

RICHARD BLUMENTHAL
CONNECTICUT

COMMITTEES:

AGING

ARMED SERVICES

COMMERCE, SCIENCE, AND TRANSPORTATION

JUDICIARY

VETERANS' AFFAIRS

United States Senate

WASHINGTON, DC 20510

706 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

(202) 224-2823
FAX: (202) 224-9673

90 STATE HOUSE SQUARE, TENTH FLOOR
HARTFORD, CT 06103

(860) 258-6940
FAX: (860) 258-6958

915 LAFAYETTE BOULEVARD, SUITE 304
BRIDGEPORT, CT 06604

(203) 330-0598
FAX: (203) 330-0608

<http://blumenthal.senate.gov>

August 20, 2018

The Honorable Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Dear Chairman Simons:

I write pursuant to the Federal Trade Commission's (FTC) request for comments in preparation for the Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201), which are expected to begin next month and continue through January 2019. This comment – one of several I am submitting, pursuant to the Commission's request of a separate comment for each topic – responds to "Topic 7" on "Evidence and analysis of monopsony power, including but not limited to, in labor markets."

As you prepare your review of FTC enforcement and oversight procedures and policies, I urge you to be mindful of the expanding literature pertaining to the impact of market power in labor markets. I encourage you to consider the following in your review:

The Problem of Labor Monopsony Power

Despite consistent long-term economic growth, substantial increases in worker productivity, and record high corporate profits, many workers have struggled to stay afloat. A number of concerning trends have developed over the course of recent decades: workers' wages have effectively flattened;¹ the share of income going to labor has declined;² workers have become less mobile;³ workers are increasingly and more broadly being classified as independent contractors, thereby denying them certain labor protections and non-monetary employment benefits.⁴

¹ Elise Gould, "Strong Job Growth Combined with Flat Wage Growth Provides Little Evidence for Skills Shortages," *Economic Policy Institute* (July 6, 2018), <https://www.epi.org/press/strong-job-growth-combined-with-flat-wage-growth-provides-little-evidence-for-skills-shortages/>.

² Simcha Barkai, "Concentrating on the Fall of the Labor Share," Working Paper, University of Chicago (2016), available at: <http://home.uchicago.edu/~barkai/doc/BarkaiDecliningLaborCapital.pdf>.

³ David Schleicher, "Getting People Where the Jobs Are," *Democracy* 42 (Fall 2016), <https://democracyjournal.org/magazine/42/getting-people-where-the-jobs-are/>.

⁴ Marshall Steinbaum, "A Missing Link: The Role of Antitrust Law in Rectifying Employer Power in Our High-Profit, Low-Wage Economy," *Roosevelt Institute* (Apr. 2018), available at: <http://rooseveltinstitute.org/missing-link/>.

A growing chorus of economists have identified “monopsony” power in labor markets as a significant driver of these weaknesses. As industries become more concentrated, employers become less numerous and larger in scale, and workers are less able to negotiate fair wages with potential employers. This problem affects workers all across the country. On average, local labor markets across the United States are “highly concentrated.”⁵ Concentration is even more severe in rural labor markets. Given the dearth of “buyers” (employers) in such a large number of geographic areas, workers across the country have been placed at a significant disadvantage in employment negotiations. This level of labor market concentration may have led to depressed wages, less stable work, and decreased mobility.

The problems associated with labor monopsony are real and growing. To sufficiently confront the issue, the FTC must attack both the causes and the effects of labor monopsony. In doing so, I recommend the FTC consider the following actions:

I. Challenge mergers that increase buyer power and apply this framework to mergers that increase employer power in labor markets

The DOJ/FTC Horizontal Merger Guidelines revised in 2010 recognize that market power encompasses, not just the power of sellers to raise prices and decrease output, but also that market power “encompasses the ability of a single buyer, a coordinating group of buyers, or a single buyer...to depress the price paid for a product to a level that is below the competitive price.”⁶

But despite the fact that the FTC has the authority to confront monopsony power in merger review, the FTC has only sporadically challenged mergers on the grounds that they enhance the market power of buyers.⁷ The FTC should more aggressively challenge mergers that substantially lessen the number of buyers in a given market. Further, the FTC should not limit their review of monopsony harms to product and service markets; the Commission should also investigate and challenge mergers that reduce the number of employers in a given geographic area.

