Federal Trade Commission Hearings on
Competition and Consumer Protection in the 21st Century

Public Comments of 18 State Attorneys General on Labor Issues in Antitrust

July 15, 2019

We, the undersigned Attorneys General, submit these Comments in response to the Federal Trade Commission's (FTC) request for public comments in connection with the FTC's public hearings on Competition and Consumer Protection in the 21st Century. In these Comments, we offer our perspective on the growing consideration of labor issues in antitrust law, and the Attorneys General's specific interest in, and ability to address, these issues. These Comments address some of the recent activity in the antitrust and labor area, including some of the discussions during the FTC's recent hearings, and propose ways in which enforcers can focus on this expanding area of antitrust enforcement.

I. Introduction

We, as State Attorneys General, have a strong interest in the competitiveness of our markets, including labor markets. We care about workers as our residents and consumers, and we want to ensure that companies and organizations compete fairly for the labor of workers through wages and other benefits. We are interested in ensuring that our economies prosper in an environment free of anticompetitive restraints. For example, some Attorneys General have an interest in ensuring that public revenue, such as tax revenue, in their jurisdictions is the product of competitive markets and not depressed as a result of anticompetitive conduct.

Labor issues have long had a place in antitrust enforcement. It may seem like a new issue today, but labor has been considered in antitrust since the passage of the Clayton Act.[1] The nature of labor has certainly changed since then, particularly in the last few decades. But like in all areas of commerce, the antitrust laws have and will adapt to the new ways of doing business. We write these Comments in an attempt to continue that development and encourage appropriate antitrust enforcement action in this area.

At the outset, it is important to note that today is a time where workers have suffered a decline in relative income.[2] This is due to a host of factors, including globalization, technological change, changes in business organization, including increased use of subcontracting and outsourcing, and decreased unionization. Whether antitrust enforcement has played a role in the relative decline

[1] 15 U.S.C. § 17; Elinor R. Hoffmann, *Looking at Labor from Both Sides Now*, A.B.A. Antitrust 2019 Spring Meeting 1-3 (March 2019) (describing the early history of labor considerations in antitrust law).
[2] *Labor Share of Output Has Declined Since 1947*, BUR. OF LABOR STATISTICS (March 7, 2017), https://www.bls.gov/opub/ted/2017/labor-share-of-output-has-declined-since-1947.htm ("Before 1950 or so, most economists agreed that labor's share of national output was relatively constant. In the late 20th century, however-after many decades of relative stability—the labor share began to decline in the United States and many other economically advanced nations, falling to unprecedented lows in the early part of the 21st century.").

of wages is an open debate.[3] Nevertheless, this reduction in relative wages gives us an impetus to revisit how antitrust law should be applied in the labor context. Recent experience strongly suggests there is ample opportunity to make progress in this area, and recent cases and scholarship have brought labor issues to the forefront. Chairman Simons has stated that labor issues will be considered in every FTC merger review going forward.[4] We believe this increased focus in addition to merger retrospectives and additional contributions from the academic community will continue to sharpen our ability, as antitrust enforcers, to keep labor markets competitive for workers.

These Comments first provide some background on the analytical approach to labor issues in antitrust review. We then discuss the four main areas that have been the focus of antitrust-labor activity in recent years and give some significant examples of enforcement activity in those areas. We then conclude with some recommendations for ways in which State enforcers, both independently and in collaboration with federal enforcers, can include labor considerations in merger reviews and address issues developing in non-compete or no-poach agreements.

II. Background

Antitrust law has some idiosyncrasies when it comes to labor, in that labor unions are exempt from the reach of the antitrust laws. The Supreme Court recognized the importance of our national labor policy that encourages collective bargaining.[5] Unions and employers, however, cannot prescribe labor standards outside of "the bargaining unit."[6]

Apart from this carveout, the rationale for reviewing labor markets is the same as with all antitrust cases. Harm in labor markets produces the same three "evils" that animate antitrust inquiry: anticompetitive prices, lower quantities, and/or lower quality.[7] Competition in labor markets manifests itself through employers competing through salaries, obviously, but also through a myriad of "quality" benefits that employers can offer such as health insurance or child care that may be decreased or eliminated by anticompetitive conditions in the labor market. When there is anticompetitive behavior, anticompetitive effects are certain in the input market (labor) and also possible in the output markets that laborers generate for consumers. But to be

[3] Professor Iona Marinescu presented her research at the FTC's hearing on labor issues in October 2018. She concludes that employers have market power in numerous geographic markets. FTC Hearing 3: Oct. 16 Opening Address and Session 1 Economic Evidence of Labor Market Monopsony, FED. TRADE COMM'N. (Oct. 16, 2018) (video at 47:00-1:00:00), https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-3-oct-16-opening-address-session-1-economic-evidence-labor.

