FTC | DOJ December Workshop | Day 1, December 6, 2021

Kelly Signs:

Good morning and welcome to Making Competition Work. A workshop hosted by the Federal Trade Commission in the Department of Justice. Over the next two days, we'll explore how to better promote competition in labor markets. My name is Kelly Signs. I'm the acting director of the FTC's Office of Policy Planning.

Kelly Signs:

On behalf of the entire workshop team from the FTC and DOJ, we are delighted that you're joining us today via our live webcast. Before we begin our program, I have ruled a few administrative details. First, a video recording and transcript of these proceedings will be available on the FTC and DOJ website shortly after the event.

Kelly Signs:

Our intent to is to create a lasting resource for anyone interested in this important topic. Second, as with any virtual event, we may experience technical issues. If these occur, we ask for your patients as we work to address them as quickly as possible. We will also try to keep you informed of any significant delays.

Kelly Signs:

Third, we're still accepting public comments until December 20th. For information on how to submit a comment online, please visit our workshop webpage on the FTC's website. Finally, please join us on Twitter. Our Twitter handle is @FTC and we will be using the hashtag #LaborMarkets2021.

Kelly Signs:

Now, I have the great pleasure of introducing our first speaker Jonathan Kanter, assistant attorney general for the Department of Justice Antitrust Division. This is one of his first appearances in AAG, and we're very happy that he could participate with us today. During his confirmation hearing, AAG Kanter described the importance of a vigorous and comprehensive antitrust program that protects workers from anti-competitive abuses.

Kelly Signs:

He stated that, "The critical mission of the antitrust laws is to protect competition for people in the workplace to ensure that thriving competitive markets leads to adequate compensation." After just three weeks on the job, we look forward to hearing about his additional thoughts on how to best promote competition in labor markets for the benefit of workers. Welcome, AAG Kanter.

Jonathan Kanter:

Thank you so much, Kelly, for that warm introduction. I am truly delighted to be here today. This is my first public appearance since being confirmed. I couldn't think of more important subject. I'm thrilled to welcome all of you across your screens. I want to express my deepest appreciation thanks to the incredible work that went into making today possible.

Jonathan Kanter:

It's a great testament to the work that the FTC and the DOJ can do together. I've been here as assistant attorney general now for roughly three weeks. I've just been awestruck by the talent and dedication of my new colleagues. They're just absolutely world class. The antitrust division across the boards has so many talented people, and such a deep commitment to promoting competition.

Jonathan Kanter:

Department leadership have tremendous support since my arrival and since their appointments for robust antitrust enforcement. Our partners at the FTC in the states around the world have demonstrated graciousness and impressive eagerness to collaborate. I would be remiss if I didn't mention that I am a proud alum of the FTC myself.

Jonathan Kanter:

The notion of having both the talented folks at the Federal Trade Commission at the FTC, working together to address issues that affect people's daily lives is such an incredible thing to behold. I think today's workshop and event will really demonstrate that the FTC and the antitrust division are truly in lockstep as we advance our shared mission to competition.

Jonathan Kanter:

I've already joined to antitrust division that's firing on all cylinders. The division has more matters in litigation now than it has in any one time in recent memory. The case span the gamut of anti-competitive conduct, including both civil criminal matters, litigating many of the same labor issues that we're going to discuss today.

Jonathan Kanter:

At the same time, the division has been impressively active in supporting inter agency competition efforts under the president's executive order and in advocating for competition across the country and the world. I'm incredibly excited about the opportunities this remarkable team has to do real good for our fellow citizens, and to protect our democracy.

Jonathan Kanter:

The same time we face enormous challenges. President Biden recently said, "We've got a problem, a major problem." He said with less competition and more concentration that holds our economy back. The consequences for the American people now here and our democracy are stark.

Jonathan Kanter:

Associate Attorney General Gupta explain how a lack of competition means fewer new products and higher prices. It means owners of powerful firms make more without having to grow the size of the pie for anyone else and I couldn't agree more. Antitrust enforcement she said levels the playing field and plays a critical part in promoting economic opportunity and equity.

Jonathan Kanter:

I agree with her that our country can do better. We'll find solutions to these challenges when we develop and apply enforcement tools that are fit for purpose in our management. If you look at the evolution we've seen in the economy over the last 20 years, it's been overwhelming.

Jonathan Kanter:

We've seen more changes since the turn of millennium than in any similar period since the industrial revolution. Markets are no longer connected, a neat pattern of up and down in a physical supply chain, interconnect in manifold directions across our connected economy. It's absolutely critical, but the tools that we have recognized those market realities.

Jonathan Kanter:

Including the implications for workers across our country. To be effective, antitrust forces must develop an applied tools that are fit for purpose [inaudible]. This is by no means a new imperative antitrust forces have faced the need for continuous adaptation for over a century, including through the industrial evolution itself.

Jonathan Kanter:

It will however require new thinking, robust debate, and fearless implementation. Those have been the hallmarks of similar change in the past and service well in the present. That's what today's workshop is really about. One of our foremost challenges will be developing and implementing tools to ensure workers realize the benefits of competition. The dialogue we continue today and tomorrow will help us advance that conversation. These are incredibly important conversations because competition of labor market is fundamental to American workers, so grateful and appreciative of the staff, the Department of Justice and the FTC and all they have done and continue to do to update our antitrust enforcement program to protect workers, as well as the competitive process.

Jonathan Kanter:

When labor markets or competitive workers have the ability to demand a higher wage and better working conditions, they have a fair shot of prosperity. When competition is lacking in labor markets, employee markets robs workers and the benefits of their time and energy. That's what makes promoting competition here so fundamental.

Jonathan Kanter:

We're talking about a moral issue, the ability of workers to earn just rewards for their work to live out the American dream, to provide for their families. I couldn't imagine a more important priority for public antitrust enforcement. It requires extraordinary vigilance from the antitrust division and I'm certain at the FTC as well.

Jonathan Kanter:

I plan to build on the work of the last several years in which the division has begun to increase its substantive knowledge of labor issues and an enforcement capacity in labor markets. On the criminal side, we prosecute criminal conspiracies among competitors, including price fixing, bid rigging, market allocation.

Jonathan Kanter:

That includes agreements among employers to fix wages, which is simply price fixing by another name and agreements to allocate markets for workers sometimes referred no [inaudible]. These agreements steal from workers by depriving them competitive wages, benefits, and other terms of employment.

Jonathan Kanter:

They fit squarely within the ambit of the antitrust laws. The Supreme Court have long ago that the Sherman Act applies equally to all industries and all markets to goods and services, therefore assessing naked restraints and label mark labor markets does not require additional experience because the other types of restraints long held per se violations of the Sherman.

Jonathan Kanter:

Put simply, employees like consumers are entitled to the benefits of the Sherman Act affords and protects. Moving forward, you can expect that rooting out labor market inclusion will remain a top priority for the division and vision prosecutors will continue to bring and to figure prosecute labor market cases.

Jonathan Kanter:

On the civil side, division attorneys have also been [inaudible]. Among other important interventions division for successful briefs in the NSA for Austin case on behalf of college student athletes. The Supreme Court largely adopted divisions reasoning in a 9-0 decision holding that colleges clue to the limit the education-related benefits offered to students, despite the NCAA's claim that [inaudible] will be treated differently.

Jonathan Kanter:

We will fight for American workers, including connection with legal mergers, that substantially less competition for labor as well. Going forward, you can expect efforts like these not only to continue, but to increase. I'm tremendously heartened by the focus of president's executive order on competition.

Jonathan Kanter:

Which recognized that many of the economic problems that working families faced have their roots inclusion, and unfair practices in the labor markets and concentration of corporate power. Among other provisions, the order directed by the Department of Justice to collaborate with our sister federal agencies to determine how we can use our joint authorities to better promote competition to open markets, including with respect to legal.

Jonathan Kanter:

That effort is fully underway. You can expect a much higher degree of collaboration between the DOJ, the FTC, and our sister agencies over the next few years. The president's executive order also directed the DOJ in the FTC and consider updating their guidance, particularly in areas where changes in the economy may have led to interpretations of guidance that are insufficiently protective of workers access to robust competitive labor markets.

Jonathan Kanter:

Among other examples and divisions FTCs joint antitrust guidance for human resource professionals, which was published in 2016 was aimed at helping human resource professionals, "Implement safeguards to prevent inappropriate discussions or agreements with other firms."

Jonathan Kanter:

It's been interpreted by many as suggesting that certain kinds of data sharing are categorically immunized from antitrust scrutiny. Once again, the process was conceived to provide the public with guidance for detecting and preventing unlawful conduct evolved into something that limited our enforcement flexibility.

Jonathan Kanter:

Similarly, principles for addressing and preventing concentration in the horizontal merger guidelines apply just as much to labor markets as the any other market and always have. Some commentators have raised questions over whether such labor, especially as the division brings more merger cases with strong labor concerns as an element.

Jonathan Kanter:

It's my hope that the evidence we gather from experts and members of the public at this workshop will help us build the consensus on those questions so that the guidance documents we issue to continue to promote flexibility and support the division's mission. Now, I want to talk a little bit about the importance of collaboration.

Jonathan Kanter:

Over the next few days, you would hear from a truly impressive group of lawyers, economists labor, organizers, and leaders from other agencies. By engaging in this dialogue, all of them will strengthen divisions mission to pursue conduct that farms labor market competition and in the end, workers.

Jonathan Kanter:

I want to especially single out the critical role play by our colleagues at the FTC, who have partnered with us in preparing this workshop. As a former FTC lawyer and a proud alum, I know how dedicated the staff and leadership of that agency are to protecting not only competition, but the welfare of workers, consumers, and the public of large, the core values of our democracy.

Jonathan Kanter:

I'm truly honored to be here virtually alongside commissions, new chair Lina Khan, and excited to for our agencies to work together. Effective coordination between the DOJ and the FTC is one of the most powerful tools that we have to protect competition the competitive process. When our agencies work together, our complimentary and skill sets and enforcement tools could be combined in a mutually beneficial manner.

Jonathan Kanter:

That will be our goal as we continue to build a collaboration with our agencies. It'll be particularly important in areas of increasing enforcement focus and policy developments like labor markets. At bottom, our collaborations on these issues are critical to ensuring that workers receive a fair turn for their work, and are able to participate freely in the benefits of our economy.

Jonathan Kanter:

In that spirit, I'm honored to introduce our next speaker, someone who needs no introduction FTC chair, Lina Khan. Even before Chair Khan was named to her position as chair, Lina had already built a reputation as one of the fiercest advocates and most thoughtful leaders for open markets and fair competition in a generation or more.

Jonathan Kanter:

She's someone I've been honored to call a friend. Prior to her appointment, Lina served as associate professor of law of Columbia, counsel to the U.S. judiciary subcommittee on Antitrust Commercial Administrative Law, and the legal advisor to the FTC commissioner, Tobra, legal director at the Open Markets Institute, among many other endeavors.

Jonathan Kanter:

In the world of antitrust, Lina is a bonafide rockstar and visionary, and you can count me among her biggest fans. Chair Khan is already doing extraordinary work with the FTC to ensure that workers benefit from a fair competition. I am as excited as the rest of you are to hear what she has to say next.

Jonathan Kanter:

Without further ado, raise your lighters for the number by Chair Lina Khan of the FTC. Lina, take it away.

Lina Khan:

Thanks so much for the extremely generous introduction, Jonathan. Good morning, everyone. I'm thrilled to welcome you all to this joint FTC-DOJ event. I'm delighted to be here with our new assistant attorney general, Jonathan Kanter. Our steadfast colleagues from both the DOJ and FTC, and our distinguished panelists.

Lina Khan:

I want to give deep thanks to the interagency team for their tireless work pulling together this event and making it possible even in this virtual format. Today's workshop comes at a pivotal moment. We've witnessed over the last few years a remarkable evolution in both the policy debate and broader public understanding of how declining levels of competition.

Lina Khan:

The conduct it enables can hurt us not just as consumers who buy products from a shrinking number of large firms, but also as workers, who are especially vulnerable when subject to the whims of a boss they can't easily or practically escape. Robust antitrust enforcement can help ensure that workers have the freedom to seek higher pay and better working conditions, and can help promote economic opportunity and widespread prosperity for all.

Lina Khan:

Both this evolution in debate and discussion in today's event are a testament to the research, enforcement efforts, organizing, and advocacy of many people. A significant number of whom will be participating in these discussions over the next couple of days.

Lina Khan:

Thank you for driving forward the conversation and getting us to a place where increasingly the key question is not whether the antitrust laws and competition policy can or should protect workers as well as consumers, but instead, precisely how they can or should do so.

Lina Khan:

This is one of the key I hope the workshop will help us answer. Staff at both the FTC and the antitrust division have already been implementing an enforcement program that incorporates some of the key insights from this research. I'm excited about the ways that we can continue to build on and expand this critical work.

Lina Khan:

At its best, antitrust enforcement adapts to match both new of realities and new learning. While labor markets have long been characterized by inequalities and bargaining power between workers and employers, over the last few decades, these asymmetries have tended to become more acute.

Lina Khan:

Research suggests that heightened market power fishering of the workplace and weakened legal protections have all contributed to a decline in and labor share of national income, and to an increase in work arrangements that are precarious, and that deprive workers of what they're owed.

Lina Khan:

These asymmetric relationships can enable firms to impose take it or leave it contract terms, including for example, non-compete clauses. Recent lawsuits have also surfaced extensive no-poach agreements among employers, which further restrict workers and depressed wages.

Lina Khan:

As businesses continue to navigate the global pandemic, workers have been leaving their current jobs in record numbers. Often citing low pay and poor working conditions. Meanwhile, a boom and corporate deal making the highest in 20 years could also potentially reshape markets and leave workers with fewer options over the long-term.

Lina Khan:

The expanded role of digital technologies and how work is structured has significantly enhanced opportunities, particularly during the pandemic, but it can also subject workers to increasingly invasive tracking and surveillance. As we focus on ensuring healthy competition, we must ensure that our tools are keeping pace with the realities of this modern economy.

Lina Khan:

At the FTC, our congressional mandate is to root out unfair methods of competition and unfair or deceptive practices in the economy. A mission that protects all Americans, including workers to recalibrate our work to protect workers. The agency is building on its existing efforts in several ways.

Lina Khan:

First, we are redoubling our commitment to investigating potentially unlawful transactions or anti-competitive conduct that harms workers. In particular, we must scrutinize mergers that may substantially less competition in labor markets recognizing that the [inaudible] act purview applies to product and labor markets alike.

Lina Khan:

Recent scholarship and research, including by many of our panelists, has expanded our understanding of the scope of monopsony power and labor markets, and the magnitude of its effects. Insights that we are keen to incorporate into our work. We have already included in merger settlements provisions curbing the exercise of non-compete clauses.

Lina Khan:

We are reviewing our merger processes and data gathering to determine how to better effectuate labor market analysis as part of our merger investigations. Our work with the Justice Department to review the merger guidelines also offers an opportunity to clarify and update how we assess a merger's potential effects on labor markets. I hope the discussion over the next two days can serve as a contribution to that effort.

Lina Khan:

Second, the FTC is scrutinizing whether certain terms in employment contracts, particularly in take it or leave it contracts may violate the law. At the commission's open meetings, some workers have shared concerns about non-compete clauses and the agency recently opened a docket to solicit public comment on the prevalence and effects of contracts that may constitute unfair methods of competition.

Lina Khan:

Later today, we will hear panelists discuss new research on the effects of employers expanded use of certain contractual terms, including non-compete clauses and non-disclosure agreement. We will also learn about state level efforts to limit the use of non-competes. As we consider the evidence, I'm committed to considering the commission's full range of tools, including enforcement and rulemaking.

Lina Khan:

Third, as part of our efforts to approach our competition and consumer protection work in an integrated manner, we are also scrutinizing unfair or deceptive practices that may harm workers. Experience has shown that some firms may have established their dominance or gained a competitive edge in part through engaging in unfair or deceptive practices.

Lina Khan:

Especially, in digital markets where quickly achieving scale and amassing data is paramount. Firms may determine that pursuing unfair or deceptive tactics is worth the cost of business. Given that even an early lead can result in a long term advantage. As part of our work to crack down on these types of tactics, we recently put over a thousand firms on notice from misleading money-making claims.

Lina Khan:

Recognizing that workers can be victim to deceptive claims that may entrench a firm's market power. Actioned by the FTC earlier this year to hold Amazon accountable for misleading its flex drivers should serve as an important reminder that employers cannot make false claims about wages in the hopes that workers or the FTC will not notice.

Lina Khan:

As we continue to build and expand this work, our close partnership and collaboration with our enforcement partners at both the federal and state level will be essential. The whole of government approach envisioned in the president's executive order on competition underscored the significant opportunities we have to strengthen our collective efforts through close coordination.

Lina Khan:

I'm eager for the FTC partner up and follow through on this vision. Our partnership with the justice department will be especially critical when charging both the DOJ and the FTC with enforcement of the antitrust laws. Congress sought for our agencies to play a complimentary role. Lawmakers granted each agency a unique albeit occasionally overlapping set of tools and authorities.

Lina Khan:

It's important for us to boost our collective impact through coordinating and making use of our respective areas of institutional and comparative advantage. I'm excited to have a like-minded partner in the assistant attorney general Kanter, and I'm looking for forward to our close collaboration in the months and years ahead.

Lina Khan:

In closing, my deep thanks again to the DOJ and FTC staff for their efforts to pull together this terrific program and to the distinguished panelists and participants for lending us their time. I'm looking forward to the upcoming panels and the insights they will provide in part guiding our critically important efforts to ensure that workers like consumers benefit from healthy competition. Thank you.

Doha Mekki:

Good morning, everyone. My name is Doha Mekki and I'm an attorney at the antitrust division of the Department of Justice. I have the tremendous honor this morning of moderating the first discussion of the workshop. We're privileged to have a panel of experts here to discuss antitrust challenges to the unilateral exercise of monopsony power in labor markets, and mergers that harm competition for workers.

Doha Mekki:

We have a lot to cover, so without further ado, I'd like to introduce our panelists. First up is Rachel Brass. She's a partner at Gibson, Dunn & Crutcher, where she serves as co-chair of the firm's antitrust group. Her practice focuses on investigations and litigation in the antitrust labor and employment areas.

Doha Mekki:

She recently represented McDonald's and Jimmy John's in private no-poach lawsuits defeating class certification motions brought by current and former workers of the chains. Josh Davis is a research professor at UC Hastings College of Law.

Doha Mekki:

In January, he'll become a shareholder at River Montage. His scholarship and legal practice focused on private antitrust enforcement and class litigation. He is currently representing worker and antitrust class actions, including a class of MMA fighters, an ongoing litigation against the USC.

Doha Mekki:

Next step is Michael Kades. He is the director of markets and competition policy at the Washington Center for Equitable Growth. His research focuses on competition and antitrust enforcement with an emphasis on consumers wages, the quality and innovation.

Doha Mekki:

He previously served as an antitrust counselor to Senator Amy Klobuchar and as a trial lawyer at the Federal Trade Commission, where he also served as an attorney advisor to former Chairman Leibowitz. Jeff Kessler is co-executive chairman of Winston & Strawn, and co-chair of the firm's antitrust and sports law practices.

Doha Mekki:

Jeff really needs an introduction. He was one of the most prominent sports antitrust litigators in the country, and mostly recently represented college athletes and the NCAA [inaudible] matter that was decided by the Supreme court. That case struck down NCAA rules for compensation for college athletes under section one of the Sherman Act.

Doha Mekki:

Finally, we have professor Fiona Scott Morton. She is the Theodore Nierenberg professor of economics at EL School of Management. Her area of academic research is industrial organization with a focus on empirical studies of competition. From 2011 to 2012, she served as the economics deputy assistant attorney general, or the chief economist at the antitrust division of the DOJ.

Doha Mekki:

Welcome home, Fiona. At Yale, she teaches courses on competitive strategy and antitrust economics. She also founded and directs the Thurman Arnold Project at Yale. Let me say at the outset that we'll give a general disclaimer, the discussion today is not purported to reflect the views of our panelists employers or clients.

