

**Written Testimony of
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**Hearing on
Antitrust and Economic Opportunity: Competition in Labor Markets**

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Chairman Cicilline, Ranking Member Sensenbrenner, my home-city Congresswoman Jayapal, and all distinguished Members of the Subcommittee, thank you for holding this hearing, and thank you for the opportunity to appear before you today to discuss important, yet historically under-looked, issues on competition in labor markets.

My name is Rahul Rao. I am an Assistant Attorney General in the Antitrust Division for the Washington State Office of the Attorney General. Within the Antitrust Division, I am part of a team responsible for our office's labor competition enforcement and litigation efforts, including our office's initiative to end the nationwide use of no-poach clauses in franchise agreements. This initiative has eliminated no-poach clauses—restrictive provisions on labor mobility and competition—from over 150 corporate chains, representing about 160,000 locations in the United States, and positively impacting *millions* of workers throughout the country. I have spoken on labor competition issues at a public workshop hosted by the U.S. Department of Justice's Antitrust Division, to the Antitrust Committee of the National Association of Attorneys General, and at a conference hosted by the American Bar Association. I would also like to take a moment to acknowledge that my office's work in this space is truly a team effort, and would not be possible without my fellow Assistant Attorneys General and incredible support staff.

As a leader in labor competition enforcement, the Washington Attorney General's Office is pleased to see this Subcommittee's bipartisan commitment to affirming the uncontroversial, but sometimes overlooked, truism that our nation's antitrust laws apply as equally to labor markets as they do to product markets. This principle is now seeing renewed vigor, in part because of new research and data coming from those in academia—including by labor economists—that give us a better understanding of labor market concentration and anticompetitive labor practices and effects. But more importantly, the enforcement community as a whole recognizes that we can do more. My office has been at the forefront of labor competition enforcement, and I come here today to tell you a bit about the things we have seen and the work we are doing.

Initiative to Eliminate No-Poach Clauses in Franchise Agreements

The matter that has brought the most attention to the Washington Attorney General’s labor competition efforts is our office’s initiative to end the use of no-poach clauses in franchise agreements nationwide.

The no-poach provisions we are investigating are covenants in lengthy franchise agreements—agreements between a franchisor and a legally distinct and independent franchisee—that restrict employee mobility among locations within the same franchise system. Typically, employees of the franchisee never see this provision and are not even aware that it exists.

No-poach provisions can come in different shapes and sizes. For example, some no-poach provisions plainly prohibit the hiring of another location’s employees, while others may prohibit the recruitment—for example, through solicitation or inducement—of another location’s employees. Similarly, some no-poach provisions only prevent the poaching of a franchisor’s employees. Some protect only company-owned locations. Some only restrict franchisees from hiring or recruiting other franchisee employees. And finally, some no-poach provisions are “all of the above.” Importantly, as these no-poach provisions exist in agreements between franchisor and franchisee—and not in the employment agreement between an employer and employee—they are often times invisible to those whose mobility is actually being restricted.

Notwithstanding their many forms, all no-poach provisions have the same effect: they artificially restrict competition for labor. By restricting franchise entities’ ability to hire or recruit new employees, no-poach provisions decrease competition for the labor of franchise employees. This decrease in competition for labor has the potential to lead to reduced opportunities and stagnant wages. It can also diminish competition for better benefits and working conditions.

The use of no-poach provisions in franchise agreements first came to our office’s attention from a September 2017 New York Times article titled “Why Aren’t Paychecks Growing? A Burger Joint Clause Offers a Clue.”¹ That article asked the question why wages were stagnating across the country’s economy, specifically looking at low-wage employees in fast food and quick serve restaurants. Underlying that New York Times article was research by leading labor economists—Alan Krueger and Orley Ashenfelter, both of Princeton University—suggesting that downward pressure from no-poach agreements may be partly responsible for the stagnating wages.²

Finding Professors Krueger and Ashenfelter’s conclusions compelling and concerning, our office took their research and viewed it through the lens of the antitrust laws. Despite the vertical nature

¹ Rachel Abrams, *Why Aren’t Paychecks Growing? A Burger Joint Clause Offers a Clue*, New York Times, September 27, 2017, at <https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html>.

² Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (September 28, 2017), Working Paper #614, Princeton University Industrial Relations Section, at <https://dataspace.princeton.edu/jspui/handle/88435/dsp014f16c547g>.

of a franchisor and its franchisees related to their product market, those same entities—entities that are independent corporations—were still horizontal competitors for workers in a labor market. Indeed, the no-poach provision itself—which only make sense if the two parties to the agreement are trying to employ the same worker—should be all that is necessary to evidence the direct horizontal nature of that competition. As a naked restraint of trade among horizontal competitors for labor, our office concluded that these no-poach provisions are per se illegal under the antitrust provisions of Washington State’s Consumer Protection Act.

With this research and legal analysis, we began to investigate franchise systems’ use of no-poach provisions in January 2018. Within seven months of launching our investigation, we secured legally binding agreements, in the form of an Assurance of Discontinuance (AOD), from seven fast food franchisors to immediately stop enforcing and eliminate no-poach clauses from their franchise agreements nationwide.³ The AOD also requires the franchisor to provide notice of the agreement nationwide to the entire franchise system. This notice ensures that all franchisees know that they are no longer subject to the restriction.

To be clear, we did not begin our initiative in the fast food industry because we thought antitrust law uniquely applied to no-poach provisions in this specific labor market. While our investigation initially focused on the fast food industry, where the majority of workers tend to make minimum wage and may be especially vulnerable to anticompetitive practices that artificially suppress their wages, we believe that all no-poach provisions in franchise agreements are per se violations of Washington’s antitrust laws, and its federal analogues.

Thus, we have or are investigating all franchise systems that have a significant presence in Washington State. To-date, we have investigated hundreds of franchise systems, and are still actively investigating a little over 100 companies. On a macro level, based on our investigation, we estimate that the majority franchise systems currently have or recently had a no-poach provision in their franchise agreement. For the minority of franchise systems that have never used a no-poach provision, we close the investigation with no further enforcement action. But for those systems who currently use or have recently used a no-poach provision, we begin negotiations to secure their compliance with our AOD terms. Through our negotiations, we have secured binding commitments from over 150 corporate chains to eliminate no-poach clauses from all franchise agreements nationwide. This number represents about 160,000 locations and frees competition for the labor of millions of workers across the United States.

We offer all franchisors the opportunity to amicably negotiate a resolution to our investigation. However, if a franchisor refuses to enter into a legally binding agreement securing a commitment to end their use of no-poach provisions, we will file an enforcement action. In October 2018, we filed one such suit against Jersey Mike’s Franchise System and all of its Washington franchisees in

³ See Press 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), at <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers>.

state court in Seattle. This was the first suit brought by a state attorney general against a company for using no-poach clauses. We filed our complaint on a per se theory of liability, and alleged liability under a quick-look analysis in the alternative. The court rejected Jersey Mike's attempt to dismiss our suit, leaving intact both our per se and quick look theories of liability. The parties eventually settled in August 2019—two months before trial—on terms substantively identical to the AOD offered to Jersey Mike's pre-litigation, as well as every other target as described earlier, plus a \$150,000 monetary component. No target since has tested our resolve to file suit.

Although starting in fast food, our initiative has expanded across several industries that use no-poach clauses in their franchise agreement, including: automotive services, child care, cleaning services, convenience stores, custom window treatment, electronic repair services, home healthcare services, home repair services, hotels, insurance adjustors, parcel services, tax preparation, and travel agencies.

As Attorney General Bob Ferguson has stated, our “goal is to end no-poach practices. Period.” We are confident we are nearing the point where we can say we have achieved our goal.

Non-compete Agreements Against Low Wage Employees

Building off our franchise no-poach initiative, we began receiving and investigating consumer complaints regarding non-compete clauses in employment agreements with low wage workers. As the Subcommittee is aware, non-compete agreements or clauses prevent employees from one business from leaving and working for or starting a competing business. This restriction deprives workers of the right to use their labor as they choose, and deprives workers the opportunity to seek employment that betters their wages or working conditions.

There is evidence suggesting that nearly 20 percent of labor force participants in the United States are bound by non-competes, and that as much as 12 percent of workers without a bachelor's degree and earning less than \$40,000 a year are restricted by a non-compete agreement.⁴ Low wage and low skill workers are far less likely to be in a position to negotiate terms of an employment agreement. Thus, they tend to be far more vulnerable to anticompetitive behavior in labor markets and improper use of overbroad non-compete agreements. Interestingly, this research suggests that non-compete agreements are as prevalent in states that permit enforcement of non-competes as in states that do not. This would suggest that for an employer, the simple existence of a non-compete agreement—even one unenforceable—has value in hindering competition for its workers.