[4] *House Judiciary Hearing on Antitrust Enforcement Oversight*, (Jan. 2, 2019) (statement of FTC Chairman Simons) https://archive.org/details/CSPAN3_20190102_220500_House_Judiciary_Hearing_on_Antitrust_Enforcement_Oversight/start/2616.9/end/2640; Ben Remaly & Kaela Coote-Stemmermann, *FTC Considers Workers in Deal Reviews*, GLOB. COMPETITION REV. (October 4, 2018), https://globalcompetitionreview.com/article/usa/1175255/ftc-considers-workers-in-deal-reviews.

[5] United Mine Workers of Am. v. Pennington, 381 U.S. 657, 661 (1965) ("The antitrust laws do not bar the existence and operation of labor unions as such.").

[6] *Id*. at 668.

[7] *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 52 (1911).

clear, the antitrust laws are violated when conduct or a merger has anticompetitive effects only on input suppliers; it is not necessary to prove downstream harm to consumers.[8]

Antitrust law can be applied in labor markets using the same analytical approach used in evaluating consumer product markets.[9] This includes defining markets by asking whether a hypothetical monopolist could decrease wages by a small but significant amount for a type of worker in a geographic area.[10] One consideration in defining geographic labor markets is the commuting distances for a given occupation in a given area.[11] This consideration addresses whether other similar jobs in an area exert a competitive constraint on an employer. Workers are only willing to travel so far for a job, just like consumers are only willing to travel so far to buy products.

As labor and antitrust issues intersect more regularly, the methods for assessing whether conduct aimed at the labor market is anticompetitive continue to evolve. In some cases involving labor, it is very easy to understand that an employer's behavior unquestionably harms competition. For example, horizontal agreements between competing employers, including no-poach agreements, have been characterized as restraints of trade that have no purpose other than to restrain competition, and thus are *per se* illegal under antitrust law.[12] Anticompetitive agreements are not limited to higher-wage, white collar workers but are prevalent in the employment of low-wage workers. However, there is some dispute, including among government enforcers, as to the standards that should be used to analyze other types of no-poach agreements. As discussed in more detail below, there is debate as to whether certain agreements should be evaluated under a *per se* standard, the rule of reason, or an intermediate "quick look" standard. Other kinds of agreements, such as non-competes, are receiving more antitrust scrutiny and courts are still evaluating how to apply antitrust analysis to these types of restraints.

Furthermore, labor in antitrust analysis sometimes is viewed as a zero-sum game of harm to workers and benefits to consumers: paying workers less allows companies to keep prices low for consumers. However, that view is mistaken as a theoretical matter of economics, and in practice. Paying workers less can lead to fewer workers at the firm, resulting in lower output and therefore

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[8] *See* United States v. Anthem, Inc., 855 F.3d 345, 371 (D.C. Cir.) (2017) ("The dissenting opinion also founders on the mistaken belief that any exercise of increased bargaining power short of monopsony is procompetitive. But securing a product at a lower cost due to increased bargaining power is not a procompetitive efficiency when doing so 'simply transfers income from supplier to purchaser without any resource savings.'"); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007); C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 1742, 2087-92 (2018); *cf.* Fed. Trade Comm'n v. Staples, Inc., 190 F. Supp. 3d 100, 127 (D.D.C. 2016) (enjoining a merger based on harm to very large businesses in their purchasing of office supplies with no allegations of consumer harm. While not a supplier or monopsony case, the case illustrates that downstream consumers are not the only actors to consider).

[9] Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power,* 132 HARV. L. REV. 536, 574-77 (2018); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1, 17 (2018) ("The boundaries of labor markets are driven mainly by employee skills or training. Geographic markets are driven mainly by the location and mobility of current or prospective employees.").

[10] JONATHAN BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 31 (2019).

[11] *Id*. at 219 n.73; Naidu, Posner, & Weyl, *supra* note 9 at 539, 575.

[12] *See infra* Pt. III.e. for discussion of cases concerning nurses, Silicon Valley employees, and rail industry workers.

higher prices for consumers.[13] In other words, output is reduced below the competitive level because the firm is not hiring a competitive level of workers, which in turn harms consumers who may have to pay more for the product and potentially receive lower-quality products. As Attorneys General, with responsibility for antitrust enforcement at the local and regional level, we believe we should review labor market issues to understand the full picture of antitrust injuries, and not focus only on a merger's or a firm's likely short-term price effects.

