigations fully account for relevant harms to workers and labor market competition.⁵⁰ In the official request for information from the public, the Agencies sought comments on how to revise the guidelines to account for the effects of mergers on labor markets.⁵¹ The Agencies also held a series of listening forums to hear from citizens directly affected by mergers and acquisitions in food and agriculture, health care, media and entertainment, and technology markets.⁵²

29. Earlier this year, the Division also entered a Memorandum of Understanding with the U.S. Department of Labor to facilitate sharing information about labor markets.⁵³

30. In addition, the Division has filed numerous statements of interest and amicus briefs in private antitrust litigation involving labor markets, including the U.S. Supreme Court case of *NCAA v. Alston*,⁵⁴ which concerned limitations that a sports league put on compensation of college athletes by universities and colleges.⁵⁵ These submissions expressed the Division's view that naked no-poach agreements between competitors are per se illegal and, more broadly, that antitrust principles apply to labor markets to the same degree that they apply to product markets.⁵⁶

<https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>.

⁵⁰ Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/pressreleases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

⁵¹ Fed. Trade Comm'n, Submit a Comment on the Joint FTC-DOJ Merger Enforcement Request for Information <https://www.ftc.gov/policy/studies/submit-comment-merger-enforcement-request-information>.

⁵² Press Release, Fed. Trade Comm'n, FTC and Justice Department Launch Listening Forums on Firsthand Effects of Mergers and Acquisitions (March 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-justice-department-launch-listening-forums-firsthand-effects-mergers-acquisitions>.

⁵³ Dep't of Justice & Dep't of Labor, Memorandum of Understanding Between the U.S. Department of Justice and U.S. Dep't of Labor (Mar. 10, 2022), <https://www.justice.gov/opa/press-release/file/1481811/download>. See also Press Release, Dep't of Justice, Dep't of Justice, Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), <https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers>.

⁵⁴ *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

⁵⁵ Brief for the United States as Amicus Curiae Supporting Respondents, *NCAA v. Alston*, 141 S. Ct. 2141, 210 L. Ed. 2d 314 (2021), <https://www.justice.gov/atr/case-document/file/1376116/download>.

⁵⁶ Statement of Interest of the United States, *In Re: Railway Industry Employee No-Poach Antitrust Litigation*, 395 F. Supp. 3d 464 (W.D. Pa. 2019) (No. 2:18-mc-00798-JFC), <https://www.justice.gov/atr/case-document/file/1131056/download>; Statement of Interest of the United States, *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758 (M.D.N.C. 2019), <https://www.justice.gov/atr/case-document/file/1141756/download>; Corrected Statement of Interest of the United States, *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019), <https://www.justice.gov/atr/case-document/file/1141726/download>; Corrected Statement of Interest of the United States, *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019),

6. Legal and Policy Issues

31. The Agencies have gained substantial experience bringing antitrust cases that affect labor markets and continue to develop new insights in this important area. There remain, however, some misconceptions about labor-side antitrust enforcement, and areas of the law where conceptual and empirical work still needs to be done.

32. Some argue that antitrust law enforcement need not concern itself with labor markets because successful challenges to illegal behavior in relevant markets for products or services sold to consumers will nearly always cure labor-market harms as well.⁵⁷ For example, it may be thought—erroneously—that if a merger is determined to be unlikely to harm consumers, then employees necessarily are also unlikely to be harmed.⁵⁸

33. But each relevant market must be analyzed based on its particular facts. If the market for the product or service is highly competitive but the associated labor market is highly concentrated, the merger may harm workers even if it does not harm consumers. For example, a hypothetical merger that reduces the number of firms in the product market from one hundred to ninety-nine, but reduces the number of firms in the labor market from two to one, may have such differing effects.

34. In some cases, often involving personal services, markets for the service provided and labor may be roughly coextensive geographically. For example, when two hospitals merge, the markets for particular health care services and labor might overlap as the workers must be located near the hospital’s customers. If only three hospitals exist in a town, and two merge, both the markets for services and labor may be affected. But the impact on each could be different. Doctors and nurses who receive wages from their employer may be affected differently from consumers. Workers’ willingness to commute may differ from their willingness to drive to obtain medical care, meaning that the impact of a hospital merger on workers does not necessarily align with the impact on consumers. Some labor markets are also limited in scope by state occupational licensing laws, which may affect worker mobility and entry into certain fields.