Doha Mekki:

For myself, I'll say that the views I'll reflect in my questions today don't necessarily reflect the opinions or views of the antitrust division. At the outset, I think it would be helpful to frame the topic of this discussion by giving the audience a baseline for what we mean by labor monopsony. Michael, I'd appreciate if you could kick things off.

Doha Mekki:

Can you tell us what is monopsony power and how does it manifest in the labor market?

Michael Kades:

Thank you, Doha and thank you to the DOJ and FTC for inviting me to be on this important and interesting panel. I think the easiest way to explain monopsony power and we may have gotten to the point that it's become more generally understood in the antitrust world is it's market power on the seller side.

Michael Kades:

In particular where employers have market power. It is a mirror reflection of what we think about on the product side. Not long ago, you can go back to I/O textbooks of the early 21st century. You can find sort of statements that employment markets are not problematic from a competition standpoint.

Michael Kades:

Really even when those were written, that was starting to change. There's just been an explosion of research done by labor economists, showing that the most employment relationships for a variety of reasons, the employer has market power. That should mean that antitrust should be concerned about both mergers and conduct occurring if there's a question about how it affects market power.

Michael Kades:

If that market affects labor relationships. The things we might be should be worried about is whether that monopsony power, whether it's created through eliminating competition or through implementation of conduct restraints, it could be show itself in lower wages, worst working conditions, restrictive contracts.

Michael Kades:

In a lot of ways, it takes a while to look in the mirror and flip everything from the problem with the buyer and not the seller, but after that, the antitrust law should pretty well track. I think that was how I would explain it.

Doha Mekki:

That's really helpful. Josh, in thinking about upstream harms, the ones that Michael just described, some scholars have made distinctions between classical monopsony and what's referred to as bargaining leverage. Can you tell us the difference between the two, and whether in your opinion, we should be concerned about one more than the other?

Joshua Davis:

Let me just say preliminarily also express my thanks for the invitation to be here. It really is a pleasure and honor. I want to build a little bit on what Michael just said, I thought in his very useful preliminary comments. Classical monopsony would mean that wages get suppressed and in addition, hiring goes down.

Joshua Davis:

You'd see potentially a decrease in output as well, and then versus bargaining leverage where the notion is that wages are suppressed, but we don't necessarily see a reduction in the workforce. What I would say is I think along the lines of that core insight that Michael just offered, that distinction really shouldn't matter, but we see sometimes arguments either that it does or it should.

Joshua Davis:

It shouldn't matter because of the symmetry of the mirror image with when sellers have market power. If a seller's market power, at least when it comes to private enforcement, which is my focus, but just more generally an antitrust, if we've seen inflation of prices as a result of market power, the question is, it is the market actor doing that legally, because they have market power through legal means?

Joshua Davis:

Are they doing it illegally, but the question is not do we need to find some other harm, not in the ordinary course? Really the same should be true on the buyer side that if a buyer has market power and therefore is able to suppress wages, there are all sorts of reasons why that's harmful, whether or not you to reduction in the workforce.

Joshua Davis:

The inquiry as to do we have the relevant kind of harm should end there. The question should just become, did that market actor acquire or maintain that market power in a means prohibited by the antitrust laws? If yes, we should be done. Now, having said that because worker claims and monopsony claims are still relatively rare and relatively new, we often see in litigation that firms will claim it's not enough that there's harm on the buy side.

Joshua Davis:

In terms of these suppression of wages, we also need to see a reduction in workforce often that is then spelled out as well, you need that because if you don't have a workforce than on the sell side of that buyer, we're not going to see a decrease in output, and that's the only real harm we care about.

Joshua Davis:

I think that is as both as a matter of economics and as doctrine not right. For the very reasons that Michael just said because of the symmetry that we should see in antitrust doctrine between the buy side and the sell side.

Doha Mekki:

Thank you, Josh. Fiona, you have reminded me in the past that this focus on output effect is maybe overblown or you specifically pointed to static versus dynamic measures of output effect. Is there anything you want to add on this issue of whether we actually need output effect and labor monopsony challenges?

Fiona Scott Morton:

This is I think an area with a lot of confusion in both the law and the intersects of the law and economics. When you have classical monopsony, you have a decline in output that everyone seems to be happy with that. I'll leave that aside. The issue arises when there's something like a bargaining, an increase in bargaining power that drives down the wages of the input supplier of let's call them nurses or something like that.

Fiona Scott Morton:

What's really important to understand is if you are pushing down the wage below the competitive level, that's not an innocuous thing to do even if short run output doesn't change because who's going to invest in becoming a nurse? What about quality? What about replacement of nurses by machines in a way that's inefficient?

Fiona Scott Morton:

The reason we like the market economy is because when we have competitive prices, we get efficient allocation of resources. Everybody's doing things that are best for aggregate welfare. Distortions away from that are going to be harmful. You can take the position that I think for an economist, that's a very good position to be in because it just makes sense.

Fiona Scott Morton:

From the legal perspective, the way that the shortcut to that is, "Look, we want the competitive price and distortions either way, whether we're talking about raising prices to hurt consumers or lowering wages just to hurt workers, those are both harms and they're symmetric in either direction."

Fiona Scott Morton:

The whole output test that we like to use in antitrust is really a very specific test. It's for the buy side in under particular models of how demand is structured, and what the harm is. It shouldn't be too broadly used. This is one of the places where you can get a mistake from that.

Fiona Scott Morton:

I would recommend Scott Hemphill and Nancy Rose's article New York Law Journal that lays all of this out. It's very clear.

Doha Mekki:

I agree with you. I think that article

Doha Mekki:

Cold murders that harm sellers is a really wonderful articulation at this point. So, the FTC chair mentioned in her opening remarks that there's been a growing body of research. And I think the gaps in the theory that has driven some of the antitrust enforcement is really closing in a really nice way to see. I've observed in the last several years, a growing body of literature, that points to concentration in labor markets. And that body of labor economic works suggests that labor markets are probably more concentrated than we've previously understood. And some papers suggest they're actually more concentrated in the product market. And so my question to you is, is concentration a measure of labor, monopsony of power? And are there other sources in this year of monopsony power in labor market?

Fiona Scott Morton:

Okay. So I'm sorry to be the first damp rag on the party, but that is actually not the right way to ask the question. The question we're interested in is, does the employer have market power over the employee? Okay, now they might have market power over the employee because they're the only place that you can work because you're an aerospace engineer and there's a merger of two aerospace firms in your town. That might be the reason why there's market power. And that's an example of concentration. But, I work at a university, Chad Severson and Austin Guls, we have a paper explaining that university's exercise monopsony power over employees, and that's not about concentration at all. It's about the fact that searching for a new job, changing houses, uprooting the kids, the spouse, going to give all the around the country to get a new job, all those frictions make changing jobs difficult.

Fiona Scott Morton:

That means that my employer can pay me less than I am worth, and I won't move. That's market power. That's a small, significant non-transfer decrease in my wage and I'm not going anywhere. And it has nothing to do with concentration. So I just think that the concentration thing is a red herring, because it makes people ignore the many, many situations where there isn't any concentration, but there's market power. So I'd rather have people focus on market power. And of course, if you have a monopoly employer, there's going to be market power there, and there's also concentration. But I just worry that this focus on concentration is going to leave out many workers who are harmed because there's market power in their situation, but not concentration.

Doha Mekki:

That's really interesting. Fiona, I think there have been a couple of papers that have attempted to go beyond the concentration framework. Ellie Frager, who is a visiting academic scholar at the department, antitrust division this year, and Chris Schmidt have a paper out where they look at hospital consolidation and negative wage effects for certain class workers. I believe David Arnold, out in California has a paper that attempts to reason towards the same conclusion. And, I think it's fair to say directionally, we are trending towards recognition among labor economists and certainly the IO world that there is a labor monopsony problem. And so you mentioned mergers, and I think that's a segue to a discussion about mergers that harm competition for workers.

Doha Mekki:

So Section Seven of the Clayton Act does not distinguish between buy-side harms, for example, harm the labor market and sell-side harms. It prohibits all mergers, the effect of which may be substantially to lessen in competition. And nonetheless, there have been very few merger challenges on labor market grounds. But as we all heard this morning, the AEG and the FTC chair are committed to better detecting and challenging mergers that harm workers. And so, I ask you and then open it up to the group, are there characteristics of transactions that you think should raise labor market concerns, or should at least prompt the agencies to investigate labor market harms? I'm so sorry. I think I might have been on mute. So, did you guys hear me talk about section seven?

Fiona Scott Morton:

Yes. You just cut the call on one of us. Obviously the one who wants to be rude and talk.

Doha Mekki:

You guys are a very polite set, I appreciate it. So Fiona, I'll start with you and then open it up to the rest of the group.

Fiona Scott Morton:

Yeah. So when should mergers be evaluated on input market? I would say labor of course, but other inputs might be relevant like chickens being produced by farmers, which is an important input market. So, we would want to look naturally at concentration in the local geography, because that is going to be one way that market power could be established. We also want to think carefully about categorizing the merger into an appropriate bucket. So for example, there might be a merger where there are workers with specific skills being used, but the output is traded globally. And so there wouldn't be market power acquisition in the output market, there might be in the input market. You can have the opposite where the output market is the problem in the merger, but there are workers who are computer science programmers located around the world and you wouldn't have any input issue.

Fiona Scott Morton:

And then there are situations where there are both. So for example, a merger to monopoly of two hospitals in a town is going to affect both the nursing market and the market for health insurance in that town. So those are the three broad ways to categorize it. And then I would say in addition to thinking about concentration in the labor market, I would be very keen on thinking about other tactics, including those that Chair Khan mentioned like information flows, like particular contract terms, like things that veer into fraud, wage dealing, or other kinds of behaviors that can be more readily done or the incentives grow for them in a setting where there's market power on the employer side. And so you might worry about all of those things being ratcheted up with additional market power.

Joshua Davis:

Can I just add one point to that? Which is it's anticipating a little bit the discussion we're going to have about direct evidence of market power versus circumstantial evidence through market definition and the like. But, I just want to emphasize one point that professor Morton made, that I think is just spot on and also is relevant to this context. And that is that concentration is often sufficient for market power, but not necessary. There can be other market conditions that mean that the harms that flow from market power can exist even with a relatively modest control of the market, because of the stickiness of the market or what have you. And so, really, I think a key is for whoever's enforcing the antitrust laws, whether it be the federal government or private enforcers, the courts, that they keep their eye in the prize and they think, "Well, let's ask the straight, what's the ultimate question here?"

Joshua Davis:

And one ultimate question is, is compensation to workers or for chickens, but let's focus on workers, going to be lower after this merger? And if the answer that is yes, for whatever structural reasons, I'll talk later about the USC, litigation and the structure of that market very briefly. But the answer that's easy to give is the one that actually matters, which is not how do we define markets and all these complicated analysis, but is compensation lower than it would be without the mergers? And if the answer is yes, you've arrived. And you needn't really think any further, and you've probably implicitly defined a relevant market and all these other things, but that's really the question. And that's what I would just emphasize the importance of.

Doha Mekki:

That is really interesting. You've certainly anticipated a couple of my other questions about merger review. It sounds like this group would maybe agree that where a merger review surfaces evidence of say, a no-coach agreement or information exchanges about salaries or benefits or other terms of employment, then that might be pretty good evidence that the companies view themselves as competing in that market. But certainly let me know if anyone disagrees. So, that sounds like a great direct evidence path, but I want to focus a bit on something you'd said, Josh, you talked about circumstantial evidence. I shouldn't be surprised if I'm sometimes surprised that the cases get really bogged down in market definition. And so it's surprising to me, because market definition is supposed to be a tool for understanding anti-competitive effects for cases outside of the first day context, but courts have really struggled with this.

Doha Mekki:

And so my sense also is that the antitrust laws are very good at detecting harms to very specialized categories of workers, maybe high tech workers, maybe doctors, neurosurgeons, or something like that.

But we are less good at detecting mergers that are harmful to lower wage or less specialized types of workers. And so, Michael, I want to start off with you and then open it up to the rest of the group. Are there particular tools... First, do you agree? And who? Are there part that you think could help inform whether mergers might harm more vulnerable groups of workers?

Michael Kades:

I feel like I'm going to be a broken record here, because I think in qualitatively the tools that the agencies should use in labor market, analyzing labor mergers involving low income workers, are the same tools you use on the product side. Or you can literally go down the merger guidelines. Do you have evidence of the... Well, before I get to that and I want to say, I think this spills a little bit on with Fiona and Josh talked about, I think, right, the evidence on market power of labor goes way beyond the concentration studies. And that's really important. I think to understand that there's a whole range of studies that just find directly the market power that employers have. But particularly in the... So that has a lot of implications.

Michael Kades:

On mergers it means, what you really need to focus on is whether the elimination of the competition in the merger is going to make things worse, right? But I do fear and I think this is why this is good question, that in antitrust litigation, there's going to be an interest in, particularly on the defense side to say, "You have to define a market." Which should be less relevant here, because we should be focusing on how the merger changes the market for labor. So I think in terms of low income workers, I think you're probably going to be looking at markets that are rural, where there's just one, where the alternatives are going to be farther away. I think you're going to want to look very closely for evidence about whether there are interactions between the employers. But, on the product side, we look at bid evidence.

Michael Kades:

Well, is there evidence of employees switching between two employers, but not switching to other types of jobs? And then I think the types of evidence you just talked about, if there's evidence that these employers have suppressed competition between them, all that would be very strong evidence that even in low wage worker markets, that the merger could be anti-competitive. But, I entirely agree with you, I think that there're questions involved in those mergers that are going to be more of a challenge than say high skilled nurse.

Fiona Scott Morton:

Can I add something Doha?

Doha Mekki:

Sure, of course.

Fiona Scott Morton:

So I agree with what Michael said, that it's easier when you can define a particular skill and it's narrow. For low wage workers, if that tends not to be the case, if the product markets are broader, labor markets are broader. I think that the one direction to go would be to assemble what we know from the labor literature about the fact that jobs are sticky and there's a lot of friction and there's a lot of market power for even an individual employer over an individual employee. If that were a finding, if that were known, that were well established as something the government believed to be true and supported by the evidence base, then any conduct on top of that, isn't conduct that we're putting into a perfectly competitive market, so we expected to be competed away.

Fiona Scott Morton:

It's conduct that we're putting into a highly non-competitive market. So think about, for example, coordinated effects cases. Where we say, "This merger might increase coordinated effects." When there is an evidence base that the firms were watching each other and following each other and tacitly communicating, that allegation that this merger is going to increase coordinated effects, is much more powerful, even though we have no tool to say exactly what the quantum of that would be, compared to a setting where that is an assertion, and there is no such evidence base of the initial behavior. So, I feel like a place we could go that would be very fruitful is establishing that there tends to be market power in non concentrated employer-employee relationships, where that shows up how much it is and so on. And that would enable us to articulate additional harms as they appear.

Joshua Davis:

I just have one additional, oh, go ahead.

Michael Kades:

I just wanted to try to clarify what I think one other area to be looking at is the fissured Workplace, which is where we have companies outsourcing large parts of what they do, say janitorial services. So in those markets, even though they're low wage, and you might say cleaning offices is not... Lots of people can switch out of that job. There is evidence that those cleaning services are imposing non-competes on their workers. And at least there's a federal court case where they enforced it, right? So, that would suggest there's the example of, if you had that history, that you would say a merger that limits the options of employees in the fissured workplace have fewer alternatives as any competitive.

Joshua Davis:

I just wanted to observe very briefly that there is a pervasive, cruel irony that we see here, which is that when you talk about workers who are not specialized, they often have the least market power. And you see this both on the buy side and the sell side, that there are all sorts reasons that the folks who are least able to resist antitrust violations are often least able to prove the antitrust violation, or especially that they were harmed by the violation. And we see this both on the sell side and the buy side, because of such limited data. If you're just a puny little worker, unlike a chicken seller, a huge chicken seller, or if you are a small buyer who has very few purchases, unlike a massive buyer, a national chain, often the econometric models we use to establish harm, can't establish harm for you.

Joshua Davis:

And so we are put in this very difficult position, where as the courts often will ratchet up, maybe for good reasons, maybe for less wise reasons, its standard of proof, we end up helping least the people we should help most. And the ones that as a matter of economic theory, are almost certainly most likely to be harmed. [inaudible] Trust laws will target buyers or sellers who are most able to resist. So their names show up in the documents and it's easy to bring a claim on their behalf. But, to quote Oliver Wendell Holmes Jr from a different context, the puny anonymities, the ones who have no chance and will never be noticed by anyone, they're not mentioned in the documents. And so it's harder to prove a case for them. And I do think that is very unfortunate from a matter of justice and from a matter of economics.

Doha Mekki:

I hear that loudly Josh. And so I think we'll have some opportunity to address this. Rachel, we'll pull you into the conversation when we talk about some of the intra-franchise no-vote restrictions in the litigation involving McDonald's and Jimmy Johns. I imagine you've made some observations about this issue. But just to wrap up mergers before we move onto conduct, hearing all of these suggestions and observations, we recognize the agencies have certain tools, as a matter of procedure when mergers come in to fair it out, whether a deal is likely to harm competition for workers. Jeff, if you are able to opine, do you have any ideas about whether there are changes to, for example, the HSR form? Second requests, or other aspects of the agency's merger review, that can better take into account some of the ideas that have been articulated on the so far?

Jeffrey Kessler:

Thank you. So, let me make a few observations here and I apologize for the train noise in the background, since I'm on a train. I think antitrust has some things it can do very well, and some things it does not do as well. And so focusing on the comments that have been made, what does it do best? It's going to do best when its focus is on markets, it's going to do best when its focus is on market power. And in that regard in labor markets, I think that the first thing to focus on is looking at specialized skill sets, because that is the lowest hanging fruit. This goes back historically. Back in 1970s, it was a case filed by basketball players against the merger of the NBA and the ABA, based on labor market's techs. And that to me is the lowest hanging fruit. Whether it's sports personalities, or nurses, or authors, or others, that's something that the HSR form should take into look at, in terms of labor markets.

Jeffrey Kessler:

The second lowest hanging fruit would be local geographic markets, which that are all no poaching agreements or other evidence of that type, that's going to be a little bit of a challenge for the DOJ and the FTC because you don't often focus on such local market effects. And maybe this is an area where state AGs can participate and help out. Because you're really looking at local effect markets, whether it's rural or others in terms of that, then you may want to look at your merger procedures in terms of how to better coordinate that, to make sure that the issues get examined. I think the hardest one and in one I'm not even sure can be effectively dealt with, is the idea that there is generally an unequal bargaining power and market power, even in the absence of normal anti-concentration concern. I think that's an issue for labor policy, but I'm not sure that HSR procedures can effectively either perish that out, or decide how to deal with it. I'm going to go back on mute, but for now in a very noisy spot, I just got off by train. So thank you.

Doha Mekki:

Thank you, Jeff. I should explain that Jeff is on an asylum that was involved in an incident this morning. And so we're really grateful for his participation by telephone, notwithstanding his circumstances. Michael, I want to come back to you with a question about antitrust reform. As many of us are undoubtedly aware, we're in the midst of a very robust discussion about whether the antitrust laws are fit for purpose. And while a lot of that discussion has focused on tech. There certainly has been an effort towards general reform. And those efforts to my mind would have an appreciable effect on the standards and burdens of proof for labor monopsony theories. Can you provide a brief summary of the federal legislative proposals on the table, and how they might impact some of the theories we've talked about thus far?

Michael Kades:

Happy to. I'm going to mostly focus on Senator's Klobuchar's bill, the claire act as it's generally antitrust law. And I should disclose that I was involved in drafting that, so any parts you don't like were clearly by somebody else? No. So I mean, what I would say about what claire would do, that those types of reforms is they would help focus court on what really matters. And would take off the table issues that haven't been litigated because we haven't done labor cases very much. So, one of the things these proposals do is they add monopsony to the antitrust laws, explicitly. Now that you shouldn't need that, but at least adding that means that you take that issue off the table, that people can't say, no, no, no. Section one says, monopolization, it doesn't say monopsony. And particularly given the federal judiciary that increasingly is textureless. It would be helpful to take that issue off the table.

