



Office of the Chair

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

September 28, 2021

The Honorable David Cicilline
Chair
Subcommittee on Antitrust, Commercial, and Administrative Law
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Ken Buck
Ranking Member
Subcommittee on Antitrust, Commercial, and Administrative Law
U.S. House of Representatives
Washington, D.C. 20515

Dear Chair Cicilline and Ranking Member Buck:

Thank you for the opportunity to provide my views as part of the Subcommittee's hearing entitled "Reviving Competition Part 4: 21st Century Antitrust Reforms and the American Worker" and for your leadership on this critical issue.

Empirical research today shows that labor markets across the United States have grown highly concentrated, resulting in lower wages and less bargaining power for workers.¹ Dominant firms, meanwhile, exploit current laws to exert significant control over workers even while classifying them as non-employees.² These asymmetric relationships often enable firms to impose take-it-or-leave-it contract terms that disfavor workers, including, for example, noncompete clauses. Recent lawsuits have also highlighted no-poach agreements among employers, which can further restrict workers and depress wages.³

The Federal Trade Commission is charged with rooting out unfair methods of competition and unfair or deceptive practices in the economy, a mandate that protects all Americans, including workers. In service of this goal, the FTC is taking a series of steps to adjust its approach.

First, I have instructed staff to investigate potentially unlawful mergers or conduct that harm workers. Although antitrust law in recent decades generally has neglected monopsony concerns and harms to workers, we must scrutinize mergers that may substantially lessen competition in labor markets. As part of this effort, the FTC will work with the Department of Justice to update the agencies' merger

¹ See, e.g., Jose Azar, Ioana Marinescu, and Marshall Steinbaum, *Labor Market Concentration*, J. HUMAN RESOURCES (2020).

² See, e.g., Marshall Steinbaum, *Monopsony and the Business Model of Gig Economy Platforms*, ORG. ECON. CO-OPERATION & DEV. (Sept. 17, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2019\)66/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf).

³ See, e.g., Press Release, Dept. of Just., DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry (July 15, 2021), <https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care>.

guidelines, looking to provide guidance on how to analyze a merger’s impact on labor markets.⁴ Illegal restraints on worker pay or opportunity can also significantly harm workers, and employers must not get a free pass. The FTC’s complaint earlier this year alleging that Amazon misled its Flex drivers when diverting their tips additionally highlights how deceptive conduct that cheats workers may be unlawful.⁵

Second, the FTC is scrutinizing whether certain contract terms, particularly in take-it-or-leave-it contexts, may violate the law. Workers are at a significant disadvantage when they are unable to negotiate freely over the terms and conditions of their employment. The FTC has heard concerns about noncompete clauses at its open meetings, and the Commission recently opened a docket to solicit public comment on the prevalence and effects of contracts that may harm fair competition.⁶ As we pursue this work, I am committed to considering the Commission’s full range of tools, including enforcement and rulemaking.

Third, the FTC should be judicious in its use of scarce resources, focusing its antitrust enforcement on tackling monopolization or mergers involving dominant firms. Although Section 6 of the Clayton Act exempts labor organizing from the Act’s purview,⁷ federal courts have held that these protections apply only to workers formally classified as employees.⁸ As a result, collective action and organizing by certain workers—including those who have the terms of their work dictated by a firm yet are classified as non-employees—may be susceptible to prosecution under the antitrust laws.⁹ Private plaintiffs can pursue these lawsuits even in the absence of action by the U.S. agencies, and in these instances I will work with the DOJ to consider providing guidance to the courts on how the Clayton Act is designed to exempt worker organizing activities from antitrust.

⁴ Statement of Chair Lina M. Khan, Comm’r Rohit Chopra, and Comm’r Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, File No. P810034 (Sept. 15, 2021), <https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca>.

⁵ Press Release, Fed. Trade Comm’n, Amazon To Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some>.

⁶ Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, Docket No. FTC-2021-0036, <https://www.regulations.gov/docket/FTC-2021-0036/document> (last visited Sept. 28, 2021).

⁷ 15 U.S.C. § 17.

⁸ *L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962); *United States v. Women’s Sportswear Mfg. Ass’n*, 336 U.S. 460 (1949); *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143 (1942). See also Robert Pitofsky, Chairman, Fed. Trade Comm’n, Concerning H.R. 1304: The “Quality Health-Care Coalition Act of 1999,” Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary, United States House of Representatives 3 (June 22, 1999), https://www.ftc.gov/sites/default/files/documents/public_statements/preparedstatement-federal-trade-commission-quality-health-care-coalition-act/healthcaretestimony.pdf (“[P]hysicians who are employees (for example, of hospitals) are already covered by the labor exemption under current law. The labor exemption, however, is limited to the employer-employee context, and it does not protect combinations of independent business people.”).

⁹ See *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 145 (1942) (“That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a controversy concerning terms or conditions of employment, or concerning the association of persons seeking to arrange terms or conditions of employment calls for no extended discussion. This definition and the stated public policy of the Act — aid to the individual unorganized worker commonly helpless to obtain acceptable terms and conditions of employment and protection of the worker from the interference, restraint, or coercion of employers of labor — make it clear that the attention of Congress was focussed upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities.”) (internal citations and quotation marks omitted); see also *L.A. Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94, 102-03 (1962) (“Here, as in *Columbia River Co.*, the grease peddlers were sellers of commodities, who became ‘members’ of the union only for the purpose of bringing union power to bear in the successful enforcement of the illegal combination in restraint of the traffic in yellow grease.”).

Congress could also pursue legislative reforms that grant workers greater protections under the antitrust laws. For example, legislation clarifying that labor organizing by workers regarding the terms and conditions of their work is outside the scope of the federal antitrust statutes, regardless of whether the worker is classified as an employee, would remove the threat of antitrust liability resulting from such coordination. This type of clarification could have far-reaching effects, especially given the prevalence and expansion of “gig economy” firms that rely heavily on workers classified as non-employees. As federal lawmakers consider antitrust legislation to better protect labor, state efforts with similar aims could also provide a useful model.¹⁰

Thank you for your leadership on promoting fair competition and protecting workers. If you have any questions, please feel free to have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195.

Sincerely,

A handwritten signature in cursive script that reads "Lina Khan".

Lina M. Khan
Chair, Federal Trade Commission

¹⁰ See, e.g., Twenty-First Century Anti-Trust Act, S. 933, Reg. Sess. (N.Y. 2021).