Department of Justice

STATEMENT OF

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U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FOR A HEARING ENTITLED

"ANTITRUST AND ECONOMIC OPPORTUNITY:
COMPETITION IN LABOR MARKETS"

OCTOBER 29, 2019

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Chairman Cicilline, Ranking Member Sensenbrenner, and distinguished members of the Subcommittee, thank you for holding this hearing on competition in labor markets. I am honored to offer the Antitrust Division's perspective during this critical moment for the American worker.

Today's topic could not be more timely or important. While labor competition issues have attracted interest at various times in the history of antitrust enforcement, recent national interest in the topic likely has its roots in the aftermath of the 2008 Financial Crisis. As labor economists, scholars, and policymakers set out to understand why wage stagnation continued despite declining unemployment rates during the economic recovery, many stakeholders looked to antitrust for possible solutions. To be sure, the challenges facing the American worker are both complex and numerous. While antitrust is not a panacea for resolving every societal ill, it is undoubtedly an important tool for ensuring robust competition for workers.

Anticompetitive behavior and transactions are possible in a labor market just as they are in other markets. Accordingly, enforcers and courts alike have reaffirmed the important principle that antitrust law seeks to preserve the free market opportunities of both buyers and sellers of employment services. Indeed, the Antitrust Division of the U.S. Department of Justice (Division) has taken companies to court in order to give meaning to this fundamental proposition of law. As discussed *infra*, labor competition issues are a high priority for Assistant Attorney General Delrahim and for the Antitrust Division. We have devoted significant resources to enforcement and advocacy in this area recently.

The idea that unlawful corporate power can harm both buyers and sellers of labor rests in the foundations of U.S. antitrust law. In supporting the passage of the law that came to bear his name, Senator John Sherman of Ohio warned that monopoly power:

> [C]an control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break

> down competition and advance prices at will where competition does not exist. […] The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, ***it commands the price of labor without fear of strikes***, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and . . . by the rule of both the common and the civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, ***and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals***.[1]

That corporate power can harm workers was not particularly novel even in 1890 when the Sherman Act was passed. More than 100 years earlier, the Scottish economist Adam Smith observed:

> We rarely hear, it has been said, of the combinations of masters; though frequently of those of workmen. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labor above their actual rate.[2]

That Adam Smith is revered as the father of free-market economics and also someone who was rightly concerned about the position of workers[3] parallels an important point: there is no faithful reading of the law, economics, or the legislative history of the antitrust laws that excludes competition for the American worker. Where companies or individuals engage in anticompetitive conduct in a labor market, antitrust enforcers must quickly step in to enforce the law.

Thus, timely and effective antitrust enforcement in labor markets is not only grounded in the rule of law, but also faithful to Congress's intent.

<u>Labor Monopsony in Mergers</u>

The federal antitrust agencies encounter labor competition concerns in a variety of investigations, including investigations of proposed or consummated transactions. In merger investigations, the Division considers, among other things, whether a transaction is likely to enhance monopsony power in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

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[1] 21 Cong. Rec. 2457 (1890). (emphasis added).

[2] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* I.viii.13 (Glasgow Edition of the Works and Correspondence of Adam Smith, 1776).

[3] *See, e.g.*, Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* I.x.c.61 (Glasgow Edition of the Works and Correspondence of Adam Smith, 1776) ("Whenever the legislature attempts to regulate the differences between masters and their workmen, its counsellors are always the masters. When the regulation, therefore, is in favour of the workmen, it is always just and equitable; but it is sometimes otherwise when in favour of the masters.").

Monopsony power is, in essence, market power exercised by a buyer against sellers of a good or service. It is well-founded that mergers of competing employers can enhance buy-side market power, just as mergers of competing sellers can enhance sell-side market power.[4] Because labor is an input that merging parties buy, Division staff assess whether a proposed transaction would allow the merged firm to reduce competition substantially in a labor market and use its enhanced bargaining power to depress workers' wages and benefits, including salary, commissions, and reimbursements. This buy-side competitive effects analysis employs a similar framework as that used to evaluate sell-side competitive effects.[5]

The Division has, for years, taken enforcement action where mergers are likely to create or enhance monopsony power at the expense of workers. For example, in 2016, the Division filed a successful lawsuit to block the proposed merger of Anthem and Cigna, two companies that compete in the sale of health insurance. The Division alleged, among other things, that the merger should be blocked because it would allow the merged firm to suppress reimbursement rates to providers.[6] Several years earlier, the Division filed a consent decree imposing certain conditions on the merger of Aetna and Prudential Insurance on the grounds that the merged firm would have the ability to harm competition by giving Aetna the ability to depress physicians' reimbursement rates in certain markets. At the time the deal was announced, Aetna and Prudential were the largest and ninth largest health insurance companies in the United States, respectively.