Michael Kades:

Second thing that the statutes do, the proposals do, is again, making it clear that we're market power as in the question is, not just looking what happened on the consumer side, but there's a definitions of market power that uses the term trading partner. So if you can show that it's the buyer who's harmed, that satisfies the market definition. Now, again, you can go through litigation, you should win this, but it shouldn't even be that hard, but why should we have courts having to do these first order questions when there really aren't, shouldn't be debatable. A third way, and this does, reflecting just what we've talked about, the proposal makes it clear that the market definition is not required in claim, unless you are relying on market share.

Michael Kades:

So, what Fiona and Josh, were talking about, if the government or the plaintiff chooses to focus on the direct evidence of monopoly power, monopsony power, that's what should be focused on, you win or lose on the facts, not on juror's credential debate about when you need to prove a market and when you don't. The last thing I wanted to touch on is, right, also these proposals, they often are lowering the standards of what the plaintiff has to show. So instead of proving something has to substantially reduce competition, saying the section seven, it's the appreciable risk standard. And, admittedly, we can argue about what that means, but almost certainly that suggests that courts should be more concerned about potential harms, both on the product side and on the producer or employee side.

Doha Mekki:

Thanks, Michael. There is so much more to say about mergers, but I want to make sure that we have time to cover conduct and remedies. So Rachel, I want to move to you next. You've been very active in litigating franchise no-coach class actions, that has challenged us to intra-firm restrictions on soliciting, recruiting and hiring workers. These restraints have been criticized because they restrict the movement of workers and they eliminate at least one avenue of competition between employers, which might have the effect of lowering wages, benefits, and other terms of employment. The courts that have considered this issue seem at least willing to consider them under the rule of reason framework, which permits, proffered pro-competitive justifications for these restraints.

Doha Mekki:

And so my question to you is, how have courts considered the fact that... So first, what kind of fact finding have the courts actually made about these justifications? And, I know that many of the franchisors, some of whom you've represented have actually dropped the restrictions. And so I wonder if you can say anything about what that means in the process.

Rachel Brass:

Yeah, so in terms of finding, of course, factual finding actually only happens at a trial. So, on most parts, findings haven't been made other than in the class of context, where courts have found there's a little [inaudible] is the appropriate metric finding is there. Not horizontal agreements that the provisions in the franchise context is an ancillary to a legitimate business arrangement, the franchise system, and that the evidence showed pro-competitive effects further confirming that the rule of reason framework was the appropriate framework for the two cases in question. There's also a district court decision, granting a motion to dismiss on the basis that the rule of reason framework is right in the first instance. But of course, that's not finding, that's a motion to dismiss. Turning to how courts have taken into effect the change that different systems made at different times, so far that's mostly come up in the context of trying to prove or assess whether there is any proof of impact or proof of injury from these restraints.

Rachel Brass:

And that's happened largely in two metrics. One is looking at whether there's direct evidence of limited mobility. So far, in two cases that I've handled where there have people, record, depending on the system between 85 and 90% of employees who wanted to move between restaurants who did so. Companies actually had in place systems, almost had a system-wide system where you could move your completion of training from one restaurant, with your worker ID, to your restaurant, with your new worker ID, not withstanding this no-coach provision. And so, looking at the absence of direct effects and then looking at well, is there an indirect evidence where we're seeing impact, where once the provision was removed, there was a change in wages? And they're also, there's not an evidence of facts.

Rachel Brass:

For example, taking the Jimmy John's case, Washington AG led the charge on removing these provisions and they were removed first and most aggressively for Jimmy Johns in Washington, although they were not enforced everywhere. Jimmy John's wages before the provision was removed were higher than after, manager wages system-wide were higher before the provision was removed than after. And that was true from a substantial number of the non-manager workers nationwide as well. Similarly, in the McDonald's case, we had appointed from Florida, and in Florida, we just were hired before the provision was removed, which was well before any litigation was filed, then after the provision was removed. And so that's been the primary place where that question of change conduct has been taken into account as the metric for the but-for world. And there, we have not seen any change decision being made, based on the fact that an employer changed the conduct, other than to look at it through the lens of causation, where [inaudible] found if plaintiff has not met their burden of showing causation or a fact.

Doha Mekki:

One of the most interesting things about the assessment of no intra-franchise no-coach restrictions has been an apparent tension between the doctrine and the nature of the restraints themselves. I think I hear you saying that, maybe there isn't proof of anti-competitive effects of these clauses, but it sounds like there's a body of literature that disputes that pretty directly. And so I saw an article by Professor

Hovenkamp, who's participating in the workshop tomorrow, in which he focuses on this. And he implicitly suggests that the binary vertical, horizontal categorization that maybe gets us to the rule of reason framework that the courts are employing, really obscures the competition problem. And in particular, he thinks that we should focus on the structural case. And I quote, he says, "These agreements arise only because they're satisfying the wish of individual franchisees to be free of competition. Not because they give a fact to a franchisors policy of encouraging optimal employee performance, through a system of promotion to new opportunities. As a result, the mere fact of such vertical agreements exist and reach down even to relatively unskilled employees should be sufficient to create a presumption that they're horizontal and thus unlawful. And at that point, the franchisors and franchisees would have the burden to prove that there's actually a beneficial purpose."

Doha Mekki:

Hearing some of the points that Josh made earlier about the difficulties that the law has had in sussing out some of the harms to some of the workers who brought class actions against Jimmy Johnson, McDonald's, I'm curious, what do you think of that framework and specifically the burden shifting argument that he propose those?

Rachel Brass:

Yeah, so I have a couple problems with professor Hovenkamp's article, one to be written as if these restraints coexist. All of the examples he uses that seem currently in effect, that's actually inaccurate. There's an assumption that these were driven by franchisee desire. That's nowhere in evidence in any of the cases that I've litigated. And there's an assumption that all of the franchisee agreed that this would be the actual operation, where in fact there has been evidence of widespread hiring. So it seems to be changing what the legal standards of proof are, based on assumptions that aren't born in evidence. And while I certainly think as Josh and Jeffrey both have illustrated, there is a problem of proving actual impacts in these cases. And that may mean we need a policy shift in terms of a legislative labor focus shift in how we appropriate and address bargaining and power inequities.

Rachel Brass:

I think changing how we look at restraints and changing the burden shifting within the laws, because the evidence on the ground isn't matching economic theory is a very dangerous proposition. And I also think it creates an exception for labor and ancillary restraints in that context, but is inconsistent with what the Supreme Court

Rachel Brass:

That long ago in the [inaudible] case about how we think about restraints within the franchise context. And I think that's dangerous as well. We have things like territorial restraints, which we would think of as usually anti-competitive, and that are certainly done to protect the business interests of individual franchisees. And we still look at the balancing, and we don't have this kind of shifting of power of the burdens to proof sort of abstract and divorced from the evidence.

Rachel Brass:

But I also just want to emphasize, and you can see this in both the Daubert decision and the class certification decision in the Jimmy John's case, and in the class cert decision in the McDonald's case, both courts found both a lack of incentive to coordinate a horizontal agreement on the franchiser's part in both cases [inaudible] a pro-competitive effect the benefit of both the worker[inaudible 00:01:03] in terms of [inaudible] concept, but I think at every turn, it's divorced from evidence and based only on theory, and this is a panel I'm litigating, antitrust cases not on theory of antitrust cases. And I think in that context, you need to think about what actual evidence has shown.

Joshua Davis:

Can I offer just one quick comment? I realize I'm talking very much, feel free to say no, but the one point I'd make is I actually welcome this comment and I think Rachel and I have a somewhat similar perspective on the importance of the evidence. I do think there's a funny schizophrenia in the antitrust doctrine. It's funny. To me, it's a little strange to hear the notion that we need to look at the facts and not you just use antitrust theory when formulating doctrine, I actually welcome it, but it's because so much of antitrust law was rewritten beginning in the 70's to conform to microeconomic theory. And so much of the difficulty plaintiffs have in litigating cases is getting judges to accept what's actually happening rather than making heroic assumptions about the efficiencies of markets.

Joshua Davis:

And that goes back to professor Morton's comments, for example, about not equating market concentration with market power. Often we see this rolling body of evidence of the stickiness in the market for workers selling their services. And so I agree, let's look at the facts on the ground and see if wages are in facts suppressed, and not put the burden on plaintiffs or defense for that matter, but not the burden on plaintiffs to overcome some strong assumption or presumption that markets are always efficient and therefore what they're claiming is happening, couldn't be happening. So that's maybe a surprising point of agreement in some ways.

Doha Mekki:

Thanks, Josh. I'm actually coming to you next to talk about your litigation experience and the USC case. So for the last several years, you've been out representing a class of MMA fighters in a section two monopsony case. Can you quickly summarize the facts and primary issues being litigated and where the matter is headed?

Joshua Davis:

Sure. And I will, given that I've already talked a lot, I will put an emphasis on quickly, which is we represent, I think it's been seven years actually, which boggles the mind, MMA fighters bringing claims against the dominant promoter of mixed martial arts, the UFC, which is really Zuffa, which is really Endeavor. And there are three basic kinds of conduct at issue: Acquisitions of rivals and contracts that are long-term on paper and perpetual in practice and then coercion, which is coercion to force fighters when they want them to, to sign up for a new contract. So basically you fight for the UFC and only for the UFC, for as long as the UFC wants you to. And that has two primary economic effects. One, it locks up the fighters so they can't fight anywhere else, and that deprives them of bargaining power.

Joshua Davis:

But two, it also deprives other promoters of a critical mass of top fighters to be able to be an attractive place. So even if you can get out of the contract, you've got nowhere to go as a single fighter or a couple of fighters. And our argument is that, and we think the evidence supports the conclusion that, whereas MMA fighters get about 20% or less of event revenues, they would get 50% more or more of event revenues if the market were competitive, because we do a regression to show that. But in addition, you see that in the NFL, the NBA, Major League Baseball, NHL, boxing, et cetera. And where we are is that the court has indicated that it will grant class certification and we are still waiting the order and opinion on that.

Doha Mekki:

So one of the things I find so fascinating about your case is that litigating under section two, you're focusing a lot on contracts. It seems to me that as a matter of litigation strategy, you very easily could have proceeded under section one. You could have done both section one and section two, but that's not what you guys are doing. How did you guys come to that decision? And what flexibilities, if any, has section two afforded you over section one?

Joshua Davis:

I think, without oversharing, I think we didn't really see any advantages under section one ultimately. At the end of the day, this is a rule of reason case. And then we should have to prove the same things under section two as it's section one, except for, we don't have to prove an agreement under section two. And some of the conduct at least is pretty clearly unilateral like the coercion by the UFC that doesn't really fit into section one. And so there's some risks with bringing, there may be some benefits just because section one cases are much more common if nothing else, but there are some risks with bringing a section one claim. One is you get into this odd situation where the contracts are with the plaintiffs, which as a matter of doctrine just should not pose a problem, but can be mucked up by a defendant to sort of say, well, wait, they wouldn't agree to it if it wasn't good for them. And so you're emphasizing that. And then there's always the concern that if what you have at heart really is a unilateral action case, bringing a section one claim in addition could be taken as a lack of confidence in that claim, but it's a close call, and I don't think that there's not one sort of slam dunk reason to pursue it just under section two, as opposed to both.

Doha Mekki:

I'll reveal myself a bit and say that I think section two law is very underdeveloped relative to section one. So I found this hugely interesting. Rachel, I would love get your defense perspective. Do you have a sense of what tactical differences exist between defending labor monopsony under section two versus section one?

Joshua Davis:

I don't think we can hear you. I can't.

Rachel Brass:

Sorry. I think much like Josh said, the real difference is where the evidence points, it's less of a tactical issue. In the courtroom it's what you can prove. So if you can prove a per se violation under section one obviously that's a nice place to be, but once you're in the land of rule of reason, as Josh said, if you read section one and you are looking at a question of whether the agreement is collusive or whether it's just an agreement. There's certainly circuits that say you can't challenge under section one as a collusive [inaudible] that you agreed to, an agreement can't challenge it under section one. And just because something's an agreement, if it doesn't have indicia of collusion, which you would have to show, that can be harder to prove. So to me, it's less of a tactical question as you know, where can I best marshal the evidence as a plaintiff? Because on the defense side, I'm similarly going to just be looking to disprove each of those things. And one of them isn't necessarily better or worse. It was very much done. I have in front of me [inaudible].

Doha Mekki:

Thanks, Rachel. Josh, I want to come back to you just 30 seconds. You mentioned proving wage share as a measure of the anti competitive effect of the alleged conduct of UFC. How have you convinced the court of your view? How have you convinced the court about the but-for world and what the proper measure of effects actually is?

Joshua Davis:

So this has been one of the central points of contention in the litigation, for sure. And again, to follow on what Rachel said in part, we were greatly aided in the fact that the UFC said wage share is the wrong way. You shouldn't look at the percentage of the revenues. You should look at just dollar amounts. And yet internally they routinely used percentages of revenue as a way to measure the compensation, paid to the fighters. And that put them, I think, in a very difficult position. And then we had a stroke of luck in the sense that one of their experts who was resisting that approach, one of the UFC's experts cited as authority, Alan Manning from the London school of economics. So we brought in Alan Manning from the London school of economics to say we were doing it the right way. And so again, it was like the evidence as it hit the ground, I think was pretty compellingly in our favor.

Doha Mekki:

I think this is hugely important. You know, it is no secret, but the cost of economic experts is sky high. And so I'm always interested in what the government doesn't litigate to get damages. Obviously we seek liability findings. And so I'm always interested in whether there's a structural case to be made for any competitive effects and not very expensive econometric analysis that is challenged to the fourth decimal point in litigation. And so I wonder, did you lean on any structural features of the market to make your case?

Joshua Davis:

We did, but at this point, realistically in litigating class certification those experts are sunk across, you're going to be spending millions of dollars on your experts. You're going to build an impact model and aggregate damages model that uses vast amounts of data, ideally, all of data available, which is what we did. And so at that point we might as well lean in and use it to establish everything. We do make structural arguments about most fundamentally the UFC is like the NBA or the NFL, they've said that, "We're the NFL." So everyone else is a feeder league and you'd expect there to be this kind of market power, but we're going to rely till the law around class certification changes dramatically, if it ever does, we're going to be spending millions of dollars on our experts to gather the data and run the econometrics. There's just no way around it.

Fiona Scott Morton:

But notice that that's different between the government and the private plaintiffs. First there's class cert, but also DOJs would be primarily interested in liability, which I think is less of a quantitative exercise. And there are ways to do liability that are not going down into the weeds. Indeed, if you have to go down into the weeds, then you're not focusing on your strong arguments because why are you down there in the details if you have a broad high level points that are right. So that's the direction I would go if you don't have to do class cert and you don't have to do damages.

Doha Mekki:

Thanks, Fiona. I could ask you questions all day long, Josh, about the UFC case, but I want to go to NCAA and ask Jack a couple questions. I think as everyone knows, earlier this year, the Supreme court decided [inaudible] opinion to strike down certain restrictions on compensation for college athletes by the NCAA because they violate section one. There's a number of interesting features of the opinion, but I think the one that caught labor competition Watchers, I think most intensely was this issue of cross market balancing. And specifically the court really tees up this issue and says, I think they point to an AAI brief that really cast out on whether cross market balancing should be available. And the court says, nonetheless, the litigants have not put this issue in controversy. So Jeff, I have two questions for you. One, how and why did you guys avoid this issue? As best as I understand the claim, there's this idea that compensation for college athletes essentially needed to be nothing allegedly to drive consumer demand for the sport and can you help us make sense of the law here?

Jeffrey Kessler:

Sure. So this indeed is a very, very important issue now. The reason it was not presented in the Austin Case directly was because we were governed by ninth circuit law, which was a case called O'Bannon, and O'Bannon had accepted the possibility of a justification being in the output market for college sports. And we were doing our best to move things forward for the athletes within the confines of the ninth circuit law. And we won under that law. And since we won even where cross market justification was possible, we ended up not bringing that issue to the Supreme Court even though there was a concurring opinion at the ninth circuit who suggested that this was another fruitful line to pursue. And it was raised directly in the oral arguments by the justices, and it appears as an open issue in their opinion. So where does this go from here?

Jeffrey Kessler:

There's a successor litigation now against the NCAA that I'm involved in called House v. NCAA. And in that case, this is over names, images, and likeness restrictions in the labor markets. And we are directly raising the fact that you should not be able to justify any of these restrictions by arguing for output market restraints, that you have to show your pro-competitive effects within the labor [inaudible]. And that will get adjudicated by judge Wilkin, we're [inaudible] again, but now we're taking it on directly because the Supreme Court and the concurring opinion suggested that this was a viable approach. And so this is going to be very important. It obviously has implications, not just for labor market restraints in sports, it would apply to many, many other contexts, including some of the franchise cases that have been discussed, where the justifications have tended to focus on what this does for the output market, as opposed to the labor market itself that's being restrained. So we'll see how this plays itself out, but we expect that we'll get to this decision sometime probably in 23, if I had a guess, probably come up on summary judgment and that's sort of where our case schedule is, but it's a very important issue.

Doha Mekki:

I agree with you, Jeff. Just to put a finer point on this, it seems to me that under our merger law, we're pretty clear that we don't count out of market efficiencies or supposed justifications for an anti competitive deal. In section one cases, under ancillary restraints doctrine, there's a little bit of something that looks like cross-market balancing anyway because of the subordinate and collateral language under the ancillary restraints doctrine, but it really does seem to be an open issue and a potentially dangerous issue if the doctrine becomes too undisciplined under section one-

Jeffrey Kessler:

I think the key [inaudible] Supreme court case here is Topco, under section one, which is not a market case, but if you go back and look at Topco, there is a whole discussion about where you can't use cross market justification, at least in part of that opinion. And that's what I think the Amicus we're alluding to, that's what I think some of the justices we're alluding to. So keep watching this channel, I think this is going to be an important issue.

Doha Mekki:

Thanks, Jeff. So we are running out of time and I will ask for the panel's indulgence because I want to just hit on remedies really quickly. So we've talked about different liability issues, paths to liabilities, obstacles to liability, but remedies are really important. And so I've long been as interested in this issue. Fiona, when there's a merger that presents harm to competition in a labor market, assume the agencies can prove liability, the agencies can block the merger outright. I don't think there's serious debate at least anymore that that is an option. But what happens when there's a product market concern for which maybe divestitures fix the issue, but it's not totally obvious what the fix is in the labor market, is structural relief still appropriate, or do you think there's a better case for behavioral remedies for mergers that harm competition upstream?

Fiona Scott Morton:

Well, as we all know, the problem with behavioral remedies is that they aren't self-enforcing, you're asking for them to do something that's against their economic interest. So unless DOJ has the personnel and inclination to babysit that industry and check back with them every a quarter or so, a behavioral remedy is not as good as a structural remedy. So we take them when we can't get the structural remedies. And I think part of what needs to happen with labor markets is to say, these are real markets, there's real harm. And if the merger causes harm in a real market, then we get to block it under the Clayton act. And that's the end of it, and it doesn't really matter which side we're talking about, because the sell side is the buy side. So I would say like we would say on the normal sell side, if a divestiture can't fix the problem, then we have an anti-competitive merger. I don't know what else you can say, we got to sue to block it.

Doha Mekki:

Thanks, Fiona. I also want to talk about remedies under section two. Personally, I'm not aware of a substantial body of scholarship on remedies for labor monopsony violations. Certainly we know there's a full menu of options available and other kinds of section two cases, including breakups. And so as I thought about this, this really raises this foundational question about labor competition concerns. And so Josh, I want to come to you. Let's say you have a section two labor monopsony case and you've moved on a remedies phase of your trial, is the goal to restore competition to the labor market, or is the goal to do something more proactive by which I mean are you trying to conceive of what the economic opportunities and bargaining power is that would've existed in a fair and robust market and do you try to seek that relief? And so the second part, that's 1A. 1B is what can you actually get a court to do?

Joshua Davis:

So I'm going to collapse those two issues if I may, because you know, thinking as a practical lawyer as again, Rachel has pointed out as is often a good way to in this context. We know that we're asking a lot of the judge, we know that asking a judge to restructure a market is a very nervous making thing. And so we are not going to be looking at brand visions of what the market could look like. Our hope is that we can identify key points, key changes and behavior that are objective. I mean, Fiona's point about how much can you really monitor what's going on anyway? We have a bit of an advantage because our clients on the ground know what's happening, but we're going to be looking for as modest and as surgical a set of changes as we can possibly have, So that something much closer to the competition can take place without achieving what we would in an ideal world, what we think might be ideal labor policy.