Our office is currently investigating non-competes. In particular, we are looking at non-compete agreements with low wage or low skilled workers, because such restrictions protect no legitimate business interest of the employer. Its *only* purpose is to stifle competition for workers' labor. By

⁴ See Starr, Evan and Prescott, J.J. and Bishara, Norman D, *Noncompetes in the U.S. Labor Force* (Aug 30, 2019). U of Michigan Law & Econ Research Paper No. 18-013, at <https://ssrn.com/abstract=2625714>.

eliminating competitors for labor, an employer has reduced incentives to compete to retain its own employees; competition that would otherwise result in the employer providing market wages, better working conditions, or promotional opportunities. 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. In sum, by hindering competition on the merits for a worker's labor, non-compete agreements used in such contexts present an unfair method of competition in violation of antitrust law.

It is important to note that whether or not a non-compete is enforced is of no moment. Non-competes, by themselves, necessarily create a chilling effect in labor markets. When dealing with widely used non-competes against low wage or low skilled workers, we may never know how many employees chose not to re-enter the labor market out of fear of being sued. Similarly, we may never know how many employees turned down a job solicitation or offer because of a non-compete. Simply put, the chilling effect that non-competes have on labor competition may be unquantifiable, but quite pervasive.

Merger Review of Monopsonization

Along with enforcement efforts, the State of Washington also conducts merger reviews—both on its own, and with the federal regulators. While much of the public attention in mergers focuses on potential harm to buyers of the merged firms' products, the enforcement community should also focus on reviewing potential harm to sellers that provide inputs to the merged company. Labor "sold" by current or future employees is one such input. In antitrust terms, a dominant buyer of a good or service raises "monopsony" concerns. Monopsonists, like monopolists, have the potential to cause inefficiencies and distort competition that would otherwise fairly dictate appropriate pricing. In the labor monopsony context, appropriate pricing is better known as wages.

Because labor is inherently localized, we believe that state attorneys general, including the Washington Attorney General, are uniquely positioned to identify situations in merger review where two merging companies who may not necessarily compete or raise monopoly concerns in an outbound product market, may still compete for employees and raise monopsony concerns in a local input labor market.

As part of our merger review, where appropriate, we should look at whether the merger involves companies that have specialized labor needs or are within the same geographic area with a small labor force. Specialized laborers involve antitrust consideration because those laborers are less likely or able to switch to other types of work.

Although there are no hard guidelines on reviewing mergers for labor market concerns, we suggest that to evaluate properly labor market effects, enforcers should consider gathering information from human resources departments earlier and more often in merger review. As but one example, reviewing "diversion ratios" and the hiring history of the merging companies could provide useful data points that can show how often the companies hire each other's employees

and whether they recruit from the same places. Interviewing human resources managers from both the merging companies and from competitors—those who compete outbound with products, as well as compete inbound for labor—could also be useful in identifying possible labor market concerns.

These, and other positions, are laid out in a joint letter submitted by eighteen states, including the State of Washington, to the Federal Trade Commission, advocating that merger review must take into account labor market impacts.⁵ We look forward to working with Congress and the federal regulators to better define parameters and best practices for reviewing mergers for labor market considerations.

Conclusion

In closing, I'd like to repeat where I started in saying how pleased we are to see bipartisan commitment to affirming that our antitrust laws apply as equally to labor markets as they do to product markets. By summarizing the work our office has been doing and the front-line issues we have been seeing, I hope that my testimony better informs the members of this Subcommittee of the need for vigorous enforcement to preserve free and open competition in labor markets.

We look forward to working with this Subcommittee, as well as federal and state enforcers, as we all further examine these issues. Thank you for your time, and I look forward to your questions.

⁵ See FTC 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), at https://oag.dc.gov/sites/default/files/2019-07/State_AGs_Comments_to_FTC_on_Labor_Issues_in_Antitrust.pdf (in addition to the Washington Attorney General, the Attorneys General of the District of Columbia and the states of California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Rhode Island, and Virginia signed the public comments).