

# How the Federal Trade Commission Can Help—Instead of Hurt— Workers

## Introduction

The Open Markets Institute\* (OMI) welcomes the opportunity to offer its perspective for the FTC’s Hearings on Competition and Consumer Protection in the 21st Century (Project Number P181201). OMI submits this comment to explain how the FTC can employ antitrust to help workers.

Properly applied, antitrust enforcement helps to ensure a balance of power between workers and employers. Antitrust law establishes that certain actions by employers against their workers, such as hiring cartels, are per se illegal.<sup>1</sup> The case for pro-worker antitrust action is clear. As recent studies have demonstrated, many local labor markets are highly concentrated and characterized by anticompetitive practices on the side of the employer, leading to lower wages and less freedom for workers to find new jobs.

At present, however, the Federal Trade Commission (FTC) largely ignores efforts by employers to concentrate control over labor markets, and instead uses the antitrust laws to *target* efforts *by* workers and professionals to work collaboratively to promote their common interests. The FTC, for instance, has filed numerous complaints against workers for engaging in collective bargaining and other joint action. Furthermore, the FTC has campaigned against state and local occupational licensing rules that can enhance the bargaining power and earnings of workers, professionals, and independent entrepreneurs. The result of the FTC’s inactivity against employers and activity against workers is to reinforce and deepen inequality between the individual and the corporation. The FTC should reorient its enforcement priorities and focus on protecting workers from employers with market power rather than on interfering with the basic rights of workers, professionals, and independent entrepreneurs to organize.<sup>2</sup>

## I. How the FTC Has Allowed Local Labor Markets to Become Stacked Against Workers

Although antitrust economists generally assume labor markets to be competitive, local labor markets in the United States are, on average, highly concentrated (as defined in the

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\* The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The vigorous enforcement of the antitrust laws is essential to protecting the U.S. economy and democracy from monopoly and oligopoly. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public.

<sup>1</sup> *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235–36 (1948).

<sup>2</sup> Sandeep Vaheesan, *How Contemporary Antitrust Robs Workers of Power*, LAW & POL. ECON., July 19, 2018, <https://lpeblog.org/2018/07/19/how-contemporary-antitrust-robs-workers-of-power/>.

Horizontal Merger Guidelines)<sup>3</sup> and have become more concentrated since the late 1970s.<sup>4</sup> Due to this concentration, many workers have only a handful of prospective employers in the city or county where they live. Labor market concentration is an especially serious problem in rural areas.<sup>5</sup> Recent empirical research has found that this concentration lowers wages<sup>6</sup> and has contributed to the multi-decade stagnation in wage growth.<sup>7</sup> In parts of the country where manufacturers are in direct competition with imports from China, this import competition serves to reinforce the power of local employers who then further drive down local wages.<sup>8</sup> Concentration can also affect workers further up the supply chain, as powerful buyers squeeze suppliers who in turn seek to reduce costs by holding down wages.<sup>9</sup>

In addition to having structural power, employers also often engage in practices that further tilt the balance of power in their favor. In many industries, employers have colluded to suppress the wages of workers. This can be true even for highly skilled employees. For instance, over a multi-year period starting in 2005, Apple, Google, Intel, and other leading tech companies agreed not to recruit, or “poach,” each other’s software engineers and other skilled professionals.<sup>10</sup> Steve Jobs and Eric Schmidt were among the principal conspirators in this anticompetitive, anti-worker agreement.<sup>11</sup> And employers have also colluded against employees performing essential care work. In several cities across the nation, hospitals have been accused of conspiring with each other to hold down the wages of nurses.<sup>12</sup>

Along with these horizontal restraints among employers, nearly 30 million workers are bound by non-compete agreements with their employers.<sup>13</sup> These non-compete clauses restrict workers from leaving their current employer to join a competitor or establish a competing business for a specified period. While many employers do not enforce non-compete agreements against workers in court, the mere possibility of employers’ suing to enforce non-competes can deter workers from seeking new employment or starting new businesses.<sup>14</sup>

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<sup>3</sup> José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* 10 (2017), <http://www.marinescu.eu/AzarMarinescuSteinbaum.pdf>.

<sup>4</sup> Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (2018).

<sup>5</sup> Azar et al, *supra* note 3, at 10.

<sup>6</sup> *See id.* at 19 (estimating in one model that “[g]oing from the 25th percentile of market concentration to the 75th percentile of market concentration is associated with a decline in wages . . . of 17%).

<sup>7</sup> Benmelech et al, *supra* note 4, at 23-24.

<sup>8</sup> *Id.* at 24.

<sup>9</sup> Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014*, 83 AM. SOC. REV. 213 (2018).

<sup>10</sup> Mark Ames, *Revealed: Apple and Google’s Wage-Fixing Cartel Involved Dozens More Companies, Over One Million Employees*, PANDO, Mar. 22, 2014, <https://pando.com/2014/03/22/revealed-apple-and-googles-wage-fixing-cartel-involved-dozens-more-companies-over-one-million-employees/>.