III. Types of Antitrust Issues in Labor Markets

Recent antitrust activity involving labor has occurred in four major areas: a) horizontal agreements between employers who are competitors, b) no-poach agreements (as used in these Comments, this term generally refers to vertical agreements, particularly franchise agreements), c) non-compete agreements between employers and employees, and d) mergers impacting labor markets.

a. Horizontal Agreements Between Employers Not to Hire Employees

Agreements between employers to not hire each other's employees are horizontal agreements between competitors that reduce competition for labor.[14] These types of agreements may be called "naked no-poach" or "no-hire" agreements. These types of agreements are *per se* illegal under antitrust law and enforcement in these cases is relatively straightforward.[15] Attorneys General and federal enforcers have enjoined the use of these types of agreements in the healthcare and technology industries.[16]

b. Non-Horizontal "No-poach" Agreements

"No-poach" agreements also can span across different levels of an organization. For example, a no-poach agreement may be executed between a franchisor and a franchisee, whereby the

[13] Naidu, Posner, & Weyl, *supra* note 9 at 559 (2018) ("[I]f firms employ fewer workers, they will produce less output, resulting in higher prices. While the firm lowers wages to workers, the cost to the firm of hiring workers rises as the firm now considers the fact that, when it hires an additional worker, it also will pay the rest of its workers more. It is this full marginal cost of an additional worker and not merely the wages that the firm now accounts for and passes on to consumers as higher, not lower, prices . . . [this] is merely the flipside of a well-understood feature of monopolistic control of product markets . . . .").
[14] Complaint at 3, United States v. Knorr-Bremse AG, No. 1:18-cv-00747 (D.D.C. April 3, 2018); DEP'T OF JUSTICE & FED. TRADE COMM'N, GUIDANCE FOR H.R. PROFESSIONALS 2, 3 (2016) ("It is unlawful for competitors to expressly or implicitly agree not to compete with one another, even if they are motivated by a desire to reduce costs. . . . Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects.").
[15] DEP'T OF JUSTICE & FED. TRADE COMM'N, GUIDANCE FOR H.R. PROFESSIONALS 3 (2016).
[16] *E.g.*, *infra* Part III.e. on Silicon Valley cases; United States v. Ariz. Hosp. & Healthcare Ass'n, No. CV07-1030-PHX (D. Ariz. Sept. 12, 2007), https://www.justice.gov/atr/case-document/complaint-28.

franchisee agrees not to hire employees of other franchisees.[17] This type of agreement operates at the employer level and does not involve the employees' consent. State enforcers have generally viewed these agreements as subject to *per se* review, or alternatively, argue they should be analyzed using a "quick look" rule of reason standard. Similarly, no-poach agreements orchestrated by a franchisor through its franchise agreements with franchisees could be considered a hub and spoke conspiracy under antitrust law.[18]

The pervasiveness of these type of agreements in the franchise context has been realized only recently,[19] leading to a series of enforcement actions by States and coalitions of Attorneys General.[20] In March 2019, a coalition of fourteen Attorneys General entered into a multistate settlement with four national fast food franchisors to stop using "no-poach" agreements.[21] The agreements, with Dunkin', Arby's, Five Guys, and Little Caesars, settled an investigation announced by the states in July 2018 over concerns that no-poach agreements harmed low-wage workers by limiting their ability to secure higher-paying jobs. These settlements were followed shortly thereafter by a similar settlement with Panera, LLC. Under the terms of the agreement, the franchisors agreed to stop including no-poach provisions in any of their franchise agreements and to stop enforcing any no-poach provisions already in place. The franchisors also agreed to amend existing franchise agreements to remove no-poach provisions and to ask their franchisees to post notices informing employees of the settlement. The franchisors agreed to notify the Attorneys General if one of their franchisees attempted to restrict any employee from moving to another location under an existing no-poach provision.