Challenging labor monopsony at the merger review stage will not be easy, as labor market analysis requires access to firm-level labor market data.⁸ Rather than rely on the data generated by merging firms, the FTC should coordinate with federal agencies to gain access to datasets maintained by governmental entities like the Bureau of Labor Statistics.⁹

⁵ According to DOJ/FTC guidelines, an HHI in excess of 2500 is considered “highly concentrated” and an HHI between 1500 and 2500 is considered “moderately concentrated.” On average, a given geographic region has labor market HHI in excess of 2500. See Jose Azar, Ioana Marinescu, and Marshall I. Steinbaum, “Labor Market Concentration,” *NBER* (Dec. 20, 2017): 10, available at: <http://www.nber.org/papers/w24147>.

⁶ U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines*, (Aug. 19, 2010), <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>

⁷ OECD, *Roundtable on Monopsony and Buyer Power* (Oct. 13, 2008), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf>.

⁸ See Steinbaum, “A Missing Link,” 9.

⁹ *Ibid.*, 9.

I am encouraged by the FTC's recent decision to require Spanish healthcare company Grifols S.A. to divest certain U.S.-based blood plasma collection centers as a condition of acquiring Biotest USA.¹⁰ In this settlement, the FTC recognized that consolidation of plasma collection centers within certain geographic areas would grant the merging parties excessive market power and would likely depress the wages paid to plasma donors. This settlement proves that the FTC instinctively understands that monopsony power harms workers. The case further demonstrates that the FTC understands that structural remedies can be particularly useful as means of promoting healthy labor markets. Going forward, I hope that the FTC will continue to aggressively target mergers that reduce worker power.

II. The FTC must confront coordinated exercises of labor market power

As labor markets become more concentrated, firms are better able to engage in coordinated conduct that harms workers. Wage-fixing agreements and no-poach agreements are two common, and illegal, ways in which firms coordinate in a manner that suppresses wages and worker freedoms. The FTC should be far more aggressive in addressing such restraints.

The FTC recently signaled a willingness to take wage-fixing agreements seriously. In July, the FTC charged a Dallas-based therapist staffing company, Your Therapy Source and competing therapist staffing companies, for colluding on rates paid to physical therapists.¹¹ I applaud the FTC for taking action against such a blatant exercise of labor market power and hope the decision signals a growing concern with coordinated conduct among employers to depress wages. However, I am concerned that the settlement in the case was insufficient given the scope of the harm. The parties were not required to pay monetary damages, nor were they required to admit to liability.¹² This settlement will do little to deter employers from colluding on wages in the future.

Following the Your Therapy Source settlement, Commissioner Chopra issued a statement in which he requested public input on whether or not more stringent remedies were needed.¹³ I commend Commissioner Chopra's willingness to explore the potential of new remedies. I hope the remaining commissioners use this upcoming slate of hearings to examine whether the FTC's current approach to wage-fixing agreements is sufficient to address the scope of the problem.

Related to the issue of wage-fixing, the FTC should also continue to aggressively target no-poaching agreements. No-poach agreements are arrangements in which firms agree to not

¹⁰ In this settlement, the FTC addressed the fact that geographic concentration enables firms to depress wages. In this case, the FTC recognized that the proposed merger between Grifols and Biotest US would reduce competition and enable Grifols, absent competitors, to exercise market power by setting wages paid to plasma donors. *See* Federal Trade Commission, "FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation," (Aug. 1, 2018), <https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest>.

¹¹ Federal Trade Commission, "Therapist Staffing Company and Two Owners Settle Charges that They Colluded on Rates Paid to Physical Therapists in Dallas/Fort Worth Area," (July 31, 2018), <https://www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they>.

¹² Marshall Steinbaum, Heidi Shierholz, and Sandeep Vaheesan, "In the Matter of Your Therapy Source, LLC; Neeraj Jindal; and Sheri Yarbray," FTC File No. 171-0134 (Aug. 8, 2018), available at: <https://t.co/N1PSsPksCC>.