<sup>11</sup> *Id.*

<sup>12</sup> *E.g.*, *Cason-Merenda v. VHS of Michigan, Inc.*, 296 F.R.D. 528 (E.D. Mich. 2013); *Fleischman v. Albany Medical Center*, No. 06-cv-0765, 2008 U.S. Dist. LEXIS 57188 (N.D.N.Y. July 28, 2008).

<sup>13</sup> U.S. DEP’T OF TREASURY, *NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS* 6 (2016).

<sup>14</sup> Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 INNOVATION POL’Y & ECON. 39, 49 (2012).

Even though the Supreme Court has long held that the antitrust laws apply to buyers of goods and services,<sup>15</sup> such as employers, the antitrust response to the problem of employer power has been acquiescence. When reviewing corporate mergers, the antitrust agencies appear to have *assumed* that the affected labor markets are competitive.<sup>16</sup> As a result, they generally have not examined the labor market effects of mergers and arguably have enabled the consolidation of labor markets.<sup>17</sup> The FTC and the DOJ have never stopped a merger on labor market grounds.

## II. How the FTC Interferes with Practices and Policies that Strengthen Workers' Bargaining Power

On top of failing to protect workers from powerful employers, the FTC has taken actions that reduce the bargaining power of workers. The FTC—under both Republican and Democratic administrations—has brought numerous cases against professional associations and other worker organizations for seeking to raise incomes through collective action. The FTC has also been an aggressive critic of occupational licensing rules, which can protect consumer health and safety and raise wages. The present anti-worker application of antitrust law bears a troubling resemblance to the deployment of antitrust against labor unions in the decades immediately following the enactment of the Sherman Act,<sup>18</sup> an abuse that was supposed to have been corrected by the Clayton Act more than a century ago.<sup>19</sup>

Labor laws create and protect the rights of workers to organize and build power against employers in labor markets.<sup>20</sup> Unions are the classic example of workers' collective action. By banding together, individual workers who otherwise lack leverage against employers can exercise power and seek better terms of employment. Much like unions, professional associations can engage in collective action and enhance the bargaining power of their members. During the mid-twentieth century, labor unions empowered workers to strike a more equitable bargain with employers.<sup>21</sup> In today's concentrated labor markets, unions and professional associations are even more important, helping to create a more level playing field when bargaining with powerful employers.<sup>22</sup>

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<sup>15</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

<sup>16</sup> Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power* 5, HARV. L. REV. (forthcoming).

<sup>17</sup> Benmelech et al, *supra* note 4, at 3.

<sup>18</sup> See generally Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. (forthcoming 2019).

<sup>19</sup> The Clayton Act's exemption for workers holds that the "labor of a human being is not a commodity or an article of commerce." 15 U.S.C. § 17.

<sup>20</sup> See 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .").

<sup>21</sup> Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 532 (2011).

<sup>22</sup> Benmelech et al., *supra* note 4, at 16.

The government’s antagonism to efforts by workers and professionals to organize is especially unfair to independent contractors and individuals who are classified by their employers as independent contractors. While workers classified as employees are entitled to a statutory antitrust exemption,<sup>23</sup> workers classified as independent contractors—a growing fraction of the workforce<sup>24</sup>—do not qualify for this exemption and can be prosecuted under the antitrust laws.<sup>25</sup> Rather than recognize this anachronistic gap in labor protections, the FTC has exploited it, targeting the collective action of independent contractors. In recent years, the FTC has sued the professional associations of ice skating coaches,<sup>26</sup> music teachers,<sup>27</sup> organists,<sup>28</sup> and property managers<sup>29</sup> for collectively seeking to raise their members’ incomes. It has also filed numerous lawsuits against doctors for bargaining collectively with often powerful private insurance companies.<sup>30</sup>

Like collective bargaining, labor market policies such as occupational licensing can promote the welfare of workers. Licensing rules condition entry into a particular labor market on the completion of specified educational and training requirements. Along with protecting consumers from unqualified and fraudulent service providers, licensure—by restricting entry—can bolster the wages of licensed professionals. To be sure, overly strict licensing can harm citizens charged overly high prices, and qualified individuals who are prevented from receiving a license. But the wage premium of licensure benefits many workers and is comparable in magnitude to the premium from unionization.<sup>31</sup> On top of these positive wage effects, licensing may mitigate gender and racial discrimination in labor markets.<sup>32</sup>

As part of its “competition advocacy,” the FTC in recent decades has been a consistent opponent of all occupational licensing regulations. The FTC’s campaign rests on questionable assumptions and a thin empirical record.<sup>33</sup> Reflecting a bipartisan consensus, the FTC has argued that licensing should aim only to protect consumers and so should be narrowly drawn to advance

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<sup>23</sup> *Spence v. Southeastern Alaska Pilots’ Ass’n*, 789 F. Supp. 1007, 1012-13 (D. Alaska 1990).

<sup>24</sup> Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Arrangements in the United States, 1995-2015* 2 (NBER Working Paper No. 22667).

<sup>25</sup> *Columbia River Packers Ass’n v. Hinton*, 315 U.S. 143, 145 (1942); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 *LOY. U. CHI. L.J.* 969, 1032-33 (2016).