Joshua Davis:

And so in a case like the UFC,, we could imagine something like, and this is me spit-balling, not the team saying, not knowing what the clients would ultimately approve of the lawyers, but you know, if you cut down long term contracts to one year contracts and had them all come up at the same time, you could have real competition among promoters for the services of the fighters. Would that take you to an ideal world? Probably not, but it's concrete, it's easy to enforce. And we still think the fighters would probably make easily two and a half times as much as they do right now, which is less than a purely competitive market, but they would be dancing in the streets. And so that's really how we think about it. What's going to be clear, not dangerous, not frightening to a judge. And I don't mean as a criticism, judges are understandably very reluctant to try to build markets on their own. And so we have to be really careful about that.

Doha Mekki:

Jeff, I'm going to give you the last question of the panel. Thinking about some of the points that Josh just raised and the theory of labor monopsony, surely I'm not the first person to wonder whether there may be better remedies available under other substantive areas of law. I think antitrust can do a lot, but I have been on record saying that antitrust is not a panacea for every issue facing workers. And so I wonder at what point do you think we should look to regulation, other relief in federal and state labor laws to achieve some of the goals that have been articulated for labor competition policy?

Jeffrey Kessler:

So I think you identified what the issue is, which is that it's very hard to ask courts to become regulators. And even if you ask them, the judges may refuse to take on that responsibility or be timid in that responsibility. I've seen cases where there was clear relief that should have been granted to restore competition in a monopoly case and courts are just reluctant to step in there and do that. So I think the easiest forms of relief are in joining specific behaviors, specific contracts, just like in the section one case. You have an illegal unreasonable strain of trade, you can enjoin that agreement for going forward. Well you could do that in monopolization case too, if you find that the agreement was the exclusionary means of monopolizing in a labor market or otherwise. So I think that's the easiest place.

Jeffrey Kessler:

If you want to do things that are going to redress the market in other ways, I really think then you're looking at modifying our labor laws. I mean, that's what the National Labor Relations Act was supposed to do. Many people may say that it used to do that maybe at the beginning, but now it doesn't do it as effectively as it could have. And there's a lot of issues to look at in labor law. There are other issues, minimum wage laws, equal protection laws. There's a lot of other laws that come into play here for labor markets. And I think if you put too much of a burden on antitrust to solve every one of these problems, we're all going to be sorely disappointed.

Doha Mekki:

Thank you so much, Jeff. That concludes our panel. If you are interested in this last topic we discussed, later in the programming, we're going to have a panel that's about what a whole of government approach to promoting competition for workers looks like. And we'll have folks from the Treasury Department, the Labor Department, OIRA and other corners of the federal government who will speak to precisely this issue. I want to express my deepest, most heartfelt gratitude to you, Jeff, Rachel, Fiona, Josh and Michael. I think this is a hugely important conversation. I think it's an essential public good that the public be able to hear these really interesting ideas and I look forward to hearing the rest of the discussion and encourage everyone who's tuning in to watch future remarks and panels as part of the programming. Thank you.

Miriam Larson-Koester:

Hi everyone. Good afternoon. I'm Miriam Larson-Koester an economist at the FTC. And I have the honor of moderating the first afternoon panel on labor perspectives on competition issues. We have five excellent speakers today and we're looking forward to some great discussion. Our speakers are Lisa Frank, the executive vice president of SEIU Healthcare Pennsylvania, Shannon Wait, a campaign assistant and former member of Alphabet Workers Union CWA, Marka Peterson, the legal director and associate general counsel at the Strategic Organizing Center or SOC, John Marshall, a senior capital markets analyst with the United Food and Commercial Workers stewardship program, and finally, Iain gold, the director of the International Brotherhood of Teamsters strategic research and campaigns department. Note that any statements made by the panelists or the moderator do not necessarily represent the views of the FTC or any of its commissioners. I'm now going to turn to each panelist to share some opening remarks. I look forward to learning from everyone's vast experience in labor work and to hearing from your unique perspective, how competition issues affect workers. First step is Lisa Frank from the Service Employees International Union. Lisa, if you could begin your remarks.

Lisa Frank:

Thanks. Thanks Miriam. And I do want to start by saying thank you to everybody who helped organized and who's participating in what I think is a really important conversation. Now, as Miriam noted, I work primarily with healthcare workers. So that's stocks, nurses, techs, professionals, clerical workers, aids, transporters, shuttle drivers, cafeteria workers, all the people who look after us and try to make us well when we need medical care, there are a lot of these workers. As a fraction of total spending and as a source of employment, healthcare continues to grow. 60 years ago, our country spent less than 5% of GDP on healthcare, today we're bumping up on 20%. And most years, healthcare job growth outpaces all other sectors. So today one in about nine of every worker earns their living in the medical field, but alongside state growth, healthcare has also experienced dramatic, horizontal and vertical consolidation as well as the integration of providers with insurers.

Lisa Frank:

And this means that the wages, benefits and working conditions of an ever growing number of people are set by an ever shrinking number of corporate entities. About a third of all states in the country have a single hospital system as its largest private sector employer. There's an impressive body of research that warns us that hospital consolidation integration don't bring benefits to consumers or payers. We're also discovering that consolidation isn't great for caregivers or caregiving. I was taught the word monopsony by Marty Gainer, a generous and wonderful healthcare economist who works with CMU in Pittsburgh, which is where I'm at and who many of you will know as a former director of the bureau of economics at the FTC. By the time I learned the word UPMC, which is the largest private sector employer in my state, Pennsylvania, was well on its way to monopsony power.

Lisa Frank:

UPMC was formally incorporated in 1990 through the merger of Western psych Presbyterian and The Ear and Eye Clinic. By 2013, UPMC had additionally acquired and merged Shadyside, Braddock, Aliquippa, Southside Mercy, St. Margaret's, Montefiore, Magee, and children's hospitals. Most of those within or just outside Pittsburgh city limits. Since 2013, UPMC has picked up Passavant, Hamot hospital in Erie, Altoona regional, Jameson Health System in Newcastle, Susquehanna Health, itself a four hospital system in north central Pennsylvania, Pinnacle Health, a seven hospital system in south central Pennsylvania, Cole Memorial hospitals, Somerset hospitals and in addition, UPMC now operates 600 outpatient sites and doctors' offices, 50 facilities for physical occupational speech and specialty therapies, 14 retirement and long-term care sites along with its insurance arm and international and for-profit ventures. So UPMC's power as a purchaser of labor really has two sources.

Lisa Frank:

First, it's power is the dominant and sometimes sole employer in discreet medical markets. But second it's sheer size gives UPMC market making power, even in unrelated industries. Physician noncompete clauses, which appear in many UPMC physician contracts, both reflect and protect that first kind of power. Doctors would prefer not to sign contracts with noncompete clauses, but such are the conditions of employment at UPMC hospitals, which to say at hospitals that are buying most doctor services. In the context that I've seen non-compete clauses bar doctors from practicing in the geographic market they're in for the year following their separation from UPMC. Not competing in the same market results in loss of income, licensure complications, perhaps the new need to uproot and relocate your family and doctors also talk a lot about what it means to practice medicine in a market with limited options for employment, knowing that upsetting your employer could lead to loss of your career.

Lisa Frank:

Fear of termination among physicians was painfully apparent when about two years ago, UPMC announced its intent to stop treating all patients who carried rivals' insurance products. So UPMC doctors who were issuing pink flips to hundreds of thousands of seniors and cancer patients often said that they believed UPMC's behavior in the market was forcing them to violate their oaths as doctors and that non-compete clauses effectively silenced them. And though they complained privately and bitterly about moral injury, very few voiced their concerns in public. So for physicians and others who can only sell their skill to a single buyer, or at best a small number of buyers, the most harmful and perverse effect of monopsony power may well be the inability to work at the highest standards of your profession. Now at the other end of the occupational hierarchy are hospital service workers, workers who hold so-called low skill jobs of cooking, cleaning, transporting record keeping, assisting patients with non-medical activities.

Lisa Frank:

And here UPMC's monopsony power is rooted less in its uniqueness as a purchaser of specialized skill and more in the sheer number of workers it employs. In Pittsburgh, workers and employers alike have long remarked that UPMC sets wages for work outside of the medical field. Organizers who bargain contracts in hotels are told that workers shouldn't expect raises until UPMC gives raises. Conversely, when our target or our [inaudible] decides to tempt workers by setting a minimum start rate above

UPMC's they're hiring perhaps 10 people in perhaps 10 stores, but not putting any real pressure on a system with tens of thousands of low wage workers. Take Nyla, a 17 year UPMC administrative worker, who was told by her manager to quit. If she didn't think that the PTE she'd been offered was sufficient to protect her. She conducted a thorough job search for the role of office administrator and found about 800 possibilities. Doctors' offices, real estate offices, but after eliminating jobs that paid less than hers, jobs that were part-time or jobs that would require her to change her kids' schools or buy a car, which she could not afford, there were in fact, two physicians available. Wages and benefits are of real importance to service workers and they are no more important social

Lisa Frank:

The determinants of health. UPMC workers are quick to note how much power their employer has over their health, because UPMC controls workers' wages and sets the price of medical services and sets the price and terms of the in-house insurance product. So UPMC effectively decides how much medicine its employees can afford and how much medical debt they'll carry. But service workers no less than doctors are subject to moral injury. And here, I just want to talk about Gary, a six year environmental services worker at UPMC's flagship hospital, the big black man, a recognized outstanding employee until the day he questioned changes in how schedules were being made at his morning huddle. His manager called UPMC's police claiming that his behavior was threatening. Gary left the building to deescalate the conflict and avoid a counter with police and was fired for job abandonment.

Lisa Frank:

Angered, he took his case to Pittsburgh's Human Relation Commission, which found that 65% of Gary's department is black, 85% of disciplines and 95% of all terminations are borne by black people. The commission also found that managerial communications about his termination used derogatory language and took note of his advocacy role. He lost his income and his health insurance in the middle of a pandemic just days before his wife gave birth, his case isn't settled and he has since moved from Pittsburgh. So let me wrap up. In a functional and competitive labor market employees dissatisfied with their situation, have the option to leave, what economists call exit. The threat of exit, we're told is what pushes employers to improve wages, benefits, and other working conditions. But in dysfunctional monopsonistic markets, exit for workers is impossible or impossibly costly and the risk of workers exiting isn't sufficient for employers to offer competitive wages, benefits, and working conditions.

Lisa Frank:

So monopsonistic markets demand another solution, what economists call Voice. Voice means empowering people who have few market options to make improvements directly on the job that they already have. With Voice on the job, workers of course can address compensation issues, but as I've tried to indicate the harms of the monopsony go well beyond loss of potential income. Collective bargaining agreements have anti-discrimination clauses and grievance procedures, community benefits can directly address what communities need. And these are the tools that have allowed workers in monopsonistic industries like coal or auto or steel to level the playing field make change over time and transform dangerous odd jobs like hospital jobs into work that builds and serves communities.

Lisa Frank:

These are also the tools that have helped the country with the tragic taste for bound labor to hold itself accountable. And the last thing I want to say is the time matters. A dietary worker at Presbyterian Hospital with a quick wit and a calculator figured out that if UPMC service workers had started their job at today's wages right after the Civil War and worked straight through to the present, they would still have a century to go before they made what UPMC CEO made last year. Hospital systems began their consolidation spree more than a generation ago. If monopsony is a problem, it's time to act. Thank you very much.

Miriam Larson-Koester:

Thank you Lisa, for those excellent remarks. I'm going to pass it now to Shannon Wait of the Communication Workers of America to give her opening statement.

Shannon Wait:

Hey everybody and thanks for having us all gathered here today. My name is Shannon Wait. For two years I worked as a data center technician at an Alphabet location in South Carolina. My employer of record was Modis, a subsidiary of global staffing from Adecco. After being suspended from my job for union organizing, I'm now a staff organizer for the Communications Workers of America, supporting other tech workers to organize their workplaces. My story illustrates the tech sectors disempowerment of its workforce through the system known as temp, vendor, and contractor or TVC employment, which makes it more than half of Google's global workforce. This approach to outsourcing core operational work is not unique to tech, but in the hands of corporations, as large and powerful as Google and other tech giants, we can see an extreme version of employer dominations that shows up in restraints like mandatory arbitration and prohibitions on discussion of wages and the very precarious nature of work. The fear instilled by the employer that workers could lose their jobs and the extensive control Google exercises over its indirect workforce.

Shannon Wait:

Going back in time a few years, everything that I had ever heard about working at Google seemed fun, ping pong tables, free food and snacks and colorful interior throughout its offices. When I was hired as a TVC at a Google data center for only $15 an hour, I was told how Google's conversion path to employment for TVCs was very common. And I was hopeful that working hard and fitting in with the Google culture would earn me a path to full-time employment. I was wrong. Google's two tiered system left me extremely jaded. Google hires TVCs on role in three month contracts that usually get extended the same day that they expire. And the max a TVC can work onsite is for two years. And then there is a mandatory six month break that is usually subsidized by unemployment. I quickly learned that Google was in the process of TVCing the majority of the workforce at its data centers. Positions that were previously done by direct employees are now revolving doors of TVCs who don't enjoy the benefits or the perks of working at Google.

Shannon Wait:

By spring of 2020, the COVID 19 pandemic was in full swing. Google promised that it would pay all employees, including TVCs, a pandemic bonus as data centers are essential to Alphabet's entire operation. The bonuses did not arrive on the day that they were supposed to and myself and my fellow Modis workers became agitated. Google had already paid Modis the money to disperse, so where was it? Our Modis program coordinator emailed every Modis TVC to say, remember, it is never okay to talk about compensation with your peers. Admittedly, I was uncertain about the legality of this, but was so used to this kind of messaging and brushed it off, but I never forgot about it, eventually we received our bonuses. During the winter holiday season of 2020, some of Modis coworkers told me that they received a random bonus in their bank accounts. I did not receive one but assumed this was yet another payroll mistake.

Shannon Wait:

I emailed the payroll manager and asked if I was going to get one. Her response was, no, you are not getting a bonus and please do not discuss pay with other TVCs. I was really angry and I screenshotted this message, but it was not the last straw. Less than a month later, my water bottle broke at work, my friend and FTE also broke her water bottle. So she asked a Google manager if we could both have a replacement, the response was that my FTE friend could have one, but I could not because I was a TVC. I vented on my own Facebook page that day about TVC issues at Google. I had just joined the new Alphabet Workers Union CWA and encouraged everyone who engaged with my Facebook post to join. The next day, I was suspended by my Modis management for potentially violating an NDA. Worse, Modis HR told me that I was not allowed to be a member of a union because I was a contractor.

Shannon Wait:

AWU-CWA filed three unfair labor practices against both Modis and Google and both companies moved to settle. Both companies were forced to hang up a sign that read we will not prohibit your right to discuss pay and you do have a right to join a union of your choice. Though a slap on the wrist, the situation set the bold precedent for how worker consciousness and organizing can hold a company like Google accountable. A minority union of 900 people not recognized by the NLRB, AWU-CWA was able to get my job back within a few weeks. It's not enough though, Google's two tiered system is sadly a realistic reflection of the current labor model for big tech companies everywhere.

Shannon Wait:

Over half of Google's workforce are TVCs and most of those in the US make only $15 an hour with no benefits, a stark contrast to Google's perceived image when I started telling the story. As you can tell from my experience, workers are severely disempowered by this employment structure. We need stronger labor laws like an improved joint employer standard, but we also need antitrust enforcement that addresses unfair methods of competition by powerful firms. You can see how Google and Modis holds workers hostage to bad jobs by using unfair restrictions like NDAs and arbitration that take even more workplace power away from us. And they deny us the tools of collective bargaining that would level the playing field. I hope and believe the agencies who organized this workshop will address the imbalance of power with every tool available. The problems that I bring to the FTCs attention today have yet to be solved.

Shannon Wait:

In September, we found out that Google executives were aware since at least May 2019, that the company was failing to comply with international laws in the UK, Europe and Asia, that mandate temporary workers be paid equal wages to full-time employees who perform similar work. Sadly, no such law exists in the United States. AWU has focused on organizing TVCs throughout 2021, but this news ignited a new wave of organizing efforts at Google's data centers. Modis TVCs found out in October that a $200 weekly attendance incentive bonus that was promised to run through the end of 2021 was canceled with no back pay for the threshold already met. These workers sent direct messages to management to protest the change and came together across the entire country to discuss organizing efforts. Less than 10 minutes before a National Modis AWU meeting, Modis management conceded to the workers demands and the bonus was reinstated.

Shannon Wait:

Just last week, AWU-CWA filed an unfair labor practice against Google and Modis for firing a worker named Tuesday Carne for being ungoogley. In other words, Tuesday was fired for engaging in protected concerted activity for discussing Modis' holiday pay policies and asking difficult questions that Modis was unable to answer regarding nonexistent benefits at the company. The lack of accountability these companies face is alarming, but worse is the low standard of working conditions that their employees are forced to endure at a multi-trillion dollar company. How many times did they get away with this behavior before an organization like AWU-CWA was around? Google can solve many of these problem by absorbing the permatemp workforce into the company, which would create good paying jobs and stable workforce in rural areas where these data centers are actually located. Of course, that would have to come with a commitment from Google to respect its employees right to form a union. Thank you for your time today.

Miriam Larson-Koester:

Thank you Shannon for sharing these stories. I'm going to pass it now to Marka Peterson from the Strategic Organizing Center to give her opening remarks. Marka.

Marka Peterson:

Thank you so much, Miriam and it's really great to have this opportunity to talk about workers in the competition frame. There are three primary causes of worker disempowerment in labor markets, corporate consolidation of power, second, friction in labor markets that allows employers to wield market power at low levels of concentration and third, and perhaps most important to highlight here, policy actions and failures that have allowed for the steady expansion of employer leverage over workers. As Chair Khan and Commissioner Slaughter have each said at various times, we must recognize that the status quo is never neutral, rather the law shapes and distributes power. Thus, we believe the goal is not just to achieve the competition in labor markets, but to proactively advance a competition policy that takes a holistic view of the legal and policy structures that shape the workplace landscape and ensures power and fairness for workers. So I'm going to talk about specific policies, suggestions in areas that my union brothers and sisters are addressing, merger review, anti-competitive restraints on workers and fissuring business models, including franchising, with these three causes in mind.

Marka Peterson:

So regarding mergers, labor market concentration must be considered a merger review. No merger has ever been blocked based on increases in labor market concentration, but there are ample examples of the need for the scrutiny. In the T-Mobile-Sprint merger, despite promises, it would grow its workforce post merger, T-Mobile took a typical approach to achieving cost synergies by shuttering significant portions of its retail stores, which represented an estimated loss of nearly 20,000 jobs and which increased concentration in labor markets. And although a study by EPI did predict wage suppression on the order of 1-7% of weekly wages, the antitrust enforcement agencies did not take a serious look at the labor aspects of this deal. We believe if they had examined the labor impacts merger could have been blocked. In addition, the FTC and DOJ should establish a market share threshold for merger review that reflects the realities of labor markets.

Marka Peterson:

As Sister Frank explained, exit is difficult or impossible in many labor markets for reasons that go beyond concentrated employer power. Labor markets are sticky, there is significant friction in labor markets that makes it much more difficult for workers to switch jobs than it is, for example, to switch brands of toothpaste. This is logical if you think of the factors and relative complexity involved in these two different transactions. Because of this friction, employers are able to exercise market power over workers, much lower levels of concentration than in product markets. Research strongly supports that an employer with 20% market share in a given labor market will be able to exercise market power.