The Washington State Attorney General also filed a lawsuit in state court alleging Jersey Mike's (a sandwich shop chain) no-poach provisions are *per se* violations of Washington state antitrust law or, in the alternative, that the agreements fail under a "quick look" rule of reason analysis.[22] The Washington State Attorney General reiterated the appropriateness of the *per se* standard of review in an amicus brief filed in a class action lawsuit in federal court in Washington.[23] The Washington Attorney General's filing was in response to a Statement of Interest filed by DOJ in that case,[24] in which DOJ argued that franchisee-franchisor no-poach agreements were part of a

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[17] Alan B. Kruger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 4 (Nat'l Bureau Econ. Research, Working Paper No. 24831, 2018) (including several examples of contract language used between franchisors and franchisees that restrict the employment mobility of employees).
[18] Comment to the Fed. Trade Comm'n, Justice Catalyst, Towards Justice, & Eric Posner (Dec. 14, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/12/ftc-2018-0088-d-0016-163103.pdf.
[19] *Id*. ("We find that 58 percent of major franchise chains include 'noncompetitive clauses' in their franchise contract that restrict the recruitment and hiring of workers currently employed (and in some cases extending for a period after employment) by other units affiliated with the franchisor.").
[20] *See e.g.*, Rach Abrams, *7 Fast Food Chains to End 'No Poach' Deals the Lock Down Low-Wage Workers*, N.Y. TIMES (July 13, 2018), https://www nytimes.com/2018/07/12/business/fast-food-wages-no-poach-deal.html.
[21] Press Release, Massachusetts Attorney General Maura Healey, Four Fast Food Chains to End Use of No-Poach Agreements (March 12, 2019), https://www.mass.gov/news/four-fast-food-chains-to-end-use-of-no-poach-agreements.
[22] Complaint at 9, 14 Washington v. Jersey Mike's Franchise Sys. Inc., No. 12-2-25822-7 SEA (King. Cty. Super. Ct. 2018).
[23] Motion at 4, Stigar v. Dough, Inc., No. 2:18-cv-000244 (E.D. Wash. March 1, 2019).
[24] Statement of Interest of the United States, Stigar v. Dough, Inc., No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 7, 2019)

vertical relationship, and therefore likely should be reviewed under the full rule of reason standard.[25]

The Jersey Mike's case highlights that state Attorneys General have independent authority to address this conduct using their state laws, including state antitrust and consumer protection laws, as well as labor law and federal antitrust law. When it comes to labor, we expect that state Attorneys General may increasingly turn to enforcing and advancing an interpretation of their own state antitrust laws, as opposed to federal law, in response to conditions in their own jurisdictions.

c. Non-Compete Agreements Between Employers and Employees

Non-compete agreements are undergoing new scrutiny. A non-compete agreement between an employer and an employee restricts an employee's ability to work for a competitor after leaving their current employer. These types of agreements have so far rarely involved antitrust litigation, but they do have real world economic impact and have come under increased scrutiny as an unfair restraint on trade.

In most states, non-compete agreements are not prohibited, and are enforceable as long as they protect a legitimate business interest, such as trade secrets, and they are reasonably limited in time and geographic scope. Almost 20% of American workers are bound by non-competes; 12% of these workers are in low-skill, low-wage jobs that do not involve trade secrets.[26] A recent article discussed the growing use of non-compete agreements for students or entry-level workers in internships.[27] By limiting worker mobility, especially that of low-wage workers, non-competes restrict workers' earnings opportunities and the economic security of their families. Non-competes also harm competition by depriving businesses, who were not a party to the non-compete agreements, the opportunity to hire available, qualified workers. Some states, such as California and Montana, refuse to enforce them. And several organizations, including the Open Markets Institute and the AFL-CIO, recently filed a petition with the FTC seeking to outright ban employment non-compete agreements on the ground that they are unfair trade practices.[28]

Certain states have or are considering legislation to ban non-competes overall or in certain situations. For example, in 2016, Illinois enacted the Illinois Freedom to Work Act, which prohibits the use of non-compete agreements for employees who earn $13 an hour or less.[29] In 2018, Massachusetts enacted legislation that regulates non-competes, limits their enforceability,

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[25] *Id*. at 11-13.

[26] Evan Starr, J.J. Prescott, & Norman Bishara, *Noncompetes in the U.S. Labor Force* (U. Mich. L. & Econ. Research Paper No. 18-013, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.

[27] Harriet Torry, *Interns' Job Prospects Constrained by Noncompete Agreements*, WALL ST. J. (June 29, 2019), https://www.wsj.com/articles/interns-job-prospects-constrained-by-noncompete-agreements-11561800600.

[28] Open Markets Inst. et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses (Fed. Trade Comm'n, 2019), https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf.