<sup>26</sup> *In re Prof’l Skaters Ass’n*, 2015 FTC LEXIS 46.

<sup>27</sup> *In re Music Teachers Nat’l Ass’n*, 2014 FTC LEXIS 68.

<sup>28</sup> *In re Am. Guild of Organists*, 2017 FTC LEXIS 76.

<sup>29</sup> *In re Nat’l Ass’n of Residential Property Managers*, 2014 FTC LEXIS 217.

<sup>30</sup> *E.g.*, *In re Praxedes E. Alvarez Santiago*, 2013 FTC LEXIS 66; *In re M. Catherine Higgins*, 149 F.T.C. 1114 (2010) N. Tex. Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008).

<sup>31</sup> Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 *ILR REV.* 142, 169-70 (2016) (finding wage premia in both unionized and licensed labor markets but higher wage premia for unionized segments).

<sup>32</sup> Peter Blair & Bobby Chung, *Occupational Licensing Reduces Racial and Gender Wage Gaps Evidence from Survey of Income and Program Participation* (2017), <https://ideas.repec.org/p/hka/wpaper/2017-50.html>.

<sup>33</sup> See generally Sandeep Vaheesan & Frank Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy*, 14 *ANN. REV. L. & SOC. SCIS.* (forthcoming 2018).

this objective.<sup>34</sup> The Commission has either ignored or disparaged the benefits to workers from licensing. In a 2014 letter concerning the City of Chicago’s proposed ordinance to govern ride-sharing services, FTC staff contended that regulatory objectives besides consumer protection and safety are somehow illegitimate.<sup>35</sup>

## Conclusion

In recent decades, the FTC has failed workers, professionals, and independent entrepreneurs. Empirical research has found that the employer-side concentration in labor markets significantly lowers wages. The FTC has done little to stem this tide of rising concentration in labor markets. Instead, it has brought enforcement actions against professionals and other workers for engaging in collective conduct, such as joint bargaining. The FTC has also been consistent critics of occupational licensing rules that can raise wages and address gender and racial discrimination in labor markets. Through this enforcement and advocacy campaign, the Commission has frustrated workers’ efforts to build power and deepened disparities in bargaining power between the worker and the employer.

The FTC must reorient its labor market enforcement and advocacy. Toward this end, the FTC must address labor market concentration and practices on the employer side and respect practices and policies that permit workers to organize to build power on the job.

1. When evaluating a proposed merger, the FTC should evaluate the potential effects on wages and other terms of employment from the merger and, when necessary, go to court to block mergers that threaten to reduce competition in labor markets.
2. The FTC should use its authority under Section 5 of the FTC Act<sup>36</sup> to restrict or prohibit non-compete agreements that impair worker mobility and depress wages.
3. The FTC should use its full remedial authority when addressing anticompetitive conduct by employers. For instance, it should be prepared to disgorge the ill-gotten

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<sup>34</sup> *E.g.*, Letter from Tara Isa Koslov, Ginger Jin, & Tad Lipsky, Fed. Trade Comm’n, to Suzanne Geist, Nebraska Senate 7 (Mar. 15, 2017), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or/neb\\_ol\\_letter\\_to\\_senator\\_geist.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comments-nebraska-state-senate-regarding-number-proposed-senate-bills-would-loosen-or/neb_ol_letter_to_senator_geist.pdf); Letter from Susan S. DeSanti, Joseph Farrell & Richard A. Feinstein, Fed. Trade Comm’n, to Loris Jones, Texas Board of Veterinary Med. Examiners 4 (Aug. 20, 2010), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-texas-board-veterinary-medical-examiners-concerning-rule-573.17-regarding-animal-teeth-floating/100910texasteethfloating.pdf).

<sup>35</sup> *See* Letter from Andrew I. Gavil, Deborah L. Feinstein & Martin S. Gaynor, Fed. Trade Comm’n, to Brendan Reilly, Chicago City Council 4 (Apr. 15, 2014), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf) (“Any restrictions on competition that are implemented should be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact.”).

<sup>36</sup> Section 5 prohibits, among other things, “unfair methods of competition.” 15 U.S.C. § 45. The Supreme Court has stated “the Federal Trade Commission does *not* arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.” *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (emphasis added).

gains of employers who have engaged in anticompetitive practices that depressed workers' wages.

4. The FTC should respect the right of all workers, regardless of federal labor law classification, to organize and build power through collective action. Workers classified (or misclassified)<sup>37</sup> as independent contractors should not be investigated or sued for attempting to build bargaining power.
5. The FTC should immediately suspend its anti-licensing campaign. Not only is this campaign outside the purview of the FTC's mission and expertise, it is contrary to the interests of workers and professionals.

The FTC can and should become a champion of the interests of American workers. This, however, will require a fundamental change in agency priorities and the adoption of an enforcement philosophy that both challenges the power of employers and respects the right of workers and independent entrepreneurs to organize.

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<sup>37</sup> Danny Vinik, *The Real Future of Work*, POLITICO, Jan. 4, 2018, <https://www.politico.com/magazine/story/2018/01/04/future-work-independent-contractors-alternative-work-arrangements-216212>.