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Legal Sidebar

Antitrust Issues in Labor Markets

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The typical antitrust case involves sellers in a product market. For example, rival manufacturers might conspire to fix the price of memory chips. A tobacco giant may monopolize the cigarette industry. The merger of two large agriculture firms might threaten to significantly reduce competition in the markets for various seed products.

The potential harm in each case is similar. Cartels and monopolists raise prices by restricting output, while concentrated markets are often susceptible to coordinated conduct and unilateral price hikes. As a result, production that would have taken place in a competitive market does not occur—a "deadweight loss." Noncompetitive product markets also lead to wealth transfers from consumers to producers, which some commentators have cited as a contributor to economic inequality.

While most antitrust cases concern sellers in product markets, comparable problems arise in employment markets, where firms often exercise market power as *buyers* of labor. For example, rival tech companies might enter into no-poach arrangements that prevent them from recruiting each other's workers. Fast-food restaurants may require employees to sign non-compete agreements that bar the employees from working for a competitor during a defined period. A hospital merger could significantly reduce competition in the labor market for nurses. The results can include lower wages, decreased output, and greater inequality.

Many commentators are increasingly concerned about these issues. Several academics have recently called on antitrust enforcers to take a more aggressive posture toward anticompetitive conduct in labor markets. Policymakers have responded. The White House, the Department of Justice (DOJ), the Federal Trade Commission (FTC), and the Treasury Department have all expressed interest in the role that antitrust can play in combatting labor market power.

Regulators have some tools at their disposal. As a formal matter, the antitrust laws apply to all markets, for products and labor alike. Certain conduct—like naked wage fixing (see below)—is *per se* illegal under current law. In other cases, however, legislation could help plaintiffs grapple with doctrinal difficulties and practical barriers they might face in labor-side antitrust lawsuits.

This Sidebar provides an overview of the current state of antitrust law vis-à-vis labor markets and proposals for legislative reform.

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Restraints of Trade

Section 1 of the Sherman Antitrust Act prohibits firms from entering into anticompetitive contracts (unreasonable "restraint[s] of trade," to use the statutory language). Under Section 1, some types of contracts—like naked price-fixing and market-division agreements among rivals—are *per se* illegal because they almost always harm competition. Most agreements, however, are evaluated using the "rule of reason," which requires plaintiffs to demonstrate that a challenged restraint is in fact unreasonable and anticompetitive.

Section 1 applies to both product markets and labor markets. Just as naked price fixing in product markets constitutes a *per se* antitrust violation, naked wage fixing in labor markets is categorically unlawful. (In antitrust parlance, an agreement is considered "naked" if its sole purpose is to restrain competition. By contrast, agreements that are "ancillary" to some separate legitimate transaction are typically evaluated under the rule of reason.) The DOJ and FTC have also taken the position that naked no-poach agreements—in which rival employers vow not to solicit or hire each other's employees—are *per se* illegal. Some federal courts have agreed.

Other fact patterns raise trickier issues. Sometimes, competing employers consistently match each other's wages or refuse to hire each other's employees, but plaintiffs cannot establish that they have agreed to do so. In other cases, plaintiffs have challenged no-poach provisions in franchise agreements, which prevent franchisees from hiring the employees of other members of the same franchise. Finally, non-compete clauses have become a ubiquitous if controversial part of many employment contracts. Each issue—parallel conduct, franchise no-poach agreements, and non-competes—has attracted the attention of the antitrust commentariat.

Conspiracy Theories

Start with parallel conduct. Antitrust doctrine is clear that consistently matching a rival's prices or declining to sell in a competitor's territory is not illegal absent proof of an agreement. Courts have applied this rule in labor-side cases, rejecting some wage-fixing and no-poach claims on the grounds that the alleged conduct was consistent with "conscious parallelism" and did not justify an inference of conspiracy.