Marka Peterson:

We also recommend that where a merger would significantly increase labor market concentration the agencies should include collective bargaining in their toolbox of potential remedies. This makes intuitive sense. The danger of increased labor market concentration is that the employer can exercise unilateral power over working conditions. And collective bargaining gives workers countervailing power to negotiate working conditions with their employers. Providing for collective bargaining is not only consistent with antitrust policy. It is also consistent with, as scholar Hiba Hafiz says broader labor and macroeconomic policy, including equal bargaining power between workers and employers, access to economic opportunity and decreased inequality for workers and expanded mass purchasing power among consumers, generally. We also believe that agency should ensure workers a place at the table during merger review by convening worker review boards to advise on the labor effects of mergers at the review stage, including how a merger may impact worker bargaining power, representation, succession, and similar key issues. Fundamentally workers should have a seat at the table in a merging and post merger company to ensure they can negotiate the effects of any restructuring. With respect to ways to address, employer restraints on workers. It is important to know that where employers have power and we know that the average labor market is overly concentrated, they are able to not only dominate workers in classic anti-competitive ways such as holding down wages, but also impose many other types of restraints and structural limits on worker power. For example, research shows employers commit more labor law violations when market concentration is higher. Curtailing and violating workers rights, whether it's through denying organizing rights or forcing workers claims out of court and into arbitration allows employers to further entrench their power over workers. And we should remember that many of these employer abuses are engendered or tolerated through policy choices that for example, favor uncompromising enforcement of arbitration clauses, and extremely weak penalties for labor law violations.

Marka Peterson:

Sister Frank and Sister Wait have discussed the heavy impact of restrictions such as non-competes and non-disclosure restrictions. We believe the FTC should ban these types of employer imposed worker restraints outright because they directly interfere with worker mobility and information exchange in labor markets and are thus directly anti-competitive. Agency regulations should also include exclusivity restrictions, imposed part-time workers and anyone defined as an independent contractor, as well as abusive [inaudible] that erect ominous economic barriers to workers seeking [inaudible] decisions. The FTC could consider ways to address their fairness in employment contracts, such as requiring affirmative consent by workers when they begin their jobs, publicizing decisions and regulating fees. Finally, on the topic of business models that fissure the workplace, these models take the use of vertical restraints to a new level because they utilize the whole system of restraints to control purportedly independent workers and businesses.

Marka Peterson:

I believe Brother Marshall and Brother Gold will address some of these models, but I'll say a couple of things about the franchising model and close with suggestions for action in this area, business models that fissure rely on a series of vertical agreements for control and franchise businesses are no exception. In fact, franchising came about through a successful effort to weaken antitrust law that had previously prohibited lead firms from amassing power by controlling external entities like workers or other businesses through vertical contracts. Franchisers control franchisees through vertical contracts and these contracts are essentially contracts of adhesion given the massively superior information, bargaining power and other resources held by lead firms through which they dictate virtually every aspect of franchisees business from exclusive supply contracts that mandate high prices to arbitrary and unilateral control over renewals, sales and terminations.

Marka Peterson:

The gaping power disparity between franchisees and their lead firms not only harms franchisees, but also harms their workers who bear the consequences in the form of low wages and substandard working conditions. And franchising businesses matter hugely to the economy and two workers because they directly represent 5.6% of all private non-firm jobs in the US economy. We believe the FTC and DOJ should investigate fissuring business models, including franchising and regulate them as unfair methods of competition. These pervasive and growing businesses systematically shift huge swaths of power from workers to employers, and thus have a clear and massive impact on workers' ability to compete within the overall vertical labor supply chain, if you will, and a broad structural impact on the labor landscape overall.

Marka Peterson:

Moreover, these are vertical restraints that antitrust law originally intended to prevent. For these reasons, we believe these models are clearly anti-competitive. Fissuring firms should be required to make a choice, either recognize employees under their control by directly employing them and similarly absorb small businesses into the corporate form or alternatively, have these external relationships regulated as illegal vertical restraints. We also urge the commission to thoroughly review the problems raised by franchising and the current shortcomings of the franchise rule with a particular eye toward the myriad vertical restraints franchisers use to control franchisees. The agency should also examine the role that intellectual property law has played in protecting the vertical control of lead firms over franchisees and workers in the name unjustified brand protection. Thank you.

Miriam Larson-Koester:

Thank you so much, Marka. Those are great remarks. I'm going to pass it now to John Marshall of the United Food and Commercial Workers to give his remarks.

John Marshall:

Thank you Miriam. On behalf of the United Food and Commercial Workers Union, I would like to thank the Department of Justice and Federal Trade Commission for inviting us to participate in this workshop and to provide our perspective on competition issues in the labor market. Over the past several decades, there's been significant consolidation in the food and retail sectors with a vast majority of the UFCWs 1.3 million members are employed. We very much agree with the other speakers on this great panel, that there should be a formal role for workers and unions in the merger review process to ensure that potential harms to workers can be mitigated. Recently for example, the UFCW was very pleased to be contacted by the FTC regarding a retail food merger. And we believe that we were able to provide information based on our industry knowledge that helped to protect workers in that case.

John Marshall:

Having said that I would now like to devote the bulk of my comments to an issue of growing importance to the UFCW members and other low wage workers throughout the economy, namely misclassification of employees as independent contractors. In particular, workers in the so-called gig economy continue to be systematically misclassified. A business that misclassifies employees, short circuits workers rights to form a union. But these businesses also put firms which do not misclassify workers at a competitive disadvantage. That's why the UFCW believes that misclassification should be regulated as an unfair method of competition. The Federal Trade Commission should work with the Department of Labor, the National Labor Relations Board, and the Department of Justice to investigate and directly remedy misclassification. The Biden administration has taken several positive steps to reverse previous administration's attempt to institutionalize misclassification in the gig economy, specifically the withdrawal of the Trump Department of Labor, gig classification guidance letter, and independent contractor rule are welcome steps.

John Marshall:

And NLRB General Counsel Jennifer Abruzzo has indicated she intends to closely scrutinize cases involving misclassification and independent contract status that arise under the NLRA. These positive actions not withstanding, gig workers across the country continue to be misclassified. UFCW members experience misclassification in a direct way, particularly in the food retail sector, where the union represents 835,000 grocery store workers across the US and Canada. Over the past five years, UFCW membership in the e-commerce sector has grown significantly both within established UFCW employers and in new grocery e-commerce startups. Today, the union represents tens of thousands of workers in e-commerce fulfillment, including picking, packing, store pickup and home delivery. With these, UFCW employers are at significant disadvantage relative to app based management platforms, including Instacart, DoorDash and Uber, which can operate with labor costs that are 20-30% lower on misclassifying their workforce.

John Marshall:

The issues related to misclassification in the gig economy are very well documented, lack of meaningful control over how the work is done, the inability of workers to set prices, the inability to maintain clients or to market services, and a fundamental lack of transparency over how much workers will be paid. Gig misclassification disproportionately targets workers of color, although available statistics are limited one publicly traded gig firm estimates that 69% of their US workforce identifies as racial minorities. Another study estimates that in the San Francisco Bay Area in 2019, immigrants and people of color comprised 78% of delivery and ride-hail gig workers, most of whom relied on these jobs as their primary source of income. While workers are the primary victims of misclassification, UFCW employers and other firms, which don't misclassify their workers are also harmed, they are an unfair competitive disadvantage. This has led many of our employers to simply turn over this work to the gig platforms. Executives at companies which employ UFCW members complain that they already lose money providing home delivery for example, but they would lose even more that had to use employees to do it.

John Marshall:

One large UFCW employer recently laid off thousands of grocery delivery drivers and outsourced those jobs to DoorDash, which classifies workers as independent contractors, even though DoorDash recently agreed to a $100 million settlement in a class action suit alleging misclassification. This unfair competition is not limited to food and retail. If the misclassified gig model is allowed to persist, we expect significant portions of existing W-2 delivery and logistics work to become misclassified along with millions of other workers in a number of other occupational categories, including healthcare and transportation and the retail sector and others. The FTC has a statutory authority to investigate and address unfair methods of competition. The commission recently reiterated that the statutory mandate is a critical tool that the agency can and must utilize in fulfilling its congressional mandate to condemn unfair methods of competition. Courts have explained that the worker misclassification can violate the policy or spirit of antitrust laws because it significantly threatens or harms competition.

John Marshall:

Not only does the FTC have statutory authority to investigate misclassification as unfair competition, but antitrust enforcers also have the authority to invest whether a company's purported classification of workers as independent contractors resulted in unlawful price fixing conspiracy. For example, a ride-share company may claim that drivers are wholly independent of the company, but by doing so, the rideshare company is arguably engaging in unlawful vertical price fixing with its purported independent drivers. But if these drivers are employees, then the platform company and drivers are in fact, a single entity, thus avoiding antitrust liability, but incurring employer responsibilities. Thus, antitrust enforcement agencies have the power and purpose to investigate misclassification as central to whether companies, particularly platform companies are engaging in price fixing with their purported independent contractors. The recent FTC actions to put gig companies and other hiring entities on notice that deceptive claims regarding wages constitute a violation of Section IV of the Federal Trade Commission Act, are a step in the right direction.

John Marshall:

These statements not only mislead consumers but also they also mislead workers. Many of whom are likely misclassified. This dual impact on both consumers and workers underscores the need for a united approach by the Department of Labor and the FTC to remedying these types of problems. We believe a logical place to start would be firms with government contracts. And we strongly encourage the federal government to use its own purchasing power to make sure that workers are not being exploited and misclassified. Ensuring that firms, which of federal contracts do not misclassify their workers is consistent with president Biden's executive order on promoting competition in the American economy. Lastly, we believe that misclassified workers themselves should be empowered to take collective action to improve their circumstances without fear of running a foul of the antitrust laws. What we firmly believe that employees who are misclassified are already covered under the NLRAs antitrust exemption, we believe the FTC could issue a policy statement indicating that it will not bring antitrust enforcement action against workers who though they are treated by hiring firms as independent contractors appear to be misclassified.

John Marshall:

But we also want to be clear that this by itself is not enough and that the underlying misclassification must also be addressed. Exemption from antitrust prosecution is only one element of the bundle of employment rights workers have, which of course include wage an hour and other laws. It seems very dangerous to try to unbundle that set of rights and give gig workers only a subset of them. If we do, then these workers may be forced to take on the significant challenges of collective action in the face of employer hostility, simply to win the rights and protections they were already due under our laws in the first place. Thank you very much.

Miriam Larson-Koester:

Thank you very much, John Marshall. I'm going to pass it finally to Ian Gold from the International Brotherhood of Teamster. We welcome your remarks, Iain.

Iain Gold:

Thank you, Miriam. And on behalf of the Teamsters, thank you to the DOJ and the FTC for hosting this panel and this entire two day workshop. My fellow union brothers and sisters have talked about how powerful employers are able to impose unreasonable and unfair restraints on workers, and that there are entire business models from gig platforms to franchising that are based on network subcontracts that a primary firm uses to control other workers or businesses. One prominent example of these kinds of networks of control is Amazon's network of delivery service partners or DSPs which are small companies Amazon establishes to provide last mile delivery services or the most labor intensive final stage of delivering packages to customers doorsteps. Amazon has set up more than 2000 DSPs in the US to deliver its packages, but it claims it doesn't own these companies or employ these delivery drivers.

Iain Gold:

Nevertheless, Amazon not only controls the corporate setup of these supposedly independent businesses, but also controls each delivery and the driver who makes them in very granular ways, the order of deliveries, the route in the progress and speed of each delivery. It even tells DSPs when to fire workers. DSP drivers and their trucks are branded with the Amazon logo, the logo on the sides of the delivery vehicles to the labels on drivers uniforms. Amazon provides the technology that allows it to dictate routes, rates and control the work and workers in other minuscule ways. Amazon has even installed cameras in its DSP trucks that constantly record drivers, everything from their driving speed and turns to highly personal biometric information such as eye movements. Amazon also controls DSPs in ways that raise clear competition issues. Amazon dictates prices for each delivery and limits the size of DSPs by restricting the number of contracts each DSP can accept.

Iain Gold:

There are reports that Amazon terminates DSPs that attempt to reduce their drivers or increase their pay. As supposedly independent businesses, DSPs and their workers cannot fight back because if they do, Amazon can simply terminate their contracts and shift this work to other DSPs. Amazon has anywhere from 5 to 15 DSPs operating out of any single delivery station, therefore easily being able to shift work to the other DSPs. Keeping each DSP small and fragmented allows Amazon to prevent DSPs from countering Amazon's power over them. But in spite of this extensive control in branding, Amazon asserts that DSPs are independent businesses

Iain Gold:

And disclaim corporate responsibility for the DSPs and employment responsibility for the DSP drivers. This arrangement puts these small businesses and the workers at the mercy of Amazon, which controls the work but avoids the liability. The way Amazon has arranged its DSP network is another example of a business model that is based on contracts through which companies exercise their power outside their corporate boundaries to control other workers or businesses while avoiding corporate liability for the people and entities they control. We would like to see the FTC and DOJ take a serious look at models like the DSP model and other fissuring models and examine their impact on workers and workers' rights and power on the job.

Iain Gold:

The evidence will show that fissuring models like these exacerbate the imbalance of power between employers and workers, can engender wider worker abuses, and widen the gulf of economic inequality in this country because a growing show of the workforce is outside the boundaries of lead firms that disproportionately profit from these arrangements. We think you will find, as we have, that these models are fundamentally unfair to workers in anti-competitive because they systematically shift power away from workers to lead firms. Indeed, we are seeing the consequences of operations like Amazon's DSP program. Teamsters have fought drove over 100 years to make delivery work a decent paying middle class job with benefits that you can retire from, but Amazon's power and approach to employment are gutting delivery as a middle class job.

Iain Gold:

Delivery jobs for Amazon have a terrible injury record, even worse at the even worse than at the intensely paced Amazon warehouses. And there are rampant reports of accidents and other safety issues with DSP trucks on the streets, again, most likely because of the relentless pressure to meet the pace that Amazon dictates. Our evidence is that fissuring networks such as these, that transfer so much control to lead firms without any of the accompanying liability and leave workers without the protections of labor law, employment law, and other protections that this shifts massive power and wealth to large firms and leaves workers disempowered, underpaid, and in a perpetually precarious work position that entrenches their lack of power and fairness on the job.

Iain Gold:

One original purpose of antitrust law was to prevent the largest firms from dominating or controlling smaller firms and workers, including by imposing contracts on groups or networks of firms or workers. This was viewed as illegal and anti-competitive. We believed the FTC and DOJ need to invoke these aspects of antitrust law and address fissuring models of employment. We believe the FTC should regulate this classification as an unfair method of competition and should also regulate fissuring models where larger companies control other actors, including small businesses, as well as workers as an anti-competitive use of contracts that should be prohibited in circumstances like Amazon's DSP network.

Iain Gold:

Also want to address one other issue, which may also be discussed on another panel. The issue of how agencies can work together to address fairness of labor markets. The Amazon DSP network obviously raises the question whether Amazon is a joint employer of DSP drivers, and we think there is overwhelming evidence that it is a joint employer. But it is also clear that this model is one that is entrenching power in the hands of one large company with implications for competition and worker power and fairness generally.

Iain Gold:

So there are implications for labor and employment law, but also for competition in how a company like Amazon gets to use its power in relation to workers and smaller players like these DSP companies. We believe the agencies should think about ways that can utilize their own expertise and standards, but also use standards and findings from other agencies to address circumstances like these. For example, if the FTC determined that Amazon has market power over DSP delivery workers because it has imposed contracts on them through the DSP companies, or has the power to lower their wages, this finding could give rise to employer liability under both labor law, the NLRA, and employment law for wage and hour liability purpose. Taking this extra step and proactively imagining how a determination of employer power or lack of fairness for workers in one venue can be used in another venue that also implicates the treatment of workers would be a major step towards addressing worker empowerment and fairness in labor markets. Thank you.

Miriam Larson-Koester:

Thank you so much, Ian. Now that we've heard from each of our panelists and before moving on to more specific questions, I want to open the floor and see if anyone has anything they want to add or touch on based on what they've heard in each other's remarks so far. Hearing nothing, I'd like to pose now some specific questions and let our panelists respond and share their thoughts in a discussion format. We have a lot to cover and only just 10 to 15 minutes for Q and A, but the topics that we'd like to cover relating to FTCs work in competition analysis are first of all, collective bargaining. Second of all, merger review. And third of all, antitrust consumer protection. And if we have time, we may discuss some specific industries as well.

Miriam Larson-Koester:

So first of all, on the topic of collective bargaining, the question I have for you all is what role should collective bargaining play in counterbalancing employer monopsony power in labor markets? And should there be heightened scrutiny of unfair labor practices if an employer is found to have monopsony power? Lisa Frank, would you like to take that one?

Lisa Frank:

Sure. We're talking about power, right? We're talking about monopsony power. We're talking about the power of employers relative to the power of employees. And I think as I said in my remarks, but as everyone has said, where there is not the option, the viable option of exit, because the job isn't there or because the friction involved in taking the job is too much, then the only remedy is voice. And collective bargaining is voice, is the most traditional form of voice. It's one that workers invented a long time ago in exactly these kinds of situations. And of course it's something that we should consider it. Should we be that sensitive to small fluctuations in monopsony power? Absolutely. Absolutely. Marka pointed out that 20% can often be enough to really change people's prospects and their lives, and the dimension that I just wanted to call people's attention to is what that means over time.

Lisa Frank:

What does it mean over time to lose 1.7% in each year, over many, many, many years? I'm going to end with this. Nyla, who I mentioned, who's been in her job I think for 17 years, we dug out an old steel workers contract to see what a 17 year employee would be making had they had collective bargaining. In our region that's the prior monopsonistic regime. $33 an hour. And so, add that up. At $20.80, over a number of years, Nyla has a house. Nyla sends her kids to college. Nyla, yes, should be paying attention to small fluctuations. We should because those are how we make generational wealth. Those are the things that matter.

Iain Gold:

I would just like to add, if I could, Miriam, on that. One, under the National Labor Relations Act, the opening preamble talks about the government's role of promoting collective bargaining as a stabilizing force in our economy. And so I think, one thing for this audience is sort of the recognition that by definition, collective bargaining is a countervailing force to monopsony power. And Lisa mentioned this in her opening statement, in industries like steel, in auto, in package delivery, quite honestly.

Iain Gold:

Our largest employer is UPS, but we are countervailing force. We have to fight for and demand at the bargaining table with the strength of 300,000 workers to demand wages, benefits, and working conditions from that employer. Left to their own devices, most employers in this country do not treat their workers in that same way and provide those level of benefits. So I think it's one, it's this recognition that collective bargaining is a countervailing force and should be used in concentrated labor markets as a remedy for those overly concentrated labor markets and should be under heightened scrutiny in concentrated markets for a variety of labor law violations.

Miriam Larson-Koester:

Thank you. That was a very interesting answer. The next question that I'm wanting to ask on collective bargaining is whether the threat of antitrust liability would affect certain types of workers and how they're able to coordinate. And for example, what additional hurdles and collective bargaining independent workers face? John Marshall?

John Marshall:

Yeah, this is a really important question. And I want to be very, very precise in my response here because you just referred to independent workers. And I want to say there are, I think, situations where bonafide independent workers have faced obstacles in the form of the antitrust laws. One example that's often cited is that of the Maine lobster fishers who work independently, but have been prevented from engaging in collective action to receive a fair price for their catch. Even though they confront a market in which the intermediaries that they sell to exert significant buyer power. This suggests there are some workers who are truly independent contractors, not misclassified employees, and who deserve a labor exemption from the antitrust laws. But again, I really need to distinguish those workers from the case of misclassified employees. And I think it would be a mistake to believe that simply removing the threat of antitrust liability in the case of misclassification would effectively remedy the harms caused by misclassification.

John Marshall:

And we have the case of these app based companies like Uber, Lyft, Instacart, and DoorDash that are exerting such significant control over their workers, this would clearly not be sufficient. In fact, this approach of simply granting collective bargaining rights could play into the hands of these same companies, which have themselves made several proposals to create a third category of worker, often dressed up as sectoral bargaining or state collective bargaining. And I want to be very clear here. The UFCW supports sectoral bargaining. We engage in it, but the proposals that the gig companies have made depend on creating an antitrust exemption to do this, while of course, denying workers the basic rights and protections of employment status. So the UFCW believes that gig company proposals would lock misclassified workers, the majority of whom are immigrants and people of color, into that new substandard category of labor. And we just are very, very concerned that we not inadvertently go in that direction.