[29] Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90, http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3737&ChapterID=68.

and codifies express requirements that non-compete agreements must meet to be enforceable.[30] On April 26, 2019, the Washington State Legislature passed the Non-Compete Act which will become effective on January 1, 2020, and will ban non-compete agreements for workers in the state with the exception of employees making more than $100,000 per year.[31] The Maryland General Assembly also enacted legislation making non-compete agreements in employment contracts for employees making less than $15 per hour or $31,200 annually void as against the state's public policy.[32] This law takes effect October 1, 2019 and provides for limited exceptions for agreements regarding a company's client related information. In February 2019, the New Hampshire Senate approved a senate bill, similar to the Illinois Freedom to Work Act, that, if enacted, would prohibit employers from requiring low-wage workers to enter into non-compete agreements, and make such agreements void and unenforceable.[33] Also in 2019, the Vermont Legislature introduced Bill H.1, which seeks to prohibit all employment non-compete agreements.[34] The New York Attorney General has proposed legislation that would prohibit non-competes for workers earning below $75,000 per year, among other things.[35]

This spate of state activity shows states are experimenting with limiting non-competes, and that there will be much to learn from these disparate approaches. The non-compete bans or limitations do not appear to be impacting competition or innovation in the states that are engaging in this experiment. For instance, California has long prohibited non-competes and is still recognized as generating innovative companies and industries.

The issue has caught attention at the federal legislative level as well. Several senators recently sent a letter to the FTC citing bipartisan concern over the use of non-competes and the "serious anti-competitive harms" workers suffer as a result of employment non-compete agreements.[36] Several senators have proposed bills to restrict non-competes. For example, the "Workforce Mobility Act of 2018", proposed by Connecticut Senator Chris Murphy, would prohibit employment non-compete agreements for most employees.[37] Florida Senator Marco Rubio's proposed legislation, the "Freedom to Compete Act", would ban the use of noncompete agreements for certain low-wage workers.[38]

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[30] Massachusetts Noncompetition Agreement Act, Mass. Gen. Laws ch. 228, § 24L (2018)https://www.mass.gov/info-details/massachusetts-law-about-noncompetition-agreements#massachusetts-laws-.

[31] H.R. 1450, 66th Leg., Reg. Sess. (Wash. 2019) http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/House/1450-S.SL.pdf.

[32] H.B. 0038 (Md. 2019), http://mgaleg maryland.gov/2019RS/bills/hb/hb0038T.pdf.

[33] New Hampshire Senate Bill 197, https://legiscan.com/NH/text/SB197/id/2031105. In 2016, New Hampshire also enacted legislation prohibiting contract terms that restrict the right of physicians to practice medicine in any geographic area for any period of time after the termination of a partnership, employment, or professional relationship contract. New Hampshire Rev. Stat. Ann. § 329:31-a.

[34] Vermont Bill H.1, H.R. 1, 2019 Leg. (Vt. 2019), https://legislature.vermont.gov/bill/status/2020/H.1.

[35] New York Assembly Bill A07864, https://nyassembly.gov/leg/?bn=A07864&term=2017.

[36] Letter from Sen. Richard Blumenthal et al., to Joseph Simons, Chairman, Fed. Trade Comm'n (Mar. 20, 2019), https://www.blumenthal.senate.gov/imo/media/doc/Sen%20Blumenthal%20et%20al%20re%20non%20competes_vF.pdf.

[37] S. 2782, Workforce Mobility Act of 2018, 115th Cong., 2d Sess. (2018), https://www.congress.gov/bill/115th-congress/senate-bill/2782/text.

[38] S. 124, Freedom to Compete Act,116th Cong., 1st Sess. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/124/text.

State Attorneys General, meanwhile, have been increasingly active in policing non-competes. The first wave began in 2016 when the New York and Illinois Attorneys General reached settlements with Jimmy John's Gourmet Sandwiches to stop using non-competes. Jimmy John's had been including language in its contracts with workers that precluded a worker for two years from taking a job at another establishment within two miles that made 10% of its revenue from sandwiches.[39] Two years later, the New York and Illinois Attorneys General reached a settlement with the office sharing company WeWork to stop imposing non-compete clauses on nearly all of its employees.[40]

A subset of these agreements are non-solicitation agreements, whereby the employer and employee agree that if the employee leaves the company, she will not solicit other employees from the old company to join the new company. We believe these types of agreements deserve antitrust scrutiny, especially when an employer tries to use the existence of such an agreement to similar ends as a non-compete, such as seeking to enjoin an employee from taking a position with a competitor.

d. Mergers

Mergers can harm not only buyers of the merged firms' products, but also sellers that provide inputs to the merging firms. In the labor context, a "seller" includes current and potential employees of the merging parties.[41] Just as there is concern over monopoly and monopolization, there is equal concern for monopsony or monopsonization, which means only one or very few buyers of a good or service instead of sellers, as in monopoly. Monopsony is harmful for the same reason monopoly is understood to be harmful: it creates dead weight loss and harms the competitive process. A monopsonist employer can push wages below their competitive level, causing sellers to exit the market, quantity of jobs to decrease, and worker satisfaction to decrease. This can indirectly cause consumer prices to increase, quantities of output to decrease, and product quality to decrease.