¹³ Federal Trade Commission, "Your Therapy Source, LLC, Neeraj Jindal, and Sheri Yarbray," Commission File No. 1710134, by Commissioner Rohit Chopra (Jul. 31, 2018).

compete for one another's employees. The FTC has indicated that they are taking the issue of no-poach agreements seriously. In 2016, the FTC and DOJ jointly issued a document stating that naked wage-fixing agreements and no-poaching agreements are per se unconstitutional.¹⁴ While the document is a promising start, I urge the FTC to seriously consider the issue of no-poaching agreements among franchises and apply the per se standard to such franchises. Following the FTC/DOJ guidance, employees of franchises like Pizza Hut and Jimmy John's have brought class action challenges to the use of no-poach provisions within franchises.¹⁵ With fresh legal questions at the fore, the upcoming set of hearings will provide an opportunity to consider whether the per se standard should govern over agreements within franchises.

III. The FTC must address exercises and maintenance of market power through non-wage contractual provisions—particularly non-compete provisions

The impact of labor market power does not manifest solely through wage effects. Employers also exercise, maintain, and capture labor market power by employing harmful non-wage provisions in employment contracts. The FTC should take an active role in addressing the prevalence of anti-competitive contractual provisions that sap workers of leverage in employment negotiations. One particularly onerous development the FTC should pay mind to is the growing use of non-compete provisions in employment contracts.

Non-compete provisions have become alarmingly prevalent. In 2016, 30 million Americans were subjected to non-compete provisions.¹⁶ In narrow circumstances—particularly circumstances in which employees have access to sensitive proprietary information and trade secrets—non-compete provisions may be warranted. But the narrow value of non-compete provisions in no way justifies the widespread proliferation of their use. Even lower-income and less-credentialed workers, who are not exposed to trade secrets nor given extensive training, are increasingly being subjected to non-competes.¹⁷ The consequences of subjecting workers, particularly less-skilled workers, to non-compete provisions are significant; the provisions make workers less mobile, prevent workers from negotiating fair wages, and make it particularly difficult to leave jobs.¹⁸

Contracts and conduct that restrain trade are unlawful under the Sherman Act and the Federal Trade Commission Act and antitrust authorities, at least in principle, have the authority

¹⁴ Department of Justice and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

¹⁵ Mary N. Strimel, Emre N. Ilter, and Matt Evola, "No-Poach Agreements Land Franchisors in Hot Water," *Bloomberg Law* (Apr. 10, 2018), <https://www.bna.com/nopoach-agreements-land-n57982090975/>.

¹⁶ Evan Starr, J.J. Prescott, and Norman Bishara, "Noncompetes in the U.S. Labor Force," University of Michigan Law & Econ Research Paper No. 18-013 (July 3, 2015), *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714##.

¹⁷ Counsel of Economic Advisors, "Labor Market Monopsony: Trends, Consequences, and Policy Responses" (Oct. 2016),

https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf.

¹⁸ U.S. Department of Treasury, "Non-Compete Contracts: Economic Effects and Policy Implications (Mar. 2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.

to address non-compete provisions that exploit or enhance market power.¹⁹ In concentrated industries, non-compete provisions can harm competition by deterring market entry by creating artificial labor scarcity.²⁰ The current common law approach to unreasonable non-compete provisions fails to consider the role market power plays and leaves workers vulnerable.

Employees should apply non-compete provisions carefully and only employ such provisions in cases where the duration and scope of non-compete provisions are reasonable in light of the type of work being conducted by an employee. Unfortunately, employers have demonstrated that they are not interested in employing non-competes with the necessary level of care. Given the ineffectiveness of the common law approach to non-competes, this may be an area in which the FTC can assert itself.

Conclusion

Increasingly, employers are imposing contractual provisions on workers that diminish their access to the judicial system. Workers are increasingly being subjected to class action waivers and arbitration agreements that place workers at a clear disadvantage. As it becomes more difficult for workers to bring meaningful legal challenges over unfair employment terms, the FTC's role in addressing anti-competitive labor market harms becomes more critical. The FTC must be willing to address labor market concentration and challenge instances of anti-competitive conduct that unreasonably burdens workers. I welcome this opportunity to help evaluate the FTC's current approach to monopsony power and hope that this formal self-reflection will lead to stronger and more robust enforcement of our laws, as well as new laws where warranted.

Sincerely,

Richard Blumenthal
United States Senate

¹⁹ Alan B. Krueger and Eric A. Posner, "A Proposal for Protecting Low-Income Workers from Monopsony and Collusion," *Brookings Institution* (Feb. 2018), available at: <https://www.brookings.edu/research/a-proposal-for-protecting-low-income-workers-from-monopsony-and-collusion/>.

²⁰ *Ibid.*, 10.