One rationale for the parallelism doctrine relies on the difficulty of crafting judicially manageable remedies for parallel pricing and wage setting. (Competitors naturally pay attention to each other's prices and wages, and courts are ill-equipped to determine the prices and wages that would prevail in a competitive market.) Some commentators, however, have contended that this argument has less force in lawsuits alleging reciprocal *no-poaching*. If rival employers consistently reject job applicants who work for one another, that pattern may suggest collusion that a court could enjoin. One scholar has argued that courts should treat such evidence as establishing a *prima facie* case of a Sherman Act violation. Defendants could then rebut that case by showing that other factors account for their failure to poach each other's workers. Whether courts will take up this suggestion remains to be seen.

Franchises and Formalism

Franchise no-poach agreements implicate other legal issues. Federal courts have employed different standards to evaluate challenges to such agreements, which prohibit franchisees from hiring employees from other members of the same franchise. Some courts have invoked what is known as the "single-entity doctrine" to conclude that certain franchisors and franchisees were not separate actors capable of conspiring with one another for purposes of the Sherman Act. Other decisions have split on the proper substantive standard for franchise no-poach clauses. While some courts have rejected the proposition that

such clauses are *per se* illegal, others have declined to rule out any standard at the pleading stage of litigation.

This split illustrates the persistence (and limitations) of formalism in certain elements of antitrust law. Franchise no-poach agreements do not fit neatly into some of the categories that structure Sherman Act doctrine. Take the distinction between horizontal and vertical restraints of trade. Traditionally, antitrust has treated horizontal agreements between competitors far more skeptically than vertical agreements between firms at different points in the same supply chain. The basic reasoning is that the former pose direct risks to competition, while the latter often create efficiencies.

The trouble is that many franchise no-poach agreements have both horizontal and vertical elements. While a contract between a franchisor and franchisee is vertical insofar as the firms operate at different levels of the market, clauses that prevent franchisees from poaching each other's workers restrict horizontal labor-market competition. Such clauses therefore elude easy formal classification as horizontal or vertical restraints.

Antitrust law's treatment of horizontal and vertical restraints is related to a separate distinction between interbrand competition and intrabrand competition. In product markets, agreements that inhibit competition among distributors or retailers of the same branded product (*intra*brand competition) receive more lenient antitrust scrutiny than agreements that restrict competition among brands (*inter*brand competition). (Restraints on intrabrand competition often enhance interbrand competition, which the Supreme Court has described as the "primary concern" of antitrust law.)

It is unclear which way this distinction cuts for franchise no-poach clauses. On the one hand, franchise agreements impose intrabrand restraints insofar as they bind firms that are members of the same franchise. On the other hand, the effects of franchise *no-poach clauses* are primarily felt in labor markets, where the interbrand/intrabrand dichotomy can be fuzzier than in product markets. For example, while geographically proximate McDonald's franchisees are engaged in intrabrand competition in the product market for hamburgers, they arguably qualify as different brands when they compete for employees. (At least one court has concluded that labor-market competition between franchisees represents a form of interbrand competition.)

This difficulty with shoehorning franchise no-poach agreements into traditional antitrust categories helps explain some of the divergence in the case law. It is an open question whether courts will continue to press such categories into service or instead directly analyze the competitive effects of franchise no-poach clauses in future litigation.

Non-Compete Clauses

Non-compete clauses—provisions that prohibit employees from working for a competitor during a defined period—are a third area of interest for antitrust regulators. Such clauses can serve the procompetitive goals of protecting a firm's trade secrets and incentivizing investments in human capital. The potential costs are threefold: incumbent employees cannot avail themselves of better job opportunities; rival employers cannot hire those workers; and consumers in the corresponding product markets may face lower output and higher prices.

Non-competes are governed by both state and federal law. The modern common law rule is that an employer defending a non-compete clause must identify some interest the clause is designed to protect (e.g., the protection of trade secrets or goodwill) and show that the clause is tailored to that interest. Some states have also enacted statutes limiting the enforceability of non-competes for certain types of employees.