State Attorneys General investigate and litigate anticompetitive mergers, independently and in collaboration with federal enforcers. Frequently, merger markets and anticompetitive effects on competition are localized. We believe state enforcers can play a particularly important role in identifying situations in merger review where two companies may not be competing in downstream product markets but nevertheless compete for employees in local markets.

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[39] Press Release, New York Attorney General, A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements In Hiring Packets (June 22, 2016), https://ag ny.gov/press-release/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete-agreements; Press Release, Illinois Attorney General, A.G. Madigan Announces Settlement With Jimmy John's For Imposing Unlawful Non-Compete Agreements (December 7, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207 html.

[40] Eliot Brown, *WeWork Reaches Settlement on Noncompete Pacts*, WALL ST. J. (Sept. 18, 2018), https://www.wsj.com/articles/wework-reaches-settlement-on-noncompete-pacts-1537304008.

[41] C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 1742 (2018).

e. Examples of Recent Activity

Over the last ten years, several antitrust cases have directly confronted labor issues. The cases have ranged from low-wage fast food workers to high-earning doctors and Silicon Valley employees. The range of cases highlights that competitive harms are not limited to any category of worker, and that even high prestige, in demand workers can suffer anticompetitive harm. Below are some of the recent examples of antitrust activity in labor markets.

- **"Wabtec" Merger**

  While investigating a merger, the DOJ uncovered an agreement between two rail road equipment suppliers to not compete for each other's employees. The agreements spanned several years.[42] The DOJ filed a complaint against the companies in 2018 and subsequently settled the matter.[43] The companies agreed to not use such agreements in the future.

- **Silicon Valley Non-Compete Investigations and Litigation**

  In 2010, the DOJ began a series of cases concerning the hiring practices of Silicon Valley tech companies.[44] In short, the companies agreed not to solicit each other's employees, and the agreements emanated from, and were enforced by, some of the highest ranking people in the world's most valuable companies, including Steve Jobs (Apple), George Lucas (Pixar), and Meg Whitman (Ebay).

  The California Attorney General's Office subsequently sued eBay over its anticompetitive agreement with Intuit. The agreement between the companies prevented each other from cold calling each other's employees. The case settled in 2014. The settlement required that eBay not enter into any further anti-competitive agreements for workers and pay $2.375 million to employees and prospective employees. As part of the *cy pres* portion of the settlement, the California Attorney General funded a documentary on antitrust and labor titled "When Rules Don't Apply."[45]

- **Duke/UNC**

  In 2018, a private lawsuit was filed against Duke University over its agreement with the University of North Carolina to not hire away each other's medical faculty. Both defendants have settled the claims, and Duke has recently agreed to pay over $50 million to affected workers.[46]

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[42] United States v. Knorr-Bremse AG, No. 1:18-cv-00747 (D.D.C. 2018).

[43] Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (April 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[44] Press Release, Office of Pub. Affairs, 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.

[45] When Rules Don't Apply: An Education Campaign to Protect Workers' Rights (2019), https://www.whenrulesdontapply.com/.

[46] Brent Kendall, *Duke University Moves to Settle No-Poach Case for $54.5 Million*, WALL ST. J. (May 21, 2019), https://www.wsj.com/articles/duke-university-agrees-to-54-5-million-settlement-in-no-poach-case-11558392798.

- **Franchisees' No-poach Agreements**

In 2018, the Washington State Attorney General's Office began investigating no-poach clauses in franchise contracts.[47] Since opening the investigation, over 60 franchise chains have reached settlements and have removed no-poach clauses from their franchise contracts across the country.[48] Washington State has also filed a lawsuit in state court alleging Jersey Mike's no-poach provisions are *per se* violations of antitrust law.[49]

- **Anthem/Cigna Merger**

In 2016, the DOJ and twelve states challenged the merger of Anthem and Cigna. The plaintiffs alleged a monopsony claim in labor markets due to the proposed transaction.[50] Specifically, the Complaint alleged that some doctors and hospitals would face lower reimbursement rates as a result of the transaction. The merging parties did not show that the new entity would be unable to use its market power to depress reimbursement rates below competitive levels, but instead relied on their contention that savings from those lower rates would be passed onto consumers.[51]

IV. Recommendations

In light of the discussion above, the undersigned Attorneys General make the following recommendations to further emphasize labor considerations in our work. As a preliminary matter, we note that this is certainly an area where more economic study and research is needed. Additional study on the areas discussed above, and new theories and issues that arise, will be valuable in helping all the stakeholders improve antitrust review and enforcement. We support additional work in this area and expect that it will inform additional recommendations in the future. We also note that the state Attorneys General have a long history of collaborating with the FTC in merger reviews and look forward to continuing that collaboration. We believe that these recommendations will allow us to strengthen state and joint state-federal enforcement relating to labor issues.