35. A relevant market analysis for labor would typically examine the substitutability of various types of labor and the geographic area where employees might find employment. As in the case of markets for products or services offered to a consumer, a hypothetical monopolist (or, actually, monopsonist) test may be useful to define relevant labor markets. The Agencies recognize that anticompetitive conduct or mergers affecting labor markets may particularly affect less mobile workers who are unable to take jobs matching their skill set in other geographic areas, including certain vulnerable populations and workers subject to state licensing requirements. The Agencies are currently seeking comments on how to

<https://www.justice.gov/atr/case-document/file/1141721/download>; Corrected Statement of Interest of the United States, *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019), <https://www.justice.gov/atr/case-document/file/1141731/download>. Brief of Amicus United States of America in Support of Neither Party, *Aya Healthcare Serv., Inc. v. AMN Healthcare, Inc. et al.*, 9 F.4th 1102 (9th Cir. 2021), <https://www.justice.gov/atr/case-document/file/1338731/download>; Statement of Interest of the United States, *Beck v. Pickert Medical Grp.*, No. CV21-02092, Nev. Second Judicial District Court (Feb. 25, 2022), <https://www.justice.gov/atr/case-document/file/1477091/download>; Statement of Interest of the United States, *In re Outpatient Med. Ctr. Employee Antitrust Litig.*, No. 21-cv-00305 (N.D. Ill., Dec. 9, 2021), <https://www.justice.gov/atr/case-document/file/1456106/download>.

⁵⁷ Richard Epstein, *The Application of Antitrust Law to Labor Markets — Then and Now*, 15 NYU J. LAW & LIBERTY 327, 382 (2022).

⁵⁸ *Id.*

update their merger guidelines in order to best address particular issues that characterize markets for labor, among other topics.⁵⁹

36. Another misconception is that if promoting competition pursuant to antitrust law protects workers, labor costs will necessarily increase, and those labor costs will result in higher prices, necessarily hurting consumers. However, in the classical model of monopsony, firms that reduce their labor costs by paying workers below the market wage can do so only by employing fewer workers. That will normally drive down output. Thus, promoting competition for workers should normally result in higher, not lower, output, benefitting consumers.

37. Much of the anticompetitive labor market behavior that has been detected so far has been naked horizontal collusion, where the *per se* rule applies. The Agencies and private plaintiffs can prevail by showing that employers have agreed to fix wages, to refrain from hiring away one another's workers, or to limit the number of hires.

38. Other cases are more complex, but tools developed for product or service market cases can be adjusted or appended for use in labor market cases. Determining market power—which is a general requirement in vertical joint conduct and unilateral conduct cases—involves the same approaches as in product market cases. Although market shares or concentration measures are generally recognized as being less than ideal measures of market power, they may be used as estimates or initial screens. Market power can be estimated in labor markets by using the wage bill, which is akin to using revenue shares.⁶⁰ The Herfindahl-Hirschman Index can also be used for labor markets in the same way that it is used for markets for products or services offered to consumers, calculated based on share of workers or wages paid as opposed to share of purchases or revenue.⁶¹ Other techniques drawn from sell-side analysis are also available.⁶²

7. Conclusion

39. The Agencies are committed to using the antitrust laws to the fullest extent to address anticompetitive harm affecting labor markets. They will continue to assess and develop approaches on how best to analyze competitive effects in labor markets. The Agencies look forward to sharing lessons learned from this ongoing work.

⁵⁹ Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2020), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

⁶⁰ David Berger et al., *Labor Market Power*, 4 AM. ECON. REV. 1147 (2022) <https://www.aeaweb.org/articles?id=10.1257/aer.20191521>.

⁶¹ See Azar, *supra* note 15 (suggesting that labor monopsony power can appear at lower HHIs than monopoly).

⁶² For example, the Agencies may use the downward pricing pressure approach (similar to upward pricing pressure for sell-side markets), and merger simulations to evaluate the impact of mergers on labor markets. See Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018).