Iain Gold:

Miriam, if I could. I just, one other piece of this is to highlight, and there's a spectrum of whether you're truly an independent contractor misclassified by employers. But I think the common thread in much of this is that there are dominant firms, lead firms that are setting up these business models and to go after whether they're true independent contractors from collectivizing their voice against a larger entity or misclassified workers, again, largely because of a dominant firm setting up that business practice. We'd like the focus to be on the dominant or lead firm and not the smaller sort of weaker links in the supply chain or in the worker supply chain. So again, we would call for increased scrutiny on the lead firms and not the smaller actors.

Miriam Larson-Koester:

Thanks so much for these answers. Another topic on collective bargaining that came up in many of the remarks was fissuring. I'm wondering in your experience, how does fissuring, vendorizing, and precarity affect collective bargaining? Shannon Wait?

Shannon Wait:

Yeah, so both the two-tiered system and deceptive management practices chill our abilities to organize. So, when you have a group of TVCs performing the same labor as FCEs, even though they report to the same manager, and I would say that this is another example being a joint employer, Google is a joint employer, of MODUS workers and Google STEs. It makes it difficult to create a bargaining unit because there are on the books two separate employers. So it also divides workers, not just terms of working conditions and the pay that they receive, but the current labor law doesn't allow for that bargaining unit to exist for FTS and TVCs on the same team and under the same management.

Shannon Wait:

I don't understand why Google keeps the permanent rotation of workers for data center, hardware operations, and server ops, and why I worked alongside Googlers who made twice the amount of money that I made for the same work. The only reason that I could come up with for why this exists is so that Google can inhibit work organizing, which I would allege is a violation of workers organizing rights under the NLRA.

Marka Peterson:

If I could just add something also, I think both Lisa and I and everyone has sort of touched on how, if you have concentrated power and labor markets, that employers are able to exercise their power with respect to workers in so many different ways and not just lowering wages, but all of these different kinds of additional ways that employers can entrench their power and abuse workers. And so including increased unfair labor practices, if workers don't have effective exit. So while I think all of us support stronger labor laws and do think that labor laws are too weak, and need those in order to get to the collective bargaining stage. We also, it's not enough on its own. We need action also on competition policy and on competition law. And the point of the fissuring workplace is that it has shifted. It's actually shifted the structure of labor markets and of the employment landscape, so that employers systematically have more power and workers systematically have less. And that's why we think that practices like misclassification need to be regulated as anti-competitive practices.

Miriam Larson-Koester:

Thank you. That's very interesting. We have just a few minutes left, I think, for one more question, which I'll touch on our next topic of merger review. So should the antitrust agencies use a different lens when the competitive issue in a merger relates to labor power, that is, should we be concerned about even small increases in concentration among employers if there's evidence that it would reduce wages or opportunities for workers? Why or why not? Marka?

Marka Peterson:

Sure. This is, I think this is the issue, there has be overwhelming evidence that labor markets are sticky, as they say, or have all of this friction, all the reasons that Lisa talked about. You're not going to easily switch a job if you have to switch schools and buy a car and do all of these other things. And for that reason, not only can employers exercise market power at much lower levels of concentration, but similarly small changes in concentration could produce pretty big impacts in terms of employer power.

Miriam Larson-Koester:

Lisa, do you have anything to add?

Lisa Frank:

Well, I just throw in also that it's important to examine all the dimensions of consolidation, right? I mean, health care's the one that I know best, but often a merger, it appears to be horizontal. This hospital's going to merge with this hospital, but what's happening also kind of under the hood is a rationalization where this hospital is going to be kind of like downgraded to here's where your broken leg goes, and this hospital's going to be upgraded to this is where your neurosurgery happens. And then there's a pipeline between those two things. So, both of those hospitals are no longer going to have need for neurosurgery. And so the market is a different kind of thing. So I think you have to understand. And what I've seen often, to be honest, not that well understood, is the dynamics that are created around where horizontal integration is actually a form of vertical integration.

Lisa Frank:

And then you throw the financing where you can tear and steer patients on top of that. You got to understand that because it can look very innocent and has looked innocent, but it really changes what workers are able to do and what their mobility looks like. A noncompete clause that says you can't work in Pittsburgh when every other hospital around you has eliminated your specialty also means you can't work in those markets.

Miriam Larson-Koester:

Unfortunately, we're out of time. So I don't think we'll be hitting any of the other questions. So this concludes our panel. And I really want to thank Lisa, Shannon, Marka, John, and Iain for sharing your views on these really important issues and letting the audience in on this great discussion. So we're going to come back at 2:10 to see video submissions from the public followed by the next panel, which is on contractual restraints that can impede worker mobility at 2:00 PM. Thank you very much.

Daniel Gilman:

Hello. This is Daniel Gilman from the FTCs office of policy planning. Welcome back to our workshop on labor competition. We're going to kick off this afternoons session with four short videos that have been submitted as testimony. And just to remind folks, anyone who would like can submit formal testimony to the public record for the workshop up to the 20th of December. Directions to do so or are on the workshop webpage. Thanks very much.

David Wietlispach:

My name's David Wietlispach. I live in Omaha, Nebraska, and I've been in the local television business for almost a decade. As you examine anti-competitive practices in the labor market, I would point you to my industries near universal use of personal services contracts, and the restrictive covenants they contain. In my experience, these contracts are almost always multiyear, and I've seen them increasingly used for low-wage work. Newsroom employees making $40,000 a year or less, for example, can be locked into these agreements with no opportunity to negotiate the terms. If the worker wants to pursue a new job with higher pay, stations threaten fines that many cannot afford. In addition, as local station ownership groups have swelled in size, some claim non-competes extend across the nation to any market where they operate a station, and some workers end up believing that. Local TV's use of employment contracts is a perfect case study for the issue you're exploring. Thanks for the opportunity to make a comment.

Alex Dorado:

My name is Alex Dorado, and I've worked as a retail sales rep at ATT Mobility for nearly 15 years. I'm also on the 2022 national bargaining committee. When I represent my coworkers and meet on any grievances, our members tell me how much they love having someone on their side. As the only union wireless carrier, we have fought to raise the wireless industry standards. We even went on strike in 2017. We're up against a lot. ATT uses third party dealers to run many stores. These dealers even look the same as corporate stores, but wages are far less and training is lackluster. ATT won't even hire a dealer employee at a corporate store unless they've separated from the dealer for at least six months, and that's not fair. After the T-Mobile Sprint merger, you've cut one of the big competitors, which weakens our bargaining power. Since the merger, T-Mobile has closed over a third of its corporate stores, so there's also fewer jobs in the retail wireless industry. All wireless workers need the right to organize and bargain. Today, bosses deny those rights.

Russell Beck:

My name is Russell Beck. I have three points. First, non-competes are often necessary to protect trade secrets and critical customer relationships. While trade secret law and nondisclosure and non-solicitation agreements are helpful, they're frequently inadequate. Second, broad regulatory restrictions can have significant unintended adverse consequences, including replacing non-competes with an endless stream of trade secret litigation against former employees, like in California, which itself hampers employee mobility. Third, reliance on the existing economic research to support non-compete regulation is problematic insofar as the research is inconclusive, in parts conflicting, and mostly infers causation from correlation, limitation that's expressly acknowledged in some of the research itself.

Russell Beck:

An example of the same limitation as the frequently cited assumption that Silicon Valley's success is the product of California's ban on non-competes. If this were true, as one of my partners noted, by the same logic, Boston's dominance in life sciences is precisely because it enforces non-competes. Finally, if the FTC has the authority to regulate and chooses to exercise it, I've recommended fairness and transparency changes and limitations in a letter that I submitted on July 14, along with almost 60 other practitioners, which also provides much greater detail around everything I've discussed today. And I offer my assistance to the FTC as it considers any potential rules or regulations concerning these issues. Thank you.

Aidan Filipi:

My name is Aiden Filipi, and I am a data center technician at a Google location, but I am employed by contractor MODUS Engineering. I have always thought that working at Google would be a positive experience that provided ample opportunity for that middle class American dream. I was terribly mistaken. In 2019, google started vendorizing the majority of their workforce and many work at data centers for only $15 an hour with no benefits, while the full-time employee equivalents earn better pay and benefits. Worse, they keep me and my coworkers on rolling three-month contracts with a max of two years employment with no path to permanent employment. Google must provide stable employment opportunities and pay parity for their extended workforce.

Michael Lipsitz:

Hi everyone. Thanks for joining us to discuss contractual restraints that can impede worker mobility. I'm Mike Lipsitz, an economist at the Federal Trade Commission, and I'm joined today by Dan Gilman in the office of policy planning to moderate this panel. A couple of quick announcements before we begin, we will not be taking live questions during this event. We do welcome public comments, which can be submitted at regulations.gov prior to December 20th. There's also a link for comments on this event's webpage. Also, if you miss a live session, video of each session will be posted online for you to watch at your leisure. And finally, I'll note that any views discussed by the panelists or moderators do not necessarily represent the views of their employers or clients or the Federal Trade Commission.

Michael Lipsitz:

Today, we're going to discuss certain terms in employment contracts, vertical restraints that can tend to impede worker mobility and may have other effects of interest to competition and labor markets. Things like non-compete agreements, non-disclosure agreements, non-solicitation agreements, training, repayment agreements and related terms. Broadly speaking, non-competes can limit the alternative jobs an employee might seek. Non-disclosures limit the employee's ability to share or make use of trade secrets or other proprietary information. Non-solicitation or non-recruitment agreements restrict the solicitation or recruitment of former customers, clients, or coworkers, and training repayment agreements require payment from the worker to the firm if the worker leaves before some specified date.

Michael Lipsitz:

Such terms have been controversial. On the one hand, it's possible there are circumstances in which they solve a certain hold up problems in labor contracting or management, helping to avoid, for example, underinvestment in employee training or inefficiently low sharing of proprietary information within a firm. On the other hand, there may be some circumstances or many in which such terms may harm workers, downstream consumers, or both possibly by exploiting employer labor market power or information asymmetries.

Daniel Gilman:

Thanks, Mike. I have the pleasure of introducing our panelists who bring considerable and very knowledge of these types of vertical restraints. In the interest of time, I'm going to skip over their many accomplishments and simply refer you to their biographies on the workshop webpage. Our panelists, just to name them and their affiliations, our panelists are Richard Cassidy from Rich Cassidy Law, a tort and employment attorney who chaired the drafting committee for the Law Commission's uniform Restrictive Employment Agreement Act.

Daniel Gilman:

Terri Gerstein, director of the state and local Enforcement Project at the Harvard Law School Labor and Work Life Program, a senior fellow at the Economic Policy Institute, and previously the labor bureau chief in the New York State Attorney General's office. Marcia Goodman, an employment partner in the global law firm of Mayor Brown, LLP, who works with employers defending and opposing non-compete agreements. And Evan Starr, associate professor of management and organization at the Robert H. Smith School of Business at the University of Maryland. Each panelist has prepared some brief introductory remarks, which we will follow with questions and discussion. So we'll start with Evan Starr. Evan, take it away.

Evan Starr:

Thank you. Thank you so much, Rich and Mike, and thanks to the FTC and DOJ for hosting these events. I want to talk a little bit about covenants not to compete or simply non-compete agreements. And I want to present three things. First, I want to talk about the competing views on non-competes some of the evidence that's been gathered over the last several years, and finally some remaining concerns. So to start with some of the competing views, if we go to the first point, the fundamental argument for why non-compete agreements might be good is that they can create social value. And as Mike alluded to in his intro, this is a situation in which a firm might develop a trade secret that it would like to share with its worker, except if the worker goes across to the street and starts his own company and utilizes that trade secret, it could hurt the firm both by stealing competition away and by not having to pay for the development of that trade secret.

Evan Starr:

And so if workers get into these agreements with their eyes open, if they're compensated fully, then they can ensure that the firms have incentives to create those investments and to share them with workers and so that everybody benefits. And so if that's the state of the world, then what we would see is that non-compete agreements would be used for workers that have access to highly technical information, and that workers would generally be better off when they sign these agreements, and so too would firms. The second argument though is that non-compete agreements can destroy social value. And in this view of the world, we see that non-compete agreements might be implemented in ways where workers have limited bargaining power, workers could be effectively coerced in signing them. And that firms may benefit by the fact that non-compete agreements keep workers from joining competitors or starting competing firms. And so the firms benefit from reduced wage competition and turnover, and there may be even no value from extra investments. It's simply about restricting turnover and wage growth. And in this view of the world, the implications are that non-compete agreements might be used broadly. They could stunt employee mobility and entrepreneurship and wages, and there could even be negative spillovers and downstream outcomes. And so these two competing views have been in existence for the last several hundred years. And what we've seen recently is a wide swap of evidence that has begun to kind of tilt in favor of one of these. And so let's go to the next slide. I think it's fair to say at this point that the evidence largely favors the value destruction argument for at least the average worker. So if we go to the first bullet point here, when you look at where non-compete agreements are used, we see that non-competes are essentially everywhere.

Evan Starr:

They cover between 16 and 28% of U.S. workers, depending on the survey that you're looking at. By one study, the modal worker is actually paid by the hour. It's not even a salary worker. And we also find that non-competes are still used in places where they are effectively unenforceable by state law. We also find negotiation is quite rare, that workers are regulated asked to sign these agreements after they've joined the company. We also find that non-compete agreements are regularly deployed alongside a whole set of other restrictive covenants, like non-disclosure agreements, non-solicitation agreements and others.

Evan Starr:

Okay, we'll go to the next point here. And when you look at worker outcomes, recent research shows that if you look at workers who are bound by non-compete agreements and all the other restrictions, if you compare those workers to workers who sign only a non-disclosure agreement, workers earn about 5% less. That research also finds that top managers are relatively better off however. What some of the other evidence shows is that when states ban non-compete agreements, whether for low-wage workers or for high tech workers, that wages rise, that job mobility rises, that entrepreneurship rises.

Evan Starr:

At the same time, there's also research that shows that unenforceable non-compete agreements also still chill worker ability, and the workers are largely unaware of when their non-competes are unenforceable. And finally, there's some evidence on the negative spillover consequences of enforcing non-compete agreements. That includes the lower wage effects spillover to other workers in the market, spillover across state orders, and the consumers face higher prices. And so I'll conclude with some remaining concerns here. First, there is some agreement, we'll go to the next point, please. There is some agreement here on low-wage workers and the non-compete agreements are particularly disfavorable for low-wage workers since they tend to have low bargaining power, they tend to have little access to legal services. They can be chilled by threats. And there's kind of wide agreement that non-compete agreements for low-wage workers are generally a bad thing.

Evan Starr:

There's also agreement about transparency in the contracting process and that helping workers and firms. Where there's disagreement is that there are power imbalances for executives and top level workers where the sort of arguments for low-wage workers don't seem to apply. And it is true, as one of the videos remarked, that non-compete agreements do offer the firm more protection than these other restrictions like non-disclosure agreements do. And so there's a question that comes up, which is where do you draw a line for high-wage or low-wage workers? And I'll say on this point that I have some ongoing work where we're trying to figure out how much firms really value the ability to enforce both low-wage and high-wage agreements, so we're trying to get at that. And then I'll just end here with what the remaining concerns are.

Evan Starr:

I think that the remaining concerns largely evolve around the spillovers for non-compete agreements. If you want to think about an argument for why non-compete agreements for executives or other high-wage workers are not a good idea, then you need to think about how are the non-compete agreements affecting the market generally. How are they affecting consumers, consumer prices, patients, clients? Are non-competes actually needed for investment once you take into account all the other alternatives?

And then I'll just note, in one specific industry, non-competes can be particularly problematic, which is healthcare, in which there's really no competition for physicians in their first job. And then if a patient has their physician leave at an inopportune time, that it could be disastrous. And just as a point of comparison, the only occupation for which non-compete agreements are unenforceable in all 50 states are for lawyers, which are often compared to doctors along these dimensions. So with that, I will leave it and send it back to Mike and Dan. Thank you so much.

Daniel Gilman:

Thanks very much, Evan. Terri, you are up next.

Terri Gerstein:

Thank you. And

Terri Gerstein:

I'll start off sharing a little bit about how I got involved in this issue, which is when I was the Labor Bureau Chief in the New York AG's office. We started getting some complaints from workers about noncompetes that they were subject to. One of them, for example, was fledgling journalists who was working for Law360. And it turned out that Law360, the news website, legal news website.

Terri Gerstein:

Had all of their new reporters fresh from college or journalism school, required them to sign non-competes as a condition of employment. We also got a complaint from a phlebotomist who her job was... She worked for a company called Emsi and took blood samples. Traveled all around New York state taking blood samples of people for health insurance purposes. And she got another job that would require no travel that would allow her to have a better salary and a more balanced life.

Terri Gerstein:

And Emsi had all of their workers required to sign non-competes. So these cases, I think, are both really good examples of the way that noncompetes... There's all of the statistics and all of the economic evidence, but just... It's important to remember the way that they really affect ordinary people's lives. That people can't get a new job. Can't get a better job. Can't get a job that requires less travel or pays more.

Terri Gerstein:

And in both of those cases, our office did reach agreements and the companies agreed to stop using the non-competes for these types of workers. And since leaving the AG's office, I've remained involved in learning about and writing about non-competes. And so. One big development over recent years is been... Has been that, a number states responding to growing awareness of this issue have passed laws restricting or limiting the use of non-competes. Thus, the laws all vary from state to state.

Terri Gerstein:

In DC, for example, there's a total ban. Although the effective date of that has been state. And other states vary in relation to certain particular questions. For example, who's covered, is it only low age workers or more broad coverage? Some states have laws that bar noncompetes for particular professions, as Evan talked about in healthcare. They vary in terms of what kind of advance notice is required, how long a noncompete can last, whether they address other restraints on job mobility.

Terri Gerstein:

For example, Maine's law restricts no poach or no higher agreements between businesses. They differ in terms of whether they cover independent contractors as Washington states laws does. And I would say all of these various state laws are really an improvement over having no restrictions on non-competes, but they really don't go far enough to address what is ultimately needed. There's really a need for more action, ideally federal action, but it's important to get it right in order to protect people and have the policy outcomes that we all hope for.

Terri Gerstein:

So I have three main points about how reform should be effectuated. One of them and Evan's data and comments really speak to this, is that non-competes should be prohibited with a penalty for violation, not just made unenforceable. If they're just unenforceable, then the worst case scenario for an employer is that a court says your non-compete has no effectiveness and is not valid.

Terri Gerstein:

Meanwhile, workers don't know their rights. They believe, particularly low and middle level workers, believe that non-competes are in fact enforceable. And they comport themselves accordingly. As Evan said, there's widespread evidence that noncompetes are used even in states where the law makes it unenforceable. And so, making noncompetes prohibited rather than unenforceable deters employer overreach.

Terri Gerstein:

My second point is that reform should be brought in its coverage and not just limited to the lowest paid workers. The consequences of non-competes on people's lives, the wage suppression, the limitation on job mobility, potentially being trapped in a job with ongoing legal violations or just a job that is not as good as what you could otherwise get. That affects employees at all income levels, not just the lowest wage workers.

Terri Gerstein:

The workers in the cases I described that we dealt with in New York AG's office Law360 and the phlebotomist, they weren't the lowest wage workers, but they were people living paycheck to paycheck. And it is a really big deal to prevent someone from being able to make a living in their field. And my third point about reform is that there's really a need for education and outreach and also proactive enforcement.

Terri Gerstein:

People don't know their rights at work. People can't afford to pay a lawyer. People need to have a job in order to support themselves when they're living paycheck to paycheck. There are very high rates of retaliation when workers report violations of all kinds. And so given these barriers for workers coming forward, it's important for the FTC or any enforcement agencies to strategically use media to inform the public and also to affirmatively investigate non-compete abuse, not just reactively in response to complaints by workers.

Terri Gerstein:

And then my final point is that the FTC and other agencies should think about other of coercive employment terms that restrict employment mobility and adversely affect labor market fairness and competition. For example, training repayment agreements require workers to pay often exorbitant sums for really often very slender training. And they have to pay these sums if they leave the job before a set time period. In other cases, contracts impose what they term liquidated damages on workers who leave before a set date.