These cases demonstrate that the consumer welfare standard is flexible enough to take into account harm to competition that is localized in an upstream labor market. And while there is often a symmetry between upstream and downstream harms, the law does not require evidence of harm to competition in a downstream product market for liability under Section 7.

The Division has also been busy developing and implementing screens to help agency staff detect mergers that are likely to create or enhance monopsony power in labor markets. Over the last 18 months, the Division has developed important new specifications for Second Requests and Civil Investigative Demands to determine whether a transaction will create or enhance labor monopsony. Moreover, the Division has leveraged improved search and review technology to identify labor competition concerns in merger and non-merger investigations.

Conspiracies and Coordinated Conduct

In addition to challenging labor monopsony in merger cases, the Antitrust Division has challenged anticompetitive agreements between employers under Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.

Historically, labor competition cases have comprised a smaller portion of the agencies'

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[4] *See* Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines § 12 (2010) (providing that a buy-side competitive effects analysis need not be based strictly, or even primarily, on the basis of effects in downstream product markets in which the merging firms compete).
[5] *See id.*
[6] Complaint, *United States et al. v. Anthem Inc. et al.*, 16-cv-01493 (D.D.C. July 21, 2016).

civil non-merger and criminal dockets than enforcement actions involving tangible goods and services. And where there has been antitrust enforcement in labor markets, it has been uneven. While several early cases marshaled the antitrust laws against labor unions, in the modern era, enforcement in conduct cases has largely focused on collusive agreements, including anticompetitive no-poach and wage-fixing agreements, and unlawful information exchanges.

No-Poach & Wage-Fixing Agreements

A no-poach agreement is an agreement between two or more employers not to solicit, cold-call, recruit, interview, hire without permission, or otherwise compete for workers. It can be formal or informal, written or unwritten, and exist in any industry. A wage-fixing agreement is an agreement between two or more employers who compete for workers regarding employee salary, wages, benefits, or other terms of compensation, either at a specific level or within a range.

These types of agreements can be anticompetitive because they restrict worker mobility, and distort the normal bargaining and price-setting mechanisms that would otherwise apply in a labor context.

In 2007, the Division sued the Arizona Hospital and Healthcare Association, a trade group acting on behalf of Arizona hospitals that used a registry program to fix certain terms and conditions about temporary nursing personnel. It also set a uniform bill rate schedule that the hospitals would pay for temporary and per diem nurses.

Between 2010 and 2012, the Division sued Adobe, Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and eBay for entering into unlawful no-poach agreements. In April 2018, the Division sued the world's largest train equipment manufacturers, Knorr-Bremse and Westinghouse Air Brake Technologies Corporation, for entering into unlawful no-poach agreements. As part of the resolution of that case, the companies were required to immediately halt their illegal conduct, enter into a broad seven-year injunction, and implement rigorous compliance and reporting obligations. Moreover, the Antitrust Division required the companies to notify employees, recruiters, and the industry at large of their settlement with the Division. In addition, the companies were required to cooperate in any future investigations by the Division into alleged no-poach agreements with other employers.

Criminal Enforcement of "Naked" No-Poach and Wage-Fixing Agreements

The Division has had significant experience investigating no-poach and wage-fixing agreements. That experience made clear that naked no-poach and wage-fixing agreements are indistinguishable from and eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers.[7] That conclusion is not merely formalistic but reflects consideration of the real harms that are likely to flow from such arrangements, including lower wages and reduced worker mobility. Moreover, they distort competition to the detriment of

[7] It is well established that naked restraints of competition among horizontal competitors, such as price-fixing or market allocation agreements, are per se unlawful. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48-50 (1990).

employees by depriving them of the chance to bargain for better job opportunities and terms of employment.

Further, market allocation agreements cannot be distinguished from one another based solely on whether they involve input or output markets.

Consistent with these precedents, the United States has challenged naked no-poach agreements that are not reasonably necessary to a separate, legitimate business transaction or collaboration as per se unlawful allocations agreements in labor markets under Section 1 of the Sherman Act – that is, without elaborate inquiry into the actual effects of the agreements.