The Sherman Act case law on non-competes is less developed. While plaintiffs have challenged non-competes as unlawful restraints of trade, those efforts have seldom been successful. Because non-

competes are vertical agreements between employers and employees, they receive rule-of-reason scrutiny—a standard that requires plaintiffs to prove that a defendant has market power and that a challenged restraint harms competition.

These requirements can pose difficult burdens. While non-competes may harm *specific employees*, several courts have held that these individualized injuries do not establish the type of damage to *competition* that is necessary for Section 1 liability. As a result, antitrust has played a limited role in policing non-compete agreements.

Some would change that. In March 2019, a number of labor and public interest organizations filed a petition for rulemaking urging the FTC to ban non-compete clauses. The White House has also expressed its support for regulation. In July 2021, President Biden issued an executive order encouraging the FTC to exercise its rulemaking authority to "curtail the unfair use" of non-competes. A recent FTC/DOJ workshop on labor-market competition suggests the agency is taking that request seriously.

Mergers

As discussed, Section 1 of the Sherman Act prohibits various forms of *coordinated* anticompetitive conduct. Antitrust law does not, however, prohibit firms from unilaterally charging (or offering) noncompetitive prices. Instead, it seeks to prevent mergers that would allow dominant firms to charge (or offer) such prices. Specifically, Section 7 of the Clayton Antitrust Act outlaws mergers and acquisitions that threaten "substantially" to lessen competition or "tend to create a monopoly."

The merger case law on labor markets is sparse. The DOJ and FTC have seldom challenged mergers based on their labor-market effects. Moreover, the agencies' Horizontal Merger Guidelines (HMGs) do not mention labor-market competition.

These absences have been a source of criticism. Several recent studies have found that many employment markets are uncompetitive. One concludes that 60 percent of U.S. labor markets—representing 20 percent of total employment—qualify as "highly concentrated" using a methodology that the HMGs embrace for product markets. Other work has focused on how search and matching frictions contribute to labor market power. This growing literature has spurred calls for the antitrust agencies to pay closer attention to labor-market effects in reviewing proposed mergers.

The regulators have responded. In September 2020, the FTC issued a staff submission to a state regulator in which it argued that a proposed hospital merger would reduce labor-market competition for registered nurses. The DOJ and FTC have also sought public comment regarding whether their merger guidelines should address transactions that diminish labor-market competition. Finally, the FTC's chair and the head of the DOJ's Antitrust Division have signaled an intent to bring more merger challenges based on labor-market harms.

These efforts raise an unsettled question: whether harms to competition in an input market are sufficient to render a merger unlawful absent proof of harm to downstream consumers. In one view that has been influential in shaping the doctrine, the welfare of consumers is the normative lodestar of the antitrust laws. That standard has unclear implications for challenges to mergers between competing buyers. Harms to input-market competition often trickle down to consumers, because firms that restrict their purchases of inputs also frequently reduce their output. However, these reductions in firm-specific output do not invariably affect total output or consumer prices. If a merged firm with buy-side market power sells in a competitive product market, for example, its restricted production will not affect overall output. (Other firms will pick up the slack.) In other cases, regulators may have difficulty proving that diminished input-market competition will translate into lower output. Merger challenges predicated on labor-market effects alone may therefore be difficult to square with narrow applications of the consumer-welfare standard.

However, there are reasons to doubt that rigid versions of the consumer-welfare standard accurately reflect the relevant doctrine. Some Sherman Act cases can be read for the proposition that buy-side harms are independently actionable, regardless of whether they raise downstream prices. The HMGs also suggest that the antitrust agencies focus on harms to sellers—not consumers—when they review mergers of competing buyers. Section 12 of the Guidelines explains that the regulators do not evaluate mergers between rival buyers "strictly, or even primarily" based on their downstream effects.

The pertinent point is that the DOJ and FTC are thinking about this issue. In their January 2022 request for comments, the agencies have asked for input on how the HMGs should treat a merger "that may generate [buyer] power, but does not substantially lessen competition in an output market."