Terri Gerstein:

These can be tens of thousands of dollars, and they really operate more as a penalty for people who want to leave a job. These kinds of other coercive employment terms can have an impact on workers that are as severe as, or often worse than non-competes because they prevent workers really from leaving their job. This potential debt prevents workers from leaving their job for any other position, not just a competitor. And they could be potentially a way employers to circumvent any restrictions on noncompetes.

Terri Gerstein:

So it's important to be mindful of these other kinds of coercive employment terms as well. Thank you so much. And I look forward to the conversation.

Daniel Gilman:

Thank you, Terri. Marcia.

Daniel Gilman:

Hi Marcia. You're on mute. We can't hear you Marcia.

Marcia Goodman:

How about now? Okay, great. My perspective comes from being a practicing lawyer for more than 30 years. I have advised and defended and litigated on both sides of this question. Observing a broad range of companies working to [inaudible] their ability to compete by asking employees to sign restrictive agreements. And observing the effects on a similarly broad range companies as they lose employees and higher employees with and without these agreements in place.

Marcia Goodman:

Speaking from a global perspective, the US is one of the only countries in the world that does not allow a company, any buffer when its employees resign. Everywhere else in the world, it's a given that an employee may have to give advanced notice and [inaudible] go work for a competitor. And that's not viewed as particularly burdensome or restrictive.

Marcia Goodman:

So, looking at the practical application of these agreements from a historical perspective, we start from the fact that companies own their confidential information and companies own the innovation and the competitive ideas that are created while employees work for the company. This is recognized not only in the trade secrets laws, but in a variety of common law and intellectual properties, law formulations.

Marcia Goodman:

And how does this happen in the real world? It happens through these kind of agreements, through non-compete agreements, confidentiality agreements, and non [inaudible] agreements of various kinds. State laws across the country have always recognized the legitimate proprietary interests of employers to have these agreements. And under the common law of virtually every state, a non-compete agreement is permissible only if it is reasonable in substantive scope.

Marcia Goodman:

In other words, what it prohibits in duration and in geographic scope. 30 years ago, companies were looking to these agreements to protect customer relationships and their sales service and pricing secret thoughts. Today, companies in all industries are focused on protecting knowledge, proprietary information and inventions and innovation. This is the tech revolution that we are all facing. For companies to protect knowledge proprietary information, inventions and innovation does enhance creativity and competition as not a lot of the research in the area has recognized.

Marcia Goodman:

The literature also shows that the... The place where you see very high percentages of non-compete agreements are in the executive areas. And that's where you'd expect to see more of that innovation knowledge residing. And companies are not going to invest in innovation if they're forbidden to reap the benefits. If it's going to work out the door unpredictably with their employees. And besides that, teamwork is a competitive edge for many companies.

Marcia Goodman:

Information is not only shared by the company to its employees. It needs to be shared freely in a team. And I think all of us have observed that sharing is inhibited when team members fear their own ideas may be taken by others. A few key points to end. It's business 101 to have agreements and processes in place to protect a company's assets, including confidential information and trade secrets. But companies have a wide variety of approaches to non-compete agreements.

Marcia Goodman:

It's certainly not one size fits all. How to use non-compete agreements becomes a tool of competition in itself for companies in the labor market. Some companies have the philosophy of not using noncompete agreements, even when they're permitted and enforced. Others take the strong position that noncompete agreements are important to their brand. Still, others are very selective in how they use the agreements only for key or knowledge employees.

Marcia Goodman:

I would also suggest that a state, such as New York, have recognized in their case law, that non-compete agreements that are provided in exchange for rich executive compensation benefits should be freely enforced and viewed differently than the run of the mill non-compete agreements. And as to training repayment agreements, to my understanding, those are in many cases already... The unreasonable times are already a violation of existing state laws. That brings my comments to a close.

Daniel Gilman:

Thank you, Marcia.

Marcia Goodman:

Over to-

Daniel Gilman:

Rich.

Marcia Goodman:

Okay.

Daniel Gilman:

Thanks. Rich, would you like to round out the introductory remarks?

Richard Cassidy:

Thanks, Dan. I'd be glad to try. My involvement in this subject area stems from my work more than 40 years as an employee side employment lawyer. And also for my interest in law reform as a longtime uniform law commissioner. The uniform law commission is comprised of lawyers, judges, and law professors appointed by their states, the District of Columbia and the territories.

Richard Cassidy:

And the commission drafts and proposes specific state statutes and areas of the law where, desirable, the state law be the same or similar from state to state. In my role as a litigator, I see a pattern of regular economic discrimination rise in these cases, the $10 an hour bookkeeper or the lab animal cage cleaner can't defend these cases if the employer seeks to enforce a non-competition or other restrictive employment agreement. If they don't comply voluntarily, the courts typically order them to comply.

Richard Cassidy:

A highly skilled and sought after employee is often defended by his employer, or has the resources to defend on his or her own. The litigation often results in a settlement that all the parties can live with if nobody's happy. That's not my idea of justice. Either way, my experience is that employees are often deprived of the opportunity to earn their living, doing what they can do most at the highest and most valuable level. That's not good for them, nor is it efficient or useful for a competitive economy.

Richard Cassidy:

As a long time uniform law commissioner, I thought the ULC could help improve the law in this area. The current law is a patchwork that's unpredictable to employers and employees alike. Even when the courts report to apply the same common law principles, the results often differ. If we could have the next slide, please. The uniform law commission took up this subject and after a year of study and a full year of drafting, we adopted the uniform restrictive employment agreement at our annual meeting this past summer.

Richard Cassidy:

The act regulates employee agreements that limit a workers' post-employment work for new employers. Next slide. The core elements of the... I'm sorry, we're a slide ahead. If you can go back one. Thank you. The core elements of the uniform act are substantial. It covers the listed restricted post-employment agreements. Now other agreements that have a similar effect adoption of any of these agreements requires 14 days of advance notice, a written agreement, a separate signature by the employee, notice of the rights from the state Department of Labor or equivalent organization.

Richard Cassidy:

The key provision of the act or low wage workers defined as those making less than the state's annual average wage. The current range runs from $40,000, Mississippi to $70,000 in Massachusetts. Confidentiality agreements or training repayment agreements can apply even to low wage workers. The strictest rules apply to non-competition agreements. Non-competition agreements must be narrow tailored in duration, geographical area, and scope of actual competition. The agreements must protect specific legitimate business interests.

Richard Cassidy:

They're identified as the sale of a business of which the worker is an owner, the protection of trade secrets for the protection of ongoing customer client relationships. The interest must not be adequately protectable by a less restrictive employment agreement in order for a non-competition agreement to be held out. Confidentiality agreements are generally enforceable if protecting genuinely confidential business information.

Richard Cassidy:

Non solicitation agreements are limited to one year. No business agreements are limited to six months after employment, no recruit agreements to six months. Payment for competition agreements can't last more than a year. And training repayment agreements are limited to the cost of special training afforded to the employee and are prorated if the employee leaves within two years of the training. All restrictive employment agreements, except for confidentiality and training repayment agreements are unenforceable.

Richard Cassidy:

If the employee resigns for good cause is terminated for some aggravated misconduct or at the end of agreed work or contract. If we'd have the next slide, please. The act deters noncompliance. In a number of ways, the employer bears the burden of showing compliance with the act, the act commits a private right of action to the employee and or to a new employer with the right to recover attorney's fees allows the states state government to enforce and provides for civil penalties of up $5,000 for employers who knowingly violate the act.

Richard Cassidy:

It prevents drafting around the agreement with choice of law and choice of annual provisions. The full text of the act is available on the web of the uniform law commission website, ulc.org, along with the reporter's comments we think it provides a reasonable rebalancing of the rights between employers and employees. Thanks.

Daniel Gilman:

Thanks very much. So one underlying theme that seems to jump out of these framing remarks is that of uniformity versus variation. Whether that's across state laws, firm conduct, and restraints and interest in effects. So we could ask several questions about this, but let's start with Rich and maybe Marsha will have follow up comments. So the first question for Rich is, as folks have said, we've seen a certain amount of experimentation in the states in recent years. How did that experimentation bear on the different approaches that the ULC contemplated and what were some of the alternatives that were considered? And if you could follow up, what are some of the advantages of uniformity generally, and of the particular provisions that we see in the act?

Richard Cassidy:

Thanks, Dan. Obviously, we had the benefit of a number of other state models to consider. There's been a lot of state legislative activity in this field, and we were able to look at what's going on. Obviously, we considered the California approach, which simply out laws, almost all non competition agreements, except in connection with the sale of businesses. But interesting in an office, I think Evan pointed out, even in states like California and Oklahoma, and I think there's a North Dakota, where these laws, these agreements are illegal.

Richard Cassidy:

Employers often impose them and employees are often not aware of their rights and comply with them. We look carefully at Massachusetts and Oregon, and I think probably Oregon provides the best state model and lots of respects. Our uniform follows that approach. Massachusetts does something which is interesting. Particularly seeing light of arches from remarks about the rest of the world. Massachusetts has in its statute, a garden leave provision, which essentially requires the employer to pay a portion.

Richard Cassidy:

Usually half of the employees compensation, if the employee's prohibited from working after the end of employment. That's very Commonwealth countries. As it turns out the way it's set up in the Massachusetts statute, I don't think it actually will come into play because other valuable consideration can substitute. So we were very influenced by Oregon and some of these other states. It seems to me that there are great advantages for both sides of the table, to some sort of uniform approach.

Richard Cassidy:

It's very difficult for employers and employees to predict what will happen if they cross state lines and there's not uniformity. We think that there's an advantage as well to primarily state law driven uniform solution, because there is need to make some small adjustments from state to state in order to adjust for local considerations. And because quite frankly, I hate to say this when the federal government is my guest. It's often difficult for this federal government to make changes, to take into account what it's, what it should be learning from activity on the ground.

Richard Cassidy:

So we think to maintain some flexibility, a state legislative approach is the right solution.

Daniel Gilman:

Thanks, Rich. Marcia, how do you see the question of uniformity or variation in the laws affecting employees and employers?

Marcia Goodman:

Yeah, it's an interesting question. So for a company that operates across the country, it can be quite efficient to have a single agreement in place across the country. But uniformity is not a value in itself. It has to be a law that works to protect the employers. And more important than that, predictability of enforcement. So for instance, some things that have been discussed are that an agreement would be presumptively valid for a period of time... For a set period of time.

Marcia Goodman:

For instance, if it's up to 18 months or up to a certain period of time. Or that it's presumptively valid in certain scopes, and that it would be presumptively valid across the US. If employers are looking for predictability and in order to share their information, their confidential information comfortably within the company and to compete in the market, they need to know that their interest can be protected.

Daniel Gilman:

Thanks Marcia. So Evan may be a somewhat different spin on this, a research spin. I know that at least one article, at least one point, you observed that at least from a research perspective. There were limits in the amount of variation we saw across the states and... So, that was a research challenge. And in recent years, it seems we've seen increasing variations, some striking state legislation in laws and the approach to noncompetes and some of the other restraints. And so I guess, I wonder what does this mean for economic research? And what's the promise of this for what we know here?

Evan Starr:

Well, I think the possibility of states being able to take different policies has really enabled a real growth in this research on non agreements. I mean, Mike and I have a study looking at what happened after Oregon banned noncompetes for low wage workers in 2008. And one of the more recent bands we saw was in Hawaii, where they banned noncompetes for tech workers in 2015. And in both of those studies, we were able to see that wages for those affected workers rose, then mobility rose in both of those cases.

Evan Starr:

And there are many more changes that are on the horizon here. In the last two years, we've seen many low wage bands that have come into place at different dollar threshold. I think that we're still waiting for more data to come in to really analyze those. But I think it provides a great opportunity to researchers on this front.

Evan Starr:

I mean, as I said before, I have a project where we're trying to figure out how much firms really value the ability to enforce non-compete agreements and having different dollar thresholds even up to a hundred thousand dollars in the state of Washington, gives us a chance to really see if firms value the ability to enforce those non-compete agreements, even for highway to workers.

Evan Starr:

I'll also say that one of the contracts we haven't talked about yet has also been in the news quite a bit because some states have been changing their policies and that's with regard to nondisclosure agreements. And the key concern with nondisclosure agreements, which came out of the 'Me Too' era, is that nondisclosure agreements can silence workers from sharing even illegal acts in the workplace related to discrimination, sexual harassment or other such issues.

Evan Starr:

And, and so several states took different approaches to this, where they started to ban non-disparagement agreements or NDAs that covered illegal acts. And so, in a recent paper with Jason [Stuck] [inaudible], we studied these state policies. And we found that when these states banned these parts of non-disclosure agreements that workers were more willing to share negative information about their firm, including instances of, of harassment.

Evan Starr:

And we also found that after these states ban these press and nondisclosure agreements, that the better firms were able to distinguish themselves, which suggested to us that this was a competition issue, because it was making it really difficult for perspective workers to distinguish between, really, the good employers and the bad employers. And so, I think that the policy variation across states has just been enormously helpful for researchers. And we'll be moving forward.

Daniel Gilman:

Terri, you have your hand up?

Terri Gerstein:

Yes. I just wanted to add something to what Evan said about NDAs and how NDAs as well as Forced Arbitration both also contribute to labor market problems because they exacerbate the information asymmetry between job seekers and workers and employers. Because both NDAs and Forced Arbitration prevent various kinds of violations and wrongdoing from coming to light. And so, I just wanted to note that particular additional impact of both NDAs and Forced Arbitration.

Daniel Gilman:

Thanks, Terri. And so maybe getting back to an aspect of this that Rich touched upon in opening it up for everyone. There's state and federal. And if federal, what federal? What would be advantages or disadvantages of federal intervention in one or more of these issues? Whether that's by the FTC or some other entity, regulatory or law enforcement? Federal standards as a floor, or both a floor and a ceiling. Just like to hear some thoughts from panels, I guess if we can use the hand mechanism and we'll try to get to everyone. Well, Terry's first.

Terri Gerstein:

I'll jump in. I mean, I think that... I think there is real value in having national standards on this, but only if they actually really protect workers. And I think... And only if it's done really effectively and does not undermine protections that exist or are in development at the state level. And so I think the model, as with the fair labor standards act where it's a floor and not a ceiling, I think is what's most advisable.

Terri Gerstein:

But I do think that federal action ensures that workers will have some kind of protection, even in states where the state legislature is reluctant to act.

Daniel Gilman:

Well. Thanks, Terri. Anyone else? Marcia. Sorry, I can't hear you Marcia.

Marcia Goodman:

Sorry. There is some value to uniformity that deter... As Evan was saying, when companies have the freedom to use these agreements in a variety of ways, they are able to compete on that basis and employees are able to see what are the better employers? So it would be important whether the regulations, federal, or state to not have it be so strict that companies can't do what works for them, their culture and their recruitment and their competition.

Daniel Gilman:

Thanks. And Rich?

Richard Cassidy:

Obviously, I'm a fan of a form of uniformity here, but I prefer to see that the uniformity of state law. This is traditionally been a matter of state law. And when the federal government moves in and, and, and takes action in an area, we often see that if Congress acts, it acts once. I look back to the Federal Arbitration Act and say that many, many scholars and practitioners have called out for reform for the Federal Arbitration Act, which hasn't changed since it was adopted.

Richard Cassidy:

So I'm concerned about the idea that the Federal Government might act with too heavy at hand here. I do think that there is some appropriate room for flexibility, although I'd like to see it be limited flexibility.

Evan Starr:

Can I just chime in here real quick, Dan? So, I just want to say that I largely agree with what's been said here. I want to add that in this new COVID world, that we're all experiencing more remote work is becoming or more popular, or here to stay, that the lines between states are becoming more and more blurred. And I think that that's going to create ever more demand for uniformity across state lines, because you could stay in the same house, but change employers and have moved halfway across the United States. And so, that's going to create a whole new strain on the legal system to figure out how to handle those situations. And so I think the uniformity is going to become more important.

Daniel Gilman:

Thanks, Evan. I don't want to editorialize too much, but I'll say that I hope the COVID part of this diminishes quite a bit before long-

Richard Cassidy:

Dan, I agree with you that we hope that's the case, but I think even if it is the case that employers and employees have learned a lot about the opportunities that remote work provides, I think it's here to stay.

Daniel Gilman:

No doubt. So, Mike.

Michael Lipsitz:

Thanks so much to everyone. I want to turn away from some of the legal aspects of this for a moment and kind of term to think about firm conduct and interests. So, this next question's for Marsha. I'm interested in hearing about what sorts of differences you've seen among the ways that firms use non-competes in other contractual restraints.

Michael Lipsitz:

I'm curious whether they're specific factors like industry or size of the firm, or the location of headquarters that drive different approaches. Or if that's more difficult to pin down. And finally, what are some of the considerations that arise when you're counseling a firm to use one versus another approach when it comes to this?

Marcia Goodman:

Sure. I mean, I should say that my comments are anecdotal based on observations. But what I've seen is that it's very much an individual company decision and the company will make the decision based in part on their own culture and in part on where they see themselves in the competitive labor market. So for instance, if they think they can't attract a particular kind of employee, if they impose a restrictive agreement, they won't... If they impose a non compete agreement, they're less likely to impose it.

Marcia Goodman:

Confidentiality agreements are basic and virtually companies in all industries of all sizes see those as important because it's protecting their assets, their property. But in terms of noncom competition, in addition to labor market competition, I would say, anecdotally, I see that noncompete tends to be used a lot in companies that rely heavily on IPS that's in their business. And that's not exclusive of course, but I think that is a trend.

Marcia Goodman:

And also companies use a variety of agreements to serve different purposes. So you start with the confidentiality agreement to protect the property. And then a noncompete agreement is aimed at giving the company a buffer so

Marcia Goodman:

So that it's most confidential plans and secret sources don't get out to its competitors immediately. It will get out to their competitors eventually, unless it's patented, but there would be a bucker of time. So that's what companies may be looking for in the non-compete agreements.

Marcia Goodman:

And then the non solicitation of customers is very much depends on what the company is doing, but they may use a non-solicitation of customers agreement either as a less restrictive alternative to a non-compete agreement or to protect particularly sensitive relationships.

Michael Lipsitz:

Thanks so much for that. And I just want to follow up on one thing quickly, which is there's evidence that employees don't necessarily know what they've signed or they don't necessarily understand what they've signed.

Michael Lipsitz:

So you mentioned how employers can use these things to compete over employees. And I'm curious how you see those things interacting if employees aren't necessarily aware of what they signed or what the full legal ramifications of it are.

Marcia Goodman:

I know I'm sure there are some employees who don't read the agreement or don't understand it, but obviously if a company is competing in that dimension, they're dealing with employees who do understand it.

Michael Lipsitz:

Great. Thanks so much. So along similar lines, I wanted to turn to you Terri. There's evidence that these non-compete agreements are used in states that don't enforce them. Players might threaten to enforce non-competes against employees who don't necessarily have a sophisticated understanding of the law, maybe poorly positioned to go to court and this might lead to non-competes that sort of work in practice, even if they're not legally enforceable.

Michael Lipsitz:

So what I'm curious to ask you, and you alluded to this in your remarks initially, how does this inform the shape that regulation or other legal intervention should take? And similarly, are there channels that exist for workers to come forward to the government, whether it be state or federal government to report non-competes that they view as problematic? And if not via workers, how might the government find out about non-competes that may be problematic?

Terri Gerstein:

Yeah, so there is lots of research out there showing that workers don't know what their rights are in relation to all kinds of laws, including in relation to non-competes and Evans Research, showing the ubiquity of non-competes even in not, well, 20% or 30% ubiquity of non-competes, even in places where they're unenforceable.

Terri Gerstein:

And I think it's valuable to consider how these often get signed, which is, sometimes they're signed usually often they're not disclosed before a person accepts a job and has maybe left their prior job. They might be in a pile of HR paperwork during onboarding. It may be done on a screen, on a touch screen. Often workers get non-competes after they've started a job, they suddenly learn that we're going to, we need you to sign this and you're subject to a non-compete.