Beginning in October 2016, the Division made a number of public announcements that it intends to prosecute naked no-poach and wage-fixing agreements criminally. In particular, the Division explained that it intends to proceed criminally against agreements that began or continued after October 2016. As a matter of prosecutorial discretion, the Division will resolve no-poach agreements that were entered into and terminated before that date by civil action. These public statements were made in order to give the public additional clarity regarding our intentions going forward.

Competitive labor markets require timely and effective antitrust enforcement. Inaction is not a price the public can afford. So while the time and effort required to build a criminal case is intensive, corporate and individual liability is also necessary to punish economic conspiracies and deter their recurrence.

The Division has a number of active criminal investigations into naked no-poach and wage-fixing agreements. While we cannot comment on the status or the timing of these investigations, I want to reaffirm that criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division.

Information Exchanges

Even in the absence of an express or implied agreement, companies can still violate the antitrust laws by sharing information with each other about terms and conditions of employment. For example, in *United States v. Utah Society for Healthcare Human Resources Administration*, the Division sued a group of human resource professionals at Utah hospitals for conspiring to exchange non-public prospective and current wage information about registered nurses. The exchange caused defendant hospitals to match each other's wages, keeping the pay of registered nurses in Salt Lake County and elsewhere in Utah artificially low.

Advocacy

The Division has also devoted its advocacy resources to studying labor matters and public education. Through illustrations and examples from prior enforcement actions, the Antitrust Guidance for Human Resource Professionals (Guidance) educates and informs human resource and business professionals about how antitrust law applies to hiring and compensation decisions. It affirms that workers are entitled to the benefits of a competitive market for their labor, and also encourages strong compliance programs and safeguards to prevent antitrust violations. The Guidance was intended to reach an audience that is broader than just antitrust practitioners and in order to increase deterrence, which helps preserve resources. Since then, the Division has participated in numerous lectures and panel discussions throughout the country to raise awareness about labor competition issues.

In March 2019, the Division filed a statement of interest in *Seaman v. Duke University* in order to address, among other things, the standard for judging the legality of alleged no-poach agreements under Section 1 of the Sherman Act.[8] The Division argued in its brief and through oral argument at a hearing on March 12, 2019, the Division argued that a naked no-poach agreement is a per se unlawful allocation agreement in a labor market.

Although the case settled shortly after the March hearing, the Division intervened in the litigation for the purpose of enforcing the injunctive relief provisions of the settlement, which bars unlawful no-poach agreements. This action allowed the Division to assist in providing crucial protections to workers without incurring the significant taxpayer resources that conducting its own, duplicative litigation would have entailed.

In addition on September 23, 2019, the Antitrust Division hosted a full workshop on competition in labor markets. By hearing from experts who focus on different aspects of worker welfare, the Division sought a more nuanced understanding of the marketplace for the employment services of the American worker, and for the role of antitrust enforcement therein.

In particular, the Division recognized the importance of gathering economists who focus on labor and industrial organization, antitrust practitioners, academics, and policymakers for a multi-dimensional discussion about the role of antitrust enforcement in labor markets. Not only did the workshop inform our competition enforcement and advocacy in labor markets, but it brought together stakeholders with diverse viewpoints. The workshop also helped identify and incentivize areas for continuing research and study. In our view, such discussions are an essential public good and the hallmark of an open society.

The workshop included, among other things, a presentation by Drs. Ioana Marinescu and Elena Prager, two scholars who have contributed to our understanding of labor market competition. We also invited thought-provoking speakers, like Professors Orley Ashenfelter and Sanjukta Paul, who discussed labor monopsony, employer collusion in franchise settings and the sharing economy, the competition concerns facing collegiate athletes, and the scope of the statutory and non-statutory labor exemptions for collective bargaining and other labor union activities.

The workshop was also held as the first event in a two-part series with the Federal Trade Commission (FTC). The next workshop will be hosted by the FTC and will focus on the legal, economic, and consumer protection issues associated with the use of non-compete clauses, and whether additional research would allow the agencies to better understand the short-term and long term micro and macro effects of such clauses. We look forward to working with the FTC

[8] Statement of Interest of the United States of America, *Seaman v. Duke University*, No. 1:15-cv-462 (M.D.N.C. Mar. 7, 2019), https://www.justice.gov/atr/case-document/file/1141756/download.

on this next workshop.

Thank you again for the opportunity to testify regarding the Antitrust Division's focus on competition for the American Worker. The Division looks forward to working with the Subcommittee on these important issues.