The following are recommendations for avenues in which the Attorneys General, independently and in collaboration with federal enforcers, can focus more on labor issues that arise in today's economies.

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[47] The investigation was spurred by a New York Times article. Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-joint Clause Offers a Clue*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring html.

[48] Press Release, Wash. Office of Att'y Gen., AG Ferguson's Initiative to End No-Poach Clauses Nationwide Secures End to Provisions at 50 Corporate Chains (Jan. 14, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-secures-end-provisions (since this press release, additional companies have settled, bringing the total to over 60 companies).

[49] Complaint at 9, Washington v. Jersey Mike's Franchise Sys. Inc., No. 12-2-25822-7 SEA (King. Cty. Super. Ct. 2018).

[50] Complaint at 24-28, United States v. Anthem, Inc., No. 1:16-cv-01493 (D.D.C. July 21, 2016).

[51] United States v. Anthem, Inc., 855 F.3d at 262, 366-67 (D.C. Cir.) (2017).

a. Incorporating Labor Concerns into Merger Review

Chairman Simons stated that the FTC would include labor considerations in all of its merger reviews.[52] The State Attorneys General who conduct merger reviews can work with the FTC to develop ways to identify relevant considerations. We suggest, for example, enforcers should look whether the merger involves companies that 1) have specialized labor needs and/or 2) are within the same geographic area with a small labor force. Specialized laborers involve antitrust consideration because those laborers have less willingness and ability to switch to other types of work.[53] If it seems that there could be a labor market issue, enforcers should consider gathering information from company human resources departments more frequently in merger reviews. For example, examining "diversion ratios" and the hiring history of the merging companies could be useful (*i.e.* how often the companies are hiring each other's employees and whether they recruit from the same places). Interviewing human resources managers from the merging parties and from competitors in the broader hiring market could be useful as well to understanding labor market considerations.

In a broader sense, we suggest that it may be time to re-examine the assumption that layoffs are an efficiency in merger reviews. That has been the traditional view. However, layoffs are only an efficiency when the merger lessens the need for work but does not result in lower total production. Bare cost-cutting is neither an antitrust benefit nor an efficiency in the merger analysis.[54] After all, only if the downstream market is competitive would savings from employee layoffs be likely to get passed through to consumers.[55] Additionally, competition in labor markets, like many markets, manifests itself in different ways simultaneously. In labor markets, employers compete for laborers through more than just salaries, but also through benefits such as health insurance benefits, paid time off, flexibility in work schedules, or on-site amenities such as child care, gyms, and cafeterias, for example. These measures of "quality" are difficult to capture in empirical studies, but they are nevertheless a key way that employers compete for workers.

As enforcement agencies become more familiar with labor markets in antitrust review, it may be worthwhile to consider updating the Horizontal Merger Guidelines with more detail on how to weigh labor market considerations. At this time, there appear to be differences of opinion on how to understand the impact of buyer power that reduces input costs.[56] When that input is

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[52] *House Judiciary Hearing on Antitrust Enforcement Oversight*, (Jan. 2, 2019) (statement of FTC Chairman Simons) https://archive.org/details/CSPAN3_20190102_220500_House_Judiciary_Hearing_on_Antitrust_Enforcement_Oversight/start/2616.9/end/2640; Ben Remaly & Kaela Coote-Stemmermann, *FTC Considers Workers in Deal Reviews*, GLOB. COMPETITION REV. (October 4, 2018), https://globalcompetitionreview.com/article/usa/1175255/ftc-considers-workers-in-deal-reviews.

[53] *See* JONATHAN BAKER, *supra* note 10 at 219-20 n.73 (2019); Naidu, Posner, & Weyl, *supra* note 9 at 575.

[54] United States v. Anthem, Inc., 855 F.3d 345, 371 (D.C. Cir.) (2017).

[55] Comment to the Fed. Trade Comm'n, Justice Catalyst, Towards Justice, & Eric Posner (Dec. 14, 2018).