Terri Gerstein:

And so there are often these really coercive ways that people end up being subject to non-competes and again, people don't know their rights. So what that means in terms of policy and in terms of enforcement actions, first of all, in terms of policy, just reiterating that it needs not to be prohibited, not just unenforceable in order to deter employer overreach, but then also what it means is that whatever enforcement happens, really has to be proactive.

Terri Gerstein:

There's lots of retaliation, widespread retaliation against workers for enforcing their rights, for speaking out there disincentives to workers, reporting violations and coming forward. And so government agencies that want to take action on this really have to be proactive. They have to reach out to worker organizations, to unions, so legal service offices, to government agencies that deal with workers like departments of labor to try and find cases.

Terri Gerstein:

They have to think about how do you find cases without requiring workers to come forward? Can you issue a subpoena or document requests without disclosing a worker's identity so that workers won't... To minimize the risk of retaliation. And also, they need to be proactive about looking at media reports, searching state court filings, doing outreach and public education on this issue.

Terri Gerstein:

Every time we had a press release and press coverage of cases that we did during all my years in state government, afterwards, we always got lots and lots of calls from the public. And so it's a situation where if a government agency wants to take action on this, they really have to be more proactive and not sort of passively wait for complaints to come to them.

Terri Gerstein:

And in terms of your question of channels that exist for workers to come forward right now, there are some state AG offices that have been really active in this area. Most notably, Illinois, and New York and Washington State. And I know there are a number of other state AG offices that are really interested in this.

Terri Gerstein:

So that would be one avenue I imagine because of this workshop, because of other inquiries the FTC has done on this issue, that certainly the FTC would be interested in learning about potential non-competes as well. So I think those are two possible channels for workers to pursue if indeed they have a non-compete that they're concerned about.

Daniel Gilman:

Thanks, Terri. You mentioned inquiries and I wanted to circle back to Evan. And part of the motivation for this question is the complex statutory mission of the FTC. I mean, just under the FTC Act we have of course, a competition mission and a consumer protection mission. We enforce special statutes as well. And the federal antitrust laws. We also have by statute, a charge, a research mission. And so that brings me back to something that you mentioned about spillovers Evan.

Daniel Gilman:

And I gather there have been some studies of the effects of the spillover effects of non-competes and related restrictions. But I also gather that these have been studied somewhat less than the impact of non-competes themselves, or the impact of variation and enforceability of non-compete.

Daniel Gilman:

So, I take it that these could co vary, that is the spillovers could co vary, with the effects on workers, but they don't have to. They don't necessarily do that. So just briefly, what are we learning in this area? What more should be studied? What future research projects would you like to see pursued, whether that's by FTC staff or outside researchers?

Evan Starr:

That's such a great question, Dan, thank you for that. I think you exactly right to think about the impact of spillovers here. And let me just be clear what I'm talking about. When we think about spillovers, I'm talking about an employment relationship where a firm and a given worker decide to agree not to compete with each other, not to compete, the worker [inaudible] join and start a competitor.

Evan Starr:

And what then I'm thinking about is what are the effects on all the other parties who were not at the table when that agreement was signed. And so just to give you an example of a research study that I think is really important. It's a research study done by Leon. And it's about the executive labor market, where we can actually observe who has signed non-compete agreements for publicly traded company.

Evan Starr:

And in her study, she points out that an executive may well agree to a non-compete agreement but permit be better off as a result, but the firms that are hurt by this are the firms that then would have hired that executive who are now covered by the non-compete agreement. And using a model and some simple calibration she uncovers that even in the markets for executives, the harms to other firms are so severe that a policy close to California is optimal.

Evan Starr:

And so even if we buy the argument that we need noncompete agreements to incentivize investments, her studies suggests that the harms are so large to everybody else that we really need to take spillovers seriously. And so I think that study is a great starting off point. I already highlighted that there are some other studies done by me, and another one done by Mike Lipsitz, and Matt Johnson, Kurt [Leavitt] that shows that not only our workers who are [inaudible] be forced off in terms of their wages.

Evan Starr:

But that affects those over to others in the labor market who are not bound by non-compete agreements, and to other workers in neighboring states. I think that if we're going to talk about externalities more broadly, there's also consumers of course, and non-compete agreements are not just restrictions on interference mobility. They also restrict workers from starting new firms.

Evan Starr:

And so there's a wide swath of research, some of my own included which finds that when states more vigorously enforce non-compete agreements that entrepreneurship fall, which is going to increase concentration and has implications for consumers. It could raise prices on consumers, and reduce the quality of the products that they're going to consume. And we have pretty limited research on that.

Evan Starr:

There's one study by Kurt Leavitt and Naomi Hausman that finds evidence of higher prices. But there's need to be a lot more on that side of the coin. I'll just mention a few other areas that I think are important. One is that we have no understanding that family spillovers that the non-compete agreements can cause. And let me just explain what I mean, if I'm a worker and I'm bound by a non-compete agreement, and I want to take an offer in my industry, but I have a non-compete, then I have a choice.

Evan Starr:

I can try to fight the non-compete. I can sit out of the labor market. I can go join a firm that's outside of the coverage of my non-compete, or I can cross state lines. And one of the recent studies finds that workers in the tech industry at least, they tend to move across state lines and stay in the tech industry to avoid their non-compete agreements. Now, what does that mean though, for the rest of the family, right?

Evan Starr:

We're not talking about workers whose... kids whose lives have been disrupted, maybe partners or spouses whose lives have been disrupted, right? These policies have affected the entire family unit in ways that we really don't understand just because we want to protect some firm's investments, right? So this is I think the spillovers that are the most important missing link here.

Evan Starr:

I just also want to highlight Dan the specific role of the FTC, because under Section 6(b) of the FTC, the FTC actually has power to collect data. And so I just want to highlight some of the limitations of what we do know. What we do know comes from surveys of workers, surveys of firms, and some cases we have contracts for executives, or from cases that were litigated. But what we don't know are really the terms that we see in the average employment contract for a US worker, right?

Evan Starr:

We don't know the non-disclosure agreements, the non-spatial agreements, the non-disclosure agreements, trainer payment, I had mentioned assignment agreements, arbitration agreements. We generally don't know much about how frequently those things are being used and deployed. We also don't know what the precise terms of those contracts are, how they vary, right? And so the FTC could just do a world of service to everybody by using their 6(b) authority to compel firms to share their employment contract so that we can understand what the average worker is agreeing to.

Evan Starr:

And I think that we didn't know about non-compete agreements really until 2014, when a Jimmy John's worker came out and shocked the world by showing them that they had a non-compete agreement. What else is in these employment contracts? Right? This is I think, a really important avenue. And really the FTC is I think maybe the only agency that has the power to do this.

Daniel Gilman:

Thanks, Evan.

Michael Lipsitz:

Yeah. Thanks so much, Evan. So I want to move into another question and I'm hoping that all four of you will field this one. What I'm curious about is how the post-employment covenants, that we've been discussing non-competes maybe chief among them in terms of what we talked about, contribute to the existence of more or less dynamic and innovative firms.

Michael Lipsitz:

And more broadly speaking, if we take a macro view and take a step back and think more about the economy as a whole, how should we be thinking about the ways that these restraints impact the economy and its trajectory? And I'm hoping we can start with Marcia here, because I'm really interested in the most micro firm level view at least to start out.

Marcia Goodman:

Sure. So one thing that has come up in conversation is what is better about a non-compete agreement than the ability to bring a trade secret to action? And the answer to that is really very simple. On the one hand you have companies investing in information innovation as we've discussed, they're trying to create a safe space for this innovation and so that the people in the company can share information freely rather than thinking their competitors are looking over their shoulders all the time.

Marcia Goodman:

And with a non-compete agreement, they have a simple agreement. You are exposed to this information for a period of time after you leave and that period of time might be three months, it might be six months. It might be 18 months or two years seldom longer than that. But it may be a very short period of time. And for that period of time, you're not going to take that information to a competitor.

Marcia Goodman:

On the other hand, if you don't have that agreement, if an employer, if a company does not have an agreement like that, then the employer must essentially prove that the employee committed a crime and created damage by stealing information and using it at their next employer. So that doesn't provide security in the company to support the innovation, the safe space, and the ability to use those innovations in competition.

Marcia Goodman:

Rather, you need to know that a company, it can help create a safe space if they know that the information they're sharing can be protected, as opposed to that they can take some legal action later if they suffer terrible damage.

Michael Lipsitz:

Thanks so much. Terri, it looks like you have something to add here.

Terri Gerstein:

Yes. I just wanted to note that there's lots of research about the impact of non-competes on economic dynamism, and entrepreneurialism. And I think Evan can really speak to that better than I can. What I want to just note is that a lot of employers use non-competes kind of indiscriminately throughout their entire workforce. And so they'll just use it for everyone.

Terri Gerstein:

The New York AGs office, the Illinois AGs office, after I left did a case involving WeWork, the co-working space, and they required everyone to sign non-competes. There are situations where janitors are signing non-competes. Where dog groomers are signing non-competes. This is not at all unusual.

Terri Gerstein:

And these are not people who are, this whole conversation about entrepreneurialism and trade secrets and a large number of people are subject to non-competes that this conversation is entirely irrelevant for them because they are low and mid-level workers, they are rank and file workers. They're living paycheck to paycheck, and they're not privy to this kind of information.

Terri Gerstein:

And again I think that, that's just something that we can get really focused on a very particular sliver of the population who are more empowered in terms of the labor market, but there are really a lot of people who this whole conversation doesn't even... They're not a pharmacist, a sandwich maker, what possible innovation does the employer have that they have to protect to keep those workers from going and taking a job with a competitor?

Michael Lipsitz:

Thanks, Terri. Go ahead, Evan.

Evan Starr:

Thanks. Yeah. I mean, I think it's worth hitting head on some of comments that Marcia made. I think first it's really great that we have some other protections in that that workers aren't allowed to steal property without ramifications. But I think that it's really important to highlight that non-compete agreements can also just stunt the creative destruction that would've otherwise happened.

Evan Starr:

So if you have a company that is invested in something valuable potentially, and a worker leaves, and goes and starts another company, if that worker is actually doing the same thing but they're doing it much, much, much, much, much better, right? And that worker couldn't go and start that company.

Evan Starr:

It couldn't implement his ideas inside the companies they're working at, then what the non-compete will have done is then essentially stop the world from having another great company that was actually better than the company that the worker was at. And so I think that we need to be careful and how we're thinking about this. It's not protection at all costs. We don't make patents 100 years. Right?

Evan Starr:

We need to think that are there other tools out there? And so what are the limits of overprotection here and what are the harms that are really done? If you look at some of the academic research on this space, venture capital goes a lot further in states that do not enforce non-compete agreements. And I feel like venture capitalists of all types of individuals want to get the return on their money.

Evan Starr:

If the workers could leave and take all that viable information and go, then I don't think the research would find that. And so I think that there are limits here to what I think Marcia is saying, and I think we need to think really carefully about the innovation evidence that we have, and what it means for the right policy.

Michael Lipsitz:

So let's hear from Richard and then we'll circle back to you Marcia. I do see your hand up there.

Richard Cassidy:

I would just say that the two points. One is that I see these agreements used as Terri suggested far outside the range of top level, highly skilled employees. The other thing I observe is that those people tend to be much more mobile than some of the low wage employees that I see. And so I get asked this question all the time, I'm in your state where non-competition agreements are enforced, what would happen if I moved to California?

Richard Cassidy:

Well, there's a why people ask that question. And I think the really bonafide interests that Marcia points out is the interest employers have in protecting trade secret information. We have a national trade secret statute. The 49 out of the 50 states have adopted the Uniform Trade Secrets Act. If employers can prove that there's a real violation around trade secrets, they don't need a non-competition agreement in order to enforce their rights.

Michael Lipsitz:

Thanks. And go ahead Marcia.

Marcia Goodman:

Okay. Look, I won't repeat what I said before about the limits of trade secrets litigation, but California and every state do enforce confidentiality agreement. So that's interesting, but to Evan, I wonder if there may be future research, looking at the effect of non-competes of a shorter time period versus a longer time period, whether there's an optimal time period that creates competition or stifles it.

Marcia Goodman:

And then also research looking at the effects on these different slices of employees because I'm seeing the research [inaudible] 16 to 20% of all employees have agreements. That's actually not a huge percentage, but then 85% of executives have agreements. So that leaves the smaller portion of non executives. But aside from the numbers, it would be very interesting to see research done to kind of tie down the effects in a more granular way.

Michael Lipsitz:

Thank you.

Daniel Gilman:

So maybe shifting gears a little bit, getting back to Rich, the Uniform Law Commission Act sweeps broadly really for low to mid wage workers, but it does seem to permit, what are sometimes called training repayment agreements, at least under some circumstances. So I think this is something that Terri had mentioned earlier. On the one hand, these non-competes could address hold up problems affecting firm investments in employee training, maybe training employees couldn't afford to undertake on their own.

Daniel Gilman:

On the other, these do seem to have the potential for abuse, perhaps sometimes all out of proportion to the firm's investment or risk. And at least in some cases effectively tying an employee to particular employers. So one question would simply be, what special considerations motivated ULC with regard to training repayment agreements? And another would be, what are some of the alternatives that might be less onerous?

Richard Cassidy:

I don't think there's any question. Some training repayment agreements are used in an abusive circumstance really to keep the employee in place. The approach that the Uniform act tries to take, is to balance the goal of encouraging employers on the one hand to invest in special training for the employees and still allow reasonable employee worker mobility.

Richard Cassidy:

So the way in which the Act does that is to say that special training has to been provided, which means instruction that's designed to who enhance the ability of the worker to perform their work, not normally received by others, and requires a significant and identifiable expenditure from the employer. And it then says that repayment only applies to the actual cost of providing that training.

Richard Cassidy:

And the [inaudible] conclusive presumption under the statute is that after two years from the date of the training itself, the worker has paid back the value of that training. If they leave early, the repayment obligation is prorated. So we think we've found a reasonable balance to allow both interests to be represented in a fair way.

Michael Lipsitz:

And Terri, I'm interested to hear your take on training repayment agreements as well. In particular, to what extent are these types of agreements or similar agreements, for example, where individuals have to pay back franchising fees or with liquidated damages, as you mentioned, how are those different from non-competes? And how should policy be designed to deal with these contracts especially with increased creative employers who always seem to find novel approaches?

Terri Gerstein:

So I would recommend to everyone there's a law review article that was recently written on this topic. Jonathan Harris, who's a professor at Loyola Law School wrote an article about training repayment agreements that really gives a lot of examples. And training repayment agreements, they become a problem for example, when there was a case that was brought against the trucking behemoth CRST, where they gave workers pretty slender training, and there were all kinds of abusive aspects of the way that workers got lured into the training.

Terri Gerstein:

And if they didn't stay for a long enough time, they owed $6,500. But the training itself only cost a couple thousand dollars to the company. And in the end, when that was challenged in court, a court did reject that. And so there are other cases, the New York AGS office recently settled a case with Albany Medical Center where some immigrant nurses each had to pay $20,000 if they left their job before I think it was a three year period.

Terri Gerstein:

And so these kinds of training repayment agreements, or liquidated damages, they really serve as penalties for leaving your job. And in some ways they're even more insidious than non-competes because with a non-compete, you're only prohibited from going to work for the competitor of your current employer. Whereas these training repayment agreements, if you are a low wage worker, or you're a medium wage worker, and suddenly you're going to owe 6, 10 to $20,000, if you leave your job, that is something that really effectively in practice prevents you from being able to get a job anywhere else and leaving your job, not just with a competitor.

Terri Gerstein:

So they really are pretty... I find them very, very concerning. I think it's concerning about whether employers will use these as a way of circumventing any kind of non-compete reform in terms of what kind of legislation or policy or enforcement could be done. In some instances, there may be wage in hour cases. They maybe violations of the minimum wage law, if the training is for the employer's benefit and doesn't really give any particular benefit to the workers.

Terri Gerstein:

I know there have been some cases in these situations that have been brought as consumer fraud cases, as unfair and deceptive practices. I know there's at least there has been discussion of them being brought as human trafficking cases. I think this is a situation where, as Evan noted, the research role of the FTC could really come into play and trying to understand the role of employer driven debt and workers basically being in debt to their employers and unable to leave the job because of this debt.

Terri Gerstein:

I'll note also that professor Harris in his law review article kind of points to some of the same factors that Rich mentioned in terms of assessing whether this is really unconscionable in terms of is it prorated? Or is it that no matter when you leave, you still owe some enormous chunk of money. Is the training really for the benefit of the worker? Is it for the benefit of the employer?

Terri Gerstein:

And so there are a number of different factors to look at, but I think a more research and swift action when these... There are all kinds of legal theories that can be used, and sometimes it will require drawing from different legal regimes, but it is something that's very, very concerning and does reduce workers wages considerably, and massively reduces their ability to leave a job.

Daniel Gilman:

Thanks, Terri. Mike time is dwindling here. Do you want to jump to the quick fire for 30 to 62nd answers?

Michael Lipsitz:

Sure. Thanks, Dan. Yeah. So, we'll try to keep this one really short and sweet. But one last question here, in President Biden's executive order and competition, he asked the FTC to explore curtailing the use of contracts that we've discussed today. So an important question is, effectively who's in and who's out?

Michael Lipsitz:

In other words, what is curtailing the use of non-competes mean? Does it mean a blanket ban? A ban just for the workers making the lowest wages? Limitations on how non-competes can be used? So any order here, feel free to raise your hand if you want to jump off, but let's keep it short in the interest of time, but I would like to hear from everyone.

Terri Gerstein:

I'll go first. I think it's a very serious thing to prevent someone from making a livelihood in their field where they live. There's all kinds of economic evidence of the harm. I think Washington DC really got it right. And I think a ban except in the case of a sale or transfer of a business is really the right way to go especially because employers have other ways to protect their interests and protect their confidential information and trade secrets.

Michael Lipsitz:

Thanks. Rich it looks like you open up your mic. You can go ahead.

Richard Cassidy:

Sure. You can probably tell I'm not a fan of these agreements. I started out in by proposing a California style ban for my own state. I've come to conclude that they do have some limited appropriate role in the employment law world, but I do think the three interest we've identified in [inaudible].

Richard Cassidy:

That is in connection with the sale of a business where the employee, the worker is one of the sellers to protect the Goodwill, or to protect a trade secret, or to protect an ongoing customer or client relationship. Those are the really three proper interests that ought to be permitted to be protected. And I think beyond that field, they should be [inaudible].

Michael Lipsitz:

Thanks so much. Evan, go ahead.

Evan Starr:

I can go next. Yeah, I mean, so I feel like a non-compete agreement is really harmful because it restricts a worker and all of the human capitals they've accumulated throughout their career. You've joined the company and on day one, you signed a non-compete agreement and now everything you've learned up at that point, can't be deployed in your chosen industry.

Evan Starr:

And so I think we need to be really, really careful with how we think about non-compete agreements. And the research, I think suggests at this point, I don't think we're there fully yet to justify a complete ban based on the evidence in part, because we haven't had the right natural experiments to run those tests. But the evidence I think at this point suggests that the threshold, the [inaudible] threshold or whatever it is, should be [inaudible].

Michael Lipsitz:

Thanks Evan. And Marcia, go ahead.

Marcia Goodman:

Sure. I'm not advocating that the FTC should step in here, but if they were to do so, the areas that are open, I think for the FTC are disclosure requirements and consistent with state law limitations, limiting agreements to situations where the company's legitimate interest in confidential information or something else proprietary is being protected in a reasonable manner and then affirmatively allowing companies to get that protection in a predictable way.

Daniel Gilman:

Well, thanks very much to all of you. I want to first of all, thank our panelists for their insights and for the work they're doing in this area. Of course, Mike FTC colleague, Mike Lipsitz for helping put this panel together and moderating with me, all of our colleagues at FTC and at DOJ who've helped to bring this together, economists, attorneys, support staff, tech people. It's a challenge, but it's been nice to see it come together.

Daniel Gilman:

And I hope that, I mean usually I'll say, I hope we see you on the second day of the workshop. I of course, don't see people who are watching, but I hope we'll get a large virtual turnout tomorrow morning at 10:00 AM. We've got a very good day of our panels and we are opening with a keynote addressed by Joseph Stiglitz, which should be very interesting. So thanks to all of you and we will see you. Thanks for the day.