Monopsonization

While the bulk of the recent interest in labor antitrust has focused on restraints of trade and mergers, some commentators have also broached the possibility of employing monopolization doctrine to promote labor-market competition. Under Section 2 of the Sherman Act, it is unlawful for firms to obtain or maintain monopoly power through anticompetitive conduct. This prohibition encompasses exclusionary conduct by dominant buyers as well as dominant sellers. (In the jargon, firms with significant sell-side market power are described as possessing *monopoly* power, while companies with significant buy-side market power are described as possessing *monopsony* power.)

Monopsony cases based exclusively on anticompetitive conduct in labor markets are rare. That may be in part due to litigation incentives. Because the law on product-market antitrust is much more developed than the law on labor-market antitrust, plaintiffs' lawyers may gravitate toward the greater predictability offered by product-market cases. Observers have also cited the small size of employee class actions based on labor-market harms and the confidentiality of wage information as additional factors that may explain the scarcity of labor-side Section 2 cases.

Regardless of the causes of this litigation gap, some commentators have argued that Congress should amend Section 2 specifically to address labor monopsony. The details of that proposal are discussed in the following section.

Options for Congress

While the DOJ, the FTC, and the courts will likely be the key players in any near-term efforts to overhaul labor antitrust, Congress may also wish to weigh in. Lawmakers have several options to address the doctrine governing restraints of trade, mergers, and monopsonization in labor markets.

Restraints of Trade

Restraints of trade have garnered the most legislative attention of the three issues discussed above. In the 117th Congress, the Workforce Mobility Act of 2021 (S. 483 and H.R. 1367) would prohibit non-competes, subject to exceptions for the sale of a business or the dissolution of a partnership. S. 2375, the Freedom to Compete Act, would adopt a narrower approach and ban non-competes for certain low-wage workers.

No-poach agreements have also been a target. In the 115th Congress, the End Employer Collusion Act (S. 2480 and H.R. 5632), would have banned agreements that restrict an employer's ability to recruit or hire another firm's employees. The bill would have included franchise no-poach clauses within this prohibition.

Mergers

The labor-market effects of mergers have received less congressional attention. Nevertheless, Congress has several options to address mergers that harm labor-market competition. In the 117th Congress, S. 225, the Competition and Antitrust Law Enforcement Reform Act, would amend the Clayton Act to clarify that mergers that threaten to create a monopsony are unlawful. While this clarification would reiterate rather than alter current law, it could emphasize for the courts that Congress is concerned with harms to buy-side competition.

More directly, Congress could pass legislation clarifying that the Clayton Act does not require regulators to prove that harms to labor-market competition will translate into higher consumer prices in order to block a proposed merger.

Finally, Congress could increase the antitrust agencies' budgets so that they have more resources to police potentially unlawful mergers. President Biden's 2023 budget would boost the FTC's funding by $139 million, while the DOJ's Antitrust Division would receive an increase of $88 million. S. 225 also includes significant increases in both agencies' budgets.

Monopsonization

As part of their broader advocacy for invigorating labor-market antitrust, two scholars have drafted proposed amendments to Section 2 of the Sherman Act that would specifically target labor monopsonization. The draft would address the two elements of a monopsonization claim: *monopsony power* and *exclusionary conduct*.

In monopolization cases, plaintiffs typically establish monopoly power by showing that the defendant occupies a large share of a properly defined antitrust market. The proposed amendments would help monopsonization plaintiffs with this task by presumptively defining labor markets on the basis of Standard Occupational Classification codes and certain commuting zones.

The draft amendments would also distinguish between firms with "significant" labor market power and "moderate" labor market power, while prescribing market-share thresholds that would presumptively place a defendant into those categories.

Finally, the proposal identifies various anticompetitive acts that would trigger liability for firms that (1) possess "significant" labor market power, or (2) possess "moderate" labor market power and pay uncompetitive wages. The prohibited acts include engaging in anticompetitive mergers, entering into unreasonable non-competes or no-poach agreements, misclassifying employees as independent contractors, and committing unfair labor practices under the National Labor Relations Act.

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