[56] *See* Jonathan Sallet, *Buyer Power in Recent Merger Reviews*, 32 ANTITRUST 1, 82 (2017) (comparing the FTC's position in *Express Scripts/Medco* with the DOJ and States position in *Anthem/Cigna*).

labor, we recommend that the federal agencies remain sensitive to the possibility that a merger may harm workers, and not yield cognizable efficiency savings from labor. [57]

We look forward to working with the FTC on developing protocols for analyzing labor concerns in merger reviews.

b. Non-Compete, Non-Solicitation, and No-Poach Agreements

Rapidly changing labor markets, particularly those involving low-wage workers, and the development of antitrust enforcement actions over the last decade shape our recommendations here.

As discussed above, use of these agreements for low-wage workers is far more widespread than previously recognized. Beyond agreements that restrain employees, many lower-wage workers participate in the "gig" economy and are dependent on an app or platform that connects different groups of users of the platform. Platforms grow through network effects, where additional users on a platform make the platform more valuable and attractive. In those situations, non-compete agreements imposed by a platform can be especially harmful because a non-compete agreement prevents laborers from switching to an upstart platform, which will have difficultly achieving the necessary scale to meaningfully enter the market. Similarly, the antitrust treatment of multi-sided platforms is in flux following the Supreme Court's *American Express* decision in 2018,[58] and therefore may lead to disputes regarding the balancing of harms to labor markets and benefits to consumers.

When non-compete agreements are entrenching monopoly power, enforcers should treat those agreements as potential violations of the Sherman Act Section 2.[59] For example, there is a question of whether non-competes prevent market entry because upstart firms are unable to hire workers away from an incumbent. If this situation exists, both workers and consumers may be harmed because new firms provide product market and labor market competition.

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[57] *But cf.* Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc., FTC File No. 111-0210, at 8 (Apr. 2, 2012) (accepting an increase in buyer power because it was "likely that a large portion of any cost savings" would be passed downstream).

[58] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

[59] *See* Alan Kreuger & Eric Posner, *A Proposal for Protecting Low-Income Worker From Monopsony and Collusion* 4-5 (The Hamilton Project 2018), http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf ("[T]here is a concern that in 'thin' labor markets for critical talent, an employer can use non-compete agreements to bind workers and discourage competitors from entering the market because they will face a scarcity of available labor."); Petition for Rulemaking by Open Markets Inst., et. al., *supra* note 28 ("Non-competes can also impair product market competition. In a highly concentrated market, monopolists and other powerful firms can use non-compete clauses to deprive rivals of essential works and thereby impede their ability to compete. Through this strategic use of non-competes, dominant firms can weaken and exclude rivals and maintain market power.").

The FTC should consider using its Section 5 enforcement authority to stop the use of non-compete, non-solicitation, and no-poach agreements in many situations.[60] At a minimum, we recommend that the FTC use its authority to ban intra-franchise no-poach agreements and non-compete agreements for low-wage workers. We understand that the FTC is studying such action right now. We further propose the FTC consider a ban on non-competes involving multi-sided platforms.

Our recommendation above recognizes that the debate regarding the appropriate standard of review for no-poach agreements is ongoing. We see some challenges in the position stated by DOJ that these agreements, when ancillary to the overall franchise agreement, should be evaluated under the rule of reason as the agreements could result in pro-consumer benefits. Some of the stated potential pro-competitive benefits, such as cost savings from depressed wages, should not offset labor harm as antitrust law does not recognize that cost cutting alone is a cognizable antitrust benefit.[61] As enforcers familiar with local markets, our enforcement efforts to date have not demonstrated that pro-competitive effects will equal or outweigh the anticompetitive effects of restraining labor markets. Generally, the lack of real potential benefits supports evaluating these restraints under *per se* or a "quick look" analysis.[62] We believe that increased judicial experience with these arrangements likely will lead to that outcome.

We thank the FTC for providing the opportunity to submit these Comments and contribute to the Commission's review of current and evolving antitrust issues. We look forward to continuing to collaborate with the FTC on antitrust/labor issues.

[60] Alan Kreuger & Eric Posner, *supra* note 36 at 12-13, 14; Petition for Rulemaking by Open Markets Inst., *supra* note 28.

[61] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1022 (10th Cir. 1998) ("The NCAA next advances the justification that the plan will cut costs. However, cost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises.").

[62] Am. Antitrust Inst., Letter to Delrahim (May 2, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf; Steve Salop, Comments at the A.B.A. 2019 Antitrust Spring Meeting, Beyond No-Poach: Mergers, Monopsony, and Labor Markets (March 29, 